NORTH CAROLINA REPORTS

Vol. 251

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1959

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1960

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

1 and 2 Martin, Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
2 "	"	3	"
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1 Murphey	"	5	"
2 "	"	6	"
3 "	"	7	"
1 Hawks	"	8	"
2 "	"	9	"
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4 "	"	11	"
1 Devereux Law	"	12	"
2 " "	"	13	"
3 " "	"	14	"
4 " "	"	15	"
1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq.	"	21	"
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1 Iredell Law	"	23	"
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3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C.
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
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

FALL TERM, 1959

CHIEF JUSTICE:

J. WALLACE WINBORNE.

ASSOCIATE JUSTICES:

EMERY B. DENNY,
R. HUNT PARKER,
WILLIAM H. BOBBITT,
CARLISLE W. HIGGINS,
WILLIAM B. RODMAN, JR.
CLIFTON L. MOORE.

EMERGENCY JUSTICE:

M. V. BARNHILL.

ATTORNEY-GENERAL:

MALCOLM B. SEAWELL.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
RALPH MOODY,
CLAUDE L. LOVE,[1]
HARRY W. McGALLIARD,
PEYTON B. ABBOTT,
KENNETH WOOTEN, JR.,
F. KENT BURNS,
LUCIUS W. PULLEN,
H. HORTON ROUNTREE.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

BERT M. MONTAGUE.

[1]Died 11 November, 1959. Succeeded by Glenn L. Hooper, Jr.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

FIRST DIVISION

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

SECOND DIVISION

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

THIRD DIVISION

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

FOURTH DIVISION

J. FRANK HUSKINS	Twenty-Fourth	Burnsville.
JAMES C. FARTHING	Twenty-Fifth	Lenoir.
FRANCIS O. CLARKSON	Twenty-Sixth	Charlotte.
HUGH B. CAMPBELL	Twenty-Sixth	Charlotte.
P. C. FRONEBERGER	Twenty-Seventh	Gastonia.
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[1]	Pittsboro.

EMERGENCY JUDGES.

H. HOYLE SINK	Greensboro.
W. H. S. BURGWYN	Woodland.
Q. K. NIMOCKS, JR.	Fayetteville.
ZEB V. NETTLES	Asheville.

[1]Resigned Dec. 31, 1959, succeeded by W. Jack Hooks 15 January, 1960.

SOLICITORS

EASTERN DIVISION

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.
LESTER V. CHALMERS, JR.	Seventh	Raleigh.
JOHN J. BURNEY, JR.	Eighth	Wilmington.
E. MAURICE BRASWELL	Ninth	Fayetteville.
JOHN B. REGAN	Ninth-A	St. Pauls.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

HARVEY A. LUPTON	Eleventh	Winston-Salem.
HORACE R. KORNEGAY	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
GRADY B. STOTT	Fourteenth	Gastonia.
JAMES E. WALKER	Fourteenth-A	Charlotte.
ZEB. A. MORRIS	Fifteenth	Concord.
B. T. FALLS, JR.	Sixteenth	Shelby.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
LEONARD LOWE	Eighteenth	Forest City.
ROBERT S. SWAIN	Nineteenth	Asheville.
GLENN W. BROWN	Twentieth	Bryson City.
CHARLES M. NEAVES	Twenty-first	Elkin.

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. 2.
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.

* 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. SAMUEL A. HOWARD, 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. GALLIE 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. R. EDMON LEWIS, Deputy Clerk, Wilmington.

(Schedule of Fall Terms of Court as above set forth change for the Fall Terms, 1960, by order dated 29 April 1960.)

OFFICERS

JULIAN T. GASKILL, U. S. Attorney, Raleigh, N. C.
HAROLD W. GAVIN, 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.
B. RAY COHOON, United States Marshal, Raleigh.
SAMUEL A. HOWARD, 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 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
BOLDEN, CONNIE EDWARD.....Mebane
BOURNE, JOEL KING.....Tarboro
BROWN, CECIL KENNETH, JR.....Davidson
BURNEY, LOUIS AUGUSTUS.....Wilmington
BURT, MOSES CEMUEL, JR.....Hillsboro
CAMPBELL, JOHN MANLEY.....Burlington
CARMICHAEL, RICHARD CARTWRIGHT, JR.....Durham
CHAMBLISS, JOSEPH BARROW.....Rocky Mount
CHILDS, STUART ROW.....Charlotte
CHURCHILL, CARL CECIL, JR.....Roanoke Rapids
CLARK, WALTER EDGAR, JR.....Asheville
CLEVELAND, ALFRED EUGENE.....Murfreesboro
COGGIN, GEORGE WILLIAM.....Star
COLEY, HAROLD DOWNEY, JR.....Winston-Salem
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*
Board of Law Examiners
State of North Carolina

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1959

STATE v. ODIS MANNING.

(Filed 14 October, 1959.)

1. Jury § 4: Criminal Law § 128: Homicide § 30—

In a prosecution for murder in the first degree the solicitor may not, in the selection of the jury, state to prospective jurors that the sole purpose of the trial is to obtain the death penalty, and held further by a divided court that the solicitor may not state to prospective jurors that the State is seeking a verdict of guilty of murder in the first degree without recommendation of life imprisonment, since such statements violate the proviso of G.S. 14-17, giving the jury the unbridled discretion to recommend life imprisonment upon conviction of a defendant of the capital offense.

2. Criminal Law § 163—

The prejudicial effect of a statement of the solicitor, in selecting the jury, that the sole purpose of the trial is to obtain the death penalty against defendant, cannot be cured by a statement of the court that all prospective jurors should disabuse their minds in regard to the solicitor's remark, and certainly such error is not cured when the court thereafter overrules the objection to later statements to prospective jurors that the State is seeking the death penalty without recommendation of life imprisonment.

3. Constitutional Law § 30: Criminal Law § 94—

The trial court has the responsibility for enforcing the right of the defendant to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.

4. Homicide § 28—

Where any view of the evidence would justify a verdict of guilty of manslaughter it is incumbent upon the court to submit to the jury the question of defendant's guilt of this lesser degree of the crime.

HIGGINS, J., not sitting.

BOBBITT, J., concurring in result.

RODMAN, J., joins in concurring opinion.

PARKER, J., dissenting.

APPEAL by defendant from *Thompson, Special J.*, February-March, 1959 Term, of EDGECOMBE.

Criminal prosecution upon a bill of indictment charging defendant with the crime of murder in the first degree of one Isabella Gatling Manning.

Plea: Not guilty.

Upon the trial in Superior Court, as shown by the record, the list of regular jurors for the term first having been exhausted, the trial court ordered and had summoned a special venire of one hundred fifty, then a second of one hundred fifty and then a third of one hundred from whom jury of twelve jurors and two alternate jurors were selected, and impaneled to try the case against defendant Odis Manning.

And the case on appeal discloses that when the case came on for trial at the February-March Term of Superior Court for Edgecombe County, 1959, the following proceedings were had:

"During Examination of Prospective Jurors the following occurred:

"Upon the first prospective juror being sworn for questioning, Mr. Hubert E. May, Solicitor, read aloud that portion of G.S. 14-17 relating to murder in the first degree, including the proviso with reference to jury recommendations and said: 'Mr. (Juror's name), I am stating this to you and for all the other jurors to hear. As far as the State is concerned the sole and only purpose of this trial is to send the defendant, Odis Manning, to his death in the gas chamber in Raleigh, North Carolina.'

"Defendant objects— Sustained.

"The court instructed all the prospective jurors to disabuse their minds entirely of the statement, and to disregard it completely. The juror to whom the statement was specifically directed was not seated. The first three jurors seated came from the regular panel and therefore were present in court when the statement by Mr. May was made.

"Defendant moves that the entire panel be discharged. Denied. Defendant excepts. Exception #1.

"The Juror Phillips:

"By Mr. Bridgers: The State will request a verdict of murder in the first degree without a recommendation for life imprisonment.

"Defendant objects— Overruled— Defendant Excepts. Exception # 2.

"The Juror O'Neal:

"By Mr. May: I guess you know the State is seeking to convict this defendant of murder in the first degree without any recommendation for life imprisonment? Defendant objects— Overruled— Defendant excepts. Exception # 3.

"The Juror Wilson:

"By Mr. Bridgers: The State is seeking a verdict in this case of guilty of murder in the first degree without recommendation for life imprisonment. Defendant objects— Overruled— Defendant excepts. Exception # 4.

"The Juror Mrs. Felton:

"By Mr. May: The defendant is indicted under the following statute (reads that portion of G.S. 14-17 relating to murder in the first degree, including the proviso with reference to jury recommendation). The State in this case is seeking a verdict of murder in the first degree without any recommendation of life imprisonment. Defendant objects— Overruled— Defendant excepts. Exception # 5.

"The Juror Howard:

"By Mr. Bridgers: The State is seeking a verdict of guilty of murder in the first degree without any recommendation of life imprisonment. Defendant objects— Overruled— Defendant excepts. Exception # 6."

And further upon the trial in Superior Court as shown by record of case on appeal the State and the defendant offered evidence, and the case was submitted to the jury under the charge of the court.

Verdict: That the defendant is guilty of murder in the first degree.

Judgment: Death by inhalation of lethal gas as provided by law.

Defendant excepts and gives notice of appeal, appeals to Supreme Court and assigns error, and is permitted to appeal without making bond, that is, in *forma pauperis*,—the County of Edgecombe to pay costs incident thereto.

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

Cameron S. Weeks, T. Chandler Muse for defendant, appellant.

WINBORNE, C. J. For error in the course of the trial of this case in Superior Court as revealed on the face of the case on appeal indicated by exceptions Numbers 1 to 6, both inclusive, on which assignments of error of like numbers are predicated, this Court is, in the light of the statute G.S. 14-17 as interpreted and applied in repeated decisions of the Court, impelled to order a new trial.

In this connection the statute, G.S. 14-17, as amended by the General Assembly of North Carolina, Section 1 of Chapter 299 of 1949 Session Laws of North Carolina, provides that "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished" etc.

The proviso embraces the 1949 amendment, and has been the subject of discussion in several cases— *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d, 212; *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684; *S. v. Simmons,* 234 N.C. 290, 66 S.E. 2d 897; s.c. 236 N.C. 340, 72 S.E. 2d 743; *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *S. v. Conner,* 241 N.C. 468, 85 S.E. 2d 584; *S. v. Carter,* 243 N.C. 106, 89 S.E. 2d 789; *S. v. Adams,* 243 N.C. 290, 90 S.E. 2d 383; *S. v. Cook,* 245 N.C. 610, 96 S.E. 2d 842; *S. v. Denny,* 249 N.C. 113, 105 S.E. 2d 446; *S. v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206; *S. v. Pugh,* 250 N.C. 278, 108 S.E. 2d 649, and perhaps others.

As interpreted in the *McMillan* case, above cited, decided in May 1951, this Court, speaking of the proviso embraced in the 1949 amendment, had this to say: "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning,— a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature." (citing cases) And, continuing, the Court declared: "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison * * * No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is un-

bridled 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. And new trials have been granted from time to time in case after case as above enumerated— for violations of the terms of the proviso in G.S. 14-17.

Applying these principles to the subject matter of exceptions Numbers 1 to 6, both inclusive, hereinabove set forth, it is manifest that the terms of the proviso set out in G.S. 14-17 have been violated and the rights of defendant impinged. True the trial judge did what he could to counteract the harmful result of the remarks of the Solicitor. But as stated by this Court in *S. v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173, in opinion by *Ervin, J.,* when such occurs, "it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation," citing cases.

Where, however, the harm is done the court may not eradicate the wrong. Such is the case in hand in respect to the first assignment of error. Moreover it is seen that in regard to the matters to which assignments of error Nos. 2 to 6, both inclusive, relate, the trial court overruled the objections of defendant and permitted the Solicitor to tell the prospective jurors the State was seeking a verdict of guilty of murder in the first degree without recommendation for life imprisonment,— a manifest violation of the provisions of the proviso in G.S. 14-17.

"Every person charged with crime has an absolute right to a fair trial. By this is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm * * * The responsibility for enforcing this right necessarily rests upon the trial judge." *S. v. Carter,* 233 N.C. 581, 65 S.E. 2d 9.

Furthermore defendant assigned as error the refusal of the trial court to instruct the jury concerning the law of manslaughter and the circumstances in the case under which the jury would be permitted to return a verdict of manslaughter. Assignment of error # 23. Exception No. 45. In respect to this contention this Court is of opinion that the fact that defendant and his wife were together in the woods 10 minutes (R. p. 32), as the State's evidence tends to show, before any shots were heard is a circumstance that requires a charge on manslaughter.

The evidence discloses that there were no eye witnesses to the shooting, and no one of the State's witnesses knows what actually took place on this occasion. It rests in speculation.

The matters to which other assignments of error relate may not recur on a new trial. Hence it is not deemed necessary that they be treated on this appeal.

There must be a

New trial.

HIGGINS, J., not sitting.

BOBBITT, J., concurring in result. In my opinion, a new trial should be awarded on either or both of two grounds, *viz.*:

1. Defendant, in his testimony, denied that he intended to kill his wife and disavowed knowledge that he had done so. In short, there was no admission that defendant intentionally shot his wife and thereby caused her death. Under these circumstances, the court erred in excluding from jury consideration whether defendant was guilty of manslaughter.

2. The solicitor's statement, to which Exception 1 relates, was of such nature that the court's instruction could not and did not cure the prejudicial effect thereof. Had the defendant tendered, and had the solicitor or the court refused, a plea of guilty of murder in the first degree? If such plea had been tendered and accepted, with the court's approval, the punishment would have been life imprisonment. G.S. 15-162.1. The statement that the "sole and only purpose of this trial" was to determine whether defendant should die in the gas chamber would be true only if such plea had been tendered and refused. Hence, the solicitor's statement would seem to imply that defendant had tendered a plea of guilty of murder in the first degree. G.S. 15-162.1 provides: "Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever."

It was permissible, in my opinion, for the solicitor to state to prospective jurors that the State sought a verdict of guilty of murder in the first degree without a recommendation by the jury that the punishment be imprisonment for life and that, if such verdict were returned, the punishment under G.S. 14-17 would be death.

I do not understand that any of the members of this Court entertain the opinion that the General Assembly, by the enactment of G.S. 14-17, intended to abolish capital punishment. Nor has it been stated or suggested that the State may not challenge a prospective juror *for cause* if he declares on *voir dire* that he has conscientious

scruples against capital punishment, that is, that he could not in good conscience under any circumstances return a verdict on which the court would be legally required to pronounce a death sentence.

It would seem that a challenge *for cause* on the ground indicated would clearly imply that the State contended that the verdict should be a verdict requiring imposition of the death penalty.

After the jury has been selected and impaneled: If it finds the defendant guilty of murder in the first degree, whether it will add to the verdict the recommendation that the punishment be imprisonment for life rests entirely within the discretion of the jury. The jury's discretion is "absolute" and "unbridled" in the sense that there is *no rule of law* by which the jury is to be guided in making this decision.

While the jury's *power of decision* is "absolute" or "unbridled," it does not follow that the State's counsel and the defense counsel may not submit their respective contentions for jury consideration.

While still of the opinion that a new trial was properly awarded in *S. v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206, on the other grounds set forth in the opinion, I am convinced that we went too far in holding erroneous the trial court's statement (without elaboration) that the State contended the jury should return a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life.

As to *S. v. Pugh,* 250 N.C. 278, 108 S.E. 2d 649, I take a different view. There the presiding judge undertook to review the respective contentions of the State and of the defendant as to *why* the jury, if they found the defendant guilty of murder in the first degree, should not or should recommend life imprisonment. The function of the presiding judge is to declare and explain *the law* arising on the evidence given in the case. G.S. 1-180. In my opinion, it is no part of his function or duty to discuss or review the respective contentions as to a matter not governed by any rule of law but resting wholly within the discretion of the jury. In short, I think it permissible for the court to state *the ultimate contentions* of the State and of the defendant, namely, the simple statement that the State contends the jury should not, and the defendant contends the jury should, recommend life imprisonment, but that it is not permissible for the court to discuss or review the various reasons or arguments submitted by the State's counsel or by the defendant's counsel in support of their respective ultimate contentions.

RODMAN, J., joins in this opinion.

PARKER, J., dissenting. I do not agree with the majority opinion, which holds that when the solicitor for the state put the defendant on trial for a capital offense, it is error for him to state to a prospective juror on the *voir dire* that the state is seeking a verdict of guilty of murder in the first degree without a recommendation by the jury of imprisonment for life, and, in my opinion, such a holding is not warranted by the language of the proviso appearing in G.S. 14-17.

G.S. 14-17 reads:

"Murder in the first and second degree defined; punishment. 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 with imprisonment of not less than two nor more than thirty years in the State's prison."

The Court held in *S. v. Denny*, 249 N.C. 113, 105 S.E. 2d 446, that this proviso does not create a separate crime. Therefore, the three separate crimes of unlawful homicide in North Carolina are murder in the first degree, murder in the second degree, and manslaughter. G.S. 14-17 and G.S. 14-18.

This Court has held in many decisions that if a jury convicts a defendant of a capital offense, it has absolute discretion by virtue of the proviso in G.S. 14-17 to make a recommendation of life imprisonment, and if it does, the mandatory judgment of the court shall be imprisonment for life. *S. v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212; *S. v. Denny, supra*, and the cases there cited. If the jury convicts of a capital offense, and makes no recommendation, G.S. 14-17 provides a mandatory death sentence. *S. v. Bass*, 249 N.C. 209, 105 S.E. 2d 645; *S. v. Bunton*, 247 N.C. 510, 101 S.E. 2d 454.

It is crystal clear from the language of G.S. 14-17 that the General Assembly has not abolished, and did not intend to abolish, capital punishment in North Carolina, and the Court has so held in the recent cases of *Bass* (1958) and *Bunton* (1957). It is perfectly plain to me that all the General Assembly did, and intended

to do, by the enactment of this proviso was to give the jury, if it convicted of a capital offense, the absolute power to recommend imprisonment for life, and if it did so recommend, to make the punishment imprisonment for life.

As the General Assembly has not abolished capital punishment in North Carolina, the solicitor, a constitutional officer representing the state, has the absolute right to place a person indicted by the grand jury for a capital offense on trial for his life, and to say to a prospective juror on the *voir dire* that the state is asking for the death penalty, and nothing in the language of the proviso appearing in G.S. 14-17 makes it improper or error for him to do so. I know of no decision in our reports that holds to the contrary. Does the majority opinion intimate that in selecting the jurors in a capital case, it is error for the solicitor to ask a juror on the *voir dire* if he has conscientious scruples against capital punishment?

This Court in *S. v. Oakes*, 249 N.C. 282, 106 S.E. 2d 206, (decided at the Fall Term 1958), and in *S. v. Pugh*, 250 N.C. 278, (decided at the Spring Term 1959 with two Justices dissenting), held that it is error for the trial judge to state to the jury that the state contends that the jury should convict of the capital offense, and not recommend imprisonment for life. To keep the record accurate. I did not participate in the decision in the *Oakes* case, as I was absent from Court due to illness. It seems to me that the necessary inference to be drawn from the *Oakes* and *Pugh* cases is that a majority of the Court is of opinion that by reason of the proviso in G.S. 14-17 it is error for the solicitor to argue to the jury that the state is asking for a verdict of guilty of the capital offense, and that the jury should not exercise its absolute right to recommend imprisonment for life, though it has not decided that exact question. In my judgment, the proviso in G.S. 14-17 does not warrant such an opinion.

Unquestionably counsel for a defendant on trial for a capital offense has the absolute right to argue to the jury that if it convicts of a capital offense, it should exercise its unqualified right to recommend imprisonment for life, and every trial judge knows that counsel for the defendant will so argue with all the eloquence and power he has. If it is error for the solicitor to state to a prospective juror that the state is asking for the death penalty, and to argue to the jury in reply to defendant counsel's argument that the jury should convict of the capital offense, and not exercise its unqualified right to recommend imprisonment for life, capital punishment

will be to a large extent, if not almost completely, abolished in North Carolina. The *Bass* and *Bunton* cases were tried in the Superior Court prior to the decisions in the *Oakes* and *Pugh* cases.

If a jury convicts a defendant of a crime and the trial judge has discretion as to the punishment, it is ordinarily no concern of the solicitor as to the punishment to be inflicted. But that is not the case here. If the jury convicts of a capital case and makes no recommendation, the mandatory sentence by virtue of G.S. 14-17 is death, and if the jury convicts of the capital offense and recommends imprisonment for life, the mandatory sentence by virtue of the same statute is life imprisonment. Under such circumstances the punishment is fixed by the General Assembly, and neither the judge nor the solicitor can change it.

S. v. Dockery, 238 N.C. 222, 77 S.E. 2d 664, is not in point. In that case counsel for the private prosecution argued to the jury: "There is no such thing as life imprisonment in North Carolina today." Such an argument of matter *dehors* the record was properly held as error. To the same effect *S. v. Little*, 228 N.C. 417, 45 S.E. 2d 542; *S. v. Hawley*, 229 N.C. 167, 48 S.E. 2d 35.

If the General Assembly had intended by the proviso in G.S. 14-17 to prevent the solicitor from announcing to prospective jurors that the state would ask for the death penalty, and from arguing to the jury that the state contends that the jury should convict of the capital offense and not exercise its unqualified right to recommend imprisonment for life, it would have said so in plain language in the proviso of G.S. 14-17. This it has not done.

If capital punishment is to be practically abolished in North Carolina, it should be done by the General Assembly, and not by this Court, by what I am thoroughly convinced is an erroneous interpretation of the meaning of the proviso in G.S. 14-17 in the instant case and in the *Oakes* and *Pugh* cases, cases decided within the past twelve months, and which go a long bow shot further than all of our other decisions in reference to this proviso.

JOHN FLETCHER WALLACE AND WIFE, RENA WALLACE v. NASH JOHNSON.

(Filed 14 October, 1959.)

1. Abatement and Revival § 7—

Plea in abatement for pendency of prior actions cannot be sustained when prior to the hearing on the plea in abatement the other actions have been dismissed by judgments of nonsuit.

2. Abatement and Revival § 8— Action against administrators for distributive share of rents and timber held not identical with action against one of administrators individually for distributive share of timber sold under power of attorney.

An action by husband and wife against a sole defendant to recover a stated sum as the male plaintiff's distributive share in the proceeds of timber sold by the defendant from certain lands under power of attorney, and to have certain deeds and powers of attorney executed to the defendant set aside, will not support a plea in abatement for the pendency of another action against the same defendant and his co-administrator to recover a specified sum as the male plaintiff's distributive share of the rents and profits of the estate coming into the hands of the defendants as administrators and to recover a different specified sum as the distributive share of the male plaintiff in timber sold by the defendants as administrators etc., since the parties are not identical and since it does not appear that there was not more than one sale of timber. Further in this case it does not appear which of the two actions was first instituted.

3. Abatement and Revival § 4—

Plea in abatement for the pendency of prior actions is properly raised by answer when the pendency of the prior suits between the same parties for the same cause does not appear on the face of the complaint, G.S. 1-133.

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

HIGGINS, J., not sitting.

APPEAL by plaintiffs from *Mintz, J.*, April Civil Term, 1959, of DUPLIN.

From a judgment allowing the defendant's plea in abatement, as alleged in his answer, and dismissing the action on the ground that there are three prior actions pending between the same parties for substantially the same cause in the same court, plaintiffs appeal.

Jones, Reed & Griffin for plaintiffs, appellants.
Butler & Butler, Hubert E. Phillips for defendant, appellee.

PARKER, J. This case bears the number A-7849 on the civil issue docket of the Superior Court of Duplin County, and is brought by

John Fletcher Wallace, and wife, against Nash Johnson. These facts appear from the complaint's allegations:

E. M. Johnson died testate in 1946. At the time of his death he owned several thousand acres of land in Duplin and Pender Counties on which large quantities of timber were growing. Among the devisees of his last will and testament, which was duly admitted to probate on 16 June 1946, are the defendant Nash Johnson, a brother, B. D. Johnson, a brother, plaintiff John Fletcher Wallace, the son of a prior deceased sister, sisters, and other nephews and nieces.

Plaintiffs and others by a deed executed on 2 September 1946, and duly recorded, conveyed to the defendant Nash Johnson two small tracts of land which E. M. Johnson owned at the time of his death.

Plaintiffs and others by an agreement dated 27 August 1947, and duly recorded, vested the defendant Nash Johnson and B. D. Johnson with title to their interest in all the personal property owned by E. M. Johnson at the time of his death.

Plaintiffs and others by a deed executed on 27 August 1947, and duly recorded, conveyed to defendant Nash Johnson and B. D. Johnson, all their interest in the real property owned by E. M. Johnson at the time of his death, excepting from the conveyance the two small tracts of land owned by E. M. Johnson at the time of his death heretofore conveyed to defendant Nash Johnson.

Plaintiffs and others by deed executed on 24 November 1947, and duly recorded, conveyed to defendant Nash Johnson and B. D. Johnson 38 tracts of land consisting of several thousand acres owned by E. M. Johnson at the time of his death.

Lucy Wallace Cookenmaster and others by deed executed on 16 April 1948, and duly recorded, conveyed to defendant Nash Johnson and B. D. Johnson, all their right, title and interest in all the personal property bequeathed to them under the will of E. M. Johnson. There is no allegation that plaintiffs signed this deed.

B. D. Johnson died intestate on 15 November 1950, without a widow or issue him surviving.

Plaintiffs and others by deed executed on 1 February 1951, and duly recorded, conveyed to defendant Nash Johnson all of their right, title, and interest in 37 tracts of land described in the deed of plaintiffs and others to defendant Nash Johnson and B. D. Johnson dated 24 November 1947, confirming the execution and delivery of the other instruments heretofore referred to vesting defendant Nash Johnson and B. D. Johnson with the grantors' interest in the real and personal properties owned by E. M. Johnson at his death.

These deeds and the agreement are not in the record. They are summarized in the complaint. According to the averments of the

complaint the deed dated 24 November 1947 conveys 38 tracts of land, and the deed dated 1 February 1951 conveys 37 tracts of land.

Plaintiffs and others by deed executed on 8 May 1951, and duly recorded, vested defendant Nash Johnson with all their right, title and interest "in all of the lands of B. D. Johnson, deceased, situated in Duplin County and Pender County, or any other lands owned by B. D. Johnson at the time of his death, including all lands that he owned in fee and including all lands which he held an interest in."

Plaintiffs and others, by a written power of attorney dated ..... day of ....., 1951, and duly recorded in Duplin County, appointed defendant Nash Johnson their attorney in fact to sell and convey all the merchantable timber from certain tracts of land in Duplin and Pender Counties described in the instrument, including 16 tracts consisting of several thousand acres, and authorized him to execute deeds incident to the sale or sales, and to receive the proceeds from such sale or sales for the use of plaintiffs and others.

Plaintiffs and others by a similar written power of attorney dated 2 April 1951, and duly recorded in Duplin County, appointed defendant Nash Johnson their attorney in fact to sell and convey all merchantable timber on all the lands which B. D. Johnson owned at his death, or in which he had an interest, and to receive and distribute the proceeds from such sale or sales to plaintiffs and the others according to their respective interests, less five per cent commissions and expenses of the sale or sales.

These powers of attorney are not in the record. They are summarized in the complaint.

The defendant Nash Johnson procured the execution and delivery of all the instruments set forth by fraud, the facts of which are averred in detail.

Plaintiffs aver on information and belief, that defendant Nash Johnson in the exercise of the powers vested in him by the powers of attorney, sold timber in the amount of $500,000.00. That he has never accounted to them for the proceeds of the sale or sales, and their distributive share of the proceeds amounts to at least $12,500.00.

Plaintiffs did not discover the fraud defendant Nash Johnson practiced upon them until on or about ..... September 1952, and could not in the exercise of reasonable diligence have discovered it earlier.

Wherefore, plaintiffs pray that they have and recover of the defendant Nash Johnson the sum of $12,500.00 as the distributive share of the plaintiff John Fletcher Wallace in the proceeds from the sale of timber from the lands of B. D. Johnson, which he owned at the time of his death, or in which he owned an interest at such time.

In this case the complaint is for the recovery by the plaintiffs of at least $12,500.00, representing John Fletcher Wallace's distributive share as an heir at law of B. D. Johnson from the sale of timber by defendant Nash Johnson acting under the powers vested in him by powers of attorney on the lands which B. D. Johnson died seized and possessed of, or in which he had an interest, and to set aside for fraud the instruments set forth in the complaint. It would seem that the estate of E. M. Johnson is involved only to the extent that B. D. Johnson is a devisee under his will.

Defendant in his answer, *inter alia*, alleges that there is now pending on the civil issue docket of the Superior Court of Duplin County three prior actions between the same parties for the same cause instituted prior to this action, numbered A-7840, A-7842, and A-7844, and attaches the complaints in these cases to his answer, and incorporates them by reference therein.

Case number A-7840. The plaintiffs are the same as in the instant case. The defendants are different. In the instant case there is one defendant Nash Johnson. In case number A-7840 the defendants are Nash Johnson, his wife, the surviving sisters of E. M. Johnson, and his nephews and nieces. Case number A-7840 is an action to set aside by reason of fraud the deed dated 2 September 1946, the agreement dated 27 August 1947, the deeds dated 27 August 1947, 24 November 1947, and 16 April 1948, all of which are referred to above, and all of which relate to the estate of E. M. Johnson, deceased, and a partition proceeding relating to lands owned by E. M. Johnson at the time of his death, and to have the plaintiff John Fletcher Wallace as a devisee under the last will and testament of E. M. Johnson, deceased, adjudged the owner of a 1/40th undivided interest in the realty owned by E. M. Johnson at the time of his death, to recover from the defendant Nash Johnson $1,000.00, as plaintiff John Fletcher Wallace's share under the will of E. M. Johnson, deceased, of the rents and profits received by Nash Johnson and B. D. Johnson from their joint operations of the farm lands owned by E. M. Johnson at the time of his death until the time of the death of B. D. Johnson, including the crop year 1950, and to recover from Nash Johnson $5,000.00, representing plaintiff John Fletcher Wallace's share under the will of E. M. Johnson, deceased, from the proceeds received by Nash Johnson and B. D. Johnson from the sale of timber made by them prior to the death of B. D. Johnson from lands owned by E. M. Johnson at the time of his death.

Case number A-7842. The parties are the same as in case number A-7840. Case number A-7842 is an action to set aside by reason of

fraud deeds dated 1 February 1951 and 8 May 1951, both of which are referred to above, and the two powers of attorney referred to above, and to have plaintiff John Fletcher Wallace with the other heirs at law of B. D. Johnson, deceased, adjudged the owners and entitled to possession as tenants in common of the realty owned by B. D. Johnson at the time of his death, and that plaintiff John Fletcher Wallace recover from Nash Johnson the sum of $10,000.00, representing his share as an heir at law of the rents and profits received by Nash Johnson from the operation of the farms of B. D. Johnson, deceased, and to recover from Nash Johnson $15,000.00, representing his share as an heir at law from the proceeds received by Nash Johnson from the sale of timber made by him under powers of attorney from lands owned by B. D. Johnson at the time of his death.

Case number A-7844. The plaintiffs are the same as in the instant case. In the instant case Nash Johnson is sole defendant. In case number A-7844 the defendants are Nash Johnson individually, and Nash Johnson and Ophelia J. Carlton, administrators of the estate of B. D. Johnson, deceased. Case number A-7844 is an action by John Fletcher Wallace as an heir at law of B. D. Johnson, deceased, and his wife, to recover $10,000.00 representing the male plaintiff's distributive share of the rents and profits from the estate of B. D. Johnson, deceased, coming into the hands of the defendant administrators until 9 April 1954, to recover $5,000.00 representing the male plaintiff's share from timber growing upon the lands owned by B. D. Johnson at the time of his death, sold by defendants for at least $100,000.00, and the proceeds from the sale received by the defendants in their capacity as administrators of the estate of B. D. Johnson, deceased, to recover from Nash Johnson individually and from the defendant administrators the male plaintiff's distributive share of $6,257.24 fraudulently paid to Nash Johnson individually by the defendant administrators, and to have declared null and void by reason of fraud practiced upon plaintiffs by Nash Johnson, with the knowledge, consent and acquiescence of his co-defendant Ophelia J. Carlton deeds dated 1 February 1951 and 8 May 1951. Copies of these deeds are not attached to the complaint, and their contents are not summarized therein. But from the dates of the deeds and the book and pages on which it is alleged in the complaint they are recorded in the Register of Deeds office of Duplin County, it would seem that they are the deeds summarized in the complaint in the instant case, and bearing the same dates of execution and the same book and pages of registration in the Register of Deeds office of Duplin County.

It is stated in appellants' brief that cases numbered A-7840 and

A-7842 were dismissed by judgments of nonsuit entered prior to the hearing on defendant's plea in abatement in the case at bar. In the oral argument before us counsel for the defendant admitted that such statement in appellants' brief is correct.

Defendant's objection to the maintenance of the instant action on the grounds that cases numbered A-7840 and A-7842 were pending on the same civil issue docket in the same court was removed by the dismissal of cases numbered A-7840 and A-7842 by judgments of nonsuit prior to the hearing on defendant's plea in abatement, since the objection presupposes that cases numbered A-7840 and A-7842 were actually pending. *Allen v. McDowell*, 236 N.C. 373, 72 S.E. 2d 746; *Cook v. Cook*, 159 N.C. 46, 74 S.E. 639; *Grubbs v. Ferguson*, 136 N.C. 60, 48 S.E. 551. Defendant relies on *Curtis v. Piedmont Co.*, 109 N.C. 401, 13 S.E. 944, in which a different opinion is expressed. In *Allen v. McDowell* the Court referred to the *Curtis v. Piedmont Co.* case, and declined to follow it, stating that "the *Cook case* presents the better view."

The Court said in *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S. E. 2d 860: "The pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction."

In the instant case and in case numbered A-7844 the plaintiffs are the same, but the defendants are different. The two cases are different. In the instant case the plaintiff John Fletcher Wallace, according to the allegations of his complaint, seeks to recover $12,500.00 from the defendant Nash Johnson as his distributive share as an heir at law of B. D. Johnson, deceased, in the proceeds received by the defendant Nash Johnson amounting to at least $500,000.00 from the sale of timber by Nash Johnson under powers of attorney, on lands owned in whole or in part by B. D. Johnson at the time of his death, and to have nine written instruments set aside for fraud. The complaint does not allege the date of the sale of the timber, or whether there was one or more sales. In case numbered A-7844, plaintiff John Fletcher Wallace, according to the allegations of the complaint, seeks to recover $10,000.00 representing his distributive share as an heir at law of B. D. Johnson, deceased, of the rents and profits from the estate of B. D. Johnson, deceased, coming into the hands of the defendants as administrators of the estate until 9 April 1954, to recover $5,000.00 representing his share from timber growing on the lands owned by B. D. Johnson at the time of his death, sold by defendants for at least $100,000.00 and the proceeds from the sale received by the defendants in their capacity as administrators of the estate of B. D.

Johnson, deceased, to recover from Nash Johnson individually and from the defendant administrators his distributive share of $6,257.24 fraudulently paid to Nash Johnson by the administrators of the estate of B. D. Johnson, and to have declared null and void two deeds by reason of fraud. The complaint in case numbered A-7844 does not allege the date of the sale of the timber or whether there was one or more sales. In the instant case it is alleged that Nash Johnson, individually, acting under powers of attorney sold $500,000.00 of timber. In case numbered A-7849 it is alleged that the defendants sold at least $100,000.00 of timber, and received the proceeds of the sale in their capacity as administrators. What the evidence will show in respect to these sales, we know not. We are dealing only with pleadings.

As the alleged pendency of prior suits between the same parties for the same cause does not appear on the face of the complaint in the instant action the defendant could not raise the question presented by demurrer, G.S. 1-127, but properly did so by his answer, G.S. 1-133. *McDowell v. Blythe Brothers Co., supra.*

The record does not show whether the instant case or case numbered A-7844 is the prior action. The record in the instant case shows that the summons was issued 15 March 1957, and served on defendant on 18 March 1957, and the record in case numbered A-7844, an appeal in which was argued before us on the same day by the same counsel as of the instant case shows that in case numbered A-7844 the summons was issued on the same day and served on the defendants the same day as in the instant case.

The judgment of the court below is

Reversed.

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

HIGGINS, J., not sitting.

JOHN FLETCHER WALLACE AND WIFE, RENA WALLACE v. NASH JOHNSON, INDIVIDUALLY AND NASH JOHNSON AND OPHELIA J. CARLTON, ADMINISTRATORS OF THE ESTATE OF B. D. JOHNSON, DECEASED.

(Filed 14 October, 1959.)

1. Abatement and Revival § 7—

Plea in abatement for pendency of a prior action cannot be sustained when prior to the hearing on the plea in abatement the other action has been dismissed by judgment of nonsuit.

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

HIGGINS, J., not sitting.

APPEAL by plaintiffs from *Mintz, J.*, April Civil Term, 1959, of DUPLIN.

This case bears the number A-7844 upon the civil issue docket of the Superior Court of Duplin County. The case, as alleged in the complaint, is summarized in the case of *Wallace v. Johnson,* 251 N. C. 11, 110 S.E. 2d 488, the opinion of the Court in which is filed contemporaneously with this opinion. It would serve no useful purpose to repeat here the summary of the case there, but reference is made to that case for the facts.

The defendants in their answer allege, *inter alia,* that there is a prior action numbered A-7842 pending between the same parties for the same cause on the civil issue docket of the Superior Court of Duplin County, and prays that the action be dismissed and abate.

From a judgment allowing defendants' plea in abatement, and dismissing the action on the ground that case numbered A-7842 is a prior action pending between the same parties for substantially the same cause in the same court, plaintiffs appeal.

Jones, Reed & Griffin for plaintiffs, appellants.
Bulter & Butler, Hubert E. Phillips for defendants, appellees.

PARKER, J. It is stated in appellants' brief that case numbered A-7842 was dismissed by judgment of nonsuit entered prior to the hearing on defendants' plea in abatement. In the oral argument before us counsel for defendants admitted that such statement in appellants' brief is correct. This being true the trial court should have overruled the plea in abatement, because case numbered A-7842 was no longer pending. *Wallace v. Johnson,* 251 N.C. 11, 110 S.E. 2d 488.

The judgment below is

Reversed.

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

HIGGINS, J., not sitting.

JEFFREY LECROY, BY AND THROUGH HIS NEXT FRIEND, CHARLES R. LECROY, JR., v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 14 October, 1959.)

1. Insurance §§ 47, 54—

A three-wheeled motor scooter known as a "mailster" is an automobile within the meaning of a policy insuring insured and his family against injuries resulting from being struck by an automobile.

HIGGINS, J., not sitting.

APPEAL by defendant from *McLean, J.*, March, 1959 Term, of GASTON.

This is an action to recover "Expenses for medical services" under a policy of insurance.

Defendant, Nationwide Mutual Insurance Company, is the insurer and Charles R. LeCroy, Jr. the insured in "Family Automobile and Comprehensive Liability Policy," No. 61-68-250, issued 3 October, 1957. Plaintiff, Jeffrey LeCroy, is the son of insured and on 21 October, 1957, was 15 months old and a resident of insured's household.

On 21 October, 1957, plaintiff, while playing in the yard of his home, was struck and seriously injured by a vehicle, known as a "mailster." The vehicle was owned by the United States Post Office Department and was being operated by an employee of the Department.

The "mailster" is of the class of motor vehicles generally referred to as a "motor scooter." It has 3 wheels, 2 in the rear and 1 in front, with conventional tires, and is 5 feet long and about 4½ feet wide. It is enclosed with metal body without doors and has fenders, a luggage compartment, 1 seat with springs and back rest, and windshield 34 inches wide with electric wipers. The body stands 12 inches above ground level and the front end has 4 inch clearance. It has conventional lights, horn and turn signals. The motor consists of an 8 horse power, 4 cycle, gasoline engine. It has a drive-shaft differential, axle and universal joint. The weight is 800 pounds and pay load capacity is 600 pounds. It has a shift gear with 3 forward speeds and reverse and is equipped with 3 wheel mechanical brakes, emergency hand brake, electric starter, foot accelerator, speedometer, shock absorbers and handlebars for steering. License plates cost $3.00, the same as for a motorcycle.

Because of the injuries to plaintiff expenses were incurred for surgery, hospitalization, X-rays, medical attention and nursing care in the amount of $721.75. Plaintiff, as third party beneficiary under

the policy of insurance, filed claim with defendant for the expenses incurred. Defendant denied liability. Plaintiff instituted this action.

The case came on for trial and in apt time defendant moved for judgment of involuntary nonsuit. The motion was overruled and exception was duly noted. There was verdict for plaintiff.

From judgment conformable to verdict defendant appealed and assigned error.

Whitener & Mitchem for plaintiff, appellee.

L. B. Hollowell and Hugh W. Johnston for defendant, appellant.

MOORE, J. There is a single question for decision on this appeal: Was the vehicle which struck and injured plaintiff an "automobile" within the terms of the insurance policy sued on and the law applicable thereto?

Appellant admits that the policy was issued and was in force at the time plaintiff was injured.

The pertinent provisions of the policy obligates defendant:

"Part III. . . . To pay all reasonable expenses incurred within one year from date of accident for necessary medical, surgical, X-Ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing . . . : . .

"Coverage G: . . . To and for the named insured and each relative who sustains bodily injury, . . . caused by accident, while occupying or through being struck by an automobile. . . ."

Appellant concedes that plaintiff was injured by accident and that the items of medical expense sued for are the items mentioned in the policy. It is further agreed that plaintiff is a "relative" within the meaning of the above quoted policy provision. A "relative" is defined by the policy to be "a relative of the named insured who is a resident of the same household."

The word "automobile" is defined in PART II of the policy. PART III (in which the above quoted coverage appears) states that "the definitions under Part II apply to Part III. . . ." The definition is as follows:

" 'Automobile,' with respect to insurance under coverage F of this policy (this suit involves coverage G), means a land motor vehicle, trailer or semi-trailer, other than crawler or farm type tractors, farm implements and, if not subject to motor vehicle registration, any equipment which is designed for use principally off public roads." (Parentheses ours.)

In PART III under DEFINITIONS appears the following:

" 'An automobile' includes a trailer of any type."

In PART III under EXCLUSIONS the following appears:

"This policy does not apply under Coverage G to bodily injury . . . through being struck by (i) a vehicle operated on rails or crawler-treads, or (ii) a farm type tractor or other equipment designed for use principally off public highways, while not upon public roads. . . ."

The gist of appellant's contention in this case is set forth in the following quotation from its brief:

"It is the defendant's position that a three wheeled motor scooter commonly known as a 'mailster' is not an automobile within the meaning of part three of defendant's policy. A motor scooter is more similar to a motorcycle.

"The insuring agreement between the plaintiff and the defendant uses the term AUTOMOBILE. This term is undefined under part three of the policy."

Part three of the policy indicates unqualifiedly that the definitions under part two apply to part three. None of the definitions given in part two are repeated or redefined in part three. "Automobile" is defined in extremely broad terms in part two. Appellant undoubtedly suggests that this definition in part two has limited application only, to Coverage F, and that it is not intended to apply to Coverage G. If this be true, it is worthy of note that the very broad definition of "automobile," quoted above, is applied to "Comprehensive Family Liability — not Automobile," that is, to obligation of insurer to pay on behalf of insured liability for personal injury and property damage to third parties not caused by automobiles. Thus the comprehensiveness of liability under Coverage F is sharply reduced when "automobile" as an exclusion becomes almost every type of "land motor vehicle." If defendant's construction is followed, Coverages D and E under PART II (obligation of insurer to pay on behalf of insured liability for property damage and personal injury to third persons caused by insured's use of automobiles) leaves "automobile" undefined. Appellant apparently contends that the term "automobile," where undefined, should be given a restricted meaning. If this is true, a large area of damage is left without coverage. In effect, appellant insists on a broad definition for its protection and a narrow definition for its liability.

The exclusion clause from Part III, quoted above, is worthy of note. It definitely and by express terms applies to Coverage G. It excludes bodily injury through being struck by a vehicle operated on rails or crawler-treads or a farm type tractor or other equipment designed for use principally off public highways, while not upon pub-

lic roads. If it was the intent of the policy that the term "automobile" should be considered in a restricted sense, why exclude the above mentioned machines which do not fall within the meaning of the term, but which may be classified as "land motor vehicles"? Is it the intent of the policy that farm tractors and similar vehicles be classified as automobiles while "upon public roads"? We do not decide these questions. Even so, the policy language is at best misleading and confusing. If the definitions of "automobile" given in several parts of the policy were applied in this case, the "mailster" would fall squarely within the definition.

Assuming, but not deciding, that the term "automobile" is undefined in the policy as it relates to this action, we turn to a consideration of the problem on this basis.

Appellant contends that the "mailster" should be classified as a motorcycle and that a motorcycle is not an "automobile." The weight of authority is that a motorcycle, either with or without a side car, is not included in either of the terms, "automobile," "private motor driven automobile" or "motor driven car," as used in insurance policies. *McDonald v. Insurance Co.*, (Tenn. 1935), 79 S.W. 2d 555; *Bullard v. Insurance Co.*, (Ga. 1934), 173 S.E. 855; *Moore v. Insurance Co.*, (Tenn. 1931), 40 S.W. 2d 403; *Deardorff v. Insurance Co.* (Pa. 1930), 151 Atl. 814; *Neighbors v. Insurance Co.* (Ark. 1930), 31 S. W. 2d 418; *Landwehr v. Insurance Co.* (Md. 1930,) 150 Atl. 732; *Colyer v. Insurance Co.* (N.Y. 1928), 230 N.Y.S. 473; *Perry v. Insurance Co.* (N.J. 1927), 138 Atl. 894; *Salo v Insurance Co.* (Mass. 1926), 153 N.E. 557; *Laporte v. Insurance Co.* (La. 1926), 109 So. 767. But there are contrary holdings. *Bolt v. Insurance Co.* (S.C. 1930), 152 S.E. 766; *Burrus v. Insurance Co.* (Mo. 1930), 40 S.W. 2d 493.

Our Court has followed the majority view. *Anderson v. Insurance Co.*, 197 N.C. 72, 147 S.E. 693. In the *Anderson* case plaintiff was injured while riding on a motorcycle (without a side car). The insurance policy covered injury by collision of or accident to "a motor driven car in which insured is riding or driving." In deciding that the motorcycle was not a "motor driven car," the Court emphasized the following points: (1) A car stands upright whether in operation or not; a motorcycle cannot keep its equilibrium when not in operation. (2) A car has a body in which passengers sit and which protects in some measure from the perils of the highway; a motorcycle has no body for protection of the rider. (3) A motorcycle has no front or rear protection in the form of bumpers or fenders. (4) A rider on a motorcycle is more exposed to danger and takes a greater risk of

injury. (5) The policy uses the word "in" instead of "on" in referring to the occupancy; a passenger rides "on" a motorcycle and not "in" it. The Court concludes that the use of the word "car" instead of "vehicle" and the word "in" instead of "on" indicates that the intention of the policy is to exclude motorcycles. The reason for exclusion, the Court suggests, was the greater risk involved in insuring against the perils inherent in the use of motorcycles.

The matters emphasized in the *Anderson* case are significantly favorable to the plaintiff here. The vehicle in the case at bar stands upright whether in operation or not; it has a body and fenders for the protection of passengers — the record is silent as to bumpers —, a rider is no more exposed in this motor scooter than in a car; an operator or passenger rides "in," not "on," the motor scooter. In these respects and in practically every essential respect disclosed by the record, the motor scooter is a "motor driven car" or "automobile," and not a motorcycle. In the *Anderson* case the injured party was a rider and in all the motorcycle cases herein cited the injured parties were riders. In the instant case the plaintiff was a by-stander. If the difference is significant, it seems to us that the advantage is with the plaintiff herein. From the facts in the record there is nothing to indicate that the motor scooter is more inherently dangerous, to riders or to third parties, than a more common type automobile. Indeed, the comparison is favorable to the scooter with its low powered engine. There is nothing in the nature and construction of this vehicle which will justify the conclusion that there was an intention that the policy exclude it from the term "automobile." The express terms of the policy justify no such inference.

The same conclusion was reached in *Womack v. Insurance Co.* (La. 1938), 184 So. 357. In that case the vehicle was known as a "traffic car." It had three wheels, a closed body with space therein for carrying goods, inclosed differential, dual chain drive, service and emergency brakes, a 74-cubic inch motor and a windshield. The driver occupied a saddle which he straddled and he steered the vehicle by means of handlebars. The vehicle was used in making deliveries of merchandise and had a load capacity of one thousand pounds. Insured was killed in a collision with another vehicle while operating the "traffic car." The policy insured against bodily injuries, or death resulting therefrom, by reason of "collision or any accident to . . . any motor driven truck inside of which the insured is riding or driving . . . provided this policy does not cover insured while riding in or on a motorcycle, or in or on any side car, trailer or other attachment to a motorcycle. . . ." The Court held that insured, at the time of the accident, was riding in a "motor driven truck."

The definition of the term "motorcycle" in G.S. 20-38(4) does not describe the "mailster." Furthermore the purpose of the definition referred to is for regulation of license fees and has no application to the situation here presented. Fundamentally license fees of vehicles are based on weight.

We find no error in the ruling of the trial court in the instant case. The judgment below is

Affirmed.

HIGGINS, J., not sitting.

AHOSKIE PRODUCTION CREDIT ASSOCIATION v. E. D. WHEDBEE; MARIETTA H. WHEDBEE; RICH SQUARE BONDED WAREHOUSE; Y. D. PENDLETON, MANAGER OF RICH SQUARE BONDED WAREHOUSE; A. B. FAIRLEY, STATE WAREHOUSE SUPERINTENDENT; EDWIN GILL, TREASURER OF THE STATE OF NORTH CAROLINA; JONES, SON & COMPANY, INC.; AND INDEMNITY INSURANCE COMPANY OF NORTH CAROLINA.

(Filed 14 October, 1959.)

1. **Controversy Without Action § 2—**

In a controversy without action the court is without authority to find additional facts or draw factual conclusions from the evidentiary facts.

2. **Controversy Without Action § 1: Trial § 54—**

Where the parties agree that stipulated facts should constitute and be the evidence in the case and waive trial by jury and agree that the judge upon the facts should determine the rights and liabilities of the parties, the cause is not a controversy without action under G.S. 1-250 et seq., and the power of the court to find additional facts must be determined in accordance with the agreement of the parties submitting the controversy to the court.

3. **Trial § 54—**

Where the parties agree that the stipulated facts should constitute and be the evidence in the case and agree that the court should determine the rights and liabilities of the parties upon said facts, and the facts agreed are insufficient predicate for a judgment, but, considered as evidentiary facts, are sufficient to support diverse inference as to the determinative inference of fact, the court has authority to draw the inference of fact in the same manner as would a jury.

4. **Warehousemen § 3b—**

The duty of a local manager of a warehouse accepting cotton for storage to satisfy himself that the depositor of the commodity has good title thereto before issuing negotiable warehouse receipts therefor, G.S.

106-442, places the burden upon the local manager to exercise that degree of diligence which an ordinarily prudent person, under the same circumstances and charged with like duty, would exercise.

5. Same— **Facts held sufficient to support inference that warehouseman exercised due diligence in issuing negotiable receipts.**

The manager of a warehouse, having had prior dealings with the depositor of cotton, issued negotiable receipts therefor in reliance on his belief in the integrity of such depositor, and the depositor's representations and written warranties that there were no liens or valid claims outstanding against the cotton, but the manager failed to examine the records in the office of the register of deeds, which would have shown registered liens against the commodity. *Held:* Whether the manager exercised the care of a reasonably prudent person in issuing the negotiable receipts is susceptible to different conclusions by reasonable people, and the facts are sufficient to support the inference of fact that the manager exercised due diligence.

6. Warehousemen § 3d—

The depositor of a commodity is primarily liable for loss sustained by reason of the issuance of negotiable receipts for the commodity upon the depositor's representations and warranties that the commodity was free and clear of all liens and encumbrances, and the liability of the guaranty fund, G.S. 106-435, is secondary.

HIGGINS, J., not sitting.

PARKER, J., dissenting.

APPEAL by defendant Gill, Treasurer, from the judgment rendered by *Bone, J.*, out of term and out of the District, by consent, at NASHVILLE on 27 June 1959.

Plaintiff, for cause of action, alleged: Defendants Whedbee, residents of Hertford County, owned and operated farms in Hertford and Northampton Counties; plaintiffs loaned them $16,000 to plant, cultivate, and harvest crops; the monies so loaned were secured by crop liens duly recorded in said counties; defendants Whedbee delivered to defendant Rich Square Bonded Warehouse, which is operated pursuant to the provisions of Art. 38, c.106 of the General Statutes, thirty-seven bales of cotton, a portion of the crops included in the recorded liens held by plaintiff; negotiable warehouse receipts for said cotton were issued to Whedbee as authorized by G.S. 106-441; defendant Fairley is the State Warehouse Superintendent; defendant Pendleton is manager of Rich Square Bonded Warehouse; a demand for the cotton so stored and a refusal to deliver. Plaintiff demanded judgment for the cotton or its value as against defendants Whedbee and defendant Pendleton and the surety on his bond as warehouse manager, and if Pendleton should not be adjudged liable, against Fairley, as State Warehouse Superintendent, and if he be adjudged

not liable, against defendant Gill, as Treasurer, and the fund provided by G.S. 106-435.

Indemnity Insurance Company is the surety for defendant Pendleton on the bond required by G.S. 106-434.

Defendants Gill and Fairley denied liability, asserting that if liability existed against any one other than defendants Whedbee, defendant Pendleton and his bond were primarily liable.

Defendants Pendleton and Rich Square Bonded Warehouse denied liability. They assert that the cotton was accepted for storage and the warehouse receipts were issued only after Pendleton had satisfied himself that Whedbee had good title to the same.

The parties submitted an agreed statement of facts to the court. This statement establishes the execution and recordation of the crop liens; Whedbee's debt to plaintiff; the operation of the warehouse as a part of the State system; the positions of Fairley and Pendleton, and the bond given by Pendleton; that Whedbee delivered thirty-seven bales of cotton to Pendleton as manager for storage.

The agreed statement shows thirty-seven bales delivered with the dates of delivery for thirty-six. Negotiable receipts were issued for the cotton. The dates on which the warehouse receipts issued appear in the agreed statement. In one instance the receipt issued the day before the cotton was delivered. The remaining receipts were issued subsequent to delivery, varying from three to thirty-five days after delivery. The value of the cotton was stipulated, as was the fact that the warehouse receipts had been negotiated. It was stipulated: "It is not contended by any of the parties that A. B. Fairley as State Warehouse Superintendent was negligent in the performance of his duties or that he failed to perform any duty required of him by law."

The 16th and 17th stipulations read as follows:

"16. Neither Y. D. Pendleton, Manager of Rich Square Bonded Warehouse, nor H. T. Jones, his assistant manager, made any investigation of the records in the office of the Register of Deeds of Hertford County, or in the office of the Register of Deeds of Northampton County, in an effort to determine whether or not there were any liens there recorded on said cotton.

"17. Except as to the two bales having Gin Numbers 4177 and 4703 (not here in controversy), Y. D. Pendleton, Manager of Rich Square Bonded Warehouse, issued official negotiable warehouse receipts to E. D. Whedbee or Bearer for the cotton accepted for storage from him, only after satisfying himself in the following manner that the depositor, E. D. Whedbee, had good title to the same:

"(a) Y. D. Pendleton had known E. D. Whedbee since 1948, had

stored cotton for him in 1948 and 1956, had known his family for a number of years and believed Mr. Whedbee to be a man of honesty and integrity.

"(b) E. D. Whedbee made numerous oral assurances to Y. D. Pendleton and to his assistant manager, M. T. Jones, that he, E. D. Whedbee, had good title to the cotton delivered for storage for which receipts were being issued and that there were no liens of any kind on said cotton which representations were believed and relied upon in issuing receipts.

"(c) Delivery of each official negotiable warehouse receipt was made only after E. D. Whedbee had signed a form note used by the Commodity Credit Corporation, which note contained the following language: 'The producer understands and agrees that the loan is made subject to and in consideration of the representations, warranties, and agreements contained in the Loan Agreement on the reverse side hereof . . .'

"The warranties referred to on the reverse side included: '. . . the producer, with full knowledge of the provisions of section 15(a) of the Commodity Credit Corporation Act, represents and warrants to all holders of the note as follows:

" '. . .

" '(b) That he has the legal right to pledge the cotton as collateral security for the loan: . . .

" '. . .

" '(f) That the cotton is free and clear of all liens and encumbrances, except warehouseman's liens; and that all persons who claimed to have any liens or encumbrances on the cotton (except the warehouseman), and all landlords, whether or not they claimed landlord's liens on the cotton, have executed the lienholder's waiver on the reverse side hereof.'

"(d) No person communicated to Y. D. Pendleton or to M. T. Jones, his assistant manager, the fact that said liens were in existence and they were without actual knowledge thereof."

The court in its judgment recited the agreed statement of facts which it incorporated as a part of the judgment. After reciting the agreed facts it found: "23. Y. D. Pendleton, Manager of Rich Square Bonded Warehouse issued said official negotiable warehouse receipts to E. D. Whedbee or Bearer for 35 bales of cotton having Gin Numbers (not material) only after having used such diligence as would have been used by an ordinarily prudent person, under the same circumstances and charged with a like duty, to satisfy himself that the depositor E. D. Whedbee had good title to the same."

Based on the facts agreed and found by the court, judgment was entered against defendants Whedbee and Gill, the recovery as against Gill to be paid from the indemnity fund provided by G.S. 106-435.

Defendant Gill excepted to the finding that Pendleton used such diligence as would have been exercised by an ordinarily prudent person under the same circumstances and charged with a like duty; he likewise excepted to the conclusions of law and appealed from the judgment rendered.

Cherry & Cherry for plaintiff, appellee.

Attorney General Seawell and Assistant Attorney General Bruton and Charles D. Barham of Staff for defendant, appellant.

Gay, Midyette & Turner for Y. D. Pendleton, Manager of Rich Square Bonded Warehouse, Jones, Son & Company, Inc., and Rich Square Bonded Warehouse, appellees.

T. Lacy Williams for Indemnity Insurance Company of North America, appellee.

RODMAN, J. The exception to finding of fact no. 23, made by the court, raises two questions: (1) Was the court authorized to find any fact in addition to the facts agreed; (2) if so, were the agreed facts sufficient to support the factual inference (finding no. 23) which the court drew from the agreed facts?

The agreement in this case provides: "It is agreed that the foregoing facts shall constitute and be the evidence in this case and that trial by Jury is hereby waived and the Judge shall upon said facts determine the rights and liabilities of the parties hereto."

In a controversy without action the court is without authority to find additional facts, *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413; nor may it do so when the parties have agreed upon facts which they deem determinative of the controversy. This limitation of authority prohibits the drawing of factual conclusions from the evidentiary facts. *Smith v. Smith,* 248 N.C. 194, 102 S.E. 2d 868; *Board of Pharmacy v. Lane,* 248 N.C. 134, 102 S.E. 2d 832; *Eason v. Dew,* 244 N. C. 571, 94 S.E. 2d 603; *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898; *Sparrow v. Casualty Co.,* 243 N.C. 60, 89 SE. 2d 800; *Marx v. Brogan,* 188 N.Y. 431, 11 Ann. Cas. 145; 2 Am. Jur. 384. Especially is this true when the agreement expressly prohibits the court from drawing inferences or factual conclusions. *Petros v. Superintendent & Inspector of Buildings,* 28 N.E. 2d 233, 128 A.L.R. 1210.

This is not a controversy without action authorized by G.S. 1-250 *et seq.* The authority of the court, if any, to make findings in addi-

tion to the facts agreed to by the parties must be found in the agreement of the parties submitting the controversy to the court.

Litigants may waive a jury trial and permit the court to find the facts. G.S. 1-184. The court must, of course, do so on the evidence. They may agree upon the evidence and permit the court to draw factual conclusions. Here the parties agreed that the stipulated facts "shall constitute and be the evidence" which a jury would hear and then stipulated that a jury trial was waived.

Until the ultimate fact of due care was determined, no judgment could be rendered, and the agreement with respect to the evidentiary facts was a useless effort. *Seminary v. Wake County,* 248 N.C. 420, 103 S.E. 2d 472; *Ellison v. Hunsinger,* 237 N.C. 619, 75 S.E. 2d 884; *Tucker v. Ashcraft,* 189 N.C. 546, 127 S.E. 531. The practice of stipulating evidentiary facts and permitting the court to find ultimate facts therefrom is not unknown. "If the parties intend that the court shall have authority upon a case agreed to make such inference, they must make an agreement to that effect as is frequently, if not usually, done in England in making up a 'special case.' " *Sawyer v. Corse,* 17 Gratt. (Va.) 230; 2 Am. Jur. 385. The agreement authorized the court to find fact no. 23.

We must determine whether the agreed facts were sufficient to support the factual conclusion that Pendleton exercised such care as to relieve him of liability.

If more than one inference can be drawn from the stipulated facts, the answer to the question as to due care was for the jury, or the court on waiver of jury trial. *Turnage v. Morton,* 240 N.C. 94, 81 S. E. 2d 135; *McCrowell v. R. R.,* 221 N.C. 366, 20 S.E. 2d 352; *Warren v. Insurance Co.,* 217 N.C. 705, 9 S.E. 2d 479; *Tucker v. Ashcraft, supra.*

What is the obligation assumed by the manager of a warehouse operating pursuant to the provisions of Art. 38, c. 106 of G.S.? The answer is to be found in the present statute considered in the light of its history. Basic provisions of this article were first enacted in 1919, c. 168 P.L. 1919, C.S. 4907 set eq. Sec. 12 of that Act (C.S. 4918) provided: "The said receipt carries absolute title to the cotton, it being the duty of the manager accepting same for storage, by inspection of the register of deeds' office, to ascertain whether there are on file crop mortgages or liens for rent or laborer's liens covering said cotton before he accepts same and issues a receipt." A local manager acting under that Act failed in the performance of his duty if he failed to examine the records for recorded liens, and for loss sustained by breach of his duty he and his bond were liable.

The original Act was amended by c. 137, P.L. 1921. So far as here pertinent, that Act provided: "The said official negotiable receipt carries absolute title to the cotton, it being the duty of the local manager accepting same for storage to satisfy himself as to the title to the same by requiring the depositor of the cotton to sign a statement appearing on the face of the official receipt to the effect that there is no lien, mortgage, or other valid claim outstanding against such cotton, and any person falsely signing such a statement shall be punished as provided for false pretenses, Consolidated Statutes, section four thousand two hundred and seventy-seven."

The Legislature in a two-year period traveled from one extreme to the other with respect to the duty of a local manager in determining the title to the cotton for storage. Both in 1919 and 1921 it fixed the standard of due care. The standard fixed in 1921 continued to measure the duty of a local manager in receiving cotton for more than thirty years. He was authorized to rely upon a signed statement which, if false, was criminal. The agreed facts show that Whedbee signed statements called for in the Commodity Credit Act. A false statement is by that Act made a crime.

The Legislature in 1955 (c. 523, S.L. 1955) removed the specifications with respect to the manager's duty. The statute (G.S. 106-442) now reads: "The said official negotiable receipt carries absolute title to the cotton or other agricultural commodity, and it is the duty of the local manager accepting same for storage to satisfy himself that the depositor has good title to the same."

Appellant would have us construe the present law as equivalent to the original Act which made the local manager an insurer against the recorded liens. We do not so construe legislative intent. Had the Legislature intended to require an examination for recorded liens, it would have been a simple matter to have inserted the language contained in the 1919 Act.

The statute now requires the local manager to satisfy himself. That implies that he must act as a prudent person and exercise reasonable care under existing conditions. That is the obligation which an employee owes to his employer. *Ellison v. Hunsinger, supra; Trustees v. Banking Co.*, 182 N.C. 298, 109 S.E. 6; *Ivey v. Cotton Mills*, 143 N. C. 189; 35 Am. Jur. 530; 56 C.J.S. 480, 481.

Whether Pendleton acted under the circumstances of this case as a reasonably prudent person would have acted is a question with respect to which different people can reach different conclusions. Hence the court, acting as a jury, had the duty of answering the question raised by the agreed facts, namely: Did Pendleton exercise that de-

gree of care, under all of the facts, which a reasonably prudent person would have exercised? Its answer determines the controversy since it found Pendleton acted as a prudent person, and the law imposes no greater duty.

The liability adjudged against the defendants Whedbee is primary. The liability of the guaranty fund is secondary. The judgment will be amended to expressly so provide.

Modified and affirmed.

HIGGINS, J., not sitting.

PARKER, J., dissenting. All the parties submitted to Judge Bone, what they called "AGREED STATEMENT OF FACTS." After setting forth 21 paragraphs of facts, this agreed statement of facts ends with this language

> "It is agreed that the foregoing facts shall constitute and be the evidence in this case and that trial by Jury is hereby waived and the Judge shall upon said facts determine the rights and liabilities of the parties hereto."

Then follows the signatures of counsel for all the parties.

Judge Bone's judgment begins with this language:

> "This cause coming on to be heard before Honorable Walter J. Bone, Judge holding the Courts of the Sixth Judicial District, at 10:00 A. M. on the 27th day of June, 1959, at the Courthouse in Nashville, North Carolina, the parties having agreed that the same be heard before said Judge and at said time and place, that trial by jury is waived, that an Agreed Statement of Facts shall constitute and be the evidence in this case and that the Judge upon said facts shall determine the rights and liabilities of the parties hereto, and it appearing to the satisfaction of the Court and the Court finding facts as follows, to wit:"

According to the record the only evidence before Judge Bone was this "AGREED STATEMENT OF FACTS:"

I can find nothing in the briefs filed by counsel to indicate that they, or anyone of them, had any idea that Judge Bone was hearing the case on anything except the "AGREED STATEMENT OF FACTS" in accordance with G. S. 1-250 *et seq.* For instance, the brief filed for appellant Gill has this at the beginning after Question Involved: "STATEMENT OF CASE. This civil action was heard by consent, upon the pleadings and Agreed Statement of Fact." The brief filed for Indemnity Insurance Company of North America, appellee, says the first question involved is: "Did the court err: 1. In including Findings of Fact 23 in the judgment, and is it supported by

the evidence set out in the Agreed Statement of Facts?" The brief of plaintiff appellee has this language: "Under and by virtue of said agreed statement of facts, this action was heard out of turn and out of the district, by consent of the parties, and judgment rendered, etc."

I do not agree with the statement in the majority opinion: "This is not a controversy without action authorized by G. S. 1-250 *et seq.*"

It is true that the parties may waive a jury trial. G.S. 1-184. When that is done, the Judge shall give his decision in writing, containing a statement of the facts found and the conclusions of law separately. G.S. 1-185. The Agreed Statement of Facts states "trial by jury is hereby waived and *the Judge shall upon said facts determine the rights and liabilities of the parties hereto.*" The beginning of Judge Bone's judgment states "that trial by jury is waived, *that an Agreed Statement of Facts shall constitute and be the evidence in this case and that the Judge upon said facts shall determine the rights and liabilities of the parties hereto.*" From the above language it seems clear to me that the agreement was that Judge Bone was merely to determine the legal rights and liabilities of the parties upon an Agreed Statement of Facts, and was not authorized to find any further facts or to infer any further facts from those agreed upon. I consider the language used "a trial by jury is waived" as surplusage.

In *Sparrow v. Casualty Co.*, 243 N.C. 60, 89 S.E. 2d 800, it is said:

> "Where, as here, a case is tried on an agreed statement of facts, such statement is in the nature of a special verdict, admitting there is no dispute as to the facts, and constituting a request by each litigant for a judgment which each contends arises as a matter of law on the facts agreed, and consequently the court is not permitted to infer or deduce further facts from those stipulated."

The majority opinion is based on Judge Bone's finding of fact number 23, to the effect that Y. D. Pendleton, manager of Rich Square Bonded Warehouse, exercised due care in issuing official negotiable warehouse receipts to E. D. Whedbee, etc. This is a finding of fact that Judge Bone had no authority to make. The Agreed Statement of Facts contains no such fact.

As to whether or not Y. D. Pendleton exercised due care under the circumstances is still an open question for decision by a jury, or by a judge under waiver of a jury trial in accordance with G.S. 1-184.

The agreed case lacks completeness. As is said in *Trustees v. Banking Co.*, 182 N.C. 298, 109 S.E. 6: "A case agreed must state all the facts necessary to a decision, which this case does not do."

I would set aside the judgment, and remand the case for further proceedings. *New Bern v. White*, 251 N.C. 65, 110 S.E. 2d 446.

JOHN G. STATHOPOULOS v. VERNON LEONARD SHOOK.

(Filed 14 October, 1959.)

1. Evidence § 1: Pleadings § 24—

The courts will not take judicial notice of a municipal ordinance, and ordinarily an ordinance must be properly pleaded before it may be introduced in evidence.

2. Appeal and Error § 7: Pleadings § 22b—

Where a pertinent municipal ordinance is not pleaded but is introduced in evidence over defendant's objection, the Supreme Court may in its discretion allow plaintiff to allege the ordinance by amendment, so as to obviate the objection to the admission of the ordinance in evidence, there being no suggestion that defendant was taken by surprise and there being no substantial change in plaintiff's claim by reason of the amendment. G.S. 1-163, G.S. 7-13, Rules of Practice in the Supreme Court, No. 20(4).

3. Negligence § 19c—

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

4. Trial § 22c—

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit, since discrepancies and contradictions in the evidence are to be resolved by the jury.

5. Automobiles § 17—

While a person entering an intersection facing a traffic control signal giving him the right of way remains under duty to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner so as not to endanger or be likely to endanger others upon the highway, nevertheless, in the absence of anything which gives or should give him notice to the contrary, he is entitled to assume and act on the assumption that other motorists will observe the rules of the road and yield him the right of way.

6. Automobiles § 42g— Evidence held insufficient to show contributory negligence as matter of law in failing to see that defendant's vehicle would not stop in observance to traffic signal.

Plaintiff, traveling on a four lane street intersecting another four lane street, entered the intersection while facing a flashing yellow signal. Defendant, entered the intersection from plaintiff's right, faced with a flashing red signal, and struck the right side of plaintiff's vehicle after it had passed the center of the intersection. A municipal ordinance introduced in evidence prescribed that motorists facing a flashing yellow signal might proceed through the intersection with caution, and that motorists facing a flashing red signal should stop, and be governed by the rules applicable to stop signs. The evidence considered in the light most favorable to plaintiff tended to show that plain-

tiff did not see defendant's vehicle until plaintiff was in the intersection, that defendant approached the intersection at some 35 miles per hour and did not decrease speed, and was about 100 feet from the intersection when plaintiff entered the intersection. *Held:* Considering the evidence in the light most favorable to plaintiff it does not show contributory negligence as a matter of law, since it does not appear that plaintiff, had he looked, would or could have seen that defendant's car would not or could not stop in time to have avoided the collision.

7. Appeal and Error § 41—

Where a fact is established by abundent competent evidence the admission of incompetent evidence tending to prove the same fact may not be held prejudicial.

8. Appeal and Error § 40—

A technical error will not justify a new trial when it is apparent that the error could not have materially affected the outcome and did not amount to a denial of any substantial right.

HIGGINS, J., not sitting.

APPEAL by defendant from *Froneberger, J.*, May 18, 1959 Schedule "B" Term, of MECKLENBURG.

Civil action to recover on account of personal injuries and property damage allegedly caused by the negligence of defendant, growing out of an automobile collision on Sunday, February 9, 1958, about 2:00 a.m., at the intersection of Seventh Street and Hawthorne Lane in Charlotte.

The intersecting streets were approximately the same width. Each (36-40 feet wide) had four traffic lanes, two (each 8-10 feet wide) for traffic in each direction.

Plaintiff, driving a Ford car east on Seventh Street, approached and entered the intersection in the eastbound traffic lane next to the center line of Seventh Street. Defendant, operating a Pontiac north on Hawthorne Lane, approached and entered the intersection about the center of his right half of Hawthorne Lane, partly in each of the northbound traffic lanes. Plaintiff's car had passed the center of Hawthorne Lane and was struck, on its right-hand side — just behind the front fender, by defendant's car.

The City of Charlotte had placed an automatic traffic control signal at this intersection. After 12:30 a.m., it operated, as a blinker light, in this manner: Facing east-west traffic along Seventh Street, a yellow light flashed. Facing north-south traffic along Hawthorne Lane, a red light flashed. These lights were so operating on the occasion of the collision.

An ordinance of the City of Charlotte, Chapter 2, Section 25, of the City Code, provided:

"FLASHING SIGNALS. Whenever flashing red or yellow signals are used they shall require obedience by vehicular traffic as follows:

"(a) Flashing red (Stop Signal). When a red lens is illuminated by rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked, and the right to proceed shall be subject to the rule applicable after making a stop at stop sign.

"(b) Flashing yellow (Caution Signal). When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or along said street or highway past such signal only with caution."

The jury answered issues of negligence and contributory negligence in favor of plaintiff and awarded damages. Judgment was entered in accordance with the verdict. Defendant excepted and appealed, assigning errors.

Plumides & Plumides for plaintiff, appellee.

Kennedy, Covington, Lobdell & Hickman for defendant, appellant.

BOBBITT, J. While he alleged the location and operation of the automatic traffic control signal placed in the intersection by the City of Charlotte, plaintiff did not allege the city ordinance. Ordinarily, before legal rights may be predicated thereon, there must be both allegation and proof of such ordinance. *Smith v. Buie,* 243 N.C. 209, 90 S.E. 2d 514; *Lutz Industries, Inc., v. Dixie Home Stores,* 242 N. C. 332, 343, 88 S.E. 2d 333; *Wilson v. Kennedy,* 248 N.C. 74, 102 S. E. 2d 459; G.S. 160-272.

In *Cox v. Freight Lines,* 236 N.C. 72, 79, 72 S.E. 2d 25, it was held that the defect (failure to plead the ordinance) in the plaintiffs' pleadings was aided and cured by the allegations in defendant's answers. Here defendant did not plead Chapter 2, Section 25, of the City Code. He did plead Chapter 2, Section 40; but this was not offered in evidence. Its provisions are not relevant to this appeal. Defendant alleged, *inter alia,* that plaintiff "was approaching an intersection where there was a flashing traffic light facing him," as relevant to the alleged contributory negligence of plaintiff.

Plaintiff offered Chapter 2, Section 25, of the City Code. Defendant objected. The sole ground of objection was that the ordinance had not been pleaded. In determining the issues, the provisions of the ordinance were of major importance. The court, upon plaintiff's motion or *ex mero motu,* might have permitted plaintiff to amend so as to plead the ordinance. G.S. 1-163. There was no suggestion that de-

fendant was taken by surprise or that such amendment would substantially change plaintiff's claim. However, there was no motion for, or order granting, such leave to amend. The court simply overruled defendant's said objection. Thereafter, the trial proceeded in all respects, including the court's instructions to the jury, as if the ordinance had been properly pleaded and admitted in evidence.

Plaintiff, in this Court, moved for leave to amend his complaint so as to plead the ordinance. In the circumstances, this Court, in its discretion and in furtherance of justice, has allowed the motion. G.S. 7-13; Rule 20(4), Rules of Practice in the Supreme Court, 221 N.C. 544, 557. Plaintiff has filed a proper amendment. Hence, defendant's assignments of error relating to the introduction of the ordinance and to portions of the charge based thereon are overruled.

The principal question is whether the court erred in overruling defendant's motion for judgment of nonsuit.

There was plenary evidence that defendant was confronted by the red signal light when he approached and entered the intersection; that he failed to stop in obedience thereto; and that in so doing he violated the ordinance and otherwise failed to exercise due care. Defendant's contention is based solely on the ground that the evidence offered in behalf of plaintiff (the defendant did not testify or offer evidence) established that plaintiff was contributorily negligent as a matter of law.

Judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, but only when, the evidence, taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Currin v. Williams,* 248 N.C. 32, 102 S.E. 2d 455, and cases cited. Discrepancies and contradictions in the evidence, even though such occur in the evidence offered in behalf of plaintiff, are to be resolved by the jury, not by the court. *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1; *Cozart v. Hudson,* 239 N.C. 279, 78 S.E. 2d 881, and cases cited.

In *Wright v. Pegram,* 244 N. C. 45, 92 S. E. 2d 416, *Higgins, J.,* states the rule established by prior decisions as follows: ". . . a motorist facing a green light as he approaches and enters an intersection is under the continuing obligation to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner as not to endanger or be likely to endanger others upon the highway. *Ward v. Bowles,* 228 N.C. 273, 45 S.E. 2d 354. Nevertheless, in the absence of anything which gives or should give him notice to the contrary, a motorist has the right to assume and to act on the assumption that another motorist will observe the

rules of the road and stop in obedience to a traffic signal." *Cox v. Freight Lines, supra; Hyder v. Battery Company, Inc.*, 242 N.C. 553, 89 S.E. 2d 124; *Troxler v. Motor Lines*, 240 N.C. 420, 82 S.E. 2d 342.

The mere failure of plaintiff to observe traffic conditions on Hawthorne Lane is insufficient to establish his contributory negligence as a matter of law. Whether such failure to look was a proximate cause of the collision depended upon whether, if he had looked, what he would or should have seen was sufficient to put him on notice, at a time when plaintiff could by the exercise of due care have avoided the collision, that defendant would not stop in obedience to the red light. Plaintiff was chargeable with notice of what he would have seen had he exercised due care to keep a proper lookout. *Currin v. Williams, supra; Marshburn v. Patterson*, 241 N. C. 441, 85 S. E. 2d 683; *Smith v. Buie, supra.*

Defendant does not challenge any of these well established legal principles. Notwithstanding, he contends the evidence discloses that plaintiff was contributorily negligent as a matter of law.

Plaintiff testified, in substance, as follows: That he was driving 20-25 miles per hour along Seventh Street; that, as he approached and entered the intersection, he slowed down and then drove 15-20 miles per hour; that he first saw defendant's car when he (plaintiff) was in the intersection, beyond the center line of Hawthorne Lane; that defendant's car was 30-36 feet from him when he first saw it; and that defendant was "coming fast" from his (plaintiff's) right, "probably making 55 or 60 miles an hour."

Plaintiff offered H. W. Hollifield, a disinterested witness, who, driving eastwardly along Seventh Street, was 100-150 feet behind plaintiff as plaintiff approached the intersection. Hollifield testified, in substance, as follows: That he could see across the park area at the southwest corner of the intersection; that he first saw defendant's car when it was some 300 feet from the intersection; that defendant was traveling 35-40 miles per hour; that defendant did not stop or decrease his speed before entering the intersection; and that defendant's car was between 50 and 100 feet, "close to 100 feet," from the intersection when plaintiff entered the intersection. On cross-examination, Hollifield testified, in effect, that he "thought" the cars of plaintiff and defendant would collide *if they kept going at the same speeds.*

According to plaintiff's testimony, there were trees and a recreation building in the park area at the southwest corner of the intersection. Defendant contends that this testimony has no probative value in view of Hollifield's testimony as to what he actually saw. Be that as it may, and without further recital of the testimony, we

think it must be conceded that plaintiff, by the exercise of due care, could have seen defendant's car for an appreciable distance as it approached the intersection.

If the speed of defendant's car was 55-60 miles per hour, as plaintiff's testimony tends to show, and plaintiff could have observed defendant's car traveling *at this speed* for a distance of some 300 feet as it approached the intersection, there would be sound basis for the view that plaintiff could and should have observed that defendant could not or would not stop in obedience to the red traffic light. While the jury might have so found the facts, to have so found would have required acceptance of the portion of Hollifield's evidence favorable to defendant and rejection of the portion thereof favorable to plaintiff. As to the issue of contributory negligence, the evidence most favorable to plaintiff may be stated as follows: Defendant approached the intersection at 35-40 miles per hour and did not decrease his speed. He was "close to 100 feet" therefrom when plaintiff entered the intersection, and was 30-36 feet therefrom after plaintiff had crossed the center line of Hawthorne Lane.

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

There is no need to restate what was said in *Currin v. Williams, supra*, as to the factual situations involved in *Hyder v. Battery Company, Inc., supra; Wright v. Pegram, supra; Troxler v. Motor Lines, supra; Cox v. Freight Lines, supra;* and *Marshburn v. Patterson, supra*. Although no yellow light was involved, the factual situation in *Wright v. Pegram, supra*, is quite similar to the present factual situation. However, this distinction is noted: In *Wright v. Pegram, supra*, the light facing the defendant did not turn red until he had nearly reached the intersection.

We have not overlooked the fact that the ordinance provides that a motorist, confronted by a yellow light, may proceed through the intersection "only with caution." While the yellow light gave notice to plaintiff that he was approaching an intersection, we do not think the ordinance may be interpreted so as to deprive plaintiff of his legal right, within the limits of the principles stated above, to assume that defendant would stop in obedience to the red light. Whether due care

or caution was exercised by plaintiff was for determination by the jury in relation to all existing circumstances. It is noted that the traffic signal here involved differs from that involved in *Wilson v. Kennedy, supra,* where the yellow light constituted a warning that the red light was about to appear.

While there are factual differences, the decision in *Allega v. Eastern Motor Express Co.* (Pa.), 105 A. 2d 360, cited by defendant, substantially supports defendant's present position. However, prior decisions in this jurisdiction impel a different result.

The evidence tended to show: Plaintiff was knocked unconscious. He was taken from the scene of collision to a hospital. He regained consciousness the next morning, that is, daylight on Sunday, February 9th. On Monday, February 10th, he was examined by Dr. Harry Winkler. From then until July 15, 1958, and on two occasions thereafter, he was under treatment by Dr. Winkler. Dr. Winkler testified as to plaintiff's injuries and his treatment thereof.

The court overruled defendant's objection to a hypothetical question asked by plaintiff's counsel and answered by Dr. Winkler, relating to whether, in Dr. Winkler's opinion, the injuries for which he treated plaintiff were caused by the collision. We agree that the court erred in overruling defendant's objection. Defendant properly preserved exception to the court's ruling. Yet all the evidence as to plaintiff's injuries indicates without serious question that the injuries for which plaintiff was treated by Dr. Winkler were caused by the collision. In the circumstances, we are of opinion that the erroneous ruling did not materially prejudice defendant.

As stated by *Parker, J.,* in *In re Will of Thompson,* 248 N. C. 588, 598, 104 S.E. 2d 280: "Technical error is not sufficient to disturb the verdict and judgment. The burden is on the appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right; or to phrase it differently, to show that if the error had not occurred, there is a reasonable probability the trial might have been materially more favorable to him."

Each of defendant's other assignments of error has been carefully considered. Suffice to say, none discloses error deemed sufficiently prejudicial to constitute a sound basis for awarding a new trial.

No error.

HIGGINS, J., not sitting.

STATE v. HARDY HERSHEL GREEN.

(Filed 14 October, 1959.)

1. Automobiles § 72—

Where witnesses testify to the effect that defendant was under the influence of intoxicants immediately after the accident and that his condition was not caused by his injuries, there being no evidence that defendant received any appreciable injury in the accident, the evidence is sufficient to be submitted to the jury on the question of whether the defendant was intoxicated at the time, notwithstanding the testimony of other witnesses that they could not tell whether defendant's condition was due to intoxication or to shock or injury received in the accident.

2. Criminal Law § 101—

Where some of the State's evidence tends to incriminate the defendant and some to exculpate him, the incriminating evidence requires the submission of the question of guilt to the jury.

3. Same—

The function of motion to nonsuit is to test the sufficiency of the evidence to be submitted to the jury, and it is not the proper procedure to raise the objection that defendant was arrested for a misdemeanor prior to the issuance of warrant.

4. Indictment and Warrant § 14—

If the warrant is regular and valid on its face objection thereto must be raised by motion to quash made prior to plea, and where defendant makes a general appearance and enters plea without objecting to the warrant he waives any objection to the regularity of the warrant.

5. Indictment and Warrant § 7—

Where the warrant upon which defendant was tried is regular on its face and charges each and every essential element of the alleged offense, the fact that the warrant was issued after defendant's arrest for the misdemeanor does not entitle defendant to his discharge, subject to the sole exception when the offense charged arises out of the wrongful arrest.

6. Automobiles § 71—

In a prosecution for driving while under the influence of intoxicating liquor, it is competent to show in evidence the injuries resulting from the accident in which defendant's car was involved for the purpose of showing the manner in which defendant was operating the car and his lack of control over it, but such evidence should be limited to this purpose, and evidence of such injuries beyond that having a bearing on this question should be excluded.

7. Criminal Law § 33—

Evidence which is relevant and competent will not be excluded simply because it may prejudice defendant or excite the sympathy of the jury.

8. Criminal Law § 91—

Ordinarily error in the admission of evidence is cured when the court withdraws such evidence and instructs the jury not to consider it, and it is only in exceptional instances when because of the serious character and gravity of the incompetent evidence that the difficulty of erasing it from the minds of the jurors is obvious, that its admission cannot be cured by action of the court.

9. Same—

In this prosecution for driving while under the influence of intoxicating liquor any error in the extent of the admission of evidence of injuries to a child injured in the accident in which defendant's car was involved *held* cured by the instruction of the court that the sole question was whether the defendant was operating his vehicle while under the influence of intoxicating beverages and that the jury should not consider the fact that the accident caused injury to another person.

HIGGINS, J., not sitting.

APPEAL by defendant from *Froneberger, J.*, July, 1959 Term, of GASTON.

The warrant charges that defendant operated a vehicle on a public street of Gastonia while under the influence of intoxicating liquor, narcotic drugs or opiates. Defendant appealed from an adverse judgment of the Municipal Court of Gastonia and the case was tried *de novo* in Superior Court. Defendant entered a plea of not guilty.

Evidence for the State was substantially as follows: On 25 April, 1959, about 11:15 A.M., defendant operated a Ford automobile on Davidson Street in Gastonia at a high rate of speed on the "wrong side of the road." He met a taxicab, swerved to the right to miss it, skidded sideways, hit a tree and turned around and hit another tree. He struck a girl, nine or ten years of age, who was pushing a bicycle. The girl suffered a broken arm and leg and other injuries and was hospitalized. The front end of the automobile was crushed, two wheels were knocked off and the steering wheel was bent. The accident took place just beyond the crest of a hill on a steep, curving down-grade at or near the intersection of Davidson and Weldon Streets. Defendant remained under the steering wheel about ten minutes until the officers arrived. The officers took him out of the car. He had the odor of intoxicants on his breath, his speech was impaired and he staggered. Defendant said he wasn't hurt and didn't want to see a physician. He had no bruises or other signs of injury. In the opinion of State witnesses his condition was caused by intoxication. Later in the afternoon of the same day the warrant was issued.

Defendant offered no evidence.

The jury returned a verdict of guilty. From judgment imposing a prison sentence defendant appealed and assigned errors.

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

Dolley & DuBose for defendant, appellant.

MOORE, J. At the close of the evidence defendant moved for judgment of nonsuit. G.S. 15-173. The motion was denied and defendant excepted. Defendant contends that this was error and urges reversal of the ruling on two grounds.

Defendant asserts that he was dazed and in a state of shock by reason of the wreck and the State's evidence that he was intoxicated should be considered nothing more than suspicion or conjecture.

A lay witness testified on direct examination that defendant was "under the influence" of some intoxicants: On cross-examination he stated that "there were a number of things that could have caused the defendant to be unsteady on his feet." An officer who assisted defendant into the jail stated that, in his opinion, defendant "was under the influence of alcohol of some kind." Under cross-examination he testified that "he did not know whether the condition of the defendant was caused by injuries received in the accident or by possible intoxication."

On the other hand, a lay witness testified unqualifiedly "that in his opinion the defendant was under the influence of intoxicating beverage." The arresting officer stated on both direct and cross-examination that defendant's condition was caused by intoxication and not injuries. He testified further that defendant said he was not hurt and did not want to be taken to a doctor.

In *State v. Hough*, 229 N.C. 532, 50 S.E. 2d 496, the only witnesses for the State were the two arresting officers. Both of them testified in effect "that they did not know whether or not the defendant's condition . . . came from what he had to drink or whether it came from the injuries he had sustained." These officers had arrived at the scene about thirty minutes after defendant's car had wrecked. Defendant had three broken ribs and two broken vertebrae. This Court said: "If the witnesses . . . were unable to tell whether or not he was under the influence of an intoxicant or whether his condition was the result of the injuries he had just sustained, we do not see how the jury could do so. . . . We do not think this evidence is sufficient to raise more than a suspicion or conjecture as to whether or not the defendant at the time of his injury, was under the influence of liquor or narcotic drugs within the meaning of G.S. 20-138. . . ."

In the instant case there is no evidence that the defendant was injured. He told the officer he was not. It is true that two of the witnesses testified in a manner similar to those in the *Hough* case. Two others testified in effect that defendant was under the influence of intoxicants and his condition was not caused by injuries.

When the State's evidence is conflicting — some tending to incriminate and some to exculpate the defendant — it is sufficient to withstand a motion for nonsuit and must be submitted to the jury. *State v. Horner,* 248 N.C. 342, 345, 103 S.E. 2d 694; *State v. Robinson,* 229 N.C. 647, 649, 50 S.E. 2d 740.

Defendant further contends that his arrest was unlawful and the case against him should have been nonsuited for this reason. It is true the record tends to show that the alleged offense was not committed in the presence of the arresting officer, that defendant was arrested without a warrant having been issued and that the warrant was procured in the afternoon following his arrest. G.S. 15-41. He asserts that he thereby "lost an opportunity to gather evidence for his defense and seek medical attention."

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or indictment. *State v. Helms,* 247 N.C. 740, 745, 102 S.E. 2d 241; *State v. Strickland,* 243 N.C. 100, 101, 89 S.E. 2d 781. But it is not an essential of jurisdiction that such warrant be issued prior to the arrest and that the defendant be initially arrested thereunder. There is no contention in the instant case that the warrant under which the defendant was tried was not regular on its face and did not properly charge each and every element of the alleged offense.

If a warrant is regular and valid on its face, an objection thereto, should there be grounds therefor, must be by motion to quash. And if the motion is not made before plea of not guilty is entered, it is addressed to the discretion of the trial court and the ruling thereon is not reviewable on appeal. *State v. Ballenger,* 247 N.C. 260, 261, 100 S.E. 2d 845; *State v. Suddreth,* 223 N.C. 610, 613, 27 S.E. 2d 623. In the case at bar there was no motion to quash and defendant made general appearances in Municipal Court and Superior Court, entered pleas of not guilty and proceeded to trial on the merits. He thereby waived any objection to the regularity of the warrant by which he had been brought into court. *State v. Johnson,* 247 N.C. 240, 244, 100 S.E. 2d 494.

A motion for nonsuit presents only the question of the sufficiency of the evidence to carry the case to the jury. *State v. Nunley,* 224 N.C. 96, 97, 29 S.E. 2d 17; *State v. Smith,* 221 N.C. 400, 406, 20 S.E. 2d

360. The evidence in the record, taken in the light most favorable to the State, makes out a *prima facie* case, and this record discloses no grounds for quashing the warrant had motion therefor been made.

We observe, parenthetically, that there is no evidence to support the contention of defendant that he lost an opportunity to gather evidence for his defense and to seek medical attention. The officer offered to take him to a physican but he stated that he was not hurt and did not want to see a doctor. Furthermore, the record discloses that he was informed of the charge against him. There is nothing to indicate that he was denied bail or was not permitted to communicate with counsel and friends. G.S. 15-47.

Appellant relies on *State v. Mobley*, 240 N.C. 476, 83 S.E. 2d 100. In that case the officer arrested the defendant for public drunkenness without warrant. The defendant forcibly resisted arrest. He was charged with public drunkenness, resisting arrest and assault on the officer. The jury acquitted him of public drunkenness but convicted him of resisting and assault. The convictions were reversed in Supreme Court. Since he was judicially declared not guilty of public drunkenness, there was no justification for arrest without a warrant. He, therefore, was within his rights in forcibly resisting. The distinction between the *Mobley* case and the case at bar is that Mobley was convicted of offenses growing out of the unlawful arrest. In the instant case the charge in the warrant did not stem from the arrest itself. The law provides liability, both civilly and criminally, for false arrest. But the law does not discharge a defendant from criminal liability merely because his arrest is not lawful, unless the offense charged stems from such arrest. It should be noted that the General Assembly has amended G.S. 15-41 since the decision in the *Mobley* case.

Appellant makes a further contention that there was error in the admission of testimony which entitles him to a new trial.

The court, over the objection of defendant, permitted witnesses to testify with respect to the injuries sustained by the little girl who was struck by defendant's automobile, substantially as follows:

Paul L. Fletcher: She seemed to be hurt. It looked like she had been hit with a car. She looked like she was "broke up." Her chin was bleeding and her arm was broken. She was lying at the foot of the tree. He saw that her arm was broken but did not look at her legs. He saw her again about a month ago, in the hospital. He doesn't know when she got out of the hospital.

Theodore T. Shuford: He saw her at the scene. "She was a-laying under the door. . . . And gasoline started pouring out of the car, and

I run and got a piece of pasteboard — I didn't want to move her — and I just slid her over on this piece of pasteboard." In his opinion she was nine or ten years old. He went to see her in the hospital eight or ten different times. She got out of the hospital about two weeks ago, but he couldn't say definitely.

During the charge of the court, at the request of defendant's counsel, the jury was instructed as follows:

"Ladies and Gentlemen, you will not consider in any aspect the fact that there was an injury to another person growing out of the car wreck. The only — only matter that you are to determine in this action is whether at the time and place in question the defendant was operating his automobile while under the influence of intoxicating beverages."

Defendant's position is that the evidence of the child's injuries and her hospitalization is irrelevant to the issues in the case and calculated to prejudice his cause and create sympathy for the State's case.

If the only effect of evidence is to excite prejudice or sympathy, its admission may be ground for a new trial. But relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it. North Carolina Law of Evidence: Stansbury, sec. 80, p. 143. *State v. Hudson,* 218 N.C. 219, 231, 10 S.E. 2d 730.

Irrelevant evidence, tending to prejudice the opponent and create sympathy for the party offering it, has been held in some cases to be cause for a new trial notwithstanding the instructions of the court to disregard it. *State v. Page,* 215 N.C. 333, 334, 1 S.E. 2d 887; *Gattis v. Kilgo,* 131 N.C. 199, 42 S.E. 684.

In this case the testimony that the child was injured, that the injuries were serious and that she was hospitalized, was clearly relevant as bearing upon the manner of operation of the automobile and the lack of control by defendant. "The State could not be deprived of the benefit of evidence which was relevant and material because it might also have a tendency to prejudice the defendant." *State v. Cox,* 201 N.C. 357, 360, 160 S.E. 358.

We are inclined to the view that the evidence was given in more detail than the State's case required and that the recounting of the visits to the hospital was in the twilight of relevancy. We do not approve the fulsomeness of the testimony. Yet, in view of the court's instruction, given at defendant's request, it is our opinion that error was averted and a new trial is not warranted.

"The power of the Court to withdraw incompetent evidence and

to instruct the jury not to consider it has long been recognized in this State. . . . In *McAllister v. McAllister*, 34 N.C., 184, *Ruffin, C. J.*, said: 'It is undoubtedly proper and in the power of the Court to correct a slip by withdrawing improper evidence from the consideration of the jury, or by giving such explanation of an error as will prevent it from misleading a jury.' He expressed the same opinion more than three-quarters of a century ago and the practice has been observed since that time. (Citing cases.)" *State v. Stewart*, 189 N.C. 340, 345, 127 S.E. 260. This principle has been applied consistently and it has been generally held that this procedure averts error. *State v. Hamer*, 240 N.C. 85, 89, 81 S.E. 2d 193; *State v. Strickland*, 229 N.C. 201, 207, 49 S.E. 2d 469; *State v. Artis*, 227 N.C. 371, 373, 42 S.E. 2d 409; *State v. Vicks*, 223 N.C. 384, 386, 26 S.E. 2d 873; *State v. King*, 219 N.C. 667, 678, 14 S.E. 2d 803; *Hagedorn v. Hagedorn*, 211 N.C. 175, 177, 189 S.E. 507; *State v. Perry*, 210 N.C. 796, 798, 188 S.E. 639; *State v. Oakley*, 210 N.C. 206, 211, 186 S.E. 244; *Nance v. Fertilizer Co.*, 200 N.C. 702, 708, 158 S.E. 486; *Eaker v. International Shoe Co.*, 199 N.C. 379, 385, 154 S.E. 667; *In re Will of Yelverton*, 198 N.C. 746, 749, 153 S.E. 319; *Sentelle v. Board of Education*, 198 N.C. 389, 391, 151 S.E. 877; *State v. Griffin*, 190 N.C. 133, 136, 129 S.E. 410; *Gerow v. R.R.*, 189 N.C. 813, 819, 128 S.E. 345; *State v. Love*, 189 N.C. 766, 773, 128 S.E. 354.

In *State v. Strickland, supra*, the Court says:

> "In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed. (Citing cases.)"

Altogether there are eighteen assignments of error. We have carefully considered each of them. Appellant has failed to show prejudicial error. *Taylor Co. v. Highway Commission*, 250 N.C. 533, 539, 109 S.E. 2d 243.

No error.

HIGGINS, J., not sitting.

MR. AND MRS. H. LINZA HUMPHREY, PARENTS AND NEXT OF KIN OF HENRY ALLEN HUMPHREY, DECEASED v. QUALITY CLEANERS AND LAUNDRY AND THE FIDELITY AND GUARANTY COMPANY OF NEW YORK.

(Filed 14 October, 1959.)

1. **Master and Servant § 40d—**

Ordinarily, an injury suffered by an employee while going to or returning from the place where he is employed, does not arise out of and in the course of his employment.

2. **Same— Evidence held sufficient to support finding that injury to the employee while on his way to work did not arise in the course of his employment.**

Evidence tending to show that the driver of a laundry truck lived some distance from the plant and used his own automobile in going to and from the plant, and that on the morning in question he was carrying with him a cash box with money belonging to the laundry and articles of clothing to be cleaned, which his girl friend had given him the night before when he stopped at her house on his way home, and that he was fatally injured when he drove his car into a bridge abutment, without any evidence that he was under any express or implied obligation to solicit laundry or dry cleaning in his home community, *is held* sufficient to support the finding of the Industrial Commission that the transportation of the cash box and clothing was merely incidental to the trip from his home to the laundry and that therefore the injury did not arise out of and in the course of his employment.

3. **Master and Servant § 55d—**

The findings of fact of the Industrial Commission are conclusive on appeal if supported by any competent evidence.

HIGGINS, J., not sitting.

APPEAL by plaintiffs from *Bundy, J.*, July Term, 1959, of ONSLOW.

This proceeding was instituted to recover compensation for the death of Henry Allen Humphrey, an employee of the defendant Quality Cleaners and Laundry (hereinafter called Laundry). The Fidelity and Guaranty Company of New York was the insurance carrier of the defendant Laundry.

Henry Allen Humphrey had been employed by the defendant Laundry from about the middle of September 1956 until the accident on 13 December 1956, which resulted in his death. He was employed as a truck driver. His duties were to work in Camp Lejeune, picking up laundry and dry cleaning and delivering it back to the owners after it had been laundered or dry cleaned. He was furnished a Ford truck by the defendant Laundry and the Laundry paid all expenses in connection with its operation, including gasoline. The driver was

not permitted to use the truck for any purpose other than picking up and delivering laundry and dry cleaning in the assigned area.

This employee was unmarried and lived with his parents in the northwestern part of Onslow County about 16 miles from Jacksonville, where the plant of his employer was located. He furnished his own automobile in which he commuted from his home to and from Jacksonville.

The employee was paid a commission of twelve per cent with a guarantee of $50.00 per week, whether he made his guarantee or not. At no time during his employment with the defendant Laundry did he earn more than his guarantee. Any money he collected for work done he kept in a cash or money box and checked up every Friday night. The drivers of the defendant Laundry, including the deceased, brought in dry cleaning from their neighbors and friends three or four times a week and delivered it and collected for it. The drivers were given credit on this cleaning in determining their commissions. On 12 December 1956, Humphrey called on his girl-friend on his way home from work and ate dinner at her home; when he left her home about 10:00 p.m. he took with him three of her skirts and one short white coat to take to his employer's plant to be cleaned. He then returned to his home. He took the money box which contained the money he had collected since the preceding Friday into the house with him. The next morning the deceased got into his car about 4:15 a.m. and proceeded by the most direct route toward Jacksonville. On the way, at approximately 4:45 a.m., the plaintiff's car struck a bridge on U. S. Highway 17; he was severely injured and died nine months later. The fog at the time of the accident was very thick, making visibility almost impossible.

At the scene of the accident, a large amount of money, presumably from the money box, was scattered in and around the car on the ground. In the back seat of the deceased's car were some articles of clothing which his girl-friend had given him the night before. Through another employee of the defendant Laundry, the coat and one of the skirts belonging to Humphrey's girl-friend were delivered to the Laundry and were cleaned. Thereafter, the Laundry delivered these articles to the owner at its place of business and for which she paid the usual cleaning charges.

The hearing Commissioner held that the accident which caused the death of Henry Allen Humphrey did not arise out of and in the course of the employment. On appeal to the full Commission the ruling of the hearing Commissioner was affirmed. An appeal was taken to the Superior Court and the ruling of the Commission was likewise affirmed. The plaintiffs appeal, assigning error.

Ellis, Warlick & Godwin for plaintiffs.
Teague, Johnson & Patterson for defendants.

DENNY, J. The sole question for determination on this appeal is whether or not the accident which caused the death of Henry Allen Humphrey arose out of and in the course of his employment.

Ordinarily, an injury suffered by an employee while going to or returning from the place where he is employed, does not arise out of and in the course of his employment. *Bray v. Weatherly & Co.*, 203 N.C. 160, 165 S.E. 332, 94 A.L.R. 589; *Smith v. Gastonia*, 216 N.C. 517, 5 S.E. 2d 540; *McLamb v. Beasley*, 218 N.C. 308, 11 S.E. 2d 283; *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751; *Ellis v. Service Co. Inc.*, 240 N.C. 453, 82 S.E. 2d 419.

In the last cited case, *Bobbitt, J.*, speaking for the court, said: "An employee is not engaged in the prosecution of his employer's business while operating his personal car to the place where he is to perform the duties of his employment, *Wilkie v. Stancil, supra* (196 N.C. 794, 147 S.E. 296), nor while leaving his place of employment to go to his home, *Rogers v. Carolina Garage*, 236 N.C. 525, 73 S.E. 2d 318."

The appellants cite and rely upon the cases of *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862; *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220; *Massey v. Bd. of Education*, 204 N.C. 193, 167 S.E. 695; and 99 C.J.S., Workmen's Compensation, §§ 232 and 236.

In our opinion, the facts in each of the foregoing cases are distinguishable from the facts in the case now before us and are therefore not controlling.

In 99 C.J.S., Workmen's Compensation, § 232, page 815, it is stated: " * * * it is held that injuries which occur to an employee while going to or from work may be compensable where it appears that at the time of such injuries he is engaged in doing an act, or performing a duty, which he is definitely charged with doing as a part of his contract of service or under the express or implied direction of his employer, * * *."

In § 236 of the above authority, at page 846, it is said: "Moreover, the fact that the employee furnishes his own conveyance will not defeat his right to compensation for injuries sustained while going to or from work where the employee, while so doing, is engaged in the business of the employer, or is on a mission for the employer, or is engaged in performing his duties, * * *." However, in another portion of § 232, preceding that quoted above, beginning at page 807, we find the following statement: "It is laid down as a general rule, known as the 'going and coming' rule, that, in the absence of special

circumstances, and except in certain unusual circumstances, and where nothing else appears, harm or injury sustained by an employee while going to or from his work is not compensable. Such an injury, or accident, is regarded by the weight of authority of many courts as not arising out of his employment, and as not being, or not occurring, in the course thereof."

The hearing Commissioner found as a fact that Henry Allen Humphrey was performing no services for his employer at the time of his accident, "but was on his way to work on his personal car; that none of the expenses of the trip were being borne by the employer; that the transportation of the employer's cash box and of the * * * clothing was merely incidental to the trip and not in the performance of any express or implied duty connected with the employment." This finding of fact is supported by competent evidence and is binding on us. *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173; *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E. 2d 109; *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668; *Creighton v. Snipes*, 227 N. C. 90, 40 S.E. 2d 612; *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97.

In the case of *Ridout v. Rose's Stores, Inc.*, 205 N.C. 423, 171 S. E. 642, Clarence B. Ridout and William Dement were employees of Rose's Stores — the former manager, the latter assistant manager of the store at Morehead City. On Sunday, 20 December 1931, these young men made a trip from Morehead City to Henderson in a car owned by William Dement. Rose's Stores had a warehouse at Henderson, from which all its branch stores were supplied. After their arrival at Henderson, Ridout had dinner with the manager of the warehouse and Dement called to see a young lady. In the afternoon, Ridout and the manager walked to the warehouse, got certain goods, put them in the car, and the young men started on their return trip. Near Raleigh the car in which they were traveling was struck by another car going in the opposite direction and both young men were killed.

The Industrial Commission found from the conflicting evidence that the death of the employees occurred while they were engaged in an adventure primarily for personal and social reasons and not in the performance of any duty expressly or impliedly connected with their employment, and that their receipt of the goods was incidental to the trip. This Court said that the facts as found by the Commission, when supported by competent evidence, are " 'conclusive and binding' on the appellate courts." And further said, "It is obvious that from Saturday night until Monday morning the relation of employer and

employee was suspended, and that there was no causal relation between the employment and the accident."

In *Marks' Dependents v. Gray,* 251 N.Y. 90, 167 N.E. 181, a plumber's helper, who was going to drive to a neighboring town to meet his wife, was asked by his employer to fix some faucets there—a trifling job which in itself would not have occasioned the trip. While on his way to this town, he was injured in a wreck and died. On the identical question now before us, *Cardozo, C. J.,* speaking for the Court, said: "If word had come to him before starting that the defective faucets were in order, he would have made the journey just the same. If word had come, on the other hand, that his wife had already returned, he would not have made the trip at all. * * * In such circumstances we think the perils of the highway were unrelated to the service. We do not say that the service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. * * * The test in brief is this: If the work of the employee creates the necessity for travel, such is in the course of his employment, though he is serving at the same time some purpose of his own. * * * If however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel was then personal, and personal the risk."

In the instant case, there is no evidence to support the view that the defendant Laundry would have made any arrangements to have laundry or dry cleaning picked up in the vicinity where the deceased employee lived had he not brought it in, or that he was under any express or implied obligation to his employer to solicit laundry or dry cleaning in his home community. On the other hand, it is obvious that Henry Allen Humphrey would have undertaken the trip from his home to Jacksonville on the morning of his accident, irrespective of the presence of the dry cleaning in his car that day.

The judgment of the court below is

Affirmed.

HIGGINS, J., not sitting.

LULA FREEMAN HILL AND HUSBAND, FRANK C. HILL; MARIE GAUSE, WIDOW; ILA FREEMAN PHILLIPS; CELESTE BURNETT EATON AND HUSBAND, HUBERT A. EATON; FOSTER F. BURNETT, JR. AND WIFE, GLORIA M. BURNETT v. RESORT DEVELOPMENT COMPANY, INC.; LIZZIE HALL FREEMAN, WIDOW OF R. B. FREEMAN, JR.; GROVER FREEMAN, UNMARRIED; ARCHIE FREEMAN AND WIFE, BERNICE FREEMAN; AVIE FREEMAN BLUEFIELD AND HUSBAND, IRA BLUEFIELD; MILDRED FREEMAN; BERTHA MAE FREEMAN; VIOLA F. RODICK, AND HUSBAND, LOUIS RODICK; GENEVA FREEMAN CROMARTIE; VICTOR FREEMAN; OLIVER DINKINS, SR., WIDOWER OF LETHA FREEMAN DINKINS; OLIVER DINKINS, JR AND WIFE, MERCEDES DINKINS; MARTHA D. HOLLIDAY AND HUSBAND, GRANT HOLLIDAY; JAMES H. DINKINS AND WIFE, MARY DOE DINKINS; MAE ELEANOR DINKINS SPICER AND HUSBAND, HARLEE SPICER; ALICE DINKINS; VICTOR DINKINS, LORETTA DINKINS; ELECTA FREEMAN, WIDOW OF OCEOLA FREEMAN; RONALD FREEMAN; ONEDA FREEMAN AND ALWILDA FREEMAN.

(Filed 14 October, 1959.)

1. Assistance, Writ of—

Writ of assistance is a remedy in the nature of an execution to enforce a decree adjudicating the title or right to possession of realty, and therefore where a petition for partition is dismissed by judgment which does not adjudicate title, the respondent is not entitled to the issuance of the writ upon motion thereafter made, nor may the findings of fact and conclusions of law of the court in dismissing the partition proceedings be considered in determining whether the judgment adjudicated title or the right to possession, the judgment alone being the sole basis for the determination of this question.

2. Judgments § 27c—

The sole remedy against an erroneous judgment entered in a cause in which the court has jurisdiction of the parties and the subject matter is by appeal, and a party may not thereafter attack such judgment for errors therein or in the proceedings culminating in the entry thereof.

HIGGINS, J., not sitting.

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

APPEAL by Lula Freeman Hill and Frank C. Hill from *Parker, J.*, March Civil Term, 1959, of NEW HANOVER.

This appeal is from an "ORDER AND WRIT OF POSSESSION" entered after a hearing on the "PETITION AND MOTION IN THE CAUSE" filed March 5, 1959, by Resort Development Company, Inc., hereafter called Development Company, and on the answer and counter-motion of Lula Freeman Hill and husband, Frank C. Hill.

This cause was instituted November 9, 1953, as a special proceeding for the partition of described lands in Federal Point Township, New Hanover County. The petitioners, including the Hills, alleged

that they and the respondents, including Development Company, owned said lands as tenants in common; and that petitioners and respondents traced their titles to specified undivided interests to a common source, to wit, Robert Bruce Freeman.

Answering, respondent Development Company denied the material allegations of the petition. It did not assert its ownership of the described lands or any part thereof. It prayed that the petition "be dismissed and that the respondent be permitted to go without day and recover its costs of the petitioners in this cause."

After transfer to the civil issue docket, the cause came on for trial before Judge Paul. A jury trial was waived; and the parties agreed that the presiding judge should hear the evidence, find the facts and enter judgment accordingly. The only evidence was that offered by the petitioners. The judgment, entered June 18, 1957, after recitals, findings of fact and conclusions of law, provided:

"IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that this Special Proceeding be, and the same hereby is dismissed and that the respondents go without day and recover of the petitioners their costs to be taxed by the Clerk of this Court."

The respondents did not except to or appeal from said judgment. The Hills, belatedly, attempted to appeal from said judgment; but notice of appeal was not given within the time prescribed by law. Their petition for writ of *certiorari* to review said judgment was denied by this Court at Fall Term, 1957.

In its said "PETITION AND MOTION IN THE CAUSE," Development Company alleged in substance: (1) That Lula Freeman Hill and husband, Frank C. Hill, have no right, title or interest in and to the lands described in the petition for partition; (2) that said lands are owned by Development Company; and (3) that the Hills have personal property in a building on said lands and refuse to remove it notwithstanding notice that they do so. Development Company pleaded Judge Paul's judgment as *res judicata* in respect of their ownership of said lands.

Answering, the Hills denied the Development Company's said allegations; and then, as a counter-motion, attacked the judgment of Judge Paul "as being irregular, erroneous, improper and in excess of the jurisdiction of the Court" and asked that it be vacated and set aside.

After hearing, Judge Parker entered an "ORDER AND WRIT OF POSSESSION" which, after recitals, findings of fact and conclusions of law, adjudged (1) that Development Company is entitled to the immediate possession of the lands described in the petition

for partition, (2) that the Sheriff of New Hanover County dispossess Lula Freeman Hill and Frank C. Hill of said lands and put Development Company in possession thereof, and (3) that costs be taxed against the Hills.

The Hills excepted and appealed.

Taylor & Mitchell for plaintiffs, appellants.
Kellum & Humphrey for defendant, appellee.

BOBBITT, J. "A 'writ of *habere facias possessionem*' or a 'writ of possession' is generally used to enforce a judgment in ejectment. The writ should pursue the judgment and contain a sufficient description of the property." 28 C.J.S., Ejectment § 122(b). 18 Am. Jur., Ejectment § 140 *et seq.*

"The writ of assistance is a form of process issued by a court of equity to transfer the possession of lands, the title or right of possession to which it has previously adjudicated, as a means of enforcement of its decree, instead of turning the party over to a court of law to recover such possession. It performs the same office in a suit in equity as an execution in an action at law, being nothing more than the process by which the court of equity finally carries its judgment or decree into effect. . . . Indeed, the writ may be termed an equitable *habere facias possessionem.* The writ of assistance is sometimes called a writ of possession, the objects of the two being substantially the same, that is, to put the person entitled to property in possession. The distinction is that the former is the proper remedy in equitable, and the latter in legal, actions." 4 Am. Jur., Assistance, Writ of, § 2. *Bank v. Leverette,* 187 N.C. 743, 123 S.E. 68, and cases cited.

". . . on an application for a writ of assistance, the title cannot be adjudicated or the original case reviewed, or the decree modified." *Bank v. Leverette, supra; Exum v. Baker,* 115 N.C. 242, 20 S.E. 448. "The writ of assistance . . . is . . . for the enforcement of decrees or orders conferring a right to the present possession or enjoyment of property." *Clarke v. Aldridge,* 162 N.C. 326, 78 S.E. 216; *Gower v. Clayton,* 214 N.C. 309, 199 S.E. 77, and cases cited.

"It (the writ of assistance) has been defined as a form of process issued by a court of equity to transfer the possession of lands, the title or right of possession to which *it has previously adjudicated,* as a means of enforcing its decree." (Our italics) *Bank v. Leverette, supra.* Its sole function is to enforce the execution of a judgment. G. S. 1-302. Hence, a party is entitled to such writ only when the judgment he seeks to enforce has adjudged that he is entitled to such possession.

The judgment entered by Judge Paul on June 18, 1957, was a final judgment. It dismissed the special proceeding and adjudged "that the respondents go without day" and recover their costs. It did *not* adjudge that the Development Company was the owner or entitled to the possession of the lands described in the petition.

We have not set forth the findings of fact and conclusions of law of Judge Paul. The gist thereof is that petitioners failed to identify the lands described in the petition and failed to establish either record title or title by adverse possession thereto. There was no finding of fact or conclusion of law to the effect that the Development Company owned the lands described in the petition or any part thereof or that it was entitled to possession.

Whether there was error in Judge Paul's findings of fact or conclusions of law, and whether there was error in the judgment rendered thereon, were matters for consideration only upon appeal from said judgment. Where, as here, there is a final judgment, the judgment itself is the only source to which we may look to ascertain whether the Development Company is entitled to a writ of possession. Judge Paul did not so adjudge. It was error for Judge Parker, upon after-judgment pleadings, to attempt to do so.

No question is now presented as to whether any of the findings of fact or conclusions of law of Judge Paul, as distinguished from his judgment, would operate as an estoppel in an independent action between appellants and appellee relating to the lands described in the petition.

The Development Company stresses the fact (and apparently Judge Parker's decision was based largely thereon) that the petition for partition alleged: That Lula Freeman Hill owned a 50/480 undivided interest; that Lula Freeman Hill and husband, Frank C. Hill, owned a 21/480 undivided interest; that the Development Company owned a 284/480 undivided interest; and that other petitioners and respondents owned other specified undivided interests. It is contended that the Hills, by their said allegations, in effect admitted ownership by the Development Company of a 284/480 undivided interest.

While, as stated above, the right to a writ of possession depends solely on the judgment, it seems appropriate to call attention to this additional fact: Petitioners alleged that the Development Company's 284/480 undivided interest was acquired by it from Woodus Kellum, Trustee, who derived his title from John Nathan Freeman, *et al.* The answer of the Development Company admitted these conveyances, but expressly denied "that any of the lands described in said deed to it constitutes any part of the lands and premises described in the

first paragraph of this petition." Thus, the Development Company denied that it owned or had acquired a 284/480 undivided interest *in the lands described in the petition* by virtue of the conveyances alleged by petitioners. Moreover, it did not assert that it had otherwise acquired or owned any interest in the lands described in the petition. Its answer was wholly a defensive pleading; and, as indicated above, it did not seek affirmative relief.

Judge Parker rightly refused to consider the matters alleged in the Hills' counter-motion, wherein they attempted to attack Judge Paul's judgment by asserting errors therein and in the proceedings culminating in the entry thereof. Judge Paul had jurisdiction of the parties and of the subject matter; and, absent an appeal, the proceedings before Judge Paul were not subject to review either by Judge Parker or by this Court.

Since the judgment of Judge Paul did not adjudicate that the Development Company was either the owner or entitled to the possession of the lands described in the petition for partition, it was not entitled to said "ORDER AND WRIT OF POSSESSION." The entry thereof was error. Hence, the said "ORDER AND WRIT OF POSSESSION" is vacated and stricken.

Order and writ of possession vacated and stricken.

HIGGINS, J., not sitting.

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

ARCHIE WHITE v. J. W. OSBORNE, CLERK OF THE SUPERIOR COURT OF CLEVELAND COUNTY.

(Filed 14 October, 1959.)

1. Parent and Child § 3c—

Where the father brings an action as next friend and recovers judgment for personal injuries sustained by the child, including damages to which the father would otherwise be entitled, the father waives his right to recover separately from the tort feasor.

2. Same: Infants § 4: Parties § 3—

Where a judgment for personal injuries in an action prosecuted by the father as next friend for his minor son is paid only in part, it is error for the court to order the clerk to pay the father out of the recovery the entire amount expended by the father for necessary medical treatment of the minor when the minor is not represented by a disinterested guardian *ad litem*, since the interests of the father and the minor in the fund are antagonistic.

HIGGINS, J., not sitting.

WHITE *v.* OSBORNE.

APPEAL by defendant from *Froneberger, J.*, July Term, 1959, of CLEVELAND.

Motion under G.S. 109-36 for judgment requiring J. W. Osborne, Clerk of the Superior Court of Cleveland County, to pay over to Archie White, the movant, the sum of $3,672.50, now held by said clerk "by virtue of and under color of his office."

In support of said motion, Archie White, therein referred to as "plaintiff," filed an affidavit styled "complaint," and said clerk filed an answer thereto in which he admitted Archie White's allegations but denied he was entitled to judgment in accordance with his prayer. The facts established by said allegations and admissions are summarized below.

In a civil action entitled "DAVID WALTON WHITE, by his Next Friend, Archie White, Plaintiff, -vs- VAN BUREN WALKER AND DAN MITCHEM CONSTRUCTION COMPANY, INC., Defendants," a judgment was signed and entered by Judge McLean at March Term, 1959, Cleveland Superior Court, which set forth that "both the plaintiff and the defendants" waived trial by jury, and that thereupon, after hearing "all testimony offered by the plaintiff and the defendants," the court made certain findings of fact and entered judgment thereon.

The findings of fact pertinent to this appeal may be summarized as follows:

David Walton White, then eight years of age, was struck and injured by a pickup truck operated by Van Buren Walker while engaged in the performance of his duties for Dan Mitchem Construction Company, Inc. David Walton White's injuries, on account of which he suffered damages in amount of $14,690.00, were proximately caused by the negligence of Van Buren Walker.

The injuries received by David Walton White "rendered him unconscious for a period of twenty-seven (27) days and required extensive medical care thereafter," and "were of a permanent nature . . ."

Archie White, the father of David Walton White, "was duly appointed and has acted as next friend for his said son in this action, and the necessary medical bills of the plaintiff have been considered as a part of the damage to the plaintiff."

". . . Archie White, father and next friend of David Walton White, has expended or incurred medical bills in the sum of three thousand six hundred seventy-two and 50/100 ($3,672.50) dollars as a result of the injuries sustained by the plaintiff and is entitled to be reimbursed said expenditures for the reason that no further action may be maintained for the recovery thereof."

Upon the foregoing and other findings of fact relating to counsel fees and costs, it was adjudged: (1) That *the plaintiff* have and recover from the defendants the sum of $14,690.00 and costs; (2) that the clerk pay to plaintiff's attorney "the total sum of three thousand five hundred ($3,500.00) dollars for his services in this cause from the monies received as payment upon the judgment, but not to exceed twenty-five (25%) per cent of the total amount collected upon the judgment"; (3) that the clerk thereafter pay to Archie White "the sum of three thousand six hundred seventy-two and 50/100 ($3,672.50) dollars when there has been received by said Clerk as payment upon the judgment an amount sufficient to make said payments"; and (4) that the clerk pay an expert witness fee of $50.00 to each of two doctors, "which amount shall be charged as a part of the costs in this action."

Judge McLean's judgment was entered March 31, 1959. On April 14, 1959, one of the judgment debtors, to wit, Van Buren Walker, paid or caused to be paid to the said clerk the sum of $5,000.00 which was duly credited on said judgment. The clerk paid $1,250.00 to plaintiff's attorney and the remaining $3,750.00 is now held by the clerk. Archie White demanded payment to him of $3,672.50. The clerk refused to make such payment.

No testimony was offered by Archie White or by the clerk when the matter came on for hearing before Judge Froneberger. Based upon the record, Judge Froneberger made findings of fact substantially as stated above, made conclusions of law favorable to Archie White, and thereupon "ORDERED, ADJUDGED AND DECREED that the plaintiff (Archie White) have and recover of the defendant the sum of $3,672.50, together with the costs of this action."

The clerk excepted and appealed.

C. C. Horn and J. A. West for defendant, appellant.
No counsel contra.

BOBBITT, J. These facts are noted: (1) Apparently, no question was raised or considered in the hearing before Judge Froneberger as to the priority, if any, in respect of costs, including expert witness fees. (2) Neither the pleadings nor the evidence upon which Judge McLean's judgment is based are in the record before us. Our information is derived solely from the judgment. (3) A brief was filed in this Court in behalf of the clerk, the appellant. No brief was filed in behalf of Archie White, the appellee. The cause was submitted without oral argument.

The clerk, citing *State v. Sawyer*, 223 N.C. 102, 25 S.E. 2d 443,

contends that the judgments, particularly the provisions purporting to give priority to Archie White, are invalid for lack of jurisdiction, and that compliance therewith would not protect him from liability to the infant plaintiff.

Only one action was instituted, to wit, an action prosecuted in behalf of the infant plaintiff by his father as next friend. In such action, nothing else appearing, the infant plaintiff was not entitled to recover for loss of earnings during his minority or for expenses incurred for necessary medical treatment; but the father, as plaintiff in a separate action, was entitled to recover therefor. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925, and cases cited.

Where a father, as next friend, in prosecuting an action for his infant child, seeks to recover therein the damages to which the father would otherwise be entitled, and no objection is interposed by the defendant, the father thereby waives his individual rights against the defendant. *Pascal v. Burke Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534; *Shields v. McKay,* 241 N.C. 37, 84 S.E. 2d 286; *Ellington v. Bradford, supra.*

Since the complaint in the infant's action is not in the record on appeal, we do not know whether recovery was sought therein for expenses incurred for necessary medical treatment. Be that as it may, it seems that the father, when the cause was heard by Judge McLean, waived his rights to recover separately from defendants. As between the father and the infant plaintiff, it would seem that the father sought to recover no more than for $3,672.50 "expended or incurred" by him for medical bills. The judgment of Judge McLean, when interpreted in the light most favorable to the father, would seem to be, in effect, a judgment for $3,672.50 in favor of the father and a judgment in favor of the infant plaintiff for the remainder ($11,017.50) of the total damages of $14,690.00.

It was contemplated that the judgment for $14,690.00 and costs would not or might not be collected in full. In this event, the judgment purported to give priority to the father's portion thereof. It is apparent that the pecuniary interests of the father and the pecuniary interests of the infant plaintiff were in sharp and irreconcilable conflict in relation to whether the father, individually, was entitled to such priority.

While the order appointing the father as next friend is not in the record on appeal, it is reasonable to assume that his appointment was made solely for the purpose of prosecuting the infant plaintiff's action. If so, it was not contemplated that conflicting interests as between the father and his infant son would develop in the infant plaintiff's action and that the father would represent his infant son in re-

solving such conflict. Under the circumstances, a question arises as to whether Judge McLean lacked jurisdiction in respect of such conflict on the ground that the infant plaintiff was not then represented with reference thereto. See *Johnston County v. Ellis,* 226 N.C. 268, 38 S. E. 2d 31.

In view of said conflicting interests, the failure of Archie White, as next friend of David Walton White, to appeal from the judgment of Judge McLean, may not be considered as binding on the infant plaintiff.

With reference to the $3,750.00 now held by the clerk, the real parties in interest are Archie White, individually, and David Walton White, the infant. The clerk is a stakeholder, ready, able and willing to disburse the $3,750.00 to whomsoever may be entitled thereto. Yet the infant had no representation whatever at the hearing before Judge Froneberger. The only parties to the present proceeding under G.S. 109-36 are Archie White, individually, and the clerk. Notwithstanding, it appears on the face of the record that the interests of the infant are vitally involved and that he is a necessary party to this proceeding. Unless and until the infant, represented by a disinterested guardian *ad litem* (for he would be a defendant in respect of Archie White's motion or "complaint" under G.S. 109-36), has had his day in court, the clerk would not be protected from liability to the infant.

Under the circumstances, it was error to proceed to judgment when it appeared that the interests of the infant, who was not a party to or represented in this proceeding, would be adversely affected thereby. Hence, the judgment of Judge Froneberger is stricken and the cause is remanded for further hearing. Prior thereto, David Walton White should be made a party defendant in the present proceeding. A disinterested guardian *ad litem* should be appointed to represent him and to file herein such answer to the motion or "complaint" of Archie White as may be appropriate to safeguard and protect the legal rights of said infant.

Error and remanded.

HIGGINS, J., not sitting.

W. W. PETERSON AND WIFE, PEGGY G. PETERSON v. ROYAL INSURANCE COMPANY.

(Filed 14 October, 1959.)

1. **Insurance § 95—**

The word "explosion" as used in a property damage policy must be given its ordinary meaning, which imports a violent expansion, incident to internal pressure, resulting in bursting or disruption.

2. **Insurance § 96—**

Proof of damage from concussion, without any evidence tending to explain the cause of the concussion, is insufficient to establish loss from explosion within the meaning of that term as used in a policy of property damage insurance which excludes liability for damage from concussion unless caused by an explosion, the words "concussion" and "explosion" not being synonymous.

HIGGINS, J., not sitting.

APPEAL by plaintiffs from *Parker, J.*, June, 1959 Civil Term, of NEW HANOVER.

Defendant issued its policy insuring plaintiffs' home against damage by fire or lightning. For an additional premium a so-called rider was attached extending the coverage to include loss by explosion. Plaintiffs brought this action to recover damages done to their home by an alleged explosion. Defendant admitted issuing the policy with the attached rider but denied that plaintiffs had been damaged by an explosion as defined in the policy. At the conclusion of plaintiffs' evidence defendant moved for nonsuit. The motion was allowed and plaintiffs appealed.

Lonnie B. Williams and O. K. Pridgen II for plaintiff, appellant.
Poisson, Campbell & Marshall for defendant, appellee.

RODMAN, J. The policy, so far as pertinent to this controversy, provides: ". . . the coverage of this policy is extended to include direct loss by . . . explosion . . ."

"PROVISIONS APPLICABLE ONLY TO EXPLOSION: Loss by explosion shall include direct loss resulting from the explosion of accumulated gases or unconsumed fuel within the firebox (or combustion chamber) of any fired vessel or within the flues or passages which conduct the gases of combustion therefrom. However, this Company shall not be liable for loss by explosion, rupture or bursting of: (a) steam boilers, steam pipes, steam turbines or steam engines; or (b) rotating parts of machinery caused by centrifugal force; if owned by, leased by or actually operated under the control of the insured.

"The following are not explosions within the intent or meaning of these provisions: (a) Concussion unless caused by explosion, (b) Electrical arcing, (c) Water hammer, (d) Rupture or bursting of water pipes.

"Any other explosion clause made a part of this policy is superseded by this Extended Coverage."

"INHERENT EXPLOSION CLAUSE: This policy shall cover direct loss to the property covered caused by explosion occurring in the described dwelling or appurtenant private structures or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, or rotating parts of machinery caused by centrifugal force. Concussion, unless caused by explosion; electrical arcing; water hammer; rupture or bursting of water pipes are not explosions within the intent or meaning of this clause."

Plaintiff W. W. Peterson testified: "I heard something that day. It sounded like an explosion . . . Yes sir, it was a tremendous noise, and it shook the building we were in. Yes sir, I felt a concussion, a vibration from that noise. Yes sir, there was a compression. Our garage has a forty-foot span with two steel beam stringers trussed from one pilaster to the other. Our garage does not have any structure under the roof or over the roof. We looked up and those trusses were vibrating . . . There were two doors that were not up at that time . . . . and the vibration from that noise had those doors going in and out approximately three inches. Yes sir, the doors shook . . . . I felt the ground shock. I was working on a car inside the shop. I went outside the minute the shock was over. We looked to see if we could find any fire or smoke, because we knew something had blown up. . . . I did not see any airplanes in the sky. . . . I could not determine where this tremendous noise and force came from. . . . There was a tremendous noise and pressure and the earth trembled. . . ."

The incident about which he testified occurred between 11:00 o'clock and 12:00 o'clock. He went to lunch about 1:00 o'clock. He then observed: ". . . the porch had been moved over from the house over 3/8 inch at one end. The porch consists of a cement slab approximately three inches thick; eight feet wide and twelve feet in length. Yes sir, it was separated from the house. Then we seen some small particles of cement, or chips, and at that point we seen the places where they were busted open all over the house. The blocks were busted open and at the southwest corner every block had split, and the more we went around the house, the more we found wrong with it. . . . There are glass, frame windows in the house, I did not find

any windows broken out. . . . We were living in it. We had a cabinet 36 inches high in the kitchen. No, we did not find any dishes or china broken; they were on the top shelf. They were not thrown to the floor. . . . No water pipes were broken that I know of. . . . I found no sign of damage to the electrical fixtures. We have an oil fired furnace; kerosene oil. . . . That was not damaged. The tank outside was not disturbed. It was still on its foundation. . . . My garage is approximately 200 feet from the nearest corner of my house; it is less than a city block. . . . Yes sir, it shocked the floor. Yes sir, I could feel the floor vibrate. . . . As far as I know, there was no explosion of anything in my house. I have a barn. There was nothing in it that could have exploded. I have a pump house. There was nothing in it that could have exploded. Yes sir, when I heard this noise, and felt this vibration in the garage, we run out into the open. . . . I have not determined what caused those vibrations or where they originated from. I felt that was not up to me to have to prove what done my damages."

Norwood Sommersett testified: "On that date I was under the hood of an automobile. The automobile was in the garage. I heard a blast with a pressure behind it on my body. I was looking out for myself. Yes sir, I heard a blast. Everything shook; me and the ground. No sir, I had never felt a pressure that struck my body before or since like that."

Lonnie Jones testified: "I don't know what it was. I never found out. It sounded like something blew up. Like, Doom, or something, and we all walked out, and the doors rattled, and we didn't see anything."

C. W. Bailey, who lived across the street from plaintiffs, testified: "Well, there was a terrific blast and shock, or snatch, that would take you off your feet. A terrific noise; it sounded like a terrible gun fired, or something. . . . I could not determine how far it was or where it came from. It seemed in a southern or southeastern direction. . . ."

Plaintiffs do not contend and their evidence negatives any idea that an explosion occurred "in the described dwelling or appurtenant private structures." Their position is an explosion occurred at some unknown place which put in motion forces causing damage to their property.

The evidence is sufficient to establish damage to their home caused by a sudden and violent movement of the air or shaking of the earth, or both. This evidence is sufficient to establish injury by concussion, which Webster defines as "shaking or agitation, a shock caused by the collision of two bodies," Webster's New Int. Dic., 15 C.J.S. 806, but

concussion and explosion are not the same. The policy expressly declares: "the following are not explosions within the intent or meaning of these provisions: (a) concussion unless caused by explosion."

What caused or produced the concussion? Was it an explosion or some other, unexplained cause? The answer cannot be left to conjecture or speculation. *Wall v. Trogdon,* 249 N.C. 747, 107 S.E. 2d 757: *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411; *Samet v. Insurance Co.,* 237 N.C. 758, 75 S.E. 2d 913.

The word "explosion" as used in the policy should be given that meaning which it has in common parlance. Webster defines explosion as "act of exploding, detonation, a violent bursting or expansion, with noise, following the sudden production of great pressure as in the disruption of a steam boiler."

Internal pressure causing a sudden expansion resulting in bursting or disruption are essential elements of an explosion. In *Bolich v. Insurance Co.,* 205 N.C. 43, 169 S.E. 826, plaintiff testified: "He stepped on the starter, and the exhaust of the motor blew up. It threw water to the ceiling. I was standing in front of the car, but was not looking into the radiator. The water was hot, and struck me in the face. When the mechanic stepped on the starter, there was a terrible combustion in the motor." It was this "liberation of warm or hot water from its environment," which the court said would constitute an explosion.

The facts detailed by plaintiff in *Polansky v. Insurance Assoc.,* 238 N.C. 427, 78 S.E. 2d 213, are sufficient to establish an explosion within the accepted definition of that word.

The definitions of explosion given by courts accord with the definition given by Webster. *Wadsworth v. Marshall,* 88 Me. 263, 32 L.R.A. 588; *Little Rock Ice Co. v. Consumers' Ice Co.,* 170 S.W. 241 (Ark.); *Sweeney v. Blue Anchor Beverage Co.,* 189 A 331 (Pa.); *Commercial Union Fire Ins. Co. v. Bank of Georgia,* 197 F 2d 455; *L. L. Olds Seed Co. v. Commercial Union Assurance Co.,* 179 F 2d 472; *Heffron v. Jersey Insurance Company of New York,* 144 F Supp. 5, s.c. 242 F 2d 136; *United Life, Fire and Marine Ins. Co. v. Foote,* 10 Am. Rep. 735 (Ohio); Annotations, 28 A.L.R. 2d 997; 35 C.J.S. 215, 216.

Plaintiffs have done no more than establish damage by forces which may have been set in motion by an explosion. That is not sufficient.

Affirmed.

HIGGINS, J., not sitting.

CITY OF NEW BERN, A MUNICIPAL CORPORATION v. S. R. WHITE, TRADING UNDER THE FIRM NAME AND STYLE OF S. R. WHITE & SON; AND MARYLAND CASUALTY COMPANY, A CORPORATION.

(Filed 14 October, 1959.)

1. Controversy Without Action § 2—

Where a cause is submitted to the court on a statement of facts agreed, the facts agreed are in the nature of a special verdict and constitute the sole basis for decision, and the court may not hear evidence, make additional findings or infer or deduce other facts from those stipulated.

2. Fraud § 1—

The essential elements of actionable fraud are a definite and specific representation which is materially false, which is made with knowledge of its falsity or in culpable ignorance of its truth and with fraudulent intent, which representation is reasonably relied on by the other party to his deception and damage.

3. Fraud § 11—

In this controversy without action, the facts agreed *are held* insufficient predicate for the adjudication of fraud, the facts being insufficient to show some of the essential elements of fraud, particularly that of fraudulent intent.

4. Appeal and Error § 49—

Where the facts agreed are insufficient to support the judgment in a controversy without action, the cause must be remanded.

5. Appeal and Error § 55—

Where there are insufficient facts to support the judgment for defendant on his counterclaim it is not necessary to consider defendant's exception to the exclusion of certain elements of damage on the counterclaim, since the entire cause must be remanded on plaintiff's appeal for further proceedings in accordance with the rights of the parties.

HIGGINS, J., not sitting.

APPEAL by both plaintiff and defendant White from judgment on agreed facts submitted to resident judge of Superior Court, Third Judicial District of North Carolina.

Civil action instituted by the city of New Bern against S. R. White, Jr., trading as S. R. White & Son, and Maryland Casualty Company, surety on performance bond given by White for breach of contract between plaintiff and defendant White to install sanitary sewer on certain streets in city of New Bern.

Defendants answering deny in material aspects the allegations of the complaint. And, further answering, and for counterclaim defendant White set up claim for damages *quantum meruit*, alleging that he, defendant, is entitled to a rescission on ground of fraud of plaintiff,

or in the alternative, mutual mistake, as to subterranean conditions encountered during excavation.

The case was submitted to Bundy, J., Resident Judge, Third Judicial District of North Carolina on "the agreed facts of the case" set out in twenty-seven paragraphs as shown in the record under title "Agreed Statement of Facts." The record shows that the cause by consent came on for hearing before the judge aforenamed, on 9 November, 1958, "upon an agreed statement of facts" and at said hearing arguments of counsel for both plaintiff and defendants were presented to the court. And "based upon the pleadings in this case, the arguments of counsel, and the agreed Statements of Facts" the court finds as facts the following:

"1. That this action was instituted by the City of New Bern by the issuance of a summons and the filing of a complaint on August 20, 1956.

"2.That the defendants filed Answer on October 11, 1956, and in said answer set up certain matters and things as a counterclaim and prayed for affirmative relief in the sum of Eight Thousand Two Hundred Eight and 30/100 ($8,208.30) Dollars.

"3. That on December 12, 1957, the plaintiff filed its reply to the answer of the defendants.

"4. That this action is now pending in the Superior Court for Craven County.

"5. All those facts agreed to by the parties as set out in the written Agreed Statement of Facts filed in this cause, and said Agreed Statement of Facts is incorporated herein and made a part hereof as fully as if set out in detail."

And upon said findings of facts the court concluded as matter of law:

"(1) That the plaintiff in this action made a definite and specific representation to the defendant * * * White * * * that there was no gas main extending along the north side of South Front Street and the east side of Metcalf Street.

"(2) That the representation made * * * was materially false in that a gas main was in fact located along the north side of South Front Street and the eastern side of Metcalf Street in the approximate location of the proposed storm sewer thus interfering with the performance of the contract according to the specifications by the defendant * * * White * * * .

"(3) That the plaintiff had actual knowledge of the falsity of its representation at the time of and prior to the making of such representation.

"(4) That the representation on the part of the plaintiff was made

with the full knowledge of its falsity and with an intent, in law, to defraud the said defendant * * * White * * * .

"(5) That the defendant * * * White * * * relied upon said representation in conducting his investigation, preparing his estimate and submitting his bid.

"(6) That the representation on the part of the plaintiff deceived the defendant * * * White * * * and caused him to suffer loss.

"(7) That the defendant * * * White * * * is not entitled to recover any sums expended or any indebtedness incurred over and above the contract price for any work performed south of South Front Street, except $170.00 which the plaintiff expressly authorized for the purchase of select borrow material."

And the record shows "IT IS THEREFORE, UPON SUCH FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDERED AND ADJUDGED that the defendant * * * White * * * have and recover of the plaintiff by reason of the counterclaim set up in the said answer of the defendant * * * White * * * have and recover the sum of Five Thousand Four Hundred Eighteen Dollars and Twenty Cents ($5,418.20) and interest thereon from the 6th day of June, 1956; the said amount being the sum of the contract price for the work performed south of South Front Street, rental for the 'Well Point System' from May 20 to June 6, 1956, — 17 days @ $65 per day, the $170.00 expressly authorized by the plaintiff, and the items for the other work performed according to the Agreed Statement of Facts * * *."

And to the rendition and signing of the foregoing judgment and to each conclusion of law, the plaintiff in apt time objects and excepts and gives notice of appeal to the Supreme Court and to the rendition and signing of the foregoing judgment and particularly to the conclusion of law #7, the defendant * * * White * * * in apt time objects and excepts and gives notice of appeal to the Supreme Court. Case on appeal is by consent of parties settled by the Judge. And the parties duly set out their respective assignments of error.

A. D. Ward for plaintiff appellant and appellee.

Ward & Tucker, Dunn & Dunn for defendant White appellant and appellee.

WINBORNE, C. J. *Plaintiff's Appeal:* Plaintiff contends and we hold rightly that the findings of fact submitted to the court are insufficient to support the judgment from which appeal is taken.

The facts agreed are in the nature of a special verdict upon which

the court is requested to render judgment arising as a matter of law thereon. The facts agreed constitute the sole basis for decision. And the court is not permitted to hear evidence, make additional findings, or infer or deduce other facts from those stipulated. See *Sparrow v. Casualty Co.*, 243 N.C. 60, 89 S.E. 2d 800, and numerous other cases designated in Strong's N. C. Index- Controversy Without Action, Sec. 2.

In this connection the agreed facts set out in the record appear insufficient to establish all of the essential elements of actionable fraud. "The essential elements of actionable fraud or deceit are the representation, its falsity, scienter, deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss," as stated by *Adams, J.*, for the Court in *Electric Co. v. Morrison*, 194 N.C. 316, 139 S.E. 455. See also *Berwer v. Ins. Co.*, 214 N.C. 554, 200 S.E. 1, and cases cited.

Testing the agreed facts here involved by this statement of law, some of the elements of fraud, particularly that as to fraudulent intent are lacking

And where findings are insufficient to support the judgment, the cause must be remanded for further proceeding in conformity with direction given in *Trustees v. Banking Co.*, 182 N.C. 298, 109 S.E. 6. See *Atkinson v. Bennett*, 242 N.C. 456, 88 S.E. 2d 76, and citation of cases in Strong's N. C. Index- Appeal and Error, Sec. 49, note 590. And it is so ordered.

Defendant White's Appeal:

Since the counterclaim of defendant White is predicated in the main upon the alleged actionable fraud of plaintiff, the cause of action therefor is without valid basis until issue of fraud is determined. Therefore the Court's ruling that the cause must be remanded as directed on plaintiff's appeal necessitates the setting aside the judgment in favor of defendant White, and the remanding of the whole case.

On Plaintiff's Appeal— Error and remanded.

On Defendant White's Appeal— Error and remanded.

HIGGINS, J., not sitting.

EUGENE MOORE, EMPLOYEE v. SUPERIOR STONE COMPANY, EMPLOYER, AND INDEMNITY INSURANCE CO. OF NORTH AMERICA, CARRIER

(Filed 14 October, 1959.)

1. Master and Servant § 55d—

The Superior Court on appeal has the discretionary power to grant an appellant's motion to remand the cause to the Industrial Commission for rehearing on the ground of newly discovered evidence.

2. Master and Servant § 44—

An employee is *sui juris* for the purpose of prosecuting a claim under the Compensation Act when he has attained the age of 18.

3. Insane Person § 10—

A judgment obtained against a person who is *non compos mentis* at the time of the trial, but who has not been previously so adjudged, is not void but voidable.

4. Trial § 47—

In the absence of fraud, movant for a new trial on the ground of newly discovered evidence must make his motion in apt time and must show that a different result would probably be reached if a new trial were granted.

5. Insane Person § 10: Master and Servant § 55e— Motion for new trial for alleged mental incapacity of movant held properly denied on facts of this case.

Motion was made in the Superior Court to remand the cause to the Industrial Commission for a new trial on the ground of newly discovered evidence, based on the contention that claimant was incompetent at the time of the hearing, and that the adverse findings were drawn from claimant's testimony. There was no contention that there was any newly discovered evidence and no suggestion of fraud and it was admitted that claimant was represented by counsel acting in good faith. Plaintiff's relatives and friends were present at the hearing and there was no suggestion at the hearing that the claimant was incompetent. It further appeared that claimant's testimony at the hearing did not prejudice his cause. *Held:* The court was without jurisdiction to grant a new trial for newly discovered evidence, and even if it be conceded that plaintiff was *non compos mentis* at the time of the original hearing there was no showing that a different result would be probable if a new trial were granted, and therefore the denial of the motion is affirmed.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Bundy, J.*, July Term, 1959, of ONSLOW.

The plaintiff employee instituted a proceeding before the North Carolina Industrial Commission (hereinafter called Commission) for an alleged injury caused by an explosion on 23 February 1953. The matter was heard before a hearing Commissioner on 15 October 1953, which Commissioner held that the accident arose out of and in the

course of the employment and directed that an award be made in favor of plaintiff employee. The defendants appealed to the full Commission. The Commission set aside the findings of fact and conclusions of law of the hearing Commissioner and found its own facts which, among other things, included the following:

"8. That in the absence of the other employees as above set out, the plaintiff * * * out of curiosity or for reasons unknown, wired the blasting machine * * * and in his attempt to set off a single dynamite cap, ignorantly and accidentally detonated the 300 dynamite caps beside the doghouse, resulting in a terrific explosion and in the injuries which he sustained," and concluded "that the injury (suffered by plaintiff) did not arise out of the employment."

The plaintiff appealed to the Superior Court and it reversed the Commission and entered judgment remanding the cause to the Commission with directions to enter an award for the plaintiff. Defendants appealed to the Supreme Court at the Fall Term 1955. The Supreme Court reversed the judgment of the Superior Court and said: "Since the testimony contains evidence sufficient to support the findings made by the full Commission, the court below was without authority to reverse." See *Moore v. Stone Co.*, 242 N.C. 647, 89 S.E. 2d 253.

At the July Term 1959 of the Superior Court of Onslow County, Eugene Moore, by his next friend, Luke Moore, his father, made a motion through counsel to set aside the judgment of the Superior Court (which judgment was reversed by the Supreme Court) and to order a new trial.

This motion was bottomed on allegations to the effect that at the time the hearing Commissioner heard the evidence in the original proceedings and in which Eugene Moore testified, the said Eugene Moore was mentally incompetent to have testified due to a brain injury caused by an explosion which resulted in severe bodily injury to him. The other ground is based on the contention that Eugene Moore was a minor and was incompetent to have brought the action in his own behalf, but that if a guardian or next friend had been appointed for him his rights would have been protected. It is conceded in the motion that in the former proceeding the plaintiff employee was represented by learned counsel who acted in good faith, but it is contended further that the true mental condition of the plaintiff employee was not known or ascertained at that time.

The court below held that the Superior Court of Onslow County had no jurisdiction over the subject of plaintiff's action and entered judgment accordingly. The plaintiff appeals, assigning error.

Charles L. Abernethy, Jr., for plaintiff.
Barden, Stith & McCotter for defendant.

DENNY, J. In a workmen's compensation case, which has been appealed from the Commission to the Superior Court, the judge of the Superior Court has the discretionary power to grant an appellant's motion to remand for a rehearing on the ground of newly discovered evidence under proper circumstances. *Byrd v. Lumber Co.*, 207 N.C. 253, 176 S.E. 572.

It is contended by the movant that where a minor or one who is *non compos mentis* is involved there is no statute of limitations that can be invoked by an appellee.

In the instant proceeding, the plaintiff was 18 years of age at the time of his injury on 23 February 1953. An injured employee who has attained the age of 18 is *sui juris* for the purpose of filing and prosecuting a claim for compensation, pursuant to the provisions of our Workmen's Compensation Act. *Lineberry v. Mebane*, 219 N.C. 257, 13 S.E. 2d 429. Hence, the contention with respect to the minority of Eugene Moore at the time he instituted his proceeding for compensation is without merit.

Moreover, a judgment obtained adverse to one who is *non compos mentis* at the time of the trial, but who had not been previously so adjudged, is not void but voidable, *Cox v. Cox*, 221 N.C. 19, 18 S.E. 2d 713; *Hood, Com'r. of Banks v. Holding*, 205 N.C. 451, 171 S.E. 633; *Bank v. Duke*, 187 N.C. 386, 122 S.E. 1.

In the absence of fraud, a party, in order to obtain a new trial on the ground of newly discovered evidence, must move in apt time and must show that a different result would probably be reached if a new trial were granted. *S. v. Casey*, 201 N.C. 620, 161 S.E. 81; *Bank v. Duke, supra.* No such showing is made on this appeal. It is not even contended that there is any newly discovered evidence.

In the instant case, the movant expressly states that plaintiff's counsel acted in good faith, and there is no suggestion of fraud. On the contrary, the appellant's brief states: "The full Commission it is contended could not have reached their (sic) findings except from inferences drawn from the most unfortunate testimony of the worker." In view of this contention we have carefully examined the evidence in the original proceeding. The plaintiff testified at some length about his work and his duties; that he went into the doghouse on the day the explosion occurred; that the others left the premises to get lunch; that he ate his lunch and laid down on a bench to take a nap and knew nothing about what happened until he became conscious some days later in the hospital. His father, who has been appointed his

next friend, was present at the hearing and testified in his son's behalf. There was no testimony or suggestion tending to show that the plaintiff was mentally handicapped to such an extent as to put anyone on notice that he was incapable of prosecuting his claim. His physician testified as a witness for him and among other things said: "I have had occasion to talk with him recently. I can't say that anything about his manner of answering questions appears to be abnormal. There may be a little, but not definitely. I can't tell. He has been complaining lately. He's been coming in with hemorrhoids, discussing and going over all that with him; his answers are intelligent."

In *Bank v. Duke, supra,* there was a motion made by the administrator of the defendant for a new trial, based on the ground that H. J. Duke was insane at the time of the trial. The judge declined to pass on the question of the sanity of the defendant Duke at the time the verdict was rendered and likewise refused to set aside the verdict and judgment. In affirming the ruling of the court below, this Court pointed out that H. J. Duke was represented by counsel in the trial, his son, Otho Duke, the present administrator, was present, and so were other members of his family, neighbors and friends. No suggestion was made to the judge holding the court or to the attorneys for plaintiff that defendant's intestate was *non compos mentis.* Therefore, the refusal of the court to pass on the question as to whether the defendant Duke was *non compos mentis* at the time of the trial was upheld. While it appears that a motion for a new trial was made in apt time in the Duke case, as provided in G.S. 1-220, there was no showing that a different result would probably have been reached if a new trial had been granted.

Likewise, in the instant case, there is no showing or even a suggestion that if a new trial were granted the evidence upon which the Commission made its findings and drew its conclusions of law would be different in any respect.

Therefore, in light of the facts and circumstances involved in this proceeding, in our opinion the court below was without jurisdiction to grant a new trial based on the grounds stated. Moreover, if it should be conceded that the court below had jurisdiction, and it should be further conceded that the plaintiff was *non compos mentis* at the time of the original hearing in this case, no showing has been made that would entitle him to a new trial under our decisions.

The ruling of the court below is

Affirmed.

HIGGINS, J., not sitting.

VERTIE MERCER BRINSON v. JESSIE KIRBY T/A WARSAW FEED MILLS, RALPH MILLER, SHERIFF OF DUPLIN COUNTY, AND BOBBY BRINSON.

(Filed 14 October, 1959.)

1. Execution § 7—

The owner of property may bring an independent action to prevent the sale of his property under execution issuing on a judgment to which he is not a party and for which he is not responsible.

2. Husband and Wife § 5—

Where the parties agree that the wife should convey her separate lands to a third person who should reconvey to the husband and wife for the purpose of creating an estate by the entireties, the deeds executed to effectuate the agreement are void when they contained no finding that the conveyance was not unreasonable or injurious to the wife as required by G.S. 52-12, since the statutory requisites for a conveyance by the wife to the husband may not be circumvented either directly or indirectly.

3. Same— Execution § 7—

In the wife's suit to restrain sale of crops grown on lands purportedly held by the entireties to satisfy a judgment against the husband alone, it is error for the court to exclude evidence tending to show that she owned the lands as her separate estate and that she conveyed the lands to a third person who reconveyed to herself and her husband solely for the purpose of creating an estate by the entireties, and that the deeds to effectuate this agreement were void for failure to comply with G.S. 52-12.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Mintz, J.*, March, 1959 Term, of DUPLIN.

Plaintiff instituted this action to obtain an order restraining the sale of tobacco and other crops seized by defendant Miller as sheriff under execution issued to satisfy a judgment obtained by defendant Kirby against defendant Brinson and to be adjudged the owner of said crops.

The complaint alleges Kirby is a judgment creditor of Bobby Brinson; seizure of crops grown on plaintiff's land to satisfy the judgment, which crops were owned by plaintiff. The complaint also alleges that plaintiff inherited the land on which the crops were produced, which land she held as her individual property until 1940 when, at the request of and by agreement with her husband, defendant Bobby Brinson, it was conveyed to R. W. Craft upon the agreement that he would forthwith reconvey the land to plaintiff and her husband as tenants by the entireties; that said conveyances were void for failure to comply with the requirements of a contract between husband and wife. G.S. 52-12.

Defendant Kirby answered. He denied that plaintiff was the owner of the crops or the land on which they were raised, asserting title thereto was held by plaintiff and her husband as tenants by the entirety. Defendants Miller and Brinson did not answer.

A restraining order issued. By agreement the crops were sold and the proceeds held in lieu thereof.

The court submitted a single issue to the jury, reading: "Is the plaintiff the owner in fee simple of the lands described in those certain deeds appearing of record in the office of the Register of Deeds for Duplin County in Book 413, page 243, and Book 413, at page 244, as alleged?" The jury, under a peremptory instruction, answered the issue "no."

On this verdict it was adjudged plaintiff was not the owner of the crops. The proceeds derived from the sale were directed to be applied as a credit on the judgment of *Kirby v. Bobbie Brinson.* Plaintiff appealed.

Jones, Reed & Griffin for plaintiff, appellant.
H. E. Phillips for defendant, appellee.

RODMAN, J. The owner of property may bring an independent action to prevent the sale of his property under execution issuing on a judgment to which he is not a party and for which he is not responsible. *Mica Industries v. Penland,* 249 N.C. 602, 107 S.E. 2d 120.

Appellee predicates his right to sell the crops on the theory that they were produced on land owned by the judgment debtor and plaintiff as tenants by the entirety, and as the husband was entitled to the usufruct of the land, the crops were his. The conclusion would not seem necessarily to follow the premise, but the case was apparently tried on that theory.

Plaintiff offered evidence sufficient to establish that she was, in April 1940, sole seized of the land on which the crops were produced. She put in evidence a deed from her and her husband to R. W. Craft. This deed, dated 27 April 1940, was filed for record at 5:00 p. m. on 8 May 1940. It recites: ". . . in consideration of Agreements and Fifty Dollars . . ." as the basis for the conveyance. This deed was acknowledged before Gordon S. Muldrow, a justice of the peace, who took plaintiff's private examination but made no finding that it was not unreasonable or injurious to the feme grantor. Plaintiff then offered a deed from R. W. Craft to "Bobbie Monroe Brinson and Vertie Mercer Brinson (his wife)." This deed, dated 30 April 1940, reciting ". . . in consideration of Agreements and Fifty Dollars . . ."

was filed for record at 5:30 p. m. on 8 May 1940. It was also acknowledged before Gordon S. Muldrow, justice of the peace. It contained no finding that the conveyance was not unreasonable or injurious to the feme grantee, plaintiff in this action.

If plaintiff's property was conveyed to Craft and by him conveyed to plaintiff and her husband only to divest plaintiff of her separate estate and fix title in the husband and wife as tenants by the entirety pursuant to the agreement alleged in the complaint, the deeds so executed were void since they contained no finding as required by G.S. 52-12. The statutory provision cannot be defeated by mere circuitous route. *Pilkington v. West,* 246 N.C. 575, 99 S.E. 2d 798; *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 916; *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598; *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624; *Garner v. Horner,* 191 N.C. 539, 132 S.E. 290; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566.

Plaintiff sought to establish by testimony of defendant Bobbie Brinson the agreement with Craft as alleged in the complaint. On objection of defendant Kirby this evidence was excluded. It was proper for plaintiff to prove the alleged agreement. It was error to exclude the evidence. It was not necessary to specifically allege, as defendant contends, that the conveyance to Craft was not based on a valuable consideration. The allegation with respect to the agreement negatives any idea that he purchased for value for his own benefit. The evidence should have been admitted, and with the evidence before the jury the court could not have given a peremptory instruction, to which plaintiff appellant likewise excepts.

New trial.

HIGGINS, J., not sitting.

HOME IMPROVEMENT FINANCING CORPORATION v. H. M. CUTHRELL AND MATTIE M. CUTHRELL

AND

N. E. AYDLETT, TRUSTEE, ADDITIONAL DEFENDANT.

(Filed 14 October, 1959.)

1. Pleadings § 15—

A plaintiff may demur to one or more defenses pleaded in an answer, but he may not divide a single affirmative defense and demur to only a part of the paragraphs setting forth such defense.

2. Cancellation and Rescission of Instruments § 8: Bills and Notes § 17—Demurrer to paragraphs of answer held properly overruled when they are but a part of allegations of defense of fraud.

Where, in an action on a note by the holder thereof to recover on the note and foreclose the deed of trust securing same, defendants allege that their signatures to the notes and deed of trust were procured by fraud and that plaintiff was not a holder in due course, plaintiff's demurrer to paragraphs of the answer on the ground that they failed to allege actual knowledge on the part of the plaintiff of defect in the title of the payee of the note, on the ground that usury was insufficient basis for the cancellation of the note, and on the ground that the answer did not show vitiating defect in the execution of the deed of trust, is properly overruled, since the failure of the answer to sufficiently allege defenses other than that of fraud is immaterial, and the paragraphs objected to being proper to state the particular facts constituted the alleged fraud and *scienter*.

8. Pleadings § 31—

Where it is determined that the allegations of an answer objected to are competent and relevant in alleging the defense of fraud and that demurrer thereto was properly overruled, it also follows that plaintiff's motion to strike such allegations is properly overruled.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Paul, J.*, at February, 1959 Term, of PASQUOTANK.

Civil action to recover judgment on a certain promissory note allegedly signed by defendants as makers for $4,173.10, with interest due and payable to Nationwide Construction Company, or order, and to foreclose a deed of trust to N. E. Aydlett, Trustee, on certain land in Shiloh Township, Camden County, North Carolina, executed by defendants as security for the payment of said note, all as alleged in the complaint.

Plaintiff alleges in its complaint (1) that it is the owner and holder of said note, and that no sum due thereunder has been paid, and that the entire amount of principal and interest is now due and unpaid after demand and payment refused; and (2) that it took the said note before its maturity, in good faith and for value, and without notice of any infirmity therein.

Defendants, H. M. Cuthrell and wife Mattie M. Cuthrell, answering, deny in material aspect the allegations of the complaint; and further answering the complaint and alleging new matter as a counterclaim they aver and say substantially the following: That their signatures to the note and deed of trust were obtained by fraud of Nationwide Construction Company, or its agents.

Upon trial in Superior Court the parties offered evidence tending to support their respective contentions. And the case was submitted to the jury on these issues, which were answered by the jury as indicated.

"1. Were the signatures of the defendants, H. M. Cuthrell and Mattie M. Cuthrell, to the note dated July 8, 1957, and the deed of trust, procured through the fraud of the agents of Nationwide Construction Company, as alleged in the answer? Answer: Yes.

"2. Is the plaintiff, Home Improvement Financing Corporation, a holder in due course of the note described in the complaint? Answer: No.

"3. If not, did Nationwide Construction Company breach its contract with the defendants, as alleged in the answer: Answer: Yes.

"4. In what amount, if any, are the defendants indebted to plaintiff? Answer: None."

Judgment was entered on and in accordance with the verdict. Plaintiff excepts thereto and appeals to Supreme Court, and assigns error.

Small & Small for plaintiff, appellant.
LeRoy, Goodwin & Wells for defendants, appellees.

WINBORNE, C. J. Appellants set out in the record of case on appeal fifteen assignments of error based upon nineteen exceptions. Some of them merit special consideration which the Court now gives.

It is contended that the court erred in overruling plaintiff's demurrer to paragraphs 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the answer as saved by Exception 1. Turning to record of demurrer of plaintiff and the additional defendant, it appears that (1) they "demur to the defense or counterclaim set out in paragraphs Eight through Fifteen of the answer for * * * that the answer fails to show that the plaintiff had actual knowledge of defect of title of Nationwide Construction Company to said note."

(2) "The new matter contained in paragraph sixteen of the answer of the defendants, H. M. Cuthrell and Mattie M. Cuthrell, and for cause of demurrer say that the answer on its face shows that a loan was not made on which a usurious rate of interest was charged or paid, and that the answer fails to show that the defendants have tendered in good faith any payment toward the principal sum due under the purchase contract."

And (3) "The defense or counterclaim set out in paragraph seventeen of the answer and for cause of demurrer say that the defense set out is without merit in that the statute does not invalidate a deed of trust executed in the manner set out in the answer." (Numbering supplied)

In this connection the plaintiff may demur to the defendant's answer if he thinks there is a defect which is subject to demurrer. G.S. 1-140, G.S. 1-141. Indeed plaintiff may demur to one or more de-

fenses pleaded in answer, but he may not divide a single affirmative defense and demur separately to paragraphs or sentences removed from context. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

Looking to the pleading challenged by the demurrer it is seen that it is based upon fraud. In such case it is not sufficient to allege this in a general way; but the particular facts constituting such fraud should be alleged with sufficient fullness and accuracy to apprise the opponent of what he is called on to answer. And in actual fraud the pleading must allege the essentials of the cause of action, which are "the representation, its falsity, *scienter,* deception, and injury. The representation must be definite and specific, materially false, made with knowledge of its falsity or in culpable ignorance of its truth, made with fraudulent intent, must be reasonably relied on by the other party and he must be deceived and caused to suffer loss." McIntosh's N. C. P. & P, Vol. 1, Sec. 990; *City of New Bern v. White,* decided contemporaneously herewith, and cases cited therein.

Now testing the sufficiency of the pleading to withstand the demurrer filed, this Court is of opinion that the ruling of the court below is correct. Consequently the ruling on the motion of plaintiff and additional defendant to strike the pleading to which demurrer was filed follows as a matter of course. See McIntosh N. C. P & P, Vol. 1, Sec. 1261. Hence appellant's second assignment of error is without avail.

Other assignments of error have been duly considered, and in them prejudicial error is not made to appear. Therefore in the judgment from which appeal is taken, there is

No error.

HIGGINS, J., not sitting.

STATE OF NORTH CAROLINA v. MILTON (PAP) GAY AND ANDY BARBOUR.

(Filed 14 October, 1959.)

1. Criminal Law § 168—

Where defendant introduces evidence he waives his motion to nonsuit made at the close of the State's evidence, and his motion to nonsuit at the close of all the evidence challenges the sufficiency of the entire evidence to be submitted to the jury.

2. Criminal Law § 99—

Only the evidence favorable to the State need be considered on defendant's motion to nonsuit.

3. Criminal Law § 101—

On motion to nonsuit the court is required to determine only the sufficiency of the evidence to be submitted to the jury, the weight of the evidence, the reconciliation of conflicts and the credibility of the witnesses being for the jury.

4. Same—

When some of the State's evidence tends to incriminate and some to exculpate the defendant, the incriminating evidence requires the submission of the issue to the jury.

5. Homicide § 20—

Evidence in this case held sufficient to be submitted to the jury on the question of defendant's guilt of second degree murder and manslaughter, defendant's contention that the State's evidence made out a complete defense being untenable.

HIGGINS, J., not sitting.

APPEAL by defendant Gay from *Bone, J.*, July Criminal Term, 1959, of WILSON.

Criminal prosecution upon a bill of indictment drawn in accordance with the provisions of G.S. 15-144, charging both defendants with the murder of Wade Thorne.

When the solicitor called the case for trial, he announced in open court that he would ask for a verdict of guilty of murder in the second degree or manslaughter as the facts might appear.

Both defendants pleaded Not Guilty. At the close of the State's evidence both defendants made motions for judgments of nonsuit. The motion of the defendant Barbour was allowed: the motion of the defendant Gay was denied. Whereupon, the defendant Gay introduced evidence in his behalf. At the close of all the evidence, the defendant Gay renewed his motion for judgment of nonsuit, which the court denied. The jury convicted defendant Gay of manslaughter.

From a judgment of imprisonment Gay appeals to the Supreme Court.

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

Vernon F. Daughtridge for defendant, appellant.

PER CURIAM. Defendant Gay introduced evidence in his behalf. He thereby waived his motion for judgment of nonsuit made at the close of the State's evidence. G.S. 15-173. His motion for judgment of nonsuit made at the close of all the evidence challenges the sufficiency of the entire evidence to carry the case to the jury. *State v. Norris,*

242 N.C. 47, 86 S.E. 2d 916; *State v. Pasour,* 183 N.C. 793, 111 S.E. 779.

In considering the sufficiency of the entire evidence, only that favorable to the State need be considered. *State v. Troutman,* 249 N.C. 395, 106 S.E. 2d 569; *State v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676.

The Court's inquiry on the motion for judgment of nonsuit is directed to the sufficiency of the evidence to warrant its submission to the jury: neither the weight nor the reconciliation of the evidence nor the credibility of the witnesses is for the Court. *State v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564; *State v. Utley,* 126 N.C. 997, 35 S.E. 428.

When the State's evidence is conflicting — some tending to incriminate and some to exculpate the defendant — it is sufficient to repel a motion for judgment of nonsuit. *State v. Horner,* 248 N.C. 342, 103 S.E. 2d 694; *State v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740.

There is no merit in defendant Gay's contention that the State's evidence makes out a complete defense for him. The State's evidence considered in the light most favorable to it tends to show that defendant Gay, Andy Barbour and Marie Jernigan met Wade Thorne on a Saturday night on a street in the city of Wilson, went to Thorne's home in the city to take drinks of whisky, that while there Gay, Barbour and Jernigan each took a drink, that Gay and Thorne got to arguing and fighting at first with their hands, that Thorne had a knife and cut Gay, and Gay got a stick of wood or a chair or table leg and hit Thorne several blows with it on his head, fracturing his skull and causing his death.

A careful consideration of the record leads us to the conclusion that the entire evidence considered in the light most favorable to the State, and giving to the State the benefit of every reasonable inference to be fairly drawn therefrom, was sufficient to warrant the submission of the case to the jury on murder in the second degree and manslaughter. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241.

The assignments of error in respect to the evidence and the charge of the court have been examined, and none is sufficient to warrant a new trial. All are overruled.

No error.

HIGGINS, J., not sitting.

STATE v. ALVIN SANDLIN AND CLYDE SANDLIN.

(Filed 14 October, 1959.)

1. Assault and Battery § 12—

In a prosecution for assault with a deadly weapon, the admission of defendants that they used a deadly weapon does not place the burden upon them of proving that they acted in self-defense.

HIGGINS, J., not sitting.

APPEAL by defendants from *Mintz, J.*, May, 1959 Term, of ONSLOW.

Defendants were tried on bills of indictment which charged an assault on Bill Wiggs with a deadly weapon a hoe handle, "to the great damage of the said Bill Wiggs. . . ."

The cases were consolidated for trial. The State offered evidence tending to show the defendants assaulted Wiggs as charged, resulting in the fracture of bones of his left arm.

Defendants, in support of their plea of not guilty, testified they only acted in self-defense after Wiggs had threatened to shoot and kill.

The court charged the jury: ". . . the defendant having admitted on the stand that he struck with a deadly weapon as charged, the question of reasonable doubt was eliminated and the burden of proof shifts to the defendant and that it was his duty to satisfy the jury that he struck in self-defense, and failing to satisfy the jury that he used the weapon in self-defense, they would convict." Defendants excepted to the quoted portion of the charge.

The jury found defendants guilty. Sentences were imposed and defendants appealed.

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

E. W. Summersill and Robert E. Lock for defendant, appellant.

PER CURIAM. Defendants were not charged with murder, but an assault. It was error to place on them the burden of proving they acted in self-defence. *S. v. Warren*, 242 N.C. 581, 89 S.E. 2d 109; *S. v. Muscat*, 247 N.C. 266, 100 S.E. 2d 510.

New trial.

HIGGINS, J., not sitting.

STATE v. JAMES E. PEURIFOY.

(Filed 14 October, 1959.)

1. Criminal Law § 18—

The references in the judge's charge to the defendant's trial in and appeal from the Recorder's Court, *held* not to have impaired in any way defendant's right to a trial *de novo* in the Superior Court uninfluenced by the trial in the Recorder's Court.

2. Automobiles § 74—

In this prosecution for operating a motor vehicle upon a public highway of this State while under the influence of intoxicating liquor, the court's definition of "under the influence" *held* without error.

3. Criminal Law § 160—

The burden is upon defendant to show prejudicial error.

HIGGINS, J., not sitting.

APPEAL by defendant from *Parker, J.*, April, 1959 Criminal Term, of NEW HANOVER.

This case, upon appeal from the Recorder's Court of New Hanover County, was tried *de novo* in Superior Court. The warrant charged that defendant operated a vehicle upon a public highway of North Carolina while under influence of intoxicating liquor or narcotic drugs. Defendant entered plea of not guilty and a jury was chosen and empanelled. Evidence was offered both by the State and defendant. The jury returned a verdict of guilty.

From judgment imposing a prison sentence defendant appealed and assigned errors.

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

William Joslin for defendant, appellant.

PER CURIAM. The case was fairly and fully tried. The references in the evidence and the judge's charge to trial in and appeal from Recorder's Court impaired in no way defendant's right to a trial *de novo* in Superior Court uninfluenced by the trial in Recorder's Court. *S. v. Williamson*, 238 N.C. 652, 655, 78 S.E. 2d 763. Indeed, such references were favorable to defendant. The judge's definition of the expression, "under the influence," is in substantial conformity to that given by this Court in *S. v. Carroll*, 226 N.C. 237, 241, 37 S.E. 2d 688. The defendant has failed to show prejudicial error. *S. v. Poolos*, 241 N.C. 382, 383, 85 S.E. 2d 342.

No error.

HIGGINS J., not sitting.

RODOLPH SIMMONS AND WIFE, BONNIE DELL SIMMONS v. PAUL WILLIAMS AND WIFE, GLADIE WILLIAMS.

(Filed 14 October, 1959.)

1. **Arbitration and Award § 7—**

An award of an arbitrator made in conformity with and pursuant to the agreement of the parties is conclusive and binding in the absence of fraud or mutual mistake.

HIGGINS, J., not sitting.

APPEAL by defendants from *Mintz, J.*, at April, 1959 Term, of DUPLIN.

Civil action commenced by plaintiffs in Superior Court of Duplin County, North Carolina, for the purpose of restraining defendants from entering or trespassing upon lands alleged to be owned by plaintiffs, and to recover damages for wrongful destruction of plaintiffs' wire fence. The defendants, answering, denied the material allegations of plaintiffs' complaint.

And the record shows that thereafter the parties and their respective attorneys of record entered into agreement, in writing and by consent, wherein both parties, desiring that the matters in controversy be terminated and their differences and contentions be settled, agreed that one J. W. Waters, in whose judgement they had utmost confidence, should go upon the lands in controversy and establish the boundary between the lands of the parties and determine the amount of damages to be assessed against either party as in his judgment he deemed just and proper, — both parties agreeing to be bound by the determination of the said J. W. Waters, and to truly execute judgment, by consent, embodying such determination.

It appears of record that pursuant thereto J. W. Waters made determination and report, to which defendants filed objection. But upon hearing before Judge of Superior Court, attorney for defendants stated in open court that defendants did not desire to attack the report of the said J. W. Waters on either the grounds of fraud, or of mutual mistake, and did not have, or intend to offer, evidence of either.

And upon facts found the Judge presiding concluded that the motion and objection of defendants be denied and dismissed, and that the said report of J. W. Waters be in all respects approved, confirmed and declared to be valid and enforceable as between the parties thereto, and that it be certified by the Clerk of Superior Court of Duplin County to the Register of Deeds of Duplin County and enrolled, re-

corded, and indexed in the Registry in the manner provided by law. Defendants except thereto and appeal to Supreme Court, and assign error.

Beasley & Stevens for plaintiffs, appellees.
William F. Simpson for defendants, appellants.

PER CURIAM: In the light of the factual situation hereinbefore set forth it appears that the parties have by consent agreement charted the course and, in the absence of fraud or mutual mistake, the award made pursuant to the agreement of the parties is final and binding.

Hence the judgment below is

Affirmed.

HIGGINS, J., not sitting.

B. M. HAYNES v. WARREN GROVER ELLER AND WAYNE GARRISON, A MINOR, BY HIS GUARDIAN AD LITEM, JAMES G. GARRISON.

(Filed 14 October, 1959.)

APPEAL by defendant, Wayne Carroll Garrison, from *McLean, J.*, June Civil Term, 1959, of GASTON.

This is a civil action instituted by the plaintiff to recover for damages to his automobile as the result of a collision between said automobile and the defendant Wayne Garrison's motorcycle, on 22 March 1958, in Cramerton, North Carolina, an unincorporated town.

The defendant Garrison filed an answer denying the allegations of negligence and set up a cross-action or counter claim.

The jury answered the first issue with respect to defendant Garrison's negligence in the negative and the third issue with respect to the plaintiff's negligence on the defendant's cross-action also in the negative. From the judgment entered on the verdict, the defendant Garrison appeals, assigning error.

L. B. Hollowell, Grady B. Stott for plaintiff.
J. L. Hamme for defendant Garrison.

PER CURIAM. In light of the theory of the trial in the court below and the charge of the court, there being no allegations by either party with respect to contributory negligence, it is clearly apparent that the jury found both the plaintiff and the defendant Wayne Garrison guilty of actionable negligence.

The exceptions and assignments of error based thereon show no prejudicial error that would justify the awarding of a new trial.

No error.

HIGGINS, J., not sitting.

SUE C. LOVE v. THE STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER, MASSACHUSETTS.

(Filed 21 October, 1959.)

1. Insurance § 21—

A certificate under a group policy terminates upon the termination of insured's membership in the association holding the group policy, and insured's liability is terminated when insured does not avail himself of the conversion privilege provided in the policy, there being no contention that the termination of the insured's membership was wrongful or fraudulent.

2. Insurance §§ 14, 16—

Provision in a certificate under a group policy for waiver of premiums due after receipt by the insurer at its home office of written notice of disability cannot entitle the beneficiary to recover upon the death of insured, even though insured may have become disabled prior to the termination of his membership in the association holding the group policy, when notice of such disability is not communicated to the insurer until after insured's death some five months after the termination of his membership.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Sharp, Special Judge,* 9 March 1959 Special Civil Term, of MECKLENBURG.

The plaintiff, beneficiary under a group insurance policy issued by the defendant on the life of John H. Love, Sr., instituted this action to recover the face amount of the policy in the sum of $1,000, plus interest.

Prior to 15 August 1956, John H. Love, Sr. was a member of the Charlotte Musicians Association (formerly known as the Musicians Protective Union Local 342, A. F. of M.). The Association was covered by the defendant's policy No. GL-2523, a non-contributory group life policy, under which the Association paid the premiums for its members and furnished them with certificates showing the insurance protection to which they were entitled. John H. Love, Sr. held Certificate No. 126.

It is stipulated that John H. Love, Sr.'s membership in the Associa-

tion was terminated on 15 August 1956. The Association thereafter notified the insurance company that Love was no longer a member.

Plaintiff introduced medical testimony tending to show that Love became disabled as early as 24 April 1956, and that during the alleged disability, deceased was not interested in, or capable of, discussing his financial affairs.

It is also stipulated that no notice of any disability which might have been suffered by John H. Love, Sr. was at any time given to the defendant until after his death, which occurred on 15 January 1957.

At the close of all the evidence, the court granted defendant's motion for nonsuit and dismissed the action. The plaintiff appeals, assigning error.

Charles T. Myers, John F. Ray for plaintiff.

Kennedy, Covington, Lobdell & Hickman; Clarence W. Walker; Edgar Love, III, for defendant.

DENNY, J. The question for determination on this appeal is whether the court below committed error in granting the defendant's motion for judgment as of nonsuit.

The group policy was a contract between the defendant and the Charlotte Musicians Association, hereinafter called Association, for the benefit of its members. The certificate held by the insured contains the following: "NOTICE TO MEMBERS. IMPORTANT: You should keep this Certificate in a safe place known to you and your beneficiary.

"If you should cease to be a Member of the Association at any time for any reason whatsoever, or if the Group Life Policy should be terminated at any time, you should refer to Section III of this Certificate, entitled 'Conversion Privilege.'

"If you leave work because of total disability before age 60 you should refer to Section II of this Certificate entitled 'Protection of Insurance with Waiver of Premium.'"

It was stipulated in the court below that the membership of John H. Love, Sr. in the Association was terminated on 15 August 1956. And there is no contention that the termination of the insured's membership in the Association was wrongful or fraudulent.

Therefore, under our decisions, the insurance held by John H. Love, Sr. automatically lapsed on 15 August 1956, subject to the conversion privilege provided in the policy. *Lineberger v. Trust Co.*, 245 N.C. 166, 95 S.E. 2d 501; *Haneline v. Casket Co.*, 238 N.C. 127, 76 S.E. 2d 372. See also *Lewis v. Connecticut General Life Ins.Co.* (1936 Tex.

App.), 94 S.W. 2d 499; *Baker v. Prudential Ins. Co.* (1935), 279 Ill. App. 5.

The insured did not take advantage of the conversion privilege which was available to him for 31 days after he ceased to be a member of the Association. Neither did he nor anyone in his behalf, as provided in the insurance certificate, notify the defendant while the policy was in force that the insured was disabled, which was a prerequisite to the obtaining of waiver of premiums. *Dewease v. Insurance Co.*, 208 N.C. 732, 182 S.E. 447; *Bergholm v. Peoria Life Ins. Co.*, 284 U.S. 489, 76 L.Ed. 416.

The policy provides: "If any member, while insured hereunder, shall furnish due proof that prior to his 60th birthday, he has become disabled because of accident or disease, so that he is wholly unable to perform any work, mental or manual, or to engage in any occupation or business for compensation, remuneration or profit, the Company agrees as follows: To waive the payment of all premiums becoming due upon such member's insurance after the commencement of, but not prior to the receipt at the home office of the Company of written notice of such disability * * *."

In the case of *Bergholm v. Peoria Life Ins. Co., supra,* in construing a similar provision to that now before us, the Court said: " * * * the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums (waiver of premiums) *becoming due after the receipt of such proof.*"

Conceding, but not deciding, that the insured became totally disabled within the meaning of the provisions of the policy from and after 24 April 1956 until his death, since notice of such disability was never communicated to the defendant until after the insured's death, the plaintiff is not entitled to recover on the policy pursuant to the provisions for waiver of premiums. *Dewease v. Insurance Co., supra; Adkins v. Aetna Life Ins. Co.*, 130 W.Va. 362, 43 S.E. 2d 372; *Southern Life Ins. Co. v. Cobb*, 71 Ga. App. 584, 31 S.E. 2d 607; *McCutcheon v. Insurance Co.*, 229 Ala. 616, 158 So. 729.

Moreover, the insured could not retain his insurance under the group policy separate and apart from membership in the Association. Consequently, when his membership in the Association was terminated, his rights were then relegated to the conversion privilege as set out in his certificate of insurance — a privilege which he never asserted.

Therefore, the judgment as of nonsuit entered by the court below must be

Affirmed.

HIGGINS, J., not sitting.

MINNIE MAE DAVIS MILLAS v. LESLIE R. COWARD.

(Filed 21 October, 1959.)

1. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper only when plaintiff's own evidence shows contributory negligence so clearly that no other reasonable conclusion or inference can be legitimately deduced therefrom.

2. Trial § 49½—

A motion for a new trial for inadequacy or excessiveness of the award is addressed to the discretion of the trial court, and his ruling thereon is not reviewable in the absence of abuse of discretion.

3. Appeal and Error § 38—

An assignment of error not supported by reason or argument or authority in the brief is deemed abandoned.

HIGGINS, J., not sitting.

APPEAL by defendant from *Fountain, S. J.*, May Term, 1959, of LENOIR.

Civil action to recover damages for personal injuries resulting from plaintiff being struck by an automobile driven by defendant, when she was walking across the intersection of Queen and Bright Streets in the city of Kinston.

The jury by its verdict found that plaintiff was injured by the negligence of the defendant, that she was free from contributory negligence, and awarded damages in the amount of $7,719.30.

From judgment in accordance with the verdict, defendant appeals.

White & Aycock for plaintiff, appellee.

Whitaker & Jeffress for defendant, appellant.

PER CURIAM. Defendant concedes in his brief "there was sufficient evidence of negligence for a finding against the defendant," but contends that plaintiff should have been nonsuited at the close of the evidence, for the reason that she was guilty of contributory negligence as a matter of law, as shown by her own evidence.

It is well established law by our decisions that a motion for judgment of nonsuit on the ground of contributory negligence shown by plaintiff's evidence will be allowed only when plaintiff's evidence tending to show contributory negligence is so clear that no other reasonable conclusion or inference can be legitimately made or deduced therefrom. *Johnson v. Thompson*, 250 N.C. 665, 110 S.E. 2d 306; *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307. When plaintiff's evidence is tested by this principle of law, it becomes manifest that the question of whether plaintiff was guilty of contributory negligence was for the jury, and that the trial court properly overruled the motion of defendant for a compulsory nonsuit.

Defendant assigns as error the failure of the court to set aside the verdict and award a new trial. His argument in his brief in support of this assignment of error is that the verdict for $7,719.30 is unreasonable and excessive and disproportionate to the injuries sustained by plaintiff.

The granting or denial of a motion for a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge. *Hinton v. Cline*, 238 N.C. 136, 76 S.E. 2d 162, and the many cases there cited. His decision on the motion will not be disturbed on appeal unless it is obvious that he abused his discretion. *Hinton v. Cline, supra; Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E. 2d 49; *Francis v. Francis*, 223 N.C. 401, 26 S.E. 2d 907; *Freeman v. Bell*, 150 N.C. 146, 63 S.E. 682.

An abuse of discretion does not appear in the case *sub judice*.

The assignment of error as to the charge is deemed abandoned for the reason that in appellant's brief no reason or argument in support of it is stated or authority cited. Rule 28 of Rules of Practice in the Supreme Court, 221 N.C. 562.

The only other assignment of error is to the signing of the judgment.

All assignments of error are overruled.

No error.

HIGGINS, J., not sitting.

HARDING L. CLARK v. WALLACE E. RUCKER AND WIFE, JEAN W. RUCKER.

(Filed 21 October, 1959.)

1. Automobile § 25—

The limitation of speed in the vicinity of a school house during school hours, effected by the posting of appropriate signs by the Highway Commission, does not affect the speed restrictions outside the time limited.

HIGGINS, J., not sitting.

APPEAL by defendants from *Campbell, J.*, May Term, 1959, of CALDWELL.

Plaintiff sought and was awarded compensation for damages done to his automobile in a collision with an automobile owned by defendant Wallace Rucker, driven by his wife, Jean Rucker.

The collision occurred 9 December 1958 on Highway 321 near Lenoir. Plaintiff's vehicle was, according to plaintiff's testimony, traveling southwardly at a speed of 35 to 40 m.p.h.; defendants' evidence tended to fix the speed in excess of 60 m.p.h.

Defendant's vehicle pulled from a parking area on plaintiff's right, immediately in front of plaintiff. The collision occurred not far from a schoolhouse and in an area in which the speed limit during school hours had been fixed (G.S. 20-141.1) at 35 m.p.h. by posted signs. The signs limited the speed restriction to school hours. The collision occurred after school hours.

The court charged the jury that the maximum speed limit was 55 m.p.h., and a speed in excess thereof would constitute negligence. He further charged: ". . . even if she were driving it at a speed less than fifty-five miles an hour, she nevertheless had to still drive it at a speed which was not greater than was reasonable and prudent under the conditions as they then existed." Defendant excepted to the charge, insisting that speed in excess of 35 m.p.h. was unlawful and negligent.

Fate J. Beal for plaintiff, appellee.
Townsend and Todd for defendant, appellants.

PER CURIAM. The Highway Commission may determine safe speeds on highways in proximity to schools. When conditions do not exist requiring a limitation of speed, the Commission is not required to impose restrictions. Here the posted signs fixed the time when the speed restriction was in force. The collision did not occur during that

period. It follows that a speed not in excess of 55 m.p.h. was not *per se* unlawful.

No error.

HIGGINS, J., not sitting.

SHELBY JEAN COKER v. BILL VESTER COKER.

(Filed 21 October, 1959.)

1. Automobiles § 41n—

Testimony of a passenger to the effect that the driver dimmed his lights in passing another car, and immediately after changing to his bright lights saw a black cow directly in front of the car, was unable to turn to the left because of oncoming traffic, and struck the cow, resulting in the injuries in suit, with further testimony that the driver was going about 45 m. p. h. and that plaintiff passenger did not know any way the driver could have avoided the accident, *is held* insufficient to establish actionable negligence on the part of the driver.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Morris, J.*, January 26 Civil Term, 1959, of WAYNE.

This is a civil action in which the plaintiff Shelby Jean Coker seeks to recover damages for personal injuries caused by the alleged negligent operation of an automobile, in which she was a guest passenger, driven by the defendant Bill Vester Coker, her husband.

The plaintiff testified that she was riding in the automobile driven by her husband about 6:00 p.m. on 16 December 1957, going from their home in Goldsboro to the home of her husband's mother who lived at Parkstown, when the automobile was involved in a collision with a cow on the highway. "The cow was standing in the road. I saw her just as we hit her." She further testified that in her opinion the car was traveling about 60 miles per hour when the accident occurred.

On cross-examination the plaintiff testified, "The road on which we were traveling was a black-topped road, and it was after dark. As we approached the scene of the accident there was a car meeting us. My husband * * * dimmed his lights. As soon as we passed this car, my husband put on his bright lights again, and I saw the cow directly in front of me, and I had not seen the cow before. * * * My husband did not have a chance to put on his brakes. * * * we were going up a long grade. It was after we had passed the top of the hill. My husband

was driving on the right side of the paved road, and as soon as he hit the cow, he stopped. This was a solid black cow. * * * I was not looking at the speedometer. The opinion given to Mr. Thomson as to the speed was based, at least in part, on the degree of injury which I received."

In the plaintiff's signed statement made some weeks after the accident, among other things, she said: "I do not know of any way Bill (her husband) could have avoided the accident, we were going about 45 miles per hour."

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

J. Faison Thomson & Son for plaintiff.
Dupree & Weaver for defendant.

PER CURIAM. In our opinion, the plaintiff's evidence is insufficient to establish actionable negligence on the part of the defendant. Hence, the ruling of the court below will be upheld.

Affirmed.

HIGGINS, J., not sitting.

JAMES R. KELLER v. HUFFMAN FULL FASHIONED MILLS, INC.

(Filed 21 October, 1959.)

1. Master and Servant § 2e—

Judgment sustaining demurrer to the complaint in an action to recover damages on account of plaintiff's being denied employment because of membership in a labor union, reversed on authority of *Willard v. Huffman*, 250 N.C. 396.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Campbell, J.*, at June, 1959 Term, of BURKE.

Civil action to recover damages on account of plaintiff being denied employment because of membership in a labor union under and by virtue of General Statutes 95-83.

On 5 June, 1959, in Superior Court the trial judge sustained demurrer of defendant to the jurisdiction, and dismissed the cause of action. Plaintiff appeals to Supreme Court and assigns error.

Robert S. Cahoon for plaintiff, appellant.
Patton & Ervin for defendant, appellee.

PER CURIAM. In the light of and by authority of decision of this Court in the case of *James M. Willard v. P. T. Huffman*, et al, in opinion filed 12 June, 1959, and reported in Vol. 250 at page 396, of North Carolina Supreme Court reports, the judgment from which this appeal is taken is

Reversed.

HIGGINS, J., not sitting.

STATE v. JOHN M. DAVIS, JR.

(Filed 21 October, 1959.)

1. Criminal Law § 94—

Questions asked a witness by the court *held* merely of a clarifying nature and not to constitute an expression of opinion by the court on the weight or credibility of the testimony. G.S. 1-180.

HIGGINS, J., not sitting.

APPEAL by defendant from *Morris, J.*, June Term, 1959, of WAYNE.

Defendant was tried and convicted in the Recorder's Court of Wayne County upon a warrant charging that he operated a motor vehicle upon the public highways within that county on 18 May, 1958, while under the influence of intoxicating liquor. He appealed to Superior Court and upon a plea of not guilty therein was tried upon said warrant *de novo*. A jury was duly selected and empanelled. Evidence was offered both by the State and defendant. The jury returned a verdict of guilty.

From judgment imposing a prison sentence defendant appealed and assigned error.

Attorney General Seawell and Assistant Attorney General Love for the State.
Edmundson and Edmundson for defendant, appellant.

PER CURIAM. The sole assignment of error relates to the interrogation of a defense witness by the court. Defendant contends that it amounted to an "expression of . . . opinion on the weight and credibility

of the testimony" of the witness. G.S. 1-180. A careful consideration of the challenged questions and the responses thereto leads to the definite conclusion that questions asked by the court were merely of a clarifying nature. *State v. Stevens,* 244 N.C. 40, 44, 92 S.E. 2d 409. To be entitled to a new trial defendant must show prejudice. *State v. Creech,* 229 N.C. 662, 672, 51 S.E. 2d 348. No prejudicial error has been shown.

No error.

HIGGINS, J., not sitting.

ETHRO D. HILL v. MRS. VICTORIA WARD AND RAYMOND JOSEPH WARD.

(Filed 21 October, 1959.)

APPEAL by defendants from *Fountain, S. J.,* at May, 1959 Term, of LENOIR.

Civil action to recover of defendants property damages proximately caused by the actionable negligence of defendant in the operation by Raymond Joseph Ward of an automobile owned by Mrs. Victoria Ward and used for family purposes.

Upon trial in Superior Court plaintiff offered evidence. On the other hand defendant introduced no evidence. And the case was submitted to the jury upon these three issues, which the jury answered as indicated:

"1. Was the plaintiff's automobile damaged by the negligence of the defendant, Raymond Joseph Ward, as alleged in the complaint? Answer: Yes.

"2. If so, was Raymond Joseph Ward driving an automobile of Mrs. Victoria Ward, and was said automobile maintained by her as a family purpose vehicle and being so operated by Raymond Joseph Ward at the time, as alleged in the complaint? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover: Answer: $1,567.50."

From judgment in favor of plaintiff in accordance with the verdict defendants appeal to Supreme Court and assign error.

Jones, Reed & Griffin for plaintiff, appellee.

J. Faison Thompson & Son for defendants, appellants.

PER CURIAM. A reading of the evidence shown in the record of case on appeal taken in the light most favorable to plaintiff tends to support the verdict rendered. The case appears to have been presented to the jury in accordance with well established legal principles, and prejudicial error is not made to appear. Hence in the judgment from which appeal is taken there is

No error.

HIGGINS, J., not sitting.

JAMES ROSS MINTZ v. FRED KURFEES AND FARM EQUIPMENT COMPANY OF ASHEVILLE, INC., A CORPORATION.

(Filed 21 October, 1959.)

APPEAL by defendants from *Sharp, S. J.*, May, 1959 Special Term, of BUNCOMBE.

This is an action to recover for personal injuries and property damage suffered by plaintiff when the front of the automobile he was driving collided with the rear of a truck-trailer combination of the corporate defendant.

The collision occurred 25 September 1958 at 5 p.m. on old U. S. Highway No. 19-23 in a rural area of Buncombe County. At the point of collision the highway runs generally east and west. The individual defendant, employee of the corporate defendant, parked and left unattended the truck-trailer on the highway so that only a width of about 13 feet of the hard surface was unobstructed. At the point of the collision the highway is 18 feet wide with narrow shoulders and high embankments on each side. The vehicle was parked about 75 feet west of the crest of a hill. A gray colored farm tractor was mounted on the trailer.

Plaintiff's evidence in brief tends to show: He was driving westwardly at about 45 to 50 miles per hour. As he came to the crest of the hill his vision was somewhat impaired by the sun. He then saw the parked vehicle and its position, slackened his speed to about 40 miles per hour, started to the left to go around the truck-trailer, then saw a car approaching from the west, pulled back to the right and applied his brakes but was unable to stop his car before colliding with the trailer. He left 48 feet of tire marks.

Defendants' evidence in brief tends to show: The highway is straight for one mile to the east of the hill. There is a rise about two-

tenths of a mile to the east of the point of collision from which the top of the tractor-trailer could have been seen. The top of the parked vehicle could have been seen 200 feet before reaching the crest of the hill.

Issues of negligence, contributory negligence and damages were submitted to the jury. The jury's verdict was favorable to plaintiff on all issues.

From judgment conformable to the verdict defendants appealed and assigned error.

Williams & Williams for plaintiff, appellee.
Meekins, Packer & Roberts for defendants, appellants.

PER CURIAM. Defendants make twenty-four assignments of error. Each of these has been carefully considered. The pleadings and the evidence adduced in support thereof make a case for the jury. The case was submitted to the jury upon instructions conforming to settled principles of law. The jury has resolved the issues in favor of the plaintiff. In the trial of the cause we find no prejudicial error.

No error.

HIGGINS, J., not sitting.

EDWIN W. CARRIGAN, PLAINTIFF, *v.* JOHN CHARLES DOVER, AND PAUL L. YOUNT, TRADING UNDER THE NAME AND STYLE OF YOUNT REEP MOTOR COMPANY, DEFENDANTS.

(Filed 4 November, 1959.)

1. Automobiles § 42a—

Whether nonsuit on the ground of contributory negligence of plaintiff motorist should be granted or whether the issue should be submitted to the jury must be determined in accordance with the facts of each particular case, and ordinarily consideration must be given to the evidence in regard to the surrounding circumstances such as fog, rain, glaring headlights, etc.

2. Negligence § 19c—

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 § 7—

A motorist is not required to anticipate negligence on the part of others, but, in the absence of anything which gives or should give notice to the contrary, is entitled to assume and to act upon the assumption that every other person will perform his legal duty and obey the law.

4. Automobiles § 42a—

The duty to exercise ordinary care for his own safety applies to a nocturnal motorist as well as to every other person, and it is his duty not merely to look but to keep a lookout in the direction of travel, and he is held to the duty of seeking what he ought to have seen.

5. Automobiles § 42d— Evidence held for jury on question of contributory negligence in striking parked vehicle.

The evidence in this case *is held* not to disclose contributory negligence as a matter of law on the part of plaintiff motorist in striking the rear of a truck, parked without lights on the right side of a six lane highway, with its rear protruding some three feet into the center lane for northbound traffic, there being evidence that plaintiff had turned from the left northern lane into the center lane some 40 feet from the trailer when a car preceding him in that lane gave a signal for a left turn, and that plaintiff was some 25 or 30 feet from the trailer when he first saw it, there being further evidence that the night was dark, that the background of the trailer was a vacant house, that the darkness blended together, that the tractor-trailer was parked on a busy thoroughfare on which parking was prohibited, etc.

6. Appeal and Error § 41—

The overruling of defendant's objection to the testimony of an expert witness relating to "possibilities" of a subsequent deterioration in plaintiff's condition from the injury in suit, *is held*, on the facts of this case, not sufficiently prejudicial to justify a new trial.

7. Automobiles § 6—

A municipal ordinance prohibiting parking along a portion of a certain street is an ordinance enacted in the interest of public safety, so as to warrant an instruction that the violation of such ordinance would constitute negligence *per se*, which would warrant recovery if the proximate cause of the injury.

8. Appeal and Error § 42—

Where the charge is free from prejudicial error when read contextually, exceptions thereto will not be sustained.

HIGGINS, J., not sitting.

APPEAL by defendants from *Froneberger, J.*, 20 April Term, 1959, of MECKLENBURG.

Civil action to recover damages for personal injuries.

The jury found by its verdict that plaintiff was injured by the negligence of the defendants as alleged in his complaint, that he was free from contributory negligence, and awarded damages in the amount of $6,500.00. The issues submitted in respect to damage to the defendant Yount's trailer, as alleged in the counter-claim, were not answered by the jury.

From judgment entered in accord with the verdict, defendants appeal.

Bailey & Booe for plaintiff, appellee.

Kennedy, Covington, Lobdell & Hickman for defendants, appellants.

PARKER, J. Plaintiff and defendants offered evidence. Defendants assign as error the denial by the trial court of their motion for judgment of nonsuit made at the close of all the evidence. Defendants' contention in their brief on this assignment of error is that plaintiff was guilty of contributory negligence as a matter of law.

Plaintiff's evidence shows the following facts:

About 3:00 a.m. on 26 January 1958 plaintiff was driving a 1956 Ford automobile, which was in good operating condition, in a northerly direction along Independence Boulevard in the city of Charlotte. It was a dark night, the weather was dry, and there was no moon. Independence Boulevard is a paved highway about 60 feet wide with three lanes for traffic going north and three lanes for traffic going south. On this occasion there was a black or white line—the evidence differs as to the color of the line—on the middle of the Boulevard separating the north lanes from the south lanes.

The collision in which plaintiff was injured occurred on Independence Boulevard between the intersection of Elizabeth Street and Independence Boulevard and the intersection of Fifth Street and Independence Boulevard. The distance between these two intersections is 385 feet. The parties stipulated in open court that the legal speed limit at the time and place where the collision occurred was 35 miles an hour.

When plaintiff reached the intersection of Elizabeth Street and Independence Boulevard, he was driving between 20 and 30 miles an hour in the lane of travel next to the white or black line in the middle of Independence Boulevard. Just before he drove across the intersection, he saw an automobile about 50 feet ahead travelling on Independence Boulevard in the same direction he was going and at a slightly lower speed than he was. About 220 feet from the intersection plaintiff had just passed through, Independence Boulevard makes a slight turn to the left. When the automobile in front approached this slight turn, it gave a signal by blinker for making a left turn. Whereupon, plaintiff proceeded to change lanes by moving from the lane he was driving in to the center lane. Plaintiff testified: "Just as I got into the center lane, this big, dark object appeared in front of me. I estimate it was sitting out three feet into the center lane. The background for that object was a vacant house. There was no light in there. The darkness blended together. By that time I was, I guess, twenty-five feet from the truck, and I had no time to apply my brakes or turn. I attempted to take my foot off, but I was on it and run into the right side, the right side of my car side-swiped the truck. . . . The tractor-trailer or a part of it was sitting in the middle lane of the three northbound lanes . . . I was approximately around forty feet I estimate from the tractor-trailer when I changed lanes. I did not see it at the moment I started to change lanes. The house that I stated a minute ago was beyond the tractor-trailer is right, you can see it behind the sign there, the Toddle House sign. It is a vacant house and is still there. It was dark on this occasion. The tractor-trailer on this occasion was a dark color. The tractor-trailer had no lights burning on it. There were no other warning signals such as flares out there. There was a street light on the corner. The street light in the picture is at Fifth Street, and there is one on Independence Boulevard. It did not make an area of broad daylight." The Ford automobile was demolished, plaintiff was knocked unconscious, and injured.

The automobile plaintiff was following was between him and the tractor-trailer, when it signalled for a left turn. The front automobile

partially kept plaintiff from seeing the tractor-trailer. He did not see the tractor-trailer, when he started to change lanes.

Plaintiff's testimony on cross-examination was to this effect. The automobile in front of him was about five feet high. There were street lights along the Boulevard. The Toddle House was open the night of the collision. They have lights inside the Toddle House. A sign in front of the Toddle House says "Toddle House." He did not recall whether this sign was burning at the time: this sign is not designed to put out light. There was a sign that said "No Parking, Stopping or Standing" where the tractor-trailer was parked. He was 35 feet from the tractor-trailer when he saw it. From the time he saw it until the collision there was such a short time he was unable to do anything. He tried to turn, and did not make it.

T. H. Cooper, a police officer of Charlotte and witness for plaintiff, arrived at the scene shortly after the collision, about 3:18 a.m. When he arrived, the rear end of the tractor-trailer was from two to three feet from the curb, the front end just slightly a few inches closer than the rear wheels, and twelve to eighteen inches of the tractor-trailer was in the middle lane for traffic. Cooper testified: "On the east side of Independence Boulevard for northbound traffic there is no parking. I do not know the complete wording of the signs at the Toddle House at the time of the accident, but there was a no parking sign there . . . there was no parking at that time." Cooper testified on cross-examination to the effect that at the time Independence Boulevard was better lighted than other Charlotte streets.

Defendant Dover was driver of the tractor-trailer. Defendant Yount was the owner of the tractor-trailer. Defendants in their joint answer admit that at the time and place defendant Dover was an agent of defendant Yount, and was operating the tractor-trailer at the time with the knowledge, permission and consent of Yount, and within the scope of his employment and in furtherance of his employer's business.

Plaintiff pleaded and introduced in evidence the following two ordinances of the city of Charlotte:

"STOPPING, STANDING, AND PARKING

Section 28. PARKING PROHIBITED ON ANY STREETS WHEN SIGNS POSTED.

(a) When signs prohibiting parking are erected on any streets no person shall park a vehicle in any such designated place.

"Section 36. STANDING OR PARKING CLOSE TO CURB. No person shall stand or park a vehicle in a roadway other than parallel with the edge of the roadway, headed in the direction of

traffic, and with the curb side wheels of the vehicle within 12 inches of the edge of the roadway. . . ."

B. A. Corbett, Jr., an employee of the Traffic Engineering Department of the city of Charlotte and a witness for the defendants, testified 1: "In January 1958, on the east side of Independence Boulevard there were four 'No Parking, Stopping or Standing' signs, there were four of them placed along the east side between Elizabeth and Fifth Streets." He testified on cross-examination in respect to these four signs: "These signs were put up by my department, the Traffic Engineering Department. That is, by the city of Charlotte pursuant to the ordinances."

Defendant Dover testified on direct examination: "The back of the trailer measured approximately eleven feet four inches from the ground. . . . When I stopped, the tractor was just north of the Toddle House, and I suppose the trailer was in the vicinity of the door of the Toddle House. By, in the vicinity, I mean opposite the door of the Toddle House. . . . I know the width of my trailer. It is 96 inches." He testified on cross-examination: "I saw the sign on the telephone pole right in front of my vehicle that said 'No Parking.' I was aware that I was violating that regulation. Nevertheless, in spite of that, I proceeded to park there, and went across the street. . . . My vehicle had probably been sitting there some twenty-five minutes in that no parking area before the collision." Dover had gone across the highway to eat breakfast, as he had not eaten for about ten hours.

According to defendants' evidence the lanes for northbound traffic had the following widths: The lane next to the white or black line on the middle of the Boulevard dividing the north and south lanes eleven feet, the middle lane twelve feet, the lane next to the curb, ten feet.

Negligence on the part of the defendants is manifest on the record. Defendants in their brief make no contention to the contrary, but argue that plaintiff should have been nonsuited for the reason that he was guilty of contributory negligence as a matter of law.

A serious and troublesome question is continually arising as to how far a court will go in declaring certain conduct of a plaintiff contributory negligence, and take away the question of contributory negligence from the jury. *Moseley v. R. R.*, 197 N.C. 628 (635), 150 S.E. 184 (188).

There are two lines of decisions in our Reports involving highway accidents which turn on the question of contributory negligence. In *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251, and in *McClamrock v. Packing Co.*, 238 N.C. 648, 78 S.E. 2d 749, will be found a list of cases of this type in which contributory negligence was held as a

matter of law to bar recovery, and a second list in which contributory negligence has been held to be an issue for a jury.

Without attempting to analyze and distinguish the reasons underlying the decisions in those cases, they illustrate the fact that frequently the point of decision was affected by concurrent circumstances, such as fog, rain, glaring headlights and color of vehicles, etc., and that these conditions must be taken into consideration in determining the question of contributory negligence and proximate cause. "Practically every case must 'stand on its own bottom.'" *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637.

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*, 250 N.C. 665, 110 S.E. 2d 306; *Tew v. Runnels*, 249 N.C. 1, 105 S.E. 2d 108; *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19.

It is a well settled principle of law that plaintiff was not bound to anticipate negligent acts or omissions on the part of others; but, in the absence of anything which gives, or should give notice to the contrary, he was entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person. *Weavil v. Myers*, 243 N.C. 386, 90 S.E. 2d 733, and the cases there cited.

The law charges a nocturnal motorist, as it does every other person, with the duty of exercising ordinary care for his own safety. *Chaffin v. Brame*, 233 N.C. 377, 64 S.E. 2d 276. In *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330, this Court said: "It is the duty of the driver of a motor vehicle not merely to *look*, but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen."

Plaintiff's evidence tended to show he was driving at night at a speed of between 20 and 30 miles an hour, where the legal speed limit was 35 miles an hour. That he was travelling about 50 feet behind an automobile, which partially kept him from seeing the tractor-trailer. That about 220 feet from the intersection of Elizabeth Street and Independence Boulevard, the Boulevard makes a slight turn to the left. That when the front automobile signalled for a left turn, plaintiff proceeded to go into the middle lane for traffic with the tractor-trailer then about 40 feet in front of him. That he was 25 or 35 feet from it, when he saw it. That the tractor-trailer was a dark color, and had no lights burning on it. It had no warning signals, such as flares. The background for the tractor-trailer was a vacant house,

dark at the time. That the darkness blended together. That the Toddle House was open the night of the collision. They have lights inside it. That the tractor-trailer was parked on the Boulevard with part of its rear extending some three feet into the center lane for traffic in violation of the ordinances of the city of Charlotte. That in the block where the collision occurred were signs reading "No Parking, Stopping or Standing" placed there by the city of Charlotte, pursuant to its ordinances. That there was a street light at Fifth Street and one on the Boulevard. It did not make an area of broad daylight. That the boulevard was better lighted than other Charlotte streets. In our opinion, opposing inferences are permissible from plaintiff's proof as to whether or not he ought to have seen in the exercise of ordinary care for his own safety the tractor-trailer in time to have avoided running into it, and as to whether or not he used ordinary care in the interest of his own safety, and therefore, the case was properly submitted to the jury.

Defendants assign as error the failure of the court to peremptorily instruct the jury, as requested by them in a special prayer for instructions aptly tendered, to answer Yes the issue as to contributory negligence of plaintiff. For the reasons stated above, the court was correct in declining to give this special prayer for instruction.

The cases relied on by defendants are factually distinguishable.

Dr. Chalmers R. Carr, stipulated by the defendants to be an expert witness specializing in the field of orthopedic surgery, testified for plaintiff. He testified as follows: "Nine months after the injury my pictures do not show any post-degenerative changes in the wrist leading to traumatic arthritis with respect to this man. Another six or eight months have passed. I don't know whether he has it today or not because I don't have any current pictures, but from examination of the wrist, I would be of the opinion that the likelihood is—it is—very small, there is a possibility." Defendants objected to "possibilities." The objection was overruled, defendants excepted, and assign this as error. On cross-examination Dr. Carr testified: "In my testimony I said there was one possibility and I am not saying that it is a probability in this particular man."

In *Gaffney v. Phelps*, 207 N.C. 553, 178 S.E. 231, Dr. Martin, from the question asked him, said: "That would be hard to answer. . . . There is no way for me to say positively that she would have trouble or not, but there is a possibility that she would." This Court said: "If there was error, we do not think it prejudicial. The defendant Allred, on recross-examination, brought out the fact: 'The pelvis itself is normal in size.'"

If there was error in overruling defendants' objection to Dr. Carr's

statement "there is a possibility," it is, in our opinion, not sufficiently prejudicial to justify a new trial.

Defendants assign as error the part of the charge to this effect: If the jury finds from the evidence and by its greater weight, the burden of proof being on the plaintiff to so show, that defendant Dover negligently parked the tractor-trailer in violation of the city ordinances, and that such negligence was a proximate cause of the collision and resulting injuries to plaintiff, then the jury should answer the first issue Yes, otherwise No. Defendants' contention is that while a violation of a statute designed for the protection and safety of others is negligence *per se*, the ordinances of the city of Charlotte introduced in evidence by plaintiff are not safety ordinances. There is no error in this part of the charge.

The two ordinances of the city of Charlotte introduced in evidence by the plaintiff are traffic ordinances patently enacted in the interests of public safety, and to promote the orderly and safe flow of traffic. "In a broad sense, then, the stopping of vehicles on the streets, including parking, is a part of traffic itself." *People v. Rubin,* 284 N.Y. 392, 31 N.E. 2d 501. A violation of these ordinances is negligence *per se. Morgan v. Coach Co.,* 225 N.C. 668, 36 S.E. 2d 263; *White v. R. R.,* 216 N.C. 79, 3 S.E. 2d 310; *Gaffney v. Phelps, supra; Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170; *Hendrix v. R. R.,* 198 N.C. 142, 150 S.E. 873. However, "it is a fundamental principle that the only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation." *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459.

All the other assignments of error, except formal ones, are to the charge of the court, failure to charge, and failure to give defendants' special prayers for instructions as tendered. We have read the charge of the court with care, and read and considered the brief of defendants. We cannot say on the record that taking the charge as a whole, there was prejudicial error that would warrant a new trial, or that prejudicial error is shown in failure to charge. One part of the charge is too favorable to the defendants.

All defendants' assignments of error are overruled.

No error.

HIGGINS, J., not sitting.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. GULF-ATLANTIC TOWING CORPORATION.

(Filed 4 November, 1959.)

1. Carriers § 1: Utilities Commission § 2—

Whether a carrier is a contract carrier or a common carrier is a question of law, but whether a particular carrier is acting as a common carrier or as a contract carrier is a question of fact, which, in proceedings before the Utilities Commission, is to be determined by the Commission.

2. Utilities Commission § 5—

On appeal from the Utilities Commission the Superior Court and the Supreme Court may not retry questions of fact, but the facts found by the Commission are conclusive unless they are not supported by competent, material, and substantive evidence in view of the entire record. G.S. 62-26.10(e).

3. Carriers § 1—

A carrier is a common carrier if it holds itself out to the public as engaged in the public business of transporting persons or property for compensation, and offers such service to all members of the public who desire such service so far as its facilities permit.

4. Same—

A private or contract carrier of goods is one who transports goods solely upon contract or a series of contracts with each individual shipper, and who does not hold himself out to the general public as ready to accept and carry all goods, but furnishes his services only to those with whom he sees fit to contract.

5. Carriers § 1: Utilities Commission § 2— Evidence held to establish that respondent was a private carrier not subject to the jurisdiction of Utilities Commission.

The evidence upon the entire record in this case is held to show that respondent transported petroleum products in bulk by tank barge solely by contract specifically negotiated with each particular shipper by competitive bids, that it exercised some discretion as to whom it would do business with and would not enter into any contract that would jeopardize its other contracts, with no evidence that it held itself out as willing to transport goods for all who might apply, or that it transported goods for anyone without first voluntarily entering into a specific contract for such carriage. *Held:* The finding of fact of the Utilities Commission that respondent's course of dealing was that of a common carrier is not supported by competent, material, and substantive evidence, and the judgment of the Superior Court is reversed with direction that the cause be remanded for dismissal by the Utilities Commission for want of jurisdiction.

HIGGINS, J., not sitting.

APPEAL by respondent from *Parker, J.*, February Civil Term, 1959, of NEW HANOVER.

This proceeding was initiated by the North Carolina Utilities Commission issuing and having served upon respondent a show cause order, requiring respondent to appear before it and show cause, if any it can, why it, as a carrier of petroleum products in intrastate and interstate commerce, should not submit to the jurisdiction of the Commission, obey its orders, rules and regulations, apply for a certificate of public convenience and necessity authorizing it to engage in such transportation in intrastate commerce, and file proper and appropriate tariffs.

Hereafter the North Carolina Utilities Commission will be called Commission, and the respondent will be designated Gatco. Gatco filed no pleading.

The show cause order was heard upon the evidence and exhibits of Gatco. We summarize the Commission's findings of fact and conclusions of law except where we quote the words of the Commission:

FINDINGS OF FACT.

Gatco is authorized to do business in the State, and has offices in Wilmington, North Carolina, Norfolk, Virginia, and two cities in Florida. For about ten years it has been engaged in transporting petroleum products in bulk along the inland waterways of the State from points in the State to other points in the State by tank barges either pushed or pulled by tugboats. At the time of the hearing Gatco by contract with Esso Standard Oil Company was transporting petroleum products in bulk from Morehead City to Belhaven and Washington, North Carolina, and was also towing by contract with the Navy petroleum products from Beaufort to Cherry Point Air Station.

Gatco submits bids to various oil companies having bulk storage terminals on the coast of the State for the transportation of their petroleum products in bulk from such storage terminals along the inland waterways of the State to other places in the State. Such bids, when accepted, result in contracts between Gatco and the oil companies. The petroleum products are brought to the bulk storage terminals on the coast of the State by ocean going tankers.

Gatco has hauled petroleum products in bulk from one place in the State to another in the State for Gulf Refining Company, Texas Company, Esso Standard Oil Company, and the U. S. Navy. In addition, it has transported petroleum products from one terminal in Wilmington to another, and holds itself out to do such business.

"Gatco holds itself out to transport oil and petroleum products by barges for any person, firm or corporation upon call if it can agree on

contract terms and if such transportation will not interfere with its other contracts, and if it has the equipment available." x x x "Gatco holds itself out to move oil and petroleum products for compensation for any person, firm or corporation from points along the Coast in the State to other points along the inland waterways of the State, and Gatco engages in the business of furnishing such transportation for compensation for any person, firm or corporation with which it can agree upon a transportation price or compensation, and Gatco's course of dealing in business is that of a common carrier on the inland waterways of the State."

Gatco has never applied to the Commission for a certificate of public convenience and necessity, has never submitted itself to the jurisdiction of the Commission, and has never filed with the Commission any tariffs for the transportation of its cargoes.

CONCLUSIONS OF LAW.

Gatco holds itself out, and is engaged as a common carrier in intrastate commerce in transporting for compensation petroleum products in bulk for all persons, firms, and corporations from one point in the State along the inland waterways of the State to other points in the State.

Before continuing its operations Gatco should apply to the Commission for a certificate of public convenience and necessity, and if it is granted, Gatco should file with the Commission appropriate tariffs, and otherwise comply with the regulations of the Commission.

Whereupon, the Commission entered an order enforcing its conclusions of law.

Gatco appealed from the order of the Commission to the Superior Court, and grouped the alleged errors of the Commission. The alleged errors are that there is no competent evidence to support the findings of fact and conclusions of law of the Commission that Gatco is a common carrier, and engaged in intrastate commerce, and subject to the jurisdiction of the Commission. The contention of Gatco being that it is a contract carrier, and engaged in interstate commerce along the inland waterways of the State.

The appeal was heard by Paul, J., at the May Term 1957 of the Superior Court of New Hanover County. Judge Paul's order recites that an examination of the transcript of the evidence in the proceeding shows that Gatco is engaged in several types of transportation, some of which is clearly interstate. Whereupon, he remanded the proceeding to the Commission to set out with exactness and particularity the business of Gatco adjudged to be intrastate, and subject to regulation by the Commission.

When the proceeding was again heard by the Commission, it found

these facts: Gatco transports 9,000 barrels of oil at least once each week from Morehead City, North Carolina, to Washington, North Carolina, and hauls petroleum products for Esso Standard Oil Company from Beaufort, North Carolina, to Cherry Point, North Carolina, and hauls petroleum products from Wilmington to Fayetteville, from Wilmington to Morehead City, from Morehead City to Belhaven. Gatco is engaged as a common carrier for hire in interstate and intrastate commerce in the State. Whereupon, the Commission reaffirmed its former order.

Gatco again appealed to the Superior Court, and grouped the alleged errors of the Commission. The alleged errors are substantially the same set forth by Gatco in its first appeal entries to the order of the Commission.

At the February Civil Term 1959 of New Hanover Superior Court Parker, J., overruled all of Gatco's exceptions, and affirmed the order of the Commission.

From this judgment Gatco appeals to the Supreme Court.

Malcolm B. Seawell, Attorney General, and F. Kent Burns, Assistant Attorney General, for North Carolina Utilities Commission, appellee.

Rountree & Clark for Gulf-Atlantic Towing Corporation, Respondent, appellant.

PARKER, J. G.S. 62-30(1) and G.S. 62-122 confer upon the North Carolina Utilities Commission regulatory authority over the rates charged and the service given "by railroads, street railways, steamboats, canals, express and sleeping-car companies, and all persons, firms or corporations engaged in the carrying of freight or passengers or otherwise engaged as common carriers" in intrastate traffic in North Carolina.

In the brief filed by the Attorney General for the Commission it is said: "From a perusal of these two statutes (G.S. 62-30 and G.S. 62-122), it is seen that the jurisdiction of the Utilities Commission in this case is dependent upon a finding that Gatco is a common carrier engaged in the business of carrying freight." In respect to this statement in the brief see *Efland v. R. R.*, 146 N.C. 135, 59 S.E. 355.

Gatco assigns as error the ruling of the trial court sustaining the finding of fact of the Commission that it by its operations on the inland waterways of the State of North Carolina is a common carrier, and so holds itself out to the public. The contention of Gatco is that the Commission should have found as a fact that it is not a common

carrier by its operations on the inland waterways of the State, but a private contract carrier not subject to the jurisdiction of the Commission.

The real and practically the only question presented in this case, therefore, is whether Gatco operates as a common carrier of intrastate freight between points in this State along its inland waterways.

What constitutes a common carrier, and what constitutes a contract carrier, are questions of law, but whether the carrier is acting as a common carrier or as a contract carrier is a question of fact. The fact is to be determined, in proceedings of this kind, by the Commission. The question is often a question of difficulty. The Superior Court and the Supreme Court are not appellate courts from the Utilities Commission to retry questions of fact. Facts found by the Commission are not open in the Law Courts, unless the Commission shall find facts to exist "unsupported by competent, material and substantial evidence in view of the entire record as submitted." G.S. 62-26.10(e). If a factual finding as a basis for an order by the Commission is supported by competent, material and substantial evidence in view of the entire record, the finding is final. *Utilities Com. v. R. R.*, 235 N.C. 273, 69 S.E. 2d 502; *Utilities Com. v. Fox*, 236 N.C. 553, 73 S.E. 2d 464; *Utilities Com. v. R. R.*, 238 N.C. 701, 78 S.E. 2d 780.

The definition of a common carrier at common law seems to be clearly settled. A common carrier is one who holds himself out to the public as engaged in the public business of transporting persons or property for others for compensation from place to place, offering his services to such of the public generally as choose to employ him and pay his charges. The distinctive characteristic of a common carrier is that he undertakes as a business to carry for all people indifferently or to take anybody's freight. *Williams v. Manufacturing Co.*, 175 N.C. 226, 95 S.E. 366; The Cape Charles, 198 F. R. 346 (District Court, E. D. North Carolina, opinion by Connor, District Judge); *Washington ex rel Stimson Lumber Co. v. Kuykendall*, 275 U. S. 207, 72 L.Ed. 241; 9 Am. Jur., Carriers, sec. 4; 13 C.J.S., Carriers, sec. 3.

"Every common carrier has the right to determine what particular line of business he will follow, and his obligation to carry is coextensive with, and limited by, his holding out or profession as to the subjects of carriage" 9 Am. Jur., Carriers, p. 432.

A private carrier of goods (sometimes called a contract carrier) is one who makes an individual contract in a particular instance for the carriage of certain goods for another to a certain destination. The private carrier of goods does not hold himself out to the public as ready to accept and carry all goods of all who offer. His contract may

be for one carriage of freight or a series. Each act of transportation is a separate and individual act. It is not for the public convenience and necessity, but is a private transaction. The private or contract carrier may refuse to take the goods and refuse to contract for carriage. He is not bound to serve every person who may apply. *The Cape Charles, supra; Home Insurance Co. v. Riddell,* 252 F. 2d 1; *Public Utilities Com. v. Johnson Motor Transport,* 147 Me. 138, 84 A. 2d 142; 9 Am. Jur., Carriers, sec. 10; 13 C.J.S., Carriers, sec. 4.

"The distinction between a common carrier and a private or contract carrier has been frequently stated. Citing cases. A common carrier is one who holds himself out as furnishing transportation to any and all members of the public who desire such service in so far as his facilities enable him to perform the service, while a contract carrier does not furnish transportation indiscriminately but furnishes it only to those with whom he sees fit to contract." *Mt. Tom Motor Line, Inc. v. McKesson & Robbins, Inc.,* 325 Mass. 45, 89 N.E. 2d 3.

The General Assembly in G.S. 62-121.7(13) has defined a "common carrier by motor vehicle" as meaning "any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of property or any class or classes thereof for compensation, whether over regular or irregular routes." In G.S. 62-121.7(14) it has defined a "contract carrier by motor vehicle" as meaning "any person which, under individual contracts or agreements, engages in the transportation, other than transportation referred to in paragraph (13), by motor vehicle of property in intrastate commerce for compensation." Similar definitions are set forth in the Bus Act of 1949 in respect to the transportation of passengers. G.S. 62-121.46(5) and (6). In respect to the provisions of G.S. 62-30(1) and G.S. 62-122, the General Assembly has defined neither a common carrier nor a contract or private carrier.

This proceeding was heard by the Commission on the evidence and exhibits of Gatco alone. The only witness testifying before the Commission was L. M. Winslow, Vice President of Gatco, who lives in Jacksonville, Florida. This is a summary of Mr. Winslow's testimony, necessary for a decision of this appeal, except where we quote his testimony.

Gatco bids on contract work, and transports the commodities it is successful in getting. The mechanics of getting a contract for hauling are as follows: Usually the customer invites a number of contract carriers to bid on commodities the customer wants hauled, stating the terms and conditions, and the contract carriers submit bids. In most cases other people bid also. Winslow does not know of any common carrier bidding on contracts for such hauling.

Gatco usually works for the various oil companies that have bulk storage terminals, and whom they have worked for before. Gatco has competitors in the bidding for contracts, who haul by barges and tugboats, as it does.

The equipment used in hauling petroleum products in bulk is not the equipment generally used by common carriers on water. Gatco has no published rates. Its rates are sent in on its contract bids. If it is the low bidder, and its bid is acceptable, it gets the work. It only works by contract. "We are the sole judge who we shall haul for and what our rates will be, and those we want to haul for and those we don't want to haul for. We do not have any authority from the Interstate Commerce Commission."

Gatco has hauled a load or two within the harbor of Wilmington, North Carolina, for the American Oil Company. It has hauled for Gulf Oil Company, Esso Standard Oil Company, the U. S. Navy and the Texas Company. It has not hauled for Cities Service Company, Phillips and Sinclair.

Mr. Winslow testified: "It wouldn't make any difference who called me if they were going to pay me. I would haul it. Even if the Commissioner asked me I would go down there and haul it after I found out what it was and whose feelings I was going to hurt. Right in that connection if Phillips, Sinclair, Cities Service or some of the other independents would want to do that same thing and had a volume movement along the coast to some inland port town or storage: I would haul for them if I had the equipment available. In explanation of that statement that if I weren't afraid I would hurt somebody's feelings, what I meant was that I would want to know a little more about it than that because for instance the Esso Standard Oil Company has an Inland Water Department and I wouldn't want to offend the Inland Water Department of Esso. I have had letters from the Esso Standard Oil Company's Sales Department requesting quotations on the movement of petroleum products and that is what I meant by that. I have got to be a little careful not to step on the toes of people we have to work with. In other words, I would rather it would come from the Inland Waterways channel, through that department —the people we have to get along with. I say that our manner of operation was such that if you had oil at one terminal in Morehead and wanted to move it to another terminal and the money was showed to me and our terms of operation were met, I would take it down for you to Morehead just on the matter of you calling and wanting it moved, if you paid me. As to whether I would do that for anybody else I say that not very many people have an oil terminal these days. But from a practical standpoint that is what I am in business to do."

Later on Mr. Winslow testified: "We have at one time or another, and still will now, haul for any of those major companies or the shipper at those points under an agreement suitable to us and suitable to them. In other words, we hold ourselves out to serve them if we can come together on the terms and agree on the terms of service, the price they will pay and the volume."

The evidence is clear and undisputed that Gatco transports goods only by contract specifically negotiated with the particular shipper by means of submitting bids for the work. Gatco is the sole judge of those it wants to haul for, and those it does not want to haul for. Mr. Winslow testified: "I have got to be a little careful not to step on the toes of people we have to work with." He also testified: "I wouldn't want to offend the Inland Water Department of Esso." It seems the plain inference is Gatco would choose not to contract with any one that would interfere with its negotiating contracts with Esso. The evidence supports this finding of fact by the Commission: "Gatco holds itself out to transport oil and petroleum products by barges for any person, firm or corporation upon call if it can agree on contract terms and if such transportation will not interfere with its other contracts, and if it has the equipment available."

There is nothing in the record to indicate that Gatco held itself out as willing to transport goods for all who might apply, or that it would carry for any one without first voluntarily entering into a specific contract for such carriage. A study of the entire record shows that Gatco is a private or contract carrier as distinguished from a common carrier.

The finding of fact by the Commission that "Gatco's course of dealing in business is that of a common carrier on the inland waterways of the State," and its conclusion of law that "Gatco holds itself out, and is engaged as a common carrier in intrastate commerce in transporting for compensation petroleum products in bulk for all persons, firms, and corporations from one point in the State along the inland waterways of the State to other points in the State," are unsupported by competent, material and substantial evidence in view of the entire record as submitted.

The judgment below is reversed. The brief of the Commission states "the jurisdiction of the Utilities Commission in this case is dependent upon a finding that Gatco is a common carrier, etc." The Superior Court will remand the proceeding to the Commission, with a direction to the Commission to dismiss the order to show cause for lack of jurisdiction in the Commission, in accord with this opinion.

Reversed with Direction to Remand to Utilities Commission for Dismissal.

HIGGINS, J., not sitting.

ARLENE H. HARRISON v. MATTIE F. WINSTEAD AND OCCIDENTAL LIFE INSURANCE COMPANY.

(Filed 4 November, 1959.)

1. Evidence § 11: Insurance § 24a—

In an action by the person substituted as beneficiary in a policy of life insurance to recover the policy and proceeds as against the original beneficiary after the death of the insured, the original beneficiary is precluded by G.S. 8-51 from testifying to the effect that she had the policy in her possession and was holding same as security for a loan to insured and for premiums paid by her on the policy, since such testimony tends to establish an oral assignment of the policy to her as security, she being a party to the action and having a direct pecuniary interest in the outcome.

2. Insurance § 24a—

In the absence of the establishment of an enforceable contract between claimant and insured assigning the policy as security, the payment of premiums by claimant is alone insufficient to create a lien on the policy or its proceeds.

3. Same—

Where a policy of insurance provides that insured has a right to change the beneficiary without the consent of the beneficiary, the beneficiary has no interest in the contract during the life of the insured, but a mere expectancy.

HIGGINS, J., not sitting.

APPEAL by defendant from Mattie F. Winstead from *Paul, J.*, March Civil Term, 1959, of WILSON.

This action was instituted to obtain possession by Claim and Delivery of a policy of life insurance and to recover the death benefits payable thereunder. The plaintiff is the widow of the insured. The defendant appellant, Mattie F. Winstead, is the mother of the insured.

The policy in question, No. 91922, was issued by the defendant Occidental Life Insurance Company, in the face amount of $2,000, on the life of William R. Harrison. It is dated 3 October 1940. The mother of the insured was originally named beneficiary.

On 30 April 1947 the insured executed a written request to change

the beneficiary to his estate. This request was filed by the defendant Insurance Company but was not endorsed on the policy. On 11 July 1958 the insured executed another request to change the beneficiary to Mrs. William Roman Harrison (Arlene Hinnant Harrison), his wife. The defendant Insurance Company approved this change and waived presentation of the policy for endorsement.

The insured died on 17 July 1958. On 24 July 1958, his widow, Arlene H. Harrison, instituted this action for the recovery of the policy and its proceeds, which she claimed as beneficiary. The defendant Mattie F. Winstead in her answer asserted a counterclaim alleging that she held a lien on the policy for moneys loaned and premiums advanced and was entitled to have the proceeds of the policy applied to the satisfaction of her lien. By consent, the defendant Insurance Company paid the proceeds into the hands of the Clerk of the Superior Court pending the outcome of this action. Therefore, reference hereinafter made to the defendant shall mean Mattie F. Winstead.

At the trial below the court refused to permit the defendant to offer any evidence before the jury, either oral or documentary, concerning her payment of premiums to the defendant Insurance Company.

Upon conclusion of the evidence, the court granted the plaintiff's motion for nonsuit of the defendant's counterclaim, declined to submit issues tendered by the defendant as to the existence and amount of her lien, and peremptorily charged the jury to answer the issues in favor of the plaintiff.

From judgment on the verdict the defendant appeals, assigning error.

Lamb, Lamb & Daughtridge for plaintiff.

Battle, Winslow Merrell, Scott & Wiley; Carr & Gibbons for defendant.

DENNY, J. It appears from the proffered evidence that when the insured requested the insurer in April 1947 to change the beneficiary from his mother, Mrs. Mattie F. Winstead, to his estate, the Insurance Company wrote the defendant, who had possession of the policy, to send the policy in to the insurer in order that it might endorse the requested change of beneficiary thereon. The defendant did not comply with the request of the insurer, therefore, the Insurance Company waived this requirement and noted the change of beneficiary on its records. It followed the same procedure in July 1958 when it changed the beneficiary from the insured's estate to his wife, the plaintiff herein. There is no controversy about the insured having had full

authority to change the beneficiary in the policy without the consent of the original beneficiary.

The defendant offered in evidence a letter, identified by an officer of the Insurance Company, which she wrote to it in response to the above request in connection with the change of beneficiary in 1947. The letter stated, "I have in my possession policy No. 91922 on the life of William R. Harrison. I am beneficiary and have made all payments on this policy and I intend to protect my rights." On objection to the introduction of the letter, the objection was sustained and the defendant excepted. In addition to the above letter, the defendant offered in support of her alleged counterclaim testimony to the effect that she had had possession of the insurance policy in question ever since it was issued, and that she had paid the premiums thereon; that the reason she had possession of the policy, it was held as security for a loan of $150.00 which she had made to the insured and for premiums she had paid. She offered canceled checks in evidence as proof of payment by her to the Insurance Company of the premiums on the policy, which payments, according to her proffered evidence, totaled $1,473.75; she further offered to testify that she was due interest on the premium payments of $829.38, or a grand total of $2,303.13. All of this evidence was excluded on plaintiff's objection and the defendant entered exceptions thereto.

In light of the proffered evidence, we must determine (1) whether or not the "dead man's statute," G.S. 8-51, precludes the defendant from testifying to an alleged assignment of the policy of insurance involved herein by the deceased insurer to her as security for an alleged loan made by the defendant to the deceased, and as security for the alleged repayment of premiums advanced by her; (2) if she is so precluded, whether or not evidence by the defendant to the effect that she retained possession of the insurance policy in question from its issuance until the death of the insured and paid all the premiums thereon, is sufficient to carry the case to the jury for its determination as to whether or not the defendant does have a lien on said policy and the proceeds payable thereunder.

We concede that the authorities in this country are in sharp conflict as to the rights of parties upon evidence similar to that revealed on the record before us. 122 A.L.R., Anno.—Competency of Witness —Insurance Proceeds, page 1300. However, it is our duty to determine the rights of the plaintiff and the defendant in this action in light of our own decisions bearing on the questions posed.

In the case of *Watts v. Warren*, 108 N.C. 514, 13 S.E. 232, the action was instituted by creditors of the intestate against his administrator and others. In the lifetime of the intestate, he obtained a

policy of insurance on his life, payable to him and for his own benefit, dated 15 March 1888, for the sum of $15,000. On 29 March 1889, he assigned, transferred and delivered this policy of insurance to his two brothers, the defendants W. A. and Frank Warren, "for value received." No particular consideration was recited. The estate of the intestate was insufficient to pay his debts and the costs of the administration. The Court said: "There was * * * some evidence * * * tending to prove that the assignment of the policy of insurance was made as a security for the reimbursement of the defendants (the Warrens) on account of premiums they might pay as required by the policy, and to pay certain debts and discharge certain liabilities of the intestate. Therefore, the evidence proposed by the defendants, and which was rejected, tending to prove what sums of money the defendant W. A. Warren had paid on account of the default of his brother, * * * was relevant and material, as was also the other evidence so proposed and rejected tending to show what debts of the intestate the defendants (the Warrens) had paid for him. Such evidence, if it had been received, would have tended, in some measure, to prove a consideration, and the amount thereof, for the assignment of the policy, and that the same was made in good faith and for a lawful purpose. * * *

"It was insisted, however, that the evidence so rejected came within the inhibition of the statute (The Code, sec. 590, now G.S. 8-51), and was not competent, because the witnesses were interested in the event of the action adversely to the deceased person, * * *.

"The court properly held that the witness W. A. Warren was not a competent witness to testify as to the contract of assignment of the policy of insurance and the consideration thereof agreed upon, because such testimony would clearly come within the inhibition of the statute just cited. But there is some evidence of the witnesses other than the defendants, the Warrens, whose proposed testimony was rejected, going to prove that the intestate made the assignment in question not for any fraudulent purpose, but for a valuable consideration, such as that above mentioned. The defendants, the Warrens, were not competent witnesses to testify as to the contract of assignments, because the deceased assignor could not testify in his own behalf and contradict them as to 'a personal transaction or communication' between him and them. The obvious purpose of the statute is to prevent the surviving interested party, in such cases, from testifying as to such 'personal transaction or communication' because the deceased party cannot." *Blake v. Blake,* 120 N.C. 177, 26 S.E. 816; *Bright v. Marcom,* 121 N.C. 86, 28 S.E. 60; *Wilson v. Featherston,* 122 N.C. 747, 30 S.E. 325; *Davidson v. Bardin,* 139 N.C. 1, 51

S.E. 779; *Brown v. Adams,* 174 N.C. 490, 93 S.E. 989; *Price v. Pyatt,* 203 N.C. 799, 167 S.E. 69; *Wilder v. Medlin,* 215 N.C. 542, 2 S.E. 2d 549; *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542; *Collins v. Covert,* 246 N.C. 303, 98 S.E. 2d 26.

In the instant case, the defendant undertook to testify in her own behalf as to why she had possession of the policy. She testified in the absence of the jury that she was holding the policy as security for a $150.00 loan and for the premiums she had paid. She was clearly incompetent to testify to any transaction between her and her son tending to show that he made an oral assignment of the policy to her as security for the $150.00 loan or as security for the repayment of the premiums paid by her to keep the policy in force. Furthermore, she is not only a party to the action, she has a direct pecuniary interest in the outcome of the litigation. *Cartwright v. Coppersmith,* 222 N.C. 573, 24 S.E. 2d 246. In fact, the defendant in her supplemental brief concedes that the provisions of G.S. 8-51 prevent her from proving an express contract creating a lien on the policy and its proceeds. This being true, she contends that the facts are sufficient to create an implied lien.

Under our decisions, it would seem that if the defendant had obtained a written assignment of the policy in language comparable to that contained in the assignment in the case of *Watts v. Warren, supra,* the evidence with respect to the payment of premiums to the insurance company would have been competent. *Hardison v. Gregory,* 242 N.C. 324, 88 S.E. 2d 96. In this jurisdiction, however, in the absence of an enforceable contract entered into between the defendant and the insured, the payment of premiums alone is insufficient to create a lien on the policy and its proceeds. *Sorrell v. Woodmen of the World,* 209 N.C. 226, 183 S.E. 400; *Pollock v. Household of Ruth,* 150 N.C. 211, 63 S.E. 940.

Where a policy of insurance provides that the insured has the right to change the beneficiary without the consent of the beneficiary, the beneficiary has no vested interest in the insurance contract during the life of the insured, but has a mere expectancy. *Sudan Temple v. Umphlett,* 246 N.C. 555, 99 S.E. 2d 791.

In *Pollock v. Household of Ruth, supra,* the brother and sister of the deceased had been originally designated as beneficiaries in the policy involved. They had paid a part of the premiums; the deceased had paid some of them, and the local lodge paid some of the premiums from funds allowed the deceased from sick benefits due her. About a week before her death, the insured caused the name of Katie Hardy to be substituted in the policy in place of the original beneficiaries. In upholding a judgment in favor of the substituted beneficiary, this

Court said: "There may be, and not infrequently are, facts and circumstances existing which would raise an equity in the original beneficiary and which would justify and require a court to interfere for his protection; but the authorities are very generally to the effect that the mere payment of the premiums and dues for a time, without more, and in the absence of a binding contract that the beneficiaries then designated should receive the proceeds of the policy or the benefits arising therefrom, would not support such a claim. Thus, in 29 Cyc., 128 - 129, the author says: 'An equity in favor of the original beneficiary precluding the substitution of another in his place may rest on a contract between him and the member, based on a sufficient consideration, by which he is to receive the benefits. Thus, if a member designates a beneficiary or, having designated a beneficiary, delivers the certificate to him, on an agreement that he shall receive the benefits in consideration of past advances made by him, or present or future advances, or in consideration of his promise to pay dues and assessments, which promise is fulfilled, the member can not thereafter substitute a different person as beneficiary. However, the fact that the person originally designated incurs expenses with reference to the transaction on the faith of the designation, as by paying dues and assessments to keep the certificate alive, does not prevent the substitution of a new beneficiary in his place, in the absence of a contract that he is to receive the benefits, nor does the fact that the member delivers the certificate to the beneficiary as a gift preclude him from subsequently substituting a new beneficiary.'

"An application of the principles stated fully justifies the court in entering judgment of nonsuit. There is no provision of law, general or special, and no rule of the company or stipulation of the policy which forbids the change that was made in the present case; and there are no facts or circumstances which show that the payments by the original beneficiaries were made under any contract or agreement with the insured that would give plaintiffs any right to the relief which they seek."

Likewise, in the case of *Sorrell v. Woodmen of the World, supra,* the original certificate of insurance on the life of Albert V. Sorrell, was issued on 27 March 1913. Quinnette Sorrell, wife of Albert V. Sorrell, was designated as beneficiary in the original certificate. Sometime after the issuance of the original certificate, the insured stopped paying the dues and assessments required to keep said certificate in force. Thereupon, Quinnette Sorrell, as the beneficiary, paid the dues and assesments until the certificate was exchanged for a new certificate on 1 June 1929. She continued to pay all the dues and assessments required to keep the new certificate in force, until her death on 11

September 1933. The sums paid by Quinnette Sorrell amounted to more than $459.00. At her death she left a will bequeathing to her nephew, J. Bostwick Cooke, all her personal property, including this insurance policy. Thereafter, until the death of the insured, the nephew paid all the dues and assessments required to keep the insurance in force.

After the death of Quinnette Sorrell no other beneficiary was designated. There was a provision in the policy as follows: " * * * if there be no surviving wife, children, or adopted children (and there were none), such benefits shall be paid to the next living relative" in the order named therein. It so happened that the nearest relative of the insured was his brother, the plaintiff Quint L. Sorrell. Judgment was entered awarding the plaintiff the entire proceeds from the certificate of insurance in the sum of $667.57. On appeal to this Court, *Connor, J.*, speaking for the Court, said: "The defendant J. Bostwick Cooke * * * is not entitled to the sum due on the certificate, or to any part of said sum. He claims under the last will and testament of Quinnette Sorrell, deceased, who was the beneficiary designated in the certificate prior to her death. At no time during her life did she have any vested interest in the certificate which she could bequeath by her last will and testament. * * *

"Neither Quinnette Sorrell nor the defendant J. Bostwick Cooke had any lien on the certificate or on the sum due on the certificate, for the sums paid by them as dues and assessments required to keep the certificate in force."

The appellant herein cites *Hooker v. Sugg*, 102 N.C. 115, 8 S.E. 919, as authority to the effect that where one of several beneficiaries has paid premiums on a life insurance policy, that person is entitled to be repaid the full amount of the premiums paid by him from the proceeds of the policy. We do not interpret the opinion in this case to hold that the payment of premiums in the absence of a contract would entitle the one who paid the premiums to recover the sums paid out of the proceeds of the policy. It appears that the *feme* plaintiff and her brother paid the premiums on the policy from the time it was issued until the death of her brother during the lifetime of their father. Thereafter, the *feme* plaintiff paid all premiums on this policy until the death of her father, the insured. Another policy had been paid up on the life of her father, details of which are not pertinent here. It does not appear that the provisions of G.S. 8-51 were involved or that the *feme* plaintiff claimed a lien on the proceeds of policy for the sums she had paid to keep the policy in force. The case was heard on an agreed statement of facts. The opinion simply states: "The *feme* plaintiff and her brother paid the premiums on the last policy

up to the death of her brother, and herself alone the premiums thereafter to her father's death, in the sum of $297, and it was agreed that she shall be reimbursed out of the funds derived under that policy." We do not construe this case as controlling in any respect on the facts in the present case.

In light of our decisions and the facts disclosed on the present record, we are of the opinion that the court below properly excluded the evidence which is made the basis of several of the defendant's assignments of error. It must be conceded that the failure of the defendant to have a valid and enforceable contract with her son, with respect to the payment of premiums on the policy of insurance involved, has resulted in a serious and unfortunate loss to her. Even so, the judgment as of nonsuit on the defendant's counterclaim will be upheld, and in the trial of the plaintiff's cause of action no prejudicial error has been shown that would justify a new trial.

No error.

HIGGINS, J., not sitting.

GOOD WILL DISTRIBUTORS (NORTHERN), INC. v. JAMES S. CURRIE, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 4 November, 1959.)

1. Pleadings § 28—

Motion for judgment on the pleadings is in the nature of a demurrer and raises the question of law whether the uncontroverted facts alleged in the pleadings entitle plaintiff to judgment.

2. Same—

Where it is determined that plaintiff's motion for judgment on the pleadings should have been denied, but the action is not dismissed because the defective statement of a good cause of action might be aided by amendment, *held* defendant is entitled to a dismissal if plaintiff fails to amend, since the prior judgment determines that upon the facts alleged plaintiff is not entitled to recover, and evidence of additional facts could avail plaintiff nothing if such evidence be not supported by allegation.

3. Taxation § 17—

In cases involving carry-forward loss deductions on the part of a corporation resulting from a merger, the courts will look beyond the corporate facade and to substance rather than form.

4. Same—

A corporation resulting from a merger is not entitled to deduct from

its taxable income loss carry-over of one or more of its constituent corporations unless there is a continuity of the business enterprise which has not been altered, enlarged, or materially affected by the merger. G.S. 105-147(9)(d).

5. Same—Merged corporation held not entitled to loss carry-over of constituent corporation under facts of this case.

Where three separate corporations operating in separate territories, with some overlapping, are merged, and the corporation resulting from the merger carries on business of the same type and kind in the same territory as had the three constituent corporations before the merger, with the same stockholders holding stock in the same proportion, *held* by reason of the merger a new and more expansive enterprise exists, which new enterprise did not suffer the loss of any of its constituent corporations, and there is no continuity of business enterprise so as to entitle it to carry over the loss of one of its constituent corporations in computing its income tax.

6. Same—

The statutory provision for a loss carry-over is purely a matter of legislative grace, and such provision will not be construed so as to give a "windfall" to a taxpayer who happens to have merged with other corporations and thus give it a tax advantage over other corporations which have not merged.

HIGGINS, J., not sitting.

APPEAL by defendant from *Craven, S. J.*, April, 1959 Term, of GASTON.

This is an action to recover income taxes paid under protest. The case was heard upon the facts alleged in the complaint and facts stipulated.

From judgment in favor of plaintiff for recovery of the tax payment with interest thereon, defendant, Commissioner of Revenue, appealed and assigned error.

Basil L. Whitener and Wade W. Mitchem for plaintiff, appellee.

Attorney General Seawell and Assistant Attorneys General Abbott and Pullen for defendant, appellant.

MOORE, J. This case was before this Court at the Fall Term, 1957. *Distributors v. Shaw, Commissioner of Revenue,* 247 N.C. 157, 100 S.E. 2d 334. Subsequently James S. Currie, Commissioner of Revenue, was, by consent, substituted as party defendant for former Commissioner Eugene G. Shaw.

A decision of the questions presented on the present appeal requires a brief review of the pleadings and a history of the proceedings had

herein. However, the former opinion should be considered in connection with the discussion here.

The complaint, filed 30 November 1956, alleges substantially the following facts:

The three corporations hereinafter named were, prior to 1 July, 1954, separate and distinct corporate entities chartered by and doing business in North Carolina. On 1 July, 1943, Catholic Books (Northeast), Inc., and Good Will Distributors (Mid-Atlantic), Inc.,—hereinafter referred to as "Mid-Atlantic"—merged with and into Good Will Distributors (Northern), Inc.,—hereinafter called "Northern"—thus forming the resulting corporation, the plaintiff in this action. The merger was effected pursuant to the then G.S. 55-165. Mid-Atlantic suffered a net economic loss of $9,587.75 during its fiscal year ending 31 October, 1953. A portion of this loss was carried forward as a deduction from the net taxable income of $1,758.93 realized during the period from 31 October, 1953 to date of merger. There remained a net economic loss of $7,828.82 at the time of the merger. Plaintiff, Northern, in its income tax return for the fiscal year ending 31 October, 1954, deducted Mid-Atlantic's pre-merger loss of $7,828.82 from Northern's net taxable income. G.S. 105-147(6)(d)—now G.S. 105-147(9)(d). The Commissioner of Revenue did not allow the deduction and assessed plaintiff with $564.28 additional income tax. Plaintiff paid this under protest and sued to recover the amount with interest. G.S. 105-267.

Defendant demurred to the complaint on the ground that it "fails to state sufficient facts to constitute a cause of action." At the March Term, 1957, of the Superior Court of Gaston County the court overruled the demurrer. The defendant then answered the complaint, admitted all the factual allegations and denied only the legal conclusions stated therein. At the May Term, 1957, plaintiff moved for judgment on the pleadings. The motion was allowed and judgment was rendered in favor of plaintiff. Defendant excepted and appealed. On appeal this Court reversed the judgment of the Superior Court but did not dismiss the action. *Distributors v. Shaw, Commissioner of Revenue, supra.* The opinion stated, *inter alia:* "The facts alleged are important in determining the right (to deduct), but of equal or greater importance to that right are facts *not alleged.* (Parentheses ours.) . . . We are not called upon to determine what relief, if any plaintiff might be entitled to upon a further development of the facts."

The case was not again heard in Superior Court until the April Term, 1959. In the meanwhile there was no amendment to the complaint and no motion to amend. When the case was called for trial defendant moved to dismiss the action. The motion was overruled

and defendant excepted. This exception is the basis of the first assignment of error on this appeal.

Defendant's position is stated in his brief as follows: ". . . (T)here having been no motion to amend the complaint and no amendment to the complaint in all of the intervening time (some 17 months), it would seem inescapable that, if plaintiff was not entitled to recover according to the decision of the Supreme Court, the defendant was entitled to have the action dismissed. . . . Appellant contends that the denial of his motion was error as being directly opposed to the decision of the Supreme Court." With this contention we agree.

When the case was here before the only question for decision was whether or not plaintiff was entitled to judgment on the pleadings. Our Court held that it was not.

"A motion for judgment upon the pleadings is in the nature of a demurrer *ore tenus* . . ." North Carolina Practice and Procedure: McIntosh (Second Edition), Vol. 1, section 1261, p. 702. In *Erickson v. Starling,* 235 N.C. 643, 656, 71 S.E. 2d 384, it is said: "A motion for judgment on the pleadings is in the nature of a demurrer. (Citing cases). Its function is to raise this issue of law: Whether the matters set up in the pleading . . . are sufficient in law to constitute a cause of action. . . . (Citing cases). . . . On a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else. (Citing authorities)." A careful reading of the former opinion in this case indicates that the Court considered the motion for judgment on the pleadings a demurrer. It ruled in effect that the complaint was insufficient to support a judgment in favor of plaintiff, but the action was not dismissed. On demurrer an action will not be dismissed unless 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.

In the former opinion this Court declared as a general rule of law that the resulting corporation in a merger may not bring forward as a deduction against net taxable income an economic loss of a constituent corporation. It also indicated that there are exceptions to this general rule. Therefore the action was not dismissed on the possibility that plaintiff, by amendment of the complaint, might bring itself within an exception.

A complaint, to withstand a demurrer *ore tenus* for failure to state a cause of action, must allege ultimate facts sufficient within themselves, if uncontroverted, to support a judgment final or a judgment and inquiry. And if evidence is offered upon trial, it must

conform to the pleadings. Allegations and proof must correspond. *Tarlton v. Keith,* 250 N.C. 298, 306, 108 S.E. 2d 621.

Since the plaintiff in the case *sub judice* did not seek to amend its complaint, it must be presumed that any further ultimate facts it might have alleged would not improve its position. No amount of proof, of whatever kind or nature, could supply the deficiencies of a defective complaint. The court erred in overruling the motion to dismiss.

Even so, plaintiff contends that its understanding and interpretation of the former opinion of this Court in the case at bar is that plaintiff would "be permitted to offer proof . . . in support of the existence of the ultimate facts alleged in the complaint." Therefore, we are constrained to consider this appeal also in the light of the facts stipulated *dehors* the complaint.

After Judge Craven had overruled the motion to dismiss, defendant, without waiving his exception to the overruling of the motion, stipulated the following facts in addition to those alleged in the complaint:

"That prior to the merger each of the constituent corporations and Good Will Distributors (Northern), Inc., were engaged in the distribution of books and Bibles through the media of independent contractors and franchise dealers. They were engaged in the same kinds of business, in fact, in identical businesses but in different territories, with some overlapping in certain of the territories. After the merger the same character of business was conducted in the same territories in which constituent companies had operated prior to the merger.

"The relative net worth of the different corporations on the date of the merger was as follows:

"Good Will Distributors (Northern), Inc., did not close its books. Its earned surplus account as of October 31, 1953, (the end of its first year of operation) showed a deficit of $18,855.06, which as a part of the economic loss carry-over was not disallowed by the State. At the date of the merger Good Will Distributors (Mid-Atlantic), Inc., had a deficit of $7,659.79. At that date, Catholic Books (Northeast), Inc., had a surplus of $8,703.49.

"At the date of the merger there was brought forward from the constituent corporations unrealized profits as follows:

"Catholic Books (Northeast), Inc., $459,042.06;

"Good Will Distributors (Mid-Atlantic), Inc., $169.03;

"Good Will Distributors (Northern), Inc., $35,903.15.

"There was a continuity of ownership and continuance of the same business after the merger in that the same owners or persons held the businesses in the same proportion after the merger as before. The succeeding business was a continuation without change of the merging businesses."

The Court, in its former opinion herein, speaking through *Rodman, J.*, stated the law with logic and clarity as it relates to the merits of this case. We repeat now only so much thereof as is necessary in applying the law to the case as enlarged by the facts stipulated.

The pertinent North Carolina statute provides: "In computing net income there shall be allowed as deductions . . . Losses in the nature of net economic losses sustained in either or both of the two preceding income years arising from business transactions or to capital or property . . . (T)he purpose in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of relief to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income. . . ." G.S. 105-147(6)(d) - now G.S. 105-147(9)(d).

The Congress had previously enacted a similar provision applicable to federal income taxes. That provision has been the subject of many decisions of the United States Courts. In the former opinion of our Court in the instant case there is quotation with approval from *Libson Shops v. Koehler* (1957) 353 U.S. 382, 1 L. Ed. 2d 924, 77 S.C. 990, and with respect thereto our Court said: "We think the reason there assigned for denying the right to deduct is sound and is applicable to the facts of this case." In the *Koehler* case sixteen separate corporations, engaged in the sale of women's apparel at separate locations in two states, merged with plaintiff, a corporation created to provide management services for the sixteen. After the merger plaintiff conducted the entire business as a single enterprise. Prior to the merger the sixteen sales corporations were operated separately and filed separate income tax returns. The stock of all the corporations was owned by the same individuals in the same proportions. After the merger the individuals owned the stock in the resulting corporation in like proportion. The plaintiff, resulting corporation, after the merger, deducted pre-merger operating losses of three constituent corporations from post-merger income of plaintiff. The Commissioner of Internal Revenue disallowed the deductions. The United States Supreme Court said: "We conclude the petitioner is not entitled to a carry-over since the income against which the offset is claimed was not produced by substantially the same businesses which incurred the losses."

We take note here that the Court in the *Koehler* case did not base its decision on the theory that plaintiff was not the "same taxable entity" as those corporations which suffered the loss. It did not reject the separate entity theory in express terms, but chose to place the decision on other grounds. We do not reject that theory. There are situations in which justice may well require its application. But we adhere to the reasoning in the *Koehler* case as the basis for decision in the case before us.

As in the *Koehler* case, Courts, in cases involving carry-forward loss deductions, have been inclined to look beyond the corporate facade and to substance rather than form. The principle is well stated in *Cotton Mills v. Commissioner of Internal Revenue*, 61 F. 2d 291, 293, as follows: ". . . (U)nless the Courts are very careful to regard substance and not form in matters of taxation, there is grave danger on the one hand that the provisions of the tax laws will be evaded through technicalities and on the other that they will work unreasonable and unnecessary hardships on the taxpayer. . . . (Citing cases) . . . To permit the deduction in the consolidated return of affiliates or in the return of a corporation succeeding to their rights by merger would open the door to tax evasion by permitting a corporation with taxable income to escape taxation by the simple expedient of aquiring a business which had sustained losses in past years."

The decision in the *Koehler* case rests on a lack of "continuity of business enterprise." This expression has a definite and well defined meaning. There is continuity of business enterprise when the income producing business has not been altered, enlarged or materially affected *by the merger*. Two cases will illustrate the point. In *Manufacturing Co. v. U. S.*, 233 F. 2d 493, a corporation was engaged in manufacturing fibers. It desired to incorporate in another state to avoid certain provisions of the franchise statute of its home state. A corporation was formed in the other state with an authorized capital stock of 450,000 shares at a par value of $2.50 each. It issued 400 shares to the manufacturing corporation for $1,000.00. The manufacturing corporation then merged with the new corporation, the plaintiff. After the merger plaintiff claimed the right to deduct from net taxable income a pre-merger economic loss sustained by the constituent manufacturing corporation. The Court allowed the deduction on the ground that the resulting corporation, prior to the merger, owned no property except the $1,000.00 and engaged in no business. The income producing business was unchanged by the merger. In substance there was no change in business, only a change in name. In *Cotton Mills v. Commissioner of Internal Revenue, supra*, a corporation was engaged in the textile business. It

suffered a substantial economic loss and could not pay its creditors. A holding company was organized to avert financial disaster. Through this device creditors were induced to take stock in lieu of their claims. The manufacturing corporation was merged into the holding company. The resulting corporation brought forward the pre-merger economic loss of the constituent manufacturing company as a deduction from post-merger net income. This was allowed by the Court. The Court said: "If it had owned any business or property other than the stock and obligations of the (constituent corporation), there would be reason for denying to the corporation resulting from the merger the right to deduct such loss from its income." (Parentheses ours.)

Where there has been a merger of corporations, the resulting corporation may not deduct from its post-merger net income the pre-merger economic loss of its constituent corporations unless there is a "continuity of business enterprise" as above defined.

In the judgment in the instant case the court concluded that there was continuity of business enterprise and said ". . . such continuing business entity is entitled and permitted to carry over the net economic loss of the merged corporation as a deduction . . .." The facts do not support this conclusion. It is true that the constituent corporations, before the merger, and the resulting corporation, after the merger, engaged in sales and distribution of Bibles, books and literature of the same type and kind, the resulting corporation conducted business in the same territory as had the three constituent corporations before the merger, the resulting corporation had the same stockholders as the constituent corporations before the merger and the stockholders owned stock in the same proportion as before. But this does not constitute "continuity of business enterprise" according to the meaning of that term as applied in such cases.

The facts in this case are analagous with those in the *Koehler* case. Before the merger the three corporations operated in separate territories, though somewhat overlapping, made separate incomes and filed separate income tax returns. By virtue of the merger a larger and more expanded business came into being and included all of the former income producing businesses. There was no continuity of the business of either of the constituent corporations. By reason of the merger a new and more extensive enterprise has emerged. This new enterprise did not suffer the loss and cannot claim a deduction therefor.

As was said in the former opinion of this Court in the instant case, the enactment of loss carry-over legislation by the General Assembly was purely a matter of grace. The provision should not be

"construed to give a 'windfall' to a taxpayer who happens to have merged with other corporations." Its purpose "is not to give a merged taxpayer a tax advantage over others who have not merged." *Libson Shops v. Koehler, supra.*

The judgment below is reversed and plaintiff's action is dismissed.

Reversed and action dismissed.

HIGGINS J., not sitting.

KING GODDARD v. BLANCHE WILLIAMS.

(Filed 4 November, 1959.)

1. Automobiles §§ 30, 46—

Where there is testimony that the accident in suit occurred along a highway in a thickly populated area with residences and business establishments fronting thereon, at least some residences being side by side, the court is required to submit to the jury the question of whether the area was a residential district as defined by G.S. 20-38 (w)(1), and an instruction to the effect that there was no evidence that the area was a residential district and that the speed limit of 55 m.p.h. applied to automobiles traveling therein, must be *held* for error.

2. Automobiles § 31—

While G.S. 20-145 exempts a police officer from observing the speed limit set out in G.S. 20-141 when such officers is in the performance of his duties in apprehending a violator of the law or a person charged with or suspected of such violation, such police officer is nevertheless required to operate his vehicle with due regard to the safety of others, and must exercise that degree of care which a reasonably prudent man would exercise under like circumstances in the discharge of such duties.

3. Same: Automobiles § 46— Instruction on exemption of police officer from speed restrictions held erroneous.

An instruction to the effect that a police officer engaged in the discharge of his duties in an effort to apprehend a person charged with or suspected of violation of law, would not be liable to the fleeing person for injury resulting from a collision unless the conduct of the officer was wilful and wanton or the injuries were intentionally inflicted when they could have been avoided, must be *held* for prejudicial error, even though mere speed alone under such circumstances, unaccompanied by any recklessness or disregard of the rights of others, would not support an allegation of negligence on the part of the officer.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *McLean, J.*, March-April Civil Term, 1959, of CLEVELAND.

The plaintiff instituted this action to recover damages for personal injuries and property damage allegedly growing out of a collision between plaintiff's Chevrolet automobile and the Chevrolet automobile of the defendant, which occurred about 9:30 p.m. on 19 April 1958.

Plaintiff alleged in his complaint that he was traveling west in his automobile on Grover Street, on the above date, in the City of Shelby, and was approaching a point on the street near Harmon's Grocery; that as he approached the driveway of Harmon's Grocery, he gave a left turn signal, indicating his intention to turn left into said driveway, and upon reaching the point where the driveway intersects with Grover Street he did in fact begin to make a left turn into the said driveway; that the defendant in his automobile approached the rear of plaintiff's automobile at a high and unlawful rate of speed and began passing the plaintiff's car without giving any signal whatsoever, and that as a result thereof a collision occurred when the right front of defendant's automobile rammed into the left side of plaintiff's automobile.

The plaintiff further alleged that the defendant operated his automobile at a speed greater than was reasonable and prudent, considering the fact that he was driving on a heavily traveled street in the City of Shelby in an area that was predominantly residential but which also contained business establishments, including Harmon's Grocery, all of which was known to the defendant; that the defendant operated his automobile upon said street at the time and place in question at a highly dangerous and unlawful rate of speed; that he was driving approximately 70 miles per hour in a 35-mile zone, contrary to the laws of the State of North Carolina and the ordinances of the City of Shelby, etc.

The defendant filed an answer and denied the plaintiff's allegations of negligence on his part and set up a cross-action alleging that, the collision was the result of the plaintiff's negligence; that he (the defendant) was a deputy sheriff of Cleveland County and was required to furnish his own automobile and at the time of the collision was pursuing the plaintiff who, he alleged, had failed to stop at a stop sign as he entered Highway No. 18 from the Ross Grove Church Road, north of Shelby; that Grover Street is a part of said highway; that with his siren blowing and red light burning, the defendant approached the plaintiff and undertook to pass him when the plaintiff, without warning and without giving any signal, suddenly turned his automobile into the path of the defendant's car, causing defendant's car to strike plaintiff's car broadside and as a result

of the collision the defendant's automobile was damages and destroyed and the defendant seriously injured.

Upon the evdience adduced in the trial below, the jury returned a verdict giving the defendant damages for personal injuries and property damage. From the judgment entered on the verdict, the plaintiff appeals, assigning error.

C. C. Horn, J. A. West for plaintiff.
Falls, Falls & Hamrick for defendant.

DENNY, J. The plaintiff bases his assignment of error No. 6 on exceptions Nos. 7 and 9, and assignment of error No. 10 on several exceptions, including No. 13, to those portions of the charge set out below. The court, after reading section 20-141 of General Statutes to the jury, charged the jury as follows: "Now, the court charges you that at the time and place in question that there is no evidence here that it was a residential district, and the court charges you that under the evidence in this case that the speed limit at the time and place in question for passenger cars — and it is admitted that both of these were — was 55 miles per hour." Exception No. 7.

The court then charged the jury, "Now, with reference to the defendant, if you shall find from this evidence and by its greater weight that he was in the performance of his duty, then the court charges you this speed limit has no application but it will be governed by Section 20-145, which reads as follows: 'The speed limits set forth in this article shall not apply to vehicles when operated with due regard to safety under the direction of the police in the chase or apprehension of violators of the law, or of persons charged with or suspected of any such violation. This exemption, however, shall not protect the driver of any such vehicle from the consequences of a reckless disregard of the safety of others.' "

The court, after giving further instruction on the last quoted statute, followed it with this instruction: "Now, the court further charges you that if you find from this evidence that he was not so operating his automobile at the time and place in question in the performance of his legal duties, then the court charges you that the speed limit of 55 miles would apply, and a violation of that speed limit would constitute negligence on the part of the defendant." Exception No. 9.

The evidence seems to support the view that it is some six or seven hundred feet or more from All-Day Barbecue on Grover Street to Harmon's Grocery, where the collision occurred. The defendant

testified: "That's a community there (speaking of the scene of the accident), thickly populated. There's houses there, right near the hospital, and there are several stores there. * * * It's a thickly populated area from the * * * All-Day Barbecue * * * to Harmon's Store, there's houses. Hudson Hosiery Mill * * * Carolina Dairy * * * Bridges Barbecue * * *. There's houses all along there and business establishments."

Officer J. W. Norman, who was riding with the defendant at the time of the collision, testified: "That was a residential zone. There's houses side by side on (sic) along from the All-Day (Barbecue) on down to that point (where the collision occurred). There are several businesses along there. In fact two or three where the collision occurred * * *. We were in a residential neighborhood, and there is a lot of business."

We think the evidence with respect to the character of the area in which the collision occurred is sufficient to require its submission to the jury and from which the jury might infer and find that the collision occurred in a residential district, as defined by the statute, G.S. 20-38 (w) (1), which reads as follows: "Residential District.—The territory contiguous to a highway not comprising a business district, where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business purposes." *Cf. Medlin v. Spurrier & Co.*, 239 N.C. 48, 79 S.E. 2d 209 and *Hinson v. Dawson*, 241 N.C. 714, 86 S.E. 2d 585.

If the jury should find from the evidence that the collision occurred in a residential district, then the plaintiff would be entitled to have the jury consider the conduct of the defendant in light of the character of the area in which he was driving, whether he was subject to the provisions of G.S. 20-141 or G.S. 20-145. The defendant testified that he was driving his car when he was within 25 feet of the point of the collision at a speed of 70 miles per hour. There was other evidence, however, to the effect that the defendant was driving 80 to 90 miles an hour at the time of the collision. The evidence was likewise conflicting as to the speed of the plaintiff's car at the time of the collision. The defendant testified that the plaintiff was traveling 70 miles per hour. The plaintiff testified he was traveling only 25 miles an hour, and offered other testimony to the effect that after giving a left turn signal, he started to make the left turn while traveling 15 to 20 miles per hour.

The portion of the charge challenged by exception No. 13 under assignment of error No. 10 is as follows: "Now, the defendant further says and contends that you should find that the defendant not

only was not violating any of the negligence allegations made by the plaintiff, but to the contrary, that upon this first issue that when you weigh and consider and compare it that you should find actually that the plaintiff was operating his automobile in order to guard and to hinder and to delay the police officers in the proper discharge of their duty. The court charges you if you should find such to be true from the evidence and by the greater weight, the burden being upon the defendant to so satisfy you, the court charges you that the defendant would not be liable upon any aspect of negligence unless you go further and find that regardless of the operation of the vehicle of the plaintiff — whether it was criminal at the time and in violation of the law — that the conduct of the officer was wilful, and wanton, that is, that it was intentional, purposeful, and made for the purpose of injuring the plaintiff in his person or property when it could have been avoided."

In 47 Am. Jur., Sheriffs, Police, and Constables, section 42, page 851, it is said: "A peace officer is generally held to be personally liable for negligence or wrongful acts causing personal injury or death. He has no right needlessly or wantonly to injure in any respect persons whom he is called on to arrest or detain, and for the infliction of any such injury he is liable to the injured person, in the same manner and to the same extent as private individuals would be. * * *"

Likewise, in 60 C.J.S., Motor Vehicles, section 375, page 929, it is also said: "The fact that a police vehicle is exempt from the operation of traffic regulations or enjoys certain prior rights over other vehicles does not permit the operator of such vehicle to drive in reckless disregard of the safety of others; nor does it relieve him from the general duty of exercising due care."

In the case of *Glosson v. Trollinger*, 227 N.C. 84, 40 S.E. 2d 606, the plaintiff a deputy sheriff, instituted the action to recover for injuries sustained in a collision between his automobile and a truck. The evidence tended to show that the deputy sheriff, after the truck passed him on the highway, followed the truck on wet, slippery pavement, in a residential district in the City of Burlington, at a speed in excess of 40 miles per hour; that as the plaintiff started to pass the truck for the purpose of stopping it and warning or arresting the driver for speeding, there was another car approaching from the opposite direction so he dropped back behind the truck and then hit the back of the truck when the truck was suddenly stopped without warning or signal of any kind. The evidence disclosed that a car stopped immediately in front of the truck causing the truck driver to stop suddenly and without having time to give any signal. Issues of

negligence and contributory negligence were submitted, both of which were answered in the affirmative. The plaintiff appealed, contending that under G.S. 20-145 it was error to sumit the issue of contributory negligence. This Court held the issue was properly submitted and that there was no error in the charge. An examination of the charge reveals that the plaintiff officer was given full benefit of the provisions of G.S. 20-145 and that the plea of contributory negligence was based on allegations to the effect that the plaintiff, at the time of the collision, was operating his car "at a high and unlawful rate of speed and in reckless disregard of the safety of others."

G.S. 20-145 exempts a police officer from observing the speed limit set out in G.S. 20-141 when such officer is operating an automobile "in the chase or apprehension of a violator of the law or persons charged with or suspected of any such violation." Even so, the speed law exemption is effective only when the officer operates his car "with due regard to safety" and does not protect him "from the consequences of a reckless disregard of the safety of others."

There is no exemption granted by G.S. 20-145 from reckless and negligent conduct by an officer unless such reckless and negligent conduct is wilful and wanton, intentional and purposeful, and made for the purpose of injuring the person the officer was seeking to arrest. In such situation, an officer is liable for his negligent acts as well as for his wilful and wanton acts. However, if the jury should find that the defendant was engaged in his official duties at the time of the collision and that the plaintiff was engaged in an effort to evade arrest, knowing that the defendant was chasing him, mere speed alone, unaccompanied by any recklessness or disregard of the rights of others, would be insufficient to support an allegation of negligence on the part of the defendant. *La Marra v. Adam,* 164 Pa. Super. 268, 63 A 2d 497; *American Motorists Ins. Co. v. Rush,* 88 N.H. 383, 190 A 432; *McKay v. Hargis,* 351 Mich. 409, 88 N.W. 2d 456; *Goldstein v. Rogers* (Cal. App.), 208 P 2d 719; *Cavey v. City of Bethlehem,* 331 Pa. 556, 1 A 2d 653.

In *McKay v. Hargis, supra,* the plaintiff, an officer, brought an action to recover for injuries sustained when his car went out of control and struck a tree while he was chasing a traffic violator. The Court cited *Edberg v. Johnson,* 149 Minn. 395, 184 N.W. 12, and quoted from the opinion in that case as follows: "We do not hold that an officer, when in pursuit of a lawbreaker, is under no obligation to exercise a reasonable degree of care to avoid injury to others who may be on the public roads and streets. What we do hold is that, when so engaged, he is not to be deemed negligent merely because he

fails to observe the requirements of the Motor Vehicles Act. His conduct is to be examined and tested by another standard. He is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances." The Michigan Court then said: "We know of no better standard by which to determine a claim of negligence on the part of a police officer than by comparing his conduct * * * to the care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances."

In our opinion, the plaintiff is entitled to a new trial and it is so ordered.

New trial.

HIGGINS, J., not sitting.

CHARLES L. MELTON v. EDGAR A. HILL; FRED O'DANIEL; TORRENCE EDGAR CORRELL; TRUCK DRIVERS UNION, AFL No. 71, ALSO KNOWN AS AND BEING DRIVERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS, LOCAL No. 71, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AN UNINCORPORATED ASSOCIATION; AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS, OF AMERICA OF WASHINGTON, D. C., AN UNINCORPORATED ASSOCIATION.

(Filed 4 November, 1959.)

1. Associations § 5: Process § 11—

G.S. 1-97(1) applies exclusively to service of process in actions against corporations, and service of process on a nonresident labor union by service in this State upon an individual not appointed a process agent of the union is ineffectual.

2. Associations § 5—

An unincorporated association, at common law, could not sue or be sued as a legal entity, but the common law in this respect has been modified by G.S. 1-97(6) and G.S. 1-69.1.

3. Associations § 5: Process § 11—

G.S. 1-69.1 makes no provision for the service of process on an unincorporated association but provides solely that such association may sue or be sued in its common name and that execution against it should bind its real and personal property in like manner as if it were incorporated, and the provisions of G.S. 1-97(6) as to service on unincorporated associations applies alike to resident and nonresident associations.

4. Same—

G.S. 1-97(6) authorizes service of process on the Secretary of State only if defendant unincorporated association fails to appoint a process agent and fails to certify the name and address of such process agent as prescribed therein, but the statute does not require that such association file with the Secretary of State the name and address of its process agent in this State, and, therefore, a ruling based on the assumption that the statute requires such association to file such information with the Secretary of State is made upon a misapprehension of the applicable law, necessitating a remand of the cause.

HIGGINS, J., not sitting.

APPEAL by defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, from *Craven, Special Judge,* December 1, 1958 Special Civil Term, of MECKLENBURG.

Plaintiff instituted this action against the three individuals and the two unincorporated associations named in the caption to recover damages for personal injuries allegedly caused by wilful and malicious assault.

The individual defendants were duly served with process and have appeared generally herein. They are not parties to this appeal.

Each of the two unincorporated associations, under special appearance, moved to dismiss the action as to it "because this Court does not have jurisdiction of the person of said defendant, there having been no lawful service of lawful process upon said defendant, and any other person served not being a process agent of the defendant"; and each defendant requested the court "to find the facts upon which the Court bases its ruling as to it upon this motion, and also to rule upon its constitutional rights under the Due Process Clause of the Fourteenth Amendment of the U. S. Constitution herein raised."

The motion of defendant Truck Drivers Union, AFL #71, *etc.,* was allowed; and the action, as to this defendant, was dismissed. (Note: As to this defendant, the only process was a summons issued February 6, 1958, by the Clerk of Superior Court of Mecklenburg County, addressed to the sheriff of said county, served February 7, 1958, according to the sheriff's return, "by delivering a copy of the within summons and a copy of the complaint to each of the following defendants: Edgar A. Hill, Sec. & Treas. AFL #71.")

The court, based upon findings of fact and upon the legal conclusion that there had been "lawful service of lawful process" upon defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, entered an order denying the motion of this defendant, and providing that this defendant "shall have 30 days from the date of this Order in which to further plead as pro-

vided by law." Appellant excepted, with particularity, to each finding of fact and conclusion of law, and appealed, under G.S.1-134.1, from this order.

Robert Cahoon for defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, appellant.
No counsel contra.

BOBBITT, J., Plaintiff alleged: ". . . the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, of Washington, D. C., is an unincorporated association of the type commonly referred to as an international labor union . . ."

Two summonses, for service on appellant, were issued February 6, 1958, by the Clerk of the Superior Court of Mecklenburg County, one addressed to the Sheriff of Mecklenburg County and the other addressed to the Sheriff of Wake County. The Mecklenburg summons was served February 11, 1958, according to the sheriff's return, "by delivering a copy of the within summons and a copy of the complaint to each of the following defendants: A. L. Gunther, Trustee or Agent for the collection of money for International Brotherhood of Teamsters." The Wake summons was served February 10, 1958, according to the sheriff's return, "by leaving two copies of the within summons, two copies of the complaint, together with the fee of $1.00, in the hands of Thad Eure, Secretary of State of North Carolina, process agent for the defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America of Washington, D. C."

The court's findings of fact include the following:

"6. That at the time the Summons herein was served upon A. L. Gunter, the said A. L. Gunter had been duly appointed Trustee of said Local #71 by said International Brotherhood under the provisions of said Constitution and that said A. L. Gunter, as Trustee, was in complete control and supervision of all the assets and affairs of said Local #71 as the agent and representative of the defendant International Brotherhood.

". . .

"9. That each of said defendant unincorporated associations, at all times material hereto, was thus performing in this State the acts or some of the acts for which they were formed.

"10. That defendant International Brotherhood unincorporated association had not appointed a process agent in the State of North Carolina on or before February 10, 1958.

"11. That service of summons was made upon the Secretary of State of North Carolina as process agent for the defendant International Brotherhood on February 10, 1958, and that at that time said International Brotherhood was the only governing agency of said Local #71, said Local #71 being incapable of self-government because under the trusteeship of A. L. Gunter as set forth above."

The finding of fact that appellant had not appointed a process agent in the State of North Carolina on or before February 10, 1958, negatives any inference that it had appointed Gunter as such process agent. As to the service of the Mecklenburg summons on Gunter, see *Stafford v. Wood,* 234 N.C. 622, 68 S.E. 2d 268. It is noted that G.S. 1-97(1) applies exclusively to service of process in actions *against corporations.*

The record indicates that Judge Craven's order was based on the service of process on the Secretary of State.

An unincorporated association, at common law, could not sue or be sued as a legal entity. *Youngblood v. Bright,* 243 N.C. 599, 91 S.E. 2d 559, and cases cited. The pertinent statutory modifications of this common law rule are G.S. 1-97(6) and G.S. 1-69.1.

In *Stafford v. Wood, supra,* this Court, referring to G.S. 1-97(6), said: "(1) It provides that any unincorporated association or organization, whether resident or nonresident, which is doing business in North Carolina by performing any of the acts for which it is formed, is subject to suit as a separate legal entity; and (2) it prescribes the manner in which service of process is to be made upon such association or organization when it is so sued."

In *Stafford v. Wood, supra,* and *Youngblood v. Bright, supra,* orders denying motions to dismiss, made under special appearance, were held erroneous in the absence of evidence and findings of fact relevant to whether the defendant (unincorporated) labor union was doing business in North Carolina by performing in this State any of the acts for which it was formed. These cases were commenced prior to the effective date (July 1, 1955) of Chapter 545, Session Laws of 1955, now G.S. 1-69.1.

G.S. 1-69.1 provides, in pertinent part, that unincorporated associations, foreign or domestic, "may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. Any judgments and executions against any

such association, organization or society shall bind its real and personal property in like manner as if it were incorporated."

No provision of G.S. 1-69.1 purports to prescribe the manner in which service of process is to be made on such unincorporated association. The only statute prescribing the manner in which such service may be made is G.S. 1-97(6).

In *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 98 S.E. 2d 852, the court, after hearing evidence relevant thereto, denied the "motion to dismiss and special demurrer" made, under special appearance, by the defendant (unincorporated) labor unions. This Court held: ". . . in the absence of a request that findings of fact be made, 'it is presumed that the Judge, upon proper evidence, found facts to support his judgment.' *Holcomb v. Holcomb,* 192 N.C. 504, 135 S.E. 287." It is noted: There was evidence that defendant had failed to appoint any process agent. The defendant had its headquarters in Forsyth County, North Carolina. Pending decision, the records of Forsyth County were searched; and it was determined that defendant had not designated any person as process agent.

In *Martin v. Brotherhood,* 248 N.C. 409, 103 S.E. 2d 462, the defendant (unincorporated) labor union, under special appearance, moved to dismiss the action against it and asked the court to find the facts upon which it based its ruling on the motion. The court "found no facts on this motion to dismiss, and thereby committed error."

While references to G.S. 1-97(6) appear in our decisions, this Court has not passed upon the question now presented, *viz.*:

Where a nonresident unincorporated association is doing business in this State by performing in this State any of the acts for which it is formed or organized, does G.S. 1-97(6) authorize service of process on it by service thereof on the Secretary of State on proof that such association has not filed *with the Secretary of State* the name and address of the process agent in this State whom it has appointed and upon whom all processes against it may be served?

G.S. 1-97(6), in pertinent part, provides: "6. Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this State by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this State upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail

to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the Secretary of State of the State of North Carolina. Upon such service, the Secretary of State shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the Secretary of State, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization."

G.S. 1-97(6) applies, without distinction, to both resident and nonresident unincorporated associations. It authorizes service of process on the Secretary of State if such unincorporated association fails to appoint a process agent or fails to certify the name and address of such process agent as prescribed therein. If it complies with the statutory requirements, service of process against it must be made on its designated process agent. It complies with the statutory requirements if and when (1) it appoints an agent in this State upon whom all processes and precepts against it may be served and (2) certifies to the clerk of the superior court of each county in which it performs any of the acts for which it is organized the name and address of such process agent.

As to whether appellant had complied with the said requirements of G.S. 1-97(6), the only evidence is a certificate of the Honorable Thad Eure, Secretary of State. He certified: ". . . upon an inspection of the records of my office, I find no record of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America having appointed a process agent in the State of North Carolina as of February 10, 1958."

No provision of G.S. 1-97(6) requires such unincorporated association to certify the name and address of such process agent to the Secretary of State or to file any notice of any kind in the office of the Secretary of State.

While appellee makes no appearance in this Court, by brief or otherwise, it is noted that the Wake summons recites that service thereof is to be made on the Secretary of State "as provided by G.S. 1-69.1, G.S. 55-144, and G.S. 55-146." G.S. 55-144 and G.S. 55-146 apply exclusively to foreign corporations. Whether analogous statutes, applicable to nonresident unincorporated associations, should be enacted, is for legislative determination.

The evidence does not disclose whether appellant failed to certify

to the clerk of the superior court in any county in which it performed any of the acts for which it was organized the name and address of a process agent appointed by it. Apparently, no inquiry was made as to this material fact. Rather, our impression is that the court's ruling was based upon the view that the failure of appellant to certify to or file with the Secretary of State the name and address of such process agent constituted a sufficient basis for service of process on the Secretary of State. Hence, the court acted under a misapprehension of the law as to this feature of the case. *Youngblood v. Bright, supra,* and cases cited.

For the error indicated, the order denying appellant's motion to dismiss is vacated; and, in the circumstances, it is deemed appropriate that the cause be remanded for a hearing *de novo* on appellant's said motion. It is so ordered. Hence, we do not pass upon appellant's exceptions to findings of fact bearing upon whether appellant, at all times material, was performing in this State the acts or some of the acts for which it was formed.

Error and remanded.

HIGGINS, J., not sitting.

PAUL HARDIN, JR., PLAINTIFF v. EDGAR A. HILL; FRED O'DANIEL; TORRENCE EDGAR CORRELL; TRUCK DRIVERS UNION, AFL No. 71 ALSO KNOWN AS AND BEING DRIVERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS, LOCAL No. 71, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AN UNINCORPORATED ASSOCIATION; AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA OF WASHINGTON, D. C., AN UNINCORPORATED ASSOCIATION, DEFENDANTS.

(Filed 4 November, 1959.)

APPEAL by defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, from *Craven, Special Judge,* December 1, 1958 Special Civil Term, of MECKLENBURG.

Robert Cahoon for defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, appellant.
No counsel contra.

PER CURIAM. This appeal is from an order denying appellant's

motion, under special appearance, to dismiss the action for lack of jurisdiction of the person. It presents the questions decided in *Melton v. Hill, ante,* 134; and on authority thereof the order is vacated and the cause is remanded for a hearing *de novo* on appellant's said motion.

Error and remanded.

HIGGINS, J., not sitting.

STATE v. JAMES FRANK GREEN.

(Filed 4 November, 1959.)

1. Automobiles § 68a—

Construing G.S. 20-138 and G.S. 20-38(h) together *in pari materia* it *is held,* a farm tractor, when operated upon a highway is a vehicle within the meaning of G.S. 20-138.

2. Automobiles § 72—

The evidence in this case *is held* amply sufficient to take to the jury the question of defendant's guilt of operating a farm tractor upon a public highway of this State while defendant was under the influence of intoxicating liquor.

3. Automobiles § 2: Criminal Law § 135—

The power to revoke or suspend an automobile driver's license rests solely with the Department of Motor Vehicles, and although the Superior Court may, with defendant's consent, express or implied, suspend execution of a judgment in a criminal prosecution upon condition that defendant not operate a vehicle upon the public highways for a stipulated period, the court may not do so over the express objection of the defendant. Chapter 1017, Session Laws 1959, (G.S. 15-180.1) enabling a defendant to appeal from a suspended sentence without waiving his acceptance of the terms of suspension is noted.

HIGGINS, J., not sitting.

APPEAL by defendant from *Morris, J.,* at June 1959 Term, of LENOIR.

Criminal prosecution upon a warrant issued out of and returnable to Municipal County Court of Lenoir County, North Carolina, charging that within the jurisdiction of the Municipal-County Court of the city of Kinston, and county of Lenoir, North Carolina, on or about the 19th day of March, 1959, James Frank Green violated General Statutes of North Carolina, 1943, Section 139 as amended, in that he unlawfully and willfully did operate a motor vehicle on the public roads while under the influence of intoxicating liquors, opiates, or

narcotic drugs. (Second count violation of City Code not here involved).

Plea: Not guilty.

After hearing the evidence in the case the Recorder finds defendant guilty as charged and adjudges that he pay a fine and costs. Defendant appeals to Superior Court. Again defendant pleads not guilty. And the record of case on appeal shows that before the offering of evidence defendant moved the court to dismiss the action for the reason that the drunken driving statute does not include such vehicles as farm tractor. The court held that the statute does include such vehicles as farm motor-driven tractors. Defendant excepts and this is defendant's exception #1.

And upon trial in Superior Court the State offered pertinent testimony of certain witnesses:

Joseph T. Haley, Chief of the Kinston Fire Department, testified substantially as follows: " * * * I saw the defendant James Frank Green on or about the 19th day of March 1959 * * * about 6:35 or 6:40 P.M., on the corner of South Tiffany and Oak Streets. We received a call for * * * a fire. When I came up, the fire truck was parked in the middle of the intersection of Oak and Tiffany. I went to the fire and when I came back the tractor was in motion going around the front of the fire truck. Officer Durwood Smith was on the corner. Mr. Merritt was on duty at the time Green was brought in. They took him off the tractor and brought him where I was. He had a strong odor of alcohol on his breath and his walk was not normal. He was in a staggering condition. He was under the influence of alcohol. I saw him operating the tractor. He was driving the tractor * * * approximately forty minutes later I saw the defendant at the Police Station."

Then on cross-examination the witness continued in pertinent part: " * * * I first saw him when I heard hollering that he was coming around the front of the truck * * * I saw him driving 40 or 50 feet * * *."

The police officer Dewey Merritt testified for the State: " * * * I was at the desk on duty when defendant came to the Police Station with officer Smith. I had a conversation with him for approximately 35 or 40 minutes. He had a heavy odor of intoxicant about his person and he was under the influence of some intoxicating beverage. He was quite unsteady on his feet and he talked the way a person would that had been drinking. He had difficulty telling me where he lived and what he had done * * * My opinion was that he was appreciably under the influence of alcohol."

Then on cross-examination this witness continued in pertinent part: "He was unsteady on his feet. His speech was somewhat impaired but not too much * * *."

And on re-direct examination the witness testified: "The best of my recollection it was * * * (a) tractor with a set of cutting discs on the back. I would say it was a cub tractor. It is commonly known as a farm tractor."

The State rested.

Defendant testified in his own behalf in pertinent part: " * * * I had been cutting lots for people * * * There was a fire next door to my house, so I tried to rush home as quick as I could. When I got to the corner I saw that the fire was just about out. I intended to twist behind the truck and got a little too close * * * the officer told me to stop and get down. When I went to him, he said I was drunk * * * ." Then on cross-examination the witness continued: " * * * I come from cutting a large lot. It was about four blocks from my house. I came down the street and stopped until the corner was unblocked * * * That was my tractor * * *."

Defendant then rested and moved for judgment as of nonsuit and a directed verdict of not guilty. Motion was denied. Defendant excepts. This is defendant's exception #2.

The case was submitted to the jury under the charge of the court.

Verdict: Guilty.

Judgment: Confinement in common jail of Lenoir County for a term of four months and assigned to work under the supervision of the State Prison Department,—sentence suspended for a period of twelve months upon condition that he be of good behavior; violate no law in North Carolina and not operate a motor vehicle upon the public highways for twelve months.

Defendant appeals and assigns error.

Attorney General Seawell, Assistant Attorney General H. Horton Rountree for the State.

McKinley Battle, Franklin M. Moore, Earl Whitted, Jr., for defendant, appellant.

WINBORNE, C. J. Defendant, appellant, first and foremost stresses for error the denial of his motion for judgment as of nonsuit when he rested his case. In this connection, and as part ten of Article 3 of the Motor Vehicle Act of 1937 as amended pertaining to the operation of vehicles and rules of the road, the General Assembly has provided in G.S. 20-138 that it shall be unlawful and punishable, as pro-

vided in G.S. 20-179, for any person, whether licensed or not, who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon the highways within the State.

And this Court held in *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688, and by subsequent uniform decision, that a person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of G.S. 20-138, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.

Moreover as a general provision of part one of Article 3 of the Motor Vehicle Act of 1937, G.S. 20-38, the General Assembly has defined certain words and phrases, including the phrase "farm tractor" and the word "vehicle." "Farm tractor" is defined as "every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry." And the word "vehicle" is defined as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon fixed rails or tracks * * *."

Construing these two definitions together *in pari materia,* that is, upon the same matter or subject, it is apparent that the General Assembly intended that, while farm tractors are motor implements of husbandry as set forth in the definition, they are vehicles within the meaning of the statute, G.S. 20-138, when operated upon a highway by one under the influence of intoxicating liquor or narcotic drugs.

Now testing the evidence in instant case by these principles, it is sufficient to take the case to the jury and to support a verdict of guilty beyond a reasonable doubt of the offense charged. Hence the case was properly submitted to the jury.

Next the defendant by exceptions 15 and 16 designated Group IV, challenges the authority of the trial judge to suspend the sentence imposed without his consent, express or implied. In this connection decisions of this Court hold that the State Department of Motor Vehicles has exclusive authority to issue, suspend and revoke, under conditions prescribed by the General Assembly, licenses to operate motor vehicles on the public roads. See *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203; also *Harrell v. Scheidt, Com'r. of Motor Vehicles,* 243 N.C. 735, 92 S.E. 2d 182.

In the *Cole* case, *supra,* in opinion by *Bobbitt, J.,* it is said that "When a person is convicted of a criminal offense, the court has no

authority to pronounce judgment suspending or revoking his operator's license or prohibiting him from operating a motor vehicle during a specified period," citing cases.

And as stated hereinabove, the General Assembly has provided in G.S. 20-138 that it shall be unlawful and punishable, as provided in G.S. 20-179, for any person, whether licensed or not, who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon the highways within the State. And it is provided in G.S. 20-179 in pertinent aspect that every person who is convicted of violating G.S. 20-138 relating to driving while under the influence of intoxicating liquor or narcotic drugs, shall for the first offense be punished by a fine of not less than one hundred dollars or imprisoned for not less than thirty days, or both such fine and imprisonment, in the discretion of the court. No express authority is granted for suspending the sentence or for attaching conditions to the judgment. Therefore the judgment pronounced must consist of a fine or imprisonment or both. *S. v. Cole, supra.* Nevertheless, courts having jurisdiction may pronounce judgment as by law provided; and then, with the defendant's consent, express or implied, suspend execution thereof upon prescribed terms as authorized by statute G.S. 15-197. See *S. v. Cole, supra,* citing *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143, and cases there cited.

In the instant case it is conceded in the brief of the Attorney General that the record does not disclose such consent. But the record does show that defendant excepted to the judgment, specifically objecting to the suspension of the sentence, and gave notice of appeal to Supreme Court.

Here it is appropriate to note the General Assembly by 1959 Session Laws, Chapter 1017, codified as G.S. 15-180.1 has declared that "In all criminal cases in the inferior and in the Superior Courts of this State a defendant may appeal from a suspended sentence under the same rules as from any other judgment in a criminal case," that "the purpose of the act is to provide that by giving notice of appeal the defendant does not waive his acceptance of the terms of suspension of sentence," and that "instead by giving notice of appeal the defendant takes the position that there is error in law in his conviction."

This act became effective on ratification 16 June 1959. And the minutes of Superior Court of Lenoir County show, according to certificate of Clerk of Superior Court, treated as return to writ of *certiorari,* issued by this Court *ex mero motu,* that the June Term 1959 of Superior Court of Lenoir County convened on Monday, 15 June

1959, and adjourned on Saturday, 20 June 1959, and that the judgment against defendant, from which this appeal is taken, was pronounced on Thursday, 18 June 1959. Hence the act was in force and applicable to case in hand.

Thus it is clear that the judge of Superior Court, without the consent of defendant, was without authority to enter the judgment below. Hence the judgment is stricken and the case remanded for proper judgment.

As to other assignments of error, they have been given due consideration and error in them is not made to appear.

Error and remanded.

HIGGINS, J., Not sitting.

J. W. CALLAHAM, TRUSTEE v. BERT S. NEWSOM.

(Filed 4 November, 1959.)

1. Trusts § 10—

The courts will construe a trust agreement to ascertain the intent of the parties from the language used in the agreement, the purposes sought to be accomplished, and the situation of the several parties to or benefited by the trust, and will give effect to such intent unless forbidden by law.

2. Trusts § 15—

The delegation of power to a trustee to withhold and accumulate the income from the trust property necessarily implies the power and duty to invest such accumulations.

3. Trusts § 20a— Trust held to empower trustee to sell for reinvestment after death of trustor.

The trust agreement in suit authorized the trustee to sell and reinvest the trust property, and directed him to pay the income therefrom to the trustor during his life, and further directed that at the trustor's death the corpus of the trust should be divided into thirteen parts for specified beneficiaries, with power in the trustee to pay to the beneficiaries their respective shares of the income or, in the trustee's discretion, to withhold and accumulate the income. *Held:* The power of the trustee was enlarged upon the death of the trustor, and power to sell for reinvestment was not terminated by the death of the trustor but continued for the purpose of managing the trust property to the advantage of the ultimate beneficiaries, and the trustee had power to sell the corpus of the estate for reinvestment.

4. Same—

Where the trust conveys the entire capital stock of a corporation to

a trustee with power to sell the corpus of the estate for reinvestment, the power to sell for reinvestment is not terminated by the dissolution of the corporation and the transfer to the trustee of the legal title to the real estate to the trustee as a liquidated dividend for the stock.

HIGGINS, J., not sitting.

APPEAL by defendant from *Clarkson, J.*, June 1, 1959 Schedule "A" Term, of MECKLENBURG.

This is an action to recover damages resulting from an asserted wrongful refusal to purchase and pay for a lot in the City of Charlotte.

The parties waived jury trial. The court found Carl K. Callaham, on 4 August 1952, transferred to and deposited with plaintiff fifty shares of Lilly White Farms, Inc., for the following uses and purposes:

"1. The Trustee shall hold and own said shares of stock with full power and authority to sell the same and to reinvest the proceeds and, in general, to hold and manage said shares and/or the proceeds that may be received upon the sale or transfer of the same by him, free and clear of any claims or demands on the part of the Grantor, who, by this instrument, does hereby part with any interest in or claim of ownership of said shares or the proceeds of any sale or transfer thereof, except as hereinafter expressly set forth.

"2. The Trustee shall collect and receive any dividends paid on said shares and collect and receive any income or profits from the reinvestment of the proceeds in the event of a sale or transfer of said shares, and, after paying the expenses incident to the administration of this trust, including his reasonable commissions for acting as Trustee, he shall disburse said dividends, income, or profit as follows:

"(a) During the lifetime of the Grantor, the Trustee shall pay the net income from the corpus of this trust over to the Grantor at such reasonable periods of time as may be found practicable.

"(b) After the death of the Grantor, the Trustee shall divide the corpus of this trust estate into 13 parts, whatever may then be the nature and character of the property or properties then comprising said estate, and he shall hold and administer each part as a separate trust for the use and benefit of each of the following:

"One part for Martha Joan Sessions, daughter of Kate Callaham, two parts for Martha Jane Callaham, daughter of J. W. Callaham, one part for J. W. Lewis, III, and one part for Tweetie Ann Lewis, children of Nell Callaham Lewis; one part for Al Scott and one part for Ronnie Scott, sons of Emma Callaham Scott; one part for

Kaye Kelley and one part for Karren Kelley, daughters of Helen Callaham Kelley; one part for Michael Callaham and one part for Vickie Amanda Callaham, children of C. K. Callaham, Jr.; one part for J. M. Callaham, Jr., son of J. M. Callaham, Sr.; and one part for J. M. Callaham, Sr.

"(c) The Trustee shall expend the income from each part for the beneficiary entitled to receive the same, or he may pay over the income direct to such beneficiary as may then be legally qualified to receive the income from his or her part or parts, or he may allow the income to which any one or more of said beneficiaries may be entitled to accumulate for such period of time as he may deem advisable, the manner of expending the income of any part or of paying it over to the beneficiary thereof being left to the sole judgment and discretion of the Trustee.

"3. The Trustee shall pay the corpus of each part to the beneficiary of said part as designated in Paragraph 2(b) above at such time after such beneficiary shall have reached 21 years of age as the Trustee, in his sole discretion may determine; provided, however, that the trusts hereby created shall, in any event, terminate when the youngest beneficiary named in paragraph 2(b) shall have reached the age of 21, and the corpus of any of the parts that may remain in the hands of the Trustee shall then be paid over to those entitled thereto; and in the event any beneficiary shall die before receiving the corpus of his or her part or parts the heir or heirs at law of such beneficiary shall stand in the place and stead of the deceased beneficiary and be entitled to receive the corpus of such part or parts."

Carl K. Callaham died 5 September 1953.

Plaintiff was the sole stockholder in Lilly White Farms, Inc., and the fifty shares held by him was the total of the issued and outstanding stock. It owned the lot which plaintiff contracted to convey and defendant to purchase.

In February 1954 Lilly White Farms, Inc. was dissolved and all of its assets, consisting of three tracts of land, one the lot here in question, were, as a liquidating dividend, conveyed to J. W. Callaham as trustee for the persons named as ultimate beneficiaries of the trust.

The contract to purchase dated 17 April 1958 provided: "It is agreed that the Seller shall furnish good marketable title to said property and Purchaser shall have ten days in which to investigate same, unless an extension shall be agreed upon. In the event the title is objected to, the Seller shall be furnished with a written statement

of all objections and be allowed a reasonable time hereafter in which to furnish a valid title."

The parties agreed on a time and place to consumate the sale. At the time and place fixed plaintiff tendered defendant a deed executed by him as trustee for each of the named beneficiaries. The deed contained the usual covenants of warranty and was in proper form.

Defendant refused to accept the deed and pay the purchase price.

Judge Clarkson concluded: ". . . the plaintiff had ample power and authority to convey as trustee under the aforesaid trust instrument the fee in said premises and to vest in the purchaser a good and marketable title thereto."

Defendant excepted to this conclusion and the judgment based thereon and appealed.

Brock Barkley for plaintiff, appellee.
Sedberry, Sanders & Walker for defendant, appellant.

RODMAN, J. The trust agreement expressly authorizes the trustee to sell the stock constituting the trust estate and reinvest the proceeds. There is no question of implied power. The only question presented is the duration of the power expressly given. Did the power to sell and reinvest terminate upon the death of Carl K. Callaham, the grantor, or does the power continue as long as the trustee has duties to perform?

When called upon to interpret a trust agreement or other contract, courts seek to ascertain the intent of the parties and, when ascertained, give effect thereto, unless forbidden by law. *In re Will of Stimpson,* 248 N.C. 262, 103 S.E. 2d 352; *DeBruhl v. Highway Com.* 245 N.C. 139, 95 S.E. 2d 553; *Hall v. Wardwell,* 228 N.C. 562, 46 S.E. 2d 556; *Trust Co. v. Steele's Mills,* 225 N.C. 302, 34 S.E. 2d 425.

The intent of one who creates a trust is to be determined by the language he chooses to convey his thoughts, the purpose he seeks to accomplish, and the situation of the several parties to or benefited by the trust. *Electric Co. v. Insurance Co.,* 229 N.C. 518, 50 S.E. 2d 295.

Here the trust agreement demonstrates a desire on the part of the grantor to provide financial aid upon his death to designated persons, some at least of whom are minors. The income from the trust property went to the grantor during his life. Upon grantor's death the corpus of the estate is to be divided into thirteen parts, eleven parts for the benefit of eleven designated beneficiaries and two parts for another named beneficiary, the daughter of the person selected to act as trustee.

The trust estate consists of the entire capital stock of a corporation whose only assets were three lots in the City of Charlotte. The nature and extent of the improvements on the several lots is not disclosed. The lot which defendant purchased had been used for residential purposes. The trust agreement manifests an intent to use the corpus to produce income for the beneficiaries. Appellant concedes the trustee had the right to sell and manage in such manner as to efficiently produce income during grantor's life.

The moment grantor died the power and responsibility of the trustee became enormously enlarged. He was invested with broad discretionary powers with respect to the distribution of income and corpus. He had the right to select the purpose for which the income could be expended for any beneficiary, or he could make payment directly to a beneficiary, or he could entirely withhold payments of income. The only limitation on his power was the requirement to distribute the trust estate not later than the day when the youngest beneficiary named became 21. The power to withhold and accumulate necessarily implied the power and duty to invest such accumulations. He could not needlessly let them lie idle. *Isler v. Brock*, 134 N.C. 428, 90 C.J.S. 505; 45 Am. Jur. 294.

It is apparent from the trust agreement the grantor imposed confidence in the business acumen and integrity of the trustee. It is not to be supposed that having expressly invested the trustee with authority to manage, sell, and reinvest the entire trust estate that the grantor intended to limit such authority to grantor's life, and at the same time impose by implication a duty to invest income which he had the power to withhold.

The dissolution of the corporation and transfer of legal title to the real estate as a liquidating dividend for the stock did not exhaust the power of the trustee to sell, manage, and reinvest. 90 C.J.S. 426. Defendant, in refusing to comply with his contract to purchase, made no suggestion that plaintiff was not acting in good faith and for the best interest of the estate. He did not furnish plaintiff with a statement of his objections to the title as required by his contract. He merely refused to comply. His assignment of error challenging plaintiff's authority is not sustained.

Affirmed.

HIGGINS, J., not sitting.

STATE v. JOHNNIE E. NEWTON.

(Filed 4 November, 1959.)

1. **Criminal Law § 159—**

Assignments of error in support of which no reason or argument is given or authority cited in the brief are deemed abandoned.

2. **Criminal Law § 156—**

An assignment of error to the charge for failure of the Court "to declare and explain the law arising on the evidence in the case" and the failure of the Court "to apply the law to the evidence" is a broadside assignment and is ineffectual.

3. **Assault and Battery § 13—**

Where the evidence shows an assault on prosecuting witnesses as they drove by defendant's house and another assault shortly thereafter when they turned around and came back to defendant's house, *held* the circumstances as to defendant's conduct at the time of the second assault are relevant as to the defendant's attitude and intent with reference to the prior incident.

4. **Assault and Battery § 15— Instruction on question of assault by pointing and firing rifle held favorable to defendant.**

The State's evidence tended to show that when the prosecuting witnesses had gotten some 50 feet beyond defendant's house in their jeep defendant pointed and fired his rifle in such manner that they were placed in apprehension of their safety, left the scene, and did not return until they had alerted all patrol cars in the area to come to their aid and had loaded their own weapons, and that after the prosecuting witnesses had turned around and again passed defendant's house he pointed the weapon directly at them. *Held:* The evidence is sufficient to support a finding that the defendant pointed and fired his rifle toward the jeep and its occupants or toward the area in which the vehicle was proceeding, notwithstanding that one of the witnesses testified that he pointed the rifle "in the general direction of" as well as "in the direction of" the witnesses, and an instruction that the jury should find defendant guilty if he shot "in the direction of" the prosecuting witnesses is not prejudicial to defendant.

5. **Assault and Battery § 5—**

A person who offers or attempts by violence to injure the person of another, or who by a show of violence puts another in fear and thereby forces him to leave a place where he has a right to be, is guilty of an assault.

HIGGINS, J., not sitting.

APPEAL by defendant from *Mallard, J.*, May 25, 1959 Special Term, of VANCE.

Criminal posecution upon two indictments, consolidated for trial, each charging that defendant, on the 22nd day of May, 1959, un-

lawfully and wilfully assaulted the person therein named with a deadly weapon, to wit, a rifle. One indictment (#3490) relates to an alleged assault on Lt. Clyde E. DeBow. The other (#3491) relates to an alleged assault on Ralph E. Deatherage.

There was evidence tending to show these facts:

On the afternoon of Friday, May 22, 1959, DeBow and Deatherage, members of the National Guard, were on active State duty in Henderson. Deatherage, operating a jeep, was on patrol duty in the area of the North Henderson Mill. Roberson Street, where defendant lived, was in this area. About 5:30 p.m. Deatherage observed defendant on his front porch cleaning a rifle. Thereafter, Deatherage "kept the house under surveillance." About seven o'clock, Deatherage met Lt. DeBow at the North Mill Gate. DeBow got into the jeep with him. They rode south on Roberson Street. When they passed defendant's house, "he was still on the front porch with his rifle." Shortly thereafter, Deatherage turned around and came back by defendant's house.

According to DeBow's testimony: As they passed defendant's house, traveling north, "the weapon was raised to his shoulder and aim was taken in this manner *(indicating)*." (Our italics) "When he raised the weapon, I kept my eyes on him." After passing, DeBow watched defendant through the back window of the jeep. "We proceeded by the house about fifty feet and as I watched him through the window, the weapon was discharged in our direction. We were going north and the weapon was pointed north." In referring to how the rifle was pointed when fired, DeBow used two expressions, namely,"in our direction" and "in our general direction."

Deatherage, who was driving the jeep, testified that he "heard the report of the first shot . . ."

DeBow testified: ". . . I did not observe the striking bullet. There was (sic) no cartridges striking the jeep."

Deatherage and DeBow, "placed in apprehension of (their) own safety," continued north on Roberson Street. After giving "the necessary alert to call in the rest of the M.P. vehicles in the area to that location," they "circled back around," proceeded back (south) along Roberson Street toward defendant's house. Meanwhile, the Guardsmen "put the ammunition in the chambers of (their) weapons as a protective measure." DeBow testified: "We proceeded toward his house and observed him with a rifle still at his shoulder and pointed at us." Again: "As we were going away, the weapon was fired in our direction and as we came back the weapon was pointed right at us." Deatherage testified: ". . . as we were coming down he had the rifle

to his shoulder pointed at us or in our direction. He had it very similar to this (indicating with rifle) pointing it at us."

Upon returning, the Guardsmen parked their jeep "on the opposite side of the dirt street across from Newton's store and house combination." They "sat in the vehicle waiting for the other jeeps to come into the area, keeping him under observation at all times." As they watched him, defendant fired his rifle into the ground, then lowered it and put it down on the bench beside him. On cross-examination by defendant, Deatherage, referring to this firing, stated: "When you fired that time you moved it in the direction of the ground."

When the other jeeps arrived, men were deployed along the street and behind Newton's house. Defendant told these men: "Stay off this damn property, you have no business on this property." ". . . the word was given to the men to step back across the ditch and stay off his property until we had the Officer of the Day who had a warrant for Newton to give us the right to be on his property." "After a few minutes, Lieutenant Priddy came up with the warrant and the warrant was read to Newton."

After defendant's arrest, a search of his premises was made. Several articles, including a box of .22 cartridges, were found. When the Guardsmen got defendant's .22 rifle, "eleven live rounds" were "in the weapon."

Defendant did not testify. Evidence offered by defendant tended to show that he was cleaning his rifle; and that, solely for the purpose of testing whether it funtioned properly, he fired *three* shots directly into the ground.

The jury, as to each indictment, returned a verdict of guilty; and judgments, imposing active sentences, were pronounced.

Defendant excepted and appealed, assigning errors.

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

W. N. Nicholson, James B. Ledford, James J. Randleman and L. Glen Ledford for defendant, appellant.

BOBBITT, J. While the record shows four assignments of error, only two are discussed in defendant's brief. Assignments of error, under our Rules and decisions, are deemed abandoned when defendant's brief states no reason or argument and cites no authority in support thereof. *S. v. Perry*, 250 N.C. 119, 132, 108 S.E. 2d 447.

Defendant assigns as error: "That the trial Court erred in that in his Charge to the Jury, he failed to declare and explain the law aris-

ing on the evidence in the case and failed to apply the law to the evidence." This assignment, and the exception on which it is based, is broadside and ineffectual. *S. v. Corl,* 250 N.C. 262, 265, 108 S.E. 2d 613. It contains no suggestion as to what instruction is deemed objectionable or as to what instruction or instructions defendant contends should have been (but were not) given.

Defendant's remaining assignment of error is directed to the italicized portion of the following excerpt from the court's instructions to the jury, *viz.*: "So, Members of the Jury, as to Case Number 3490, I instruct you that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you, *that the defendant Johnnie E. Newton, did on the 22nd day of May, 1959, point a rifle in the direction of the prosecuting witness, Clyde E. DeBow and shoot the rifle in the direction of the prosecuting witness,* Clyde E. DeBow, and that he then and there shot said rifle at said prosecuting witness with the intent to do him bodily harm, then the defendant Johnnie E. Newton would be guilty of an assault with a deadly weapon as charged in the Bill of Indictment and if you so find and beyond a reasonable doubt, it will be your duty to return a verdict of guilty as charged in case Number 3490 in the bill of indictment."

The evidence is positive and precise that, when the Guardsmen returned, defendant pointed his loaded rifle directly at them. G.S. 14-34 provides: "If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be fined, imprisoned, or both, at the discretion of the court." True, the quoted instruction shows the case was submitted in relation to the shot fired when the jeep was proceeding north on Roberson Street. Even so, the circumstances as to defendant's conduct when the Guardsmen returned are relevant as to defendant's attitude and intent with references to the prior incident.

The ground upon which defendant challenges the italicized portion of the quoted instruction is that the court used the expression, "in the direction of," sometimes used by DeBow, when DeBow also used the expression, "in the general direction of," asserted to be a broader expression. As to this point, it would seem that the court, by requiring as a prerequisite to conviction that the jury find that defendant shot "in the direction of" the prosecuting witness, adopted the view more favorable to defendant.

When considered in the light most favorable to the State, we think the testimony that defendant pointed and fired his rifle "in the di-

rection of" and "in the general direction of" the prosecuting witness is sufficient, taking all circumstances into consideration, to support the finding that defendant pointed and fired his rifle toward the jeep and its occupants or toward the area in which the jeep was proceeding.

It is noted that the jeep was approximately 50 feet from defendant when defendant pointed and fired his rifle. It is further noted that defendant pointed and fired his rifle in such manner that DeBow, who observed defendant's conduct, was placed in apprehension of the safety of himself and of Deatherage; and that, by reason of defendant's conduct, these Guardsmen left the scene and did not return until (1) they had alerted all patrol cars in the area to come to their aid, and (2) they had loaded their pistols for possible use in their own protection. It is further noted that when they did return they found defendant with his loaded rifle raised and pointed directly at them.

Defendant's guilt does not depend upon whether, before firing his rifle, he took precise aim at the jeep or any occupant thereof. "It is an assault, without regard to the aggressor's intention, to fire a gun at another or in the direction in which he is standing." Wharton's Criminal Law and Procedure, Vol. 1, § 332. "The law will not tolerate such a reckless disregard for human life." 4 Am. Jur., Assault and Battery § 6. In *S. v. Baker*, 20 R.I. 275, 38 A. 653, 78 Am. St. Rep. 863, this instruction was approved: "Firing a pistol in the direction of another with the intention of frightening him, or with the intention of wounding him, are equally assaults." In *Edwards v. State*, 62 S.E. 565, the Court of Appeals of Georgia approved this instruction: ". . . If you find the defendant, without justification, shot a pistol in the direction of the witness, within carrying distance of the pistol, not intending to hit him, but intending to scare him, he would be guilty of an assault." If any portion of the quoted instruction is incorrect, it would seem to be the portion, to which defendant did not except, which imposed upon the State the burden of establishing defendant's intent to do bodily harm to the prosecuting witness.

"The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be. *S. v. Hampton*, 63 N.C. 13; *S. v. Church*, 63 N.C. 15; *S. v. Rawles*, 65 N.C. 334; *S. v. Shipman*, 81 N.C. 513; *S. v. Martin*, 85 N.C. 508, 39 Am. Rep. 711; *S. v. Jeffreys*, 117 N.C. 743." *S. v. Daniel*, 136 N.C. 571, 575, 48 S.E. 544. As succinctly stated by *Ruffin, J.*, in *S. v. Marsteller*, 84 N.C. 726; "No man has a right by a show

of force to put another and an unoffending person in an immediate fear of bodily harm."

Defendant has failed to show prejudicial error.

No error.

HIGGINS, J., not sitting.

STATE v. ANNIE RAY GLENN.

(Filed 4 November, 1959.)

1. **Criminal Law § 99—**

On motion for judgment as of nonsuit the evidence is to be taken in the light most favorable to the State. G.S. 15-173.

2. **Intoxicating Liquor § 5—**

It is unlawful in this State for any person to possess any intoxicating liquor for the purpose of sale, G.S. 18-2, and possession within the meaning of the statute may be either actual or constructive.

3. **Criminal Law § 24—**

Defendant's plea of not guilty puts in issue every element of the offense charged.

4. **Criminal Law § 101—**

Evidence which merely shows that a criminal offense was committed and that it was possible that defendant committed the offense, but which raises a mere conjecture or speculation of the identity of defendant as the offender, is insufficient to be submitted to the jury.

5. **Intoxicating Liquor § 13c—**

Evidence tending to show merely that non-taxpaid liquor was found buried in the ground on lands adjacent to defendant's residence near a hog pen which defendant was permitted by the owner of the lands to maintain thereon, with further evidence that there were houses around the locus and that the locus was crisscrossed by many paths, *is held* insufficient to be submitted to the jury on the question of defendant's constructive possession of the liquor.

HIGGINS, J., not sitting.

APPEAL by defendant from *Gambill, J.*, at April 1959 Mixed Term, of DAVIDSON.

Criminal prosecution upon a warrant issued out of and returnable to the Recorder's Court of Thomasville charging substantially that defendant Annie Ray Glenn did, on or about 26 September 1958, at and in Davidson County, unlawfully and willfully violate or know-

ingly aid and abet in the violation of the State liquor laws by the unlawful possession of and transporting of liquors or other intoxicating beverage for the purpose of sale, barter, beverage or other unlawful disposal eight one-half gallon jars of white non-taxpaid whiskey, against the statute in such cases made and provided, etc.

Upon trial in said Recorder's Court the defendant was found guilty. Judgment was imposed that she be confined for a term of two years in Central Prison in Raleigh,—sentence suspended for a period of five years on conditions stated. Defendant appealed to Superior Court of Davidson County. There she pleaded not guilty.

Upon the trial in Superior Court the State offered evidence tending to show substantially the following: On 26 September, 1958, about 4 o'clock P. M., two officers of the police department of Thomasville went to the premises of defendant, Annie Ray Glenn, and made a search of an area away from her premises but joining her lot. She lived just off Doak Street and had resided there around sixteen years. Her premises consisted of the house located on Doak Street and the lot surrounding it.

The officers found a hog pen— with three partitions— and about four feet in front of the pen they found a wash tub sitting near a trough where the hogs were fed. Underneath the tub there was a can that had a lid on it, covered with an inch or two of dirt, and in the can there were eight half-gallon Mason fruit jars of white whiskey. There were no tax stamps affixed to any of it.

Between the house of defendant and the location of the hog pen there is about a ten-foot road that goes between her property and the property where the hog pen is located. It is a public road— an alley— not a street, that goes up to some more colored houses on the hill behind it, two houses in fact, 60 feet from the back of her lot. The hog pen is on land that belongs to the Evans Estate across the said roadway entirely off the premises owned by defendant. It is looked after by Lieutenant Easley who is a member of the police department of Thomasville. One of the officers was told by the owners that defendant had permission to raise her hogs there, and "according to Annie," said one of the officers, "all of the hogs that were in that particular pen belonged to her." No one else had a hog pen within 60 feet of that pen. There are a number of pens located there.

One of the officers testified that "there are several paths through the woods leading to the hog pen onto Mr. Easley's property, and these paths lead on up in the woods away from Annie's house. They lead in about every direction to Annie's house. I wouldn't say that they all go to the hog pen. There is one that comes down off Barnwell

Street, comes by the hog pen to Annie's house and then there is one above the pen that goes back through the woods. Other people live on the other side of the woods and these paths lead to their houses to Barnwell Street and on out onto Doak Street from the hog pen. There are lots of paths * * * ."

Another one of the officers testified that defendant "denied all the time that it was her whiskey."

The State offered other evidence (1) as to prior possession by defendant of a jar of whiskey which broke and spilled on her clothes, for which no charge was made against her, and (2) as to search of her house on day in question finding a jar that smelled of whiskey and an odor of disinfectants in her kitchen.

The case was submitted to the jury upon the evidence offered, and the charge of the court.

Verdict: Guilty.

Judgment: Confinement in the common jail of Davidson County for a period of 18 months and assigned to the prison department — this sentence to begin at the expiration of the sentence imposed in No. 8933. Defendant excepted thereto and appeals to Supreme Court and assigns error.

Attorney General Seawell, Assistant Attorney General Claude L. Love for the State.

Walser & Brinkley for defendant, appellant.

WINBORNE, C. J. This appeal challenges the action of the trial court in overruling her motion for judgment as of nonsuit at the close of all the evidence under provisions of G.S. 15-173. When so challenged, the evidence is to be taken in the light most favorable to the State. So considered under applicable principles of law, this Court is of opinion and holds that the evidence shown in the record is not sufficient to support a verdict of guilty of the offense charged. *S. v. Webb*, 233 N.C. 382, 64 S.E. 2d 268; *S. v. McLamb*, 236 N.C. 287, 72 S.E 2d 656; *S. v. Wooten*, 239 N.C. 117, 79 S.E. 2d 254; *S. v. Harrelson*, 245 N. C. 604, 96 S. E. 2d 867.

In the *Wooten* case, *supra*, opinion by *Ervin, J.*, it is said: "The testimony for the State is ample to show that some person violated the statutes relating to the possession of intoxicating liquor. It leaves to mere conjecture, however, the all-important question whether the culprit was the defendant or somebody else. Since the evidence does not indicate that the defendant had either the actual or the constructive possession of the intoxicating liquor found by the officers, the

prosecution should have been involuntarily nonsuited in Superior Court," citing the *Webb* and *McLamb* cases.

In this State it is unlawful for any person to possess any intoxicating liquor for the purpose of sale. G.S. 18-2.

Defendant is charged with violating this statute. Her plea of not guilty puts in issue every element of the offense charged. *S. v. Meyers,* 190 N. C. 239, 129 S. E. 600; *S. v. Harvey,* 228 N. C. 62, 44 S. E. 2d 472; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Webb, supra; S. v. Harrelson, supra.*

Possession, within the meaning of the above statute, may be either actual or constructive. *S. v. Lee,* 164 N.C. 533; 80 S.E. 405; *S. v. Meyers, supra; S v. Penry,* 220 N. C. 248, 17 S. E. 2d 4; *S. v. Webb, supra; S. v. McLamb, supra; S. v. Harrelson, supra.*

In the Meyers case, *supra,* it is stated: "If the liquor was within the power of the defendant in such a case that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual."

Concedely there is no evidence that defendant had actual possession of the liquor— eight half-gallon jars found buried in the ground as related in statement of case. But the State relies upon circumstantial evidence to support the conviction of defendant on the theory that the circumstances testified to show that defendant had constructive possession of the liquor.

"Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to a jury," — *Rodman, J.,* in *S. v. Vinson,* 63 N.C. 335; *S. v. Harvey, supra,* and cases cited. See also *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *S. v. Murphy,* 225 N.C. 115, 33 S.E. 2d 588; *S. v. Webb, supra.* These principles of circumstantial evidence and constructive possession are applied in *S. v. McLamb, supra.* See also *S. v. Harrelson, supra.*

In the *Murphy* case, *supra,* defendant was charged with highway robbery, and the evidence showed that others had equal opportunity with defendant for taking the money. It is there held that under such circumstances to find that any particular person took the money is to enter the realm of speculation, and that verdicts so found may not stand.

Just so in the case in hand, to hold that there is sufficient evidence to support a finding that the defendant had constructive possession of the liquor, as charged, is conjecture and speculation. She ought not to be convicted on such evidence Hence the motion of defendant

for judgment of nonsuit should have been allowed. See *S. v. Webb, supra; S. v. McLamb, supra; S. v. Wooten, supra; S. v. Harrelson, supra.*

In the light of these principles, applied to the evidence shown in the record of case on appeal, whether the whiskey in the can buried in the ground about four feet right in front of defendant's hog pen on the lands of the Evans Estate, in charge of a member of the police department of Thomasville, belonged to defendant, or was in her possession, is purely speculative and insufficient to support a verdict of guilty of possession of intoxicating liquor for purpose of sale.

Hence this Court, as above stated, holds that the motion for judgment as of nonsuit should have been allowed.

In accordance therewith the judgment from which appeal is taken is Reversed.

HIGGINS, J., not sitting.

STATE v. ANNIE RAY GLENN.

(Filed 4 November, 1959.)

1. Criminal Law § 136—

When an order putting into effect a suspended sentence is based upon a conviction of defendant which is reversed on appeal to the Supreme Court for insufficiency of the evidence of guilt, the order putting into effect the suspended sentence must be reversed on defendant's appeal from such order.

HIGGINS, J., not sitting.

APPEAL by defendant from *Gambill, J.*, at April 1959 Mixed Term, of DAVIDSON.

Criminal posecution upon a warrant charging defendant Annie Ray Glenn with the offense of assault with a deadly weapon, heard in Superior Court of Davidson County at the April 27, 1959 Mixed Term, when and where the following occurred: The presiding judge, finding as a fact that in Recorder's Court of Thomasville on 13 September 1958, defendant was convicted of assault with a deadly weapon and sentenced to two years in the Women's Division of the State Prison,—the sentence being suspended for a period of five years with the express consent of defendant upon certain conditions, one of which was that she not violate any law during the period of suspension; that on

13 October 1958, defendant was convicted of violating the liquor laws of the State of North Carolina and the aforesaid two-year sentence was placed into effect in the Recorder's Court; that defendant appealed to Superior Court therefrom, and from the conviction of violating the liquor laws; that in Superior Court defendant was found guilty by a jury of possessing four gallons of illicit liquor for the purpose of sale; and the court finding that the violation of the liquor laws by defendant was willful and in violation of one of the terms of the said suspended sentence, adjudged that there has been a violation of the conditions of the suspended sentence, and ordered that the two-year sentence to the Women's Division of State Prison, which was theretofore suspended, be placed into immediate effect by the issuance of a commitment.

And defendant having appealed to Supreme Court from the conviction in the said liquor case, also appealed from the order placing into effect the suspended sentence above described; and it now appears that the judgment in the liquor case, No. 370, has been reversed. Therefore defendant appeals to Supreme Court and assigns error.

Attorney General Seawell, Assistant Attorney General Claude L. Love for the State.

Walser & Brinkley for defendant, appellant.

WINBORNE, C. J. The ruling of the court putting into effect the suspended sentence against defendant, as hereinabove described, being predicated upon finding that the verdict of guilty in the liquor case above described, is violative of the conditions on which the two-year sentence was suspended is in error. Hence defendant is entitled to have the judgment by which suspended sentence was put into effect reversed and stricken from the record— and it is so ordered. *S. v. Harrelson,* 245 N.C. 604, 96 S.E. 2d 867.

Reversed.

HIGGINS, J., not sitting.

GEORGE M. RICK v. JIM MURPHY, T/A MURPHY'S USED CARS, AND WESLEY PETE FRONEBERGER.

(Filed 4 November, 1959.)

1. Automobiles § 54f—

Evidence tending to show that the vehicle causing the damage in suit carried the license plates issued to the driver and was registered in his name, and that the driver had employed the owner of a used car lot to construct the vehicle from a body of a car, whose motor had been damaged, and the motor from the vehicle theretofore owned by the driver, the body of which had been damaged beyond repair, *is held* insufficient to be submitted to the jury on the question of the liability of the owner of the used car lot under the doctrine of *respondeat superior*. G.S. 20-71.1.

2. Pleadings § 8a—

Plaintiff is not required to allege evidential facts, but only the ultimate facts constituting his cause of action.

3. Automobiles §§ 35, 37—

Where the complaint in an action to recover damages resulting from a collision alleges a reckless operation of his vehicle by defendant, G.S. 20-140, evidence tending to show that defendant was intoxicated at the time is competent notwithstanding the absence of allegation of defendant's violation of G.S. 20-138, since a physical condition which may cause a person to act in a given manner is merely evidentiary.

4. Appeal and Error § 42—

Where there is evidence that plaintiff suffered serious, painful and permanent injury in the accident in suit, a statement by the court that defendant contended that his pain and suffering seriously affected his nervous condition will not be held prejudicial for the want of allegation and evidence of injury to plaintiff's nervous condition, it being apparent from a contextual construction of the charge that the court meant merely to call attention to plaintiff's contention that the injuries were permanent and did continue to cause pain.

HIGGINS, J., not sitting.

APPEAL by defendants from *McLean, J.*, March 1959 Term, of GASTON.

The complaint alleges personal injury and property damage to plaintiff resulting from a collision between an automobile owned and operated by plaintiff and an automobile operated by defendant Froneberger as the agent and for the benefit of defendant Murphy.

The collision occurred at the intersection of Hawthorne Street and Highway 27 in Mount Holly. Traffic lights at the intersection regulate the flow of traffic. Plaintiff alleges the collision was caused by Froneberger's unlawful speed and failure to heed the traffic lights. To es-

tablish agency, plaintiff relies on G.S. 20-71.1 and his assertion that Murphy was the owner of the motor vehicle driven by Froneberger.

Plaintiff's evidence with respect to ownership is sufficient to establish these facts: Defendant Murphy, who operates a service station and used car lot, had purchased from Clayton Ball, for $20, two or three weeks prior to the collision, a 1947 Chevrolet, the motor in which was "tore up." It had two tires; it had to be towed by wrecker to Murphy's place of business. Froneberger was, in May, the owner of a 1947 Sportsmaster Chevrolet, which he had purchased from Murphy. He paid part of the purchase price in cash and gave mortgage to Murphy for the balance. The 1947 Sportsmaster was wrecked and taken to Murphy's for repair. The body was so badly damaged that repairs to it were not economically practical. Murphy agreed to provide Froneberger with a motor vehicle constructed in part from what had been the Ball car and in part from what had been the Froneberger Sportsmaster. Froneberger was to pay $35, of which $20 was the cost of parts supplied and $15 for labor. The part supplied by Murphy was the body purchased from Ball. This vehicle was to continue subject to the original chattel mortgage executed by Froneberger. The work was completed prior to 15 June, the day of the collision. On that afternoon Froneberger went to Murphy's to get his car. Murphy at first refused to let him have it but finally consented that he might try it out.

At the time of the collision the car driven by Froneberger carried the license plates issued to him for use on the Sportsmaster and a registration card showing the ownership of the Sportsmaster. The highway patrolman who investigated the wreck, testifying for plaintiff, said: "The only difference that I noticed between the car described on the registration card and the car that Froneberger was driving was the body type."

Murphy, testifying with respect to the repairs and his agreement with Froneberger, said: "As a result of that agreement, I rebuilt the automobile for him."

Issues as to agency, negligence, contributory negligence, and damages were submitted to the jury and answered in favor of plaintiff. Judgment was entered on the verdict and defendants appealed.

Frank Battley Rankin for plaintiff, appellee.
Carpenter & Webb for defendant, appellants.

RODMAN, J. Defendant Murphy's motion to nonsuit was over-

ruled. This he assigns as error. Plaintiff's evidence does not tend to establish that Murphy was the owner of the vehicle operated by Froneberger. To the contrary, it shows that the driver was the owner. It was registered in his name and carried license plates issued to him. This made a *prima facie* case of ownership. G.S. 20-71.1(b). True the body was not the same as the body described on the registration card, but the body is merely a part of the motor vehicle referred to in the statute, G.S. 20-71.1.

By definition, G.S. 20-38(p), a motor vehicle is self-propelled or propelled by electric current obtained from trolley wires. The article sold by Ball to Murphy and by Murphy to Froneberger had no means of propulsion.

The evidence clearly establishes an absence of intent on the part of either Froneberger to purchase or Murphy to sell a motor vehicle. What the evidence shows is the sale of parts owned by Murphy to be used with other parts owned by Froneberger to make for Froneberger a motor vehicle which could be operated on the highway. Froneberger was, on this evidence, the owner of the repaired or reconstructed automobile. Murphy merely had a lien for labor and material. G.S. 44-2.

G.S. 20-71.1 does not make the merchant who supplies parts or the mechanic who performs work and supplies parts responsible for the operation of a repaired or rebuilt motor vehicle. Defendant Murphy's motion for nonsuit should have been allowed.

The evidence was sufficient to establish negligence by Froneberger causing the collision. He does not here argue to the contrary.

Lewis Ball, a witness for plaintiff, testified that he saw Froneberger about five minutes prior to the collision and observed his condition. Counsel for plaintiff then asked: "What, if anything, was his condition with reference to drunk or sober?" Defendant's objection was overruled, and the witness answered: "He was drinking." The court, in reviewing the evidence, called attention to this testimony.

Froneberger assigns as error the admission of this evidence and reference thereto in the charge. The complaint does not charge a violation of G.S. 20-138, which prohibits the operation of a motor vehicle while under the influence of intoxicating beverages. It charges a reckless operation prohibited by G.S. 20-140. Plaintiff was not required to allege evidential facts. An allegation of the ultimate facts sufficed. *Pinnix v. Toomey*, 242 N.C. 358, 87, S.E. 2d 893; *Spake v. Pearlman*, 222 N.C. 62, 21 S.E. 2d 881. A physical condition which may cause a person to act in a given manner is merely evidentiary, not the ultimate fact on which liability must rest.

The right to offer evidence of the consumption of alcoholic beverages by the driver in vehicle collision cases on an allegation of negligence without specific allegation of intoxication was considered in *Fox v. Hopkins*, 343 Ill. App. 404, 26 A.L.R. 2d 352. Cases considering the question are gathered in the note appearing in A.L.R. The annotator summarizes the conclusion which the courts have reached thus: "In nearly all of the vehicle accident cases in which the question has arisen, whether the pleading alleged the negligence of the defendant or his agent, or contributory negligence on the part of the plaintiff or his decedent, it has been held or recognized that evidence tending to prove the opposing party's intoxication was admissible, notwithstanding the pleading failed to allege such intoxication." The evidence to which the assignment is directed was competent.

Plaintiff was carried to a hospital where he remained for nine days. Six of his ribs were broken, two crushed; his leg and hand were cut. He sustained head injuries; he was out of work for seven weeks. The collision occurred in June 1957. The case was tried in March 1959. Plaintiff testified: "I have not fully recovered as a result of these injuries. I still have hurting in my head, and my ribs still—in cold weather I still have trouble with my ribs." Plaintiff alleged permanent injuries. He did not specifically allege injury to his nervous system. In stating plaintiff's contentions, the court said: "He says and contends that the pain and suffering which he sustained seriously affected his nervous system and will continue to do so." Defendant assigns this statement of contention as error, contending there was no allegation or evidence of injury to the nervous system. When the charge is read as a whole, it is apparent that the court merely meant to call attention to plaintiff's contention that the injuries were permanent and would continue to cause pain. Prejudicial error has not been established by Froneberger.

On defendant Murphy's appeal — Reversed.

On defendant Froneberger's appeal — No error.

HIGGINS, J., not sitting.

A. F. ENGELBERG v. THE HOME INSURANCE COMPANY AND THE HOME INDEMNITY COMPANY; RUFUS ODELL CAUDLE, MRS. NANCY JANE PRUITT AND MRS. DELLA MAE HARDY PAYNE.

(Filed 4 November, 1959.)

1. Insurance §§ 3, 61—

Unless payment of premium is waived it is a condition precedent to insurance coverage.

2. Insurance § 2—

Insurance companies may authorize agents to carry out cancellation provisions of a policy so long as the acts of the agents are not in conflict with the terms of the policy contract.

3. Same: Insurance §§ 3, 61—

Where an insurance agent mails notice of cancellation of the policy for nonpayment of premiums after default in payment by insured, in accordance with the terms of the policy, which notice is received by insured, the policy contract is terminated ten days after notice, and this result is not affected by the fact that the agent himself may have paid the premium to the insurance company. In this case insurer had refunded to the agent the unearned portion of the premium and the agent had recovered judgment against the insured for the earned portion thereof prior to the occurrence of the accident in suit.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Olive, J.*, March 1959 Term, of FORSYTH.

The case was heard upon an agreed statement of facts, which is in substance as follows:

The corporate defendants (insurance companies) by and through Elam Insurance Agency, Inc. (hereinafter referred to as Elam), of Winston-Salem, delivered to plaintiff their joint and several combination automobile policy, effective 11 August 1956 covering plaintiff's 1954 Chrysler automobile for the policy period from 11 August 1956 to 11 August 1957. This is a renewal policy. Within 60 days of the issuance of the policy Elam paid the corporate defendants the premium, $58.60. Plaintiff did not at any time pay Elam or the corporate defendants the premium or any part thereof. On 10 January 1957, Elam mailed to plaintiff at his home address as set out in the policy notice of cancellation of the policy, to be effective 20 January 1957 for nonpayment of the earned portion of the premium. The cancellation notice was in the name of the corporate defendants by Elam, "authorized representative." It was signed by Douglas B. Elam, president and manager of Elam. Plaintiff phoned Elam on 14 January 1957 and stated that he had received cancellation notice and inquired if the policy could be reinstated upon payment of premium. Plaintiff

was advised that it would be reinstated if the premium was paid "in the next few days." Plaintiff did not thereafter pay the premium. The corporate defendants refunded to Elam $32.58, the unearned portion of the premium. On 18 March 1957 Elam recovered judgment of plaintiff herein before a justice of the peace for the earned portion of the premium, $26.02, and costs. Plaintiff did not attend the trial but phoned the justice of the peace that he would pay the judgment. This judgment has not been paid. On 20 March 1957 plaintiff's Chrysler automobile, while being driven by plaintiff, was involved in a collision with another automobile. The individual defendants herein were injured in the collision and have instituted actions against plaintiff to recover damages on account of his alleged actionable negligence in causing the collision. Plaintiff notified the corporate defendants of the actions but corporate defendants declined to defend the suits on the ground that the policy of insurance had been cancelled and was not in force on the date of the collision. The actions are still pending. The policy contains the following condition:

> "24. Cancellation: . . . This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of the surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. . . . If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation."

The agency agreement between the corporate defendants and Elam provides:

> "The company hereby grants authority to the agent . . . to solicit and submit applications for . . . insurance . . .; to issue and deliver policies . . . ; to collect and receipt for premiums . . . ; to cancel such policies . . . in the discretion of the agent where cancellation is legally possible; . . ."

Upon the facts agreed the court concluded that the policy was lawfully canceled on 20 January 1957, was not in force on 20 March 1957 and the individual defendants are not entitled to recover for their injuries under the policy.

From judgment dismissing the action, plaintiff appealed and assigned error.

Charles L. Abernethy, Jr., for plaintiff, appellant.

Womble, Carlyle, Sandridge & Rice for corporate defendants, appellees.

PER CURIAM. On this appeal plaintiff contends that Elam paid the premium and the amount thereof became an open account due by plaintiff to Elam, that Elam was without authority to give notice of cancellation or to cancel the policy, that plaintiff was not privy to the agency agreement between Elam and the insurance companies and is bound only by the provisions of the policy and that the corporate defendants could not effectively cancel the policy in as much as the premium had been paid to them by Elam.

Plaintiff did not at any time pay the premium or any part thereof. Unless the payment of premium is waived, it is a condition precedent to insurance coverage. *Allen v. Insurance Co.*, 215 N.C. 70, 1 S.E. 2d 94. The agreed statement of facts discloses no agreement on the part of Elam or the corporate defendants to waive payment of premium or to extend the time of payment for any period, definite or indefinite. Actually the facts agreed show the contrary to be true. The language of the "cancellation" clause is clear and unambiguous. The clause was strictly complied with. Insurance companies may authorize agents to carry out cancellation provisions of a policy so long as the acts of the agents are not in conflict with the terms of the policy contract. The cancellation notice indicates that Elam gave notice of the cancellation as agent of the corporate defendants. In so doing Elam did not contravene any policy provision and had full authority to perform the act.

Affirmed.

HIGGINS, J., not sitting.

MELVIN THEODORE WITHERSPOON, JR. v.
EDGAR A. OWEN, D/B/A DUFFY'S TAVERN.

(Filed 4 November, 1959.)

1. Negligence § 4f(2)—

While a proprietor is under duty to protect his patrons against foreseeable assaults by others, a patron is also under duty not to needlessly expose himself to danger, and nonsuit was properly entered in this action by a patron against the proprietor of a restaurant for injuries from an assault by another patron, if not on the ground that the proprietor could not have foreseen the assault, then on the ground that plaintiff attempted to pass the other patron who was belligerent and attempting to block the stairs, and that plaintiff had equal notice with the proprietor if the conditions were such as to give warning of probable assault.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Clarkson, J.*, March 23, 1959 Schedule B Civil Term, of MECKLENBURG.

Plaintiff seeks compensation for damages resulting from an assault and fall in defendant's place of business. Defendant denied negligence and pleaded contributory negligence.

Plaintiff alleged and defendant admitted defendant did business as Duffy's Tavern, operating a restaurant and dine and dance club open to the public; "the defendant serves beer to his customers and also set-ups, that is ice and mix for his customers and patrons to mix alcoholic drinks."

Plaintiff, with a party of six others, went to the tavern about 9:30 on Saturday night. They proceeded to the second floor dining room, access to which was provided by a stairway four or five feet wide.

Here they remained until closing time, 1:00 a.m., or later. Using plaintiff's language: "we closed them up. . ." While at the tavern the party purchased food and "mix" and consumed the whiskeys they had brought to the tavern.

At leaving time plaintiff remained to pay the bill for his party. There were four or five couples ahead of him. He was the last in line. The others of his party did not wait for plaintiff but went down the stairs.

The cashier's desk was located near the head of the stairs. An argument took place between a customer and the cashier. A man was standing at the head of the stairs, blocking traffic during the argument between the customer and the cashier. The person at the head of the stairs was loud and boisterous. The proprietor requested him to leave. Plaintiff testified: "After I paid the bill and started to go down the steps, this man was standing and blocking the steps and

I asked him to let me by. He didn't let me by. He said, 'If you want by, get by.' I started on by him. I proceeded on by him and when I did, he swung at me and I tried to catch on to something, and I couldn't find anything else to catch on to so I grabbed hold of him and we rolled down the steps together."

Defendant moved for nonsuit at the conclusion of plaintiff's evidence. The motion was allowed and plaintiff appealed.

Charles M. Welling for plaintiff, appellant.
Carpenter & Webb for defendant, appellee.

PER CURIAM. Conceding defendant's duty to protect his patrons against foreseeable assaults by others, the patron also had a duty not to needlessly expose himself to danger. Here plaintiff and defendant had equal knowledge. Apparently nothing had transpired which would indicate plaintiff could not descend in safety. So far as appears, the others ahead of him had done so. But if the conditions were such as to warn defendant that plaintiff might be assaulted if he attempted to descend, these conditions gave equal warning to plaintiff. He could no more ignore the dangerous condition, if it existed, than could defendant.

Affirmed.

HIGGINS, J., not sitting.

THRESIA MARIE JARVIS AND HUSBAND, F. C. JARVIS *v.* ZEB R. SOUTHER AND WIFE, MARTHA SOUTHER.

(Filed 4 November, 1959.)

1. Appeal and Error § 22—

An assignment of error that the court erred in the findings of fact and conclusions of law as contained in the judgment is a broadside assignment and does not bring up for review the findings of fact or the sufficiency of the evidence to support them.

2. Appeal and Error § 21—

An appeal from the signing of the judgment constitutes an exception to the judgment, but raises only the questions whether the facts found support the judgment and whether error of law appears on the face of the record.

HIGGINS, J., not sitting.

JARVIS *v.* SOUTHER.

APPEAL by petitioners from *Gwyn, J.*, at April-May 1959 Civil Term, of WILKES.

Processioning proceeding to establish the true boundary line between certain lands of petitioners and certain lands of respondents described in the pleadings.

Petitioners treating respondents' answer as denial of petitioners' title, applied for order restraining respondents from trespassing upon the disputed area. And addendum to the record brought up on suggestion of diminution thereof discloses that by order entered at April-May Term of Superior Court of Wilkes County, by agreement of counsel for petitioners and counsel for respondents, "jury trial is waived, and the judge shall pass upon the issues of fact; that his findings shall have the same effect as if found by a jury; that where the boundary lines are in dispute, the court shall locate, find and establish said lines according to the contentions of the plaintiffs or according to the contentions of the defendants, or at any intermediate points between the contentions of the parties as the court may find from the evidence to be the true and proper boundary lines between the parties * * * that the court may cause such lines to be laid off on the ground, properly marked by stone, stakes, or other appropriate monuments, giving courses and distances where the court deems proper, render judgments declaring the rights of the parties and cause said judgment to be recorded in the office of the Register of Deeds of the county; * * * that the court may view the premises and consider such other evidence as may be offered or elicited; * * * that the costs may be taxed against the losing party or apportioned between the parties, as the court may deem proper," each of the parties reserving "the right to object to any evidence deemed to be incompetent and to except to any finding of fact, and each preserves the right to appeal to the Supreme Court from any judgment rendered against him."

And the record further discloses judgment entered by presiding judge in accordance with the stipulation of parties, finding the facts, and adjudging the rights of the parties according to the contentions of the respondents and against the contention of the petitioners, and taxing cost as indicated.

The plaintiffs object and except and appeal to Supreme Court, and assign error.

W. G. Mitchell, McElwee & Ferree for plaintiffs, appellants.
Whicker & Whicker for defendants, appellees.

PER CURIAM: The first assignment of error set forth in the record of case on appeal is that the trial court erred in the finding of fact and conclusions of law as contained in the judgment. This is a broadside assignment, and does not bring up for review the findings of fact or the sufficiency of the evidence to support the findings of fact. Indeed, while the appeal from the signing of the judgment constitutes an exception to the judgment, it raises two questions only (1) do the facts found support the judgment; and (2) does error of law appear upon the face of the record? A reading of the record indicates that the facts found support the judgment, and that error in law does not appear upon the face of the record.

Hence under authority of *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351, the judgment from which appeal is taken is

Affirmed.

HIGGINS, J., not sitting.

WARREN E. MOODY T/D/B/A ELVERSON MOTORS v. WARREN-ROBBINS, INC. AND B & L MOTORS, INC.

(Filed 4 November, 1959.)

1. Venue § 4b—

The court has the discretionary power to remove a cause to another county for the convenience of witnesses, and action of the court in doing so in this case after a mistrial for inability of the jury to reach a verdict is affirmed, the order being based on the evidence taken at the trial, and there being nothing in the record to show that the opposing parties were denied an opportunity to present evidence in opposition to the motion or that they requested a continuance of the hearing of the motion for an opportunity to present evidence.

HIGGINS, J., not sitting.

APPEAL by defendants from *Gwyn*, J., June 1959 Term, of WILKES.

Plaintiff is a resident of Guilford. Defendants are North Carolina corporations having their principal place of business in Wilkes. The complaint alleges plaintiff is the owner of a Cadillac automobile which, with the documents necessary to transfer title, was stolen and sold to defendant Warren-Robbins, Inc., who in turn mortgaged it to defendant B & L Motors, Inc. Plaintiff prays that he be adjudged the owner and entitled to possession of the motor vehicle.

Defendants, by answer, admitted a purchase from the alleged thief,

who, they assert, was the agent of plaintiff with authority to sell.

The cause was submitted to a jury at the June Term of Wilkes on issues raised by the pleadings. The jury was unable to agree on a verdict, and on Saturday, the last day of the term, a juror was withdrawn and a mistrial ordered. Plaintiff then made an oral motion to remove the cause to Guilford County for the convenience of witnesses.

The court, reciting: "This cause being heard and it appearing to the court upon motion of the plaintiffs made in open court following an extensive trial of this cause that it would be to the convenience of witnesses that the cause be removed to Guilford County for trial, and also that it would promote the ends of justice," ordered the removal.

After the order was signed, plaintiff was permitted to reduce his motion for removal to writing and to file an affidavit signed by plaintiff in support of the motion.

Defendants excepted to the order removing the cause to Guilford and appealed.

E. James Moore and Cecil Lee Porter for plaintiff, appellee.

Ralph Davis for appellant Warren-Robbins, Inc. and McElwee & Ferree for appellant B & L Motors, Inc.

PER CURIAM. The cause was properly instituted in Wilkes County. G.S. 1-76. This did not, however, prevent plaintiff from seeking a removal for the convenience of witnesses. *Pushman v. Dameron,* 208 N.C. 336, 180 S.E. 578. Whether the motion to remove should be granted was a matter in the discretion of the court.

The record presented to us does not show defendants, as here argued, were denied an opportunity to present evidence in opposition to the motion. It does not show a request to continue the hearing with opportunity to present evidence. The order was based on the evidence taken at the trial.

Affirmed.

HIGGINS, J., not sitting.

STATE v. CLEM J. WILSON, JR.

(Filed 4 November, 1959.)

1. Criminal Law § 23—

Defendant's plea of guilty is equivalent to conviction of the offense charged and no other proof of guilt is required, and after judgment has been pronounced thereon, defendant, upon withdrawal of his original counsel from the case, may not contend to the contrary in the absence of a motion for leave to withdraw the plea.

HIGGINS, J., not sitting.

APPEAL by defendant from *Olive, J.*, March Term, 1959, of FORSYTH.

Criminal prosecution on a two-count indictment charging (1) larceny and (2) receiving stolen goods in violation of G.S. 14-71. Each count related to described meat of the value of $225.28.

Defendant, represented by counsel, entered a plea of guilty to receiving stolen goods as charged in the second count. Thereupon, after hearing certain evidence relative to appropriate punishment, the court pronounced judgment imposing a sentence of eight months.

Judgment was pronounced on March 4, 1959. On March 6, 1959, these events occurred: (1) Original counsel was granted leave to withdraw as defendant's counsel. (2) Defendant excepted to the judgment and appealed.

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

Hastings, Booe & Mitchell for defendant, appellant.

PER CURIAM. While the evidence heard by the court, solely for the purpose stated above, showed defendant had received the meat from the same persons in a course of dealings, defendant asserts it shows he did not receive meat of a value in excess of $100.00 *at any one time.* His complaint seems to be that the court, *ex mero motu,* should have stricken out his plea of guilty and directed that defendant be prosecuted on multiple warrants charging separate offenses, each involving the receiving of stolen meat of a value less than $100.00.

Since the State, in the circumstances, had no reason to bring forward all available evidence, we do not consider whether the facts, if fully developed, were such as to warrant conviction of the offense charged. Suffice to say, defendant made no motion for leave to withdraw his plea of guilty nor does it appear that the contention now made was brought to the attention of the trial judge.

When defendant entered his plea of guilty he had full knowledge of all circumstances relating to his criminal conduct. Apparently defendant's original counsel was of opinion that the entry of the plea of guilty as charged was to defendant's advantage; and, in view of the judgment pronounced, we cannot say this was not the wiser course.

Defendant's plea of guilty was equivalent to a conviction of the offense charged and no other proof of guilt was required. Absent a motion for leave to withdraw such plea, the court properly pronounced judgment thereon.

Affirmed.

HIGGINS, J., not sitting.

STATE v. WOODROW GOODING AND LEROY WILLIAMSON.

(Filed 4 November, 1959.)

1. Assault and Battery § 17—

In a prosecution upon a warrant charging assault with a deadly weapon the jury may return a verdict of guilty of a simple assault when warranted by the evidence. G.S. 15-170.

2. Criminal Law § 108—

Defendants' contentions that the judge failed to give equal stress to their contentions as compared with those of the State *held* to be without substance, the charge of the court complying with the provisions of G.S. 1-180.

HIGGINS, J., not sitting.

APPEAL by defendants from *Mallard, J.*, Special Criminal Term, 4 May 1959, of VANCE.

Criminal prosecution on a warrant charging defendant Gooding on 9 February 1959 with a criminal assault with a deadly weapon, to wit: a shotgun, on Walter Frank Norwood. A similar warrant charges defendant Williamson on the same date with a similar assault on Walter Frank Norwood, with the exception that the deadly weapon is alleged in the warrant to be a pistol.

Each defendant appealed to the Superior Court of Vance County from judgments against them in the Recorder's Court of Vance County.

In the Superior Court the two cases were consolidated for trial by the judge without objection. In the Superior Court both defen-

dants pleaded not guilty, and were tried anew and *de novo* by a judge and jury. G.S. 15-177.1.

Jury verdict as to each defendant: Guilty of a simple assault as charged in the warrant.

From separate judgments of 30 days imprisonment as to each defendant, each defendant appeals to the Supreme Court.

Malcolm B. Seawell, Attorney General, and T. W. Bruton, Assistant Attorney General for the State.

W. M. Nicholson, James B. Ledford, James J. Randleman and L. Glen Ledford for defendants, appellants.

PER CURIAM. Each warrant charges a criminal assault with a deadly weapon, specifying the weapon. The jury convicted each defendant of a simple assault, a less degree of the same crime. The evidence warranted such verdicts, and the jury was empowered by virtue of the provisions of G.S. 15-170 to return such verdicts on warrants charging assault with a deadly weapon, *S. v. Anderson,* 230 N.C. 54, 51 S. E. 2d 895.

Defendants have one assignment of error, that the court in charging the jury failed to give equal stress to the contentions of the defendants as compared to those of the State. A study of the charge does not support this criticism. *S. v. Morgan,* 245 N.C. 215, 95 S.E. 2d 507. The assignment of error is overruled. The court in its charge complied with the provisions of G.S. 1-180.

In the trial below we find no error.

HIGGINS, J., not sitting.

IN RE: ADOPTION OF — VIRGINIA ANN ANDERSON.

(Filed 4 November, 1959.)

1. Appeal and Error § 33—

Where the record does not show that the term of court was regularly held or that the proceeding was properly instituted, or the pleadings, the appeal must be dismissed. Rule 19, Rules of Practice in the Supreme Court.

HIGGINS, J., not sitting.

APPEAL by petitioners from *Gwyn, J.,* June Civil Term, 1959, of WILKES.

This is purportedly a proceeding in which the petitioners, Roy Anderson and Viola Anderson, are seeking to adopt the minor child of Geraldine Johnson Cornelius.

The petitioners appeal only from conclusions of law and the judgment entered pursuant thereto.

J. F. Jordan for petitioners.
Tressie Pierce Fletcher for respondent.

PER CURIAM. The record contains nothing to show that the term of court was regularly held or that the proceeding was properly instituted. *Brown v. Johnson,* 207 N.C. 807, 178 S.E. 570. Moreover the petitioners' petition is not included in the transcript. Nothing is contained in the record except the findings of fact, the conclusions of law and the judgment entered pursuant thereto.

Consequently, the appeal is dismissed under Rule 19, Rules of Practice in the Supreme Court, 221 N.C. 553, *et seq.* See also *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126 and *Waters v. Waters,* 199 N.C. 667, 155 S.E. 564.

Appeal dismissed.

HIGGINS, J., not sitting.

STATE v. ROBERT J. GRUNDLER
AND
STATE v. JOSEPH LEONID JELLY

(Filed 11 November, 1959)

1. Criminal Law § 143—

A person convicted of any criminal offense has the right to appeal. G.S. 15-180.

2. Same—

A defendant has the right to the dismissal of his appeal only upon application addressed to the sound discretion of the court having jurisdiction and further, in capital cases and in all other serious felonies, it must affirmatively appear that defendant advisedly assented to and directed that his appeal be withdrawn or dismissed.

3. Criminal Law § 146—

An appeal becomes effective *eo instanti* the appeal entries are noted and thereafter the Superior Court is *functus officio* to make orders

affecting the merits of the case, however, jurisdiction of all matters pertaining to the settlement of the case on appeal remains in the trial court and it has jurisdiction, even at a later term after notice and a proper showing, to adjudge that the appeal had been abandoned and to proceed in the cause as if no appeal had been taken.

4. Same: Criminal Law § 143—

The Superior Court having jurisdiction of a motion of a defendant to set aside an order vacating the appeal also has jurisdiction to reinstate the appeal in the exercise of its sound discretion for good cause shown.

5. Same: Criminal Law § 139—

Where defendants base their right to reinstatement of their appeals solely on the ground that order theretofore entered vacating their appeal entries should be set aside for surprise and excusable neglect under G.S. 1-220, their appeals from the denial of their motion will be determined in accordance with the theory advanced in the court below.

6. Criminal Law § 143—

The failure of the court to find that the order entered striking defendant's appeal entries and permitting them to abandon their appeal was entered by their mistake, inadvertence, surprise and excusable neglect is conclusive when supported by evidence that defendants advisedly and with full knowledge of the facts requested that they be allowed to abandon their appeals over the protest of their counsel, notwithstanding their evidence *contra* that they were in a state of shock and emotional instability to the extent that they did not and could not comprehend the advice of counsel and the acts done and things said by them at the time in question.

7. Same: Appeal and Error § 46—

Whether the facts found constitute excusable neglect is a conclusion of law reviewable on appeal, but even if there is excusable neglect whether the court will set aside a judgment or order rests in its legal sound discretion which will not be reviewed except in cases of gross abuse.

8. Constitutional Law § 37—

A defendant may waive a constitutional right relating to a mere matter of practice and procedure.

9. Criminal Law § 139—

Ordinarily constitutional questions which are not raised and passed upon in the trial court will not be considered on appeal.

10. Criminal Law § 143—

Upon defendants' motions to set aside an order abandoning their appeal on the ground of surprise and excusable neglect, defendants entered a stipulation that the only issue was whether the order should be set aside for mistake, inadvertence, surprise or excusable neglect. *Held*: Upon the court's finding to the effect that there was no mis-

take, inadvertence, surprise or excusable neglect it was not necessary that the court consider whether the appeal had merit.

11. Same—

Even if defendants attacking an order for their mistake, inadvertence, surprise and excusable neglect, prove such grounds, the order should not ordinarily be set aside unless the court should further find merit and that a different result would probably be reached.

12. Criminal Law § 149—

Certiorari is a discretionary writ, and petitioner must show merit or that error was probably committed in the lower court, since the writ will issue only for good and sufficient cause.

13. Same—

Certiorari is granted in this case for the purpose of considering petitioners' contentions of deprivation of constitutional rights in the trial.

14. Criminal Law § 87—

The separate indictments of defendants for rape of the same prosecutrix on the same evening, defendants being in company with each other, *held* properly consolidated for trial, G.S. 15-152, the material evidence being equally pertinent to both indictments.

15. Rape § 3—

In a prosecution for rape, the general character of the prosecutrix for unchastity may be shown both to attack the credibility of her testimony and as bearing upon the likelihood of consent, but testimony of specific acts of unchastity with a person other than defendant is properly excluded.

16. Same: Criminal Law § 80—

In a prosecution for rape, the State is entitled to prove only the general character of the prosecutrix, and testimony of officers that they had never seen the prosecutrix in establishments where beer was sold is incompetent.

17. Criminal Law § 91—

Where the court properly withdraws incompetent evidence from the consideration of the jury and instructs the jury not to consider it, error in its admission is cured in all but exceptional circumstances.

18. Criminal Law § 84—

Testimony of officers as to statements witnesses had made to them is competent even though such statements were not made in the presence of defendants, when the testimony of the officers tends to corroborate the testimony of the witnesses upon the trial, and the admission of such testimony cannot be held for error when the court specifically restricts it to the purpose of corroboration.

19. Criminal Law § 94—

The interrogation of witnesses by the court solely for the purpose of clarification of their testimony cannot be held erroneous as an expression of opinion by the court on the evidence.

20. Criminal Law § 161—

Exceptions to the charge cannot be sustained when the charge considered contextually is without prejudicial error. G.S. 1-180.

21. Criminal Law § 156—

Minor errors and discrepancies in stating the contentions of the parties must be brought to the attention of the trial court at the time in order for exceptions based thereon to be considered.

HIGGINS, J., not sitting.

APPEAL by defendants from *Parker, J.*, March 1959 Criminal Term, of NEW HANOVER.

Defendants were indicted by the Grand Jury at the February, 1958, Term of Superior Court of New Hanover County in separate bills of indictment. The bills charged each of them with the capital offense of rape. The cases were consolidated for trial and were tried at the March, 1958, Criminal Term of said county before Burgwyn, E. J., and a jury. As to each of them "the jury returned a verdict of guilty of rape with recommendation of life imprisonment." Thereupon the court entered judgment of imprisonment for life as to each. G.S. 14-21. Defendants gave notice of appeal in open court. On the same day and in open court at term, the judge at request of defendants entered an order permitting defendants to abandon and withdraw their appeals and the appeals were thereby dismissed. Thereafter defendants filed petition in Superior Court to set aside the order dismissing the appeals and applied to Supreme Court of North Carolina for *certiorari*.

From "Order and Judgment" denying defendants' petition to set aside order of Burgwyn, E. J., dismissing the appeals, defendants excepted and appealed, assigning errors.

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

Arthur P. Hartel, Jr., Herbert E. Rosenberg and Edward Norwalk for defendants, appellants.

MOORE J. Defendants were represented at the criminal trial by counsel of their own choice, employed and paid by them. Upon the coming in of the verdict the jury was polled. The defendants, and each of them, in apt time moved to set aside the verdict, for new trial and in arrest of judgment. Upon the overruling of the motions, defendants gave notice of appeal and made written application in due form to be permitted to appeal in *forma pauperis*. The court

forthwith entered an order providing: (1) defendants are permitted to appeal to Supreme Court without giving bond for costs and in *forma pauperis;* (2) transcript of the trial proceedings and evidence be furnished to defendants and their counsel at public expense; (3) the cases on appeal and appeal briefs, together with the required copies thereof, be typed and furnished at public expense; (4) counsel who had represented defendants at the trial are appointed to prepare and argue the appeals at public expense. One hundred and twenty days were allowed for preparing and serving case on appeal.

About an hour later defendant Grundler and his father signed and delivered to his attorney the following writing:

"Mr. Aaron Goldberg:

On behalf of myself and my son I desire that the appeal taken in this case be withdrawn and abandoned.

This 8th day of March, 1958.

William Henry Grundler
Robert Joseph Grundler."

Immediately thereafter defendant Jelly and his brother signed and delivered to his attorney a written statement as follows:

"Mr. David Sinclair:

On behalf of myself and my brother, I desire that the appeal taken in this case be withdrawn and abandoned.

March 8, 1958.

Raymond F. Jelly
Joseph L. Jelly."

Upon being informed of defendants' desires to withdraw the appeals, the court required that the defendants be brought before the court. The defendants were asked to stand and state in person whether or not they desired the appeals withdrawn and abandoned. Pursuant to defendants' statements that they desired the appeals withdrawn, the court entered an order dismissing the appeals.

Twenty-eight days later, 5 April 1958, Grundler filed a petition in the Superior Court of New Hanover County to set aside the order dismissing the appeal. In the meanwhile he had employed different attorneys, one of them from his home state of New York.

The petition alleged in substance: Petitioner protests his innocence. ". . . (T)he jury's verdict and subsequent sentence of life imprisonment by the court left me in a state of shock and great emotional upset. . . . The only recollection deponent has concerning the signing (request to attorney to withdraw appeal) is that it was suggested that I sign rather than if I lost the appeal and receiving the

Gas Chamber. In my then condition, even though innocent of the alleged crime, the fear of the Gas Chamber and my state of shock caused me to sign anything that was placed before me." Petitioner should be given opportunity to review trial record and confer with his attorney from his home state. An appeal would prejudice no one. The trial attorney and present attorneys advise there is reasonable cause to prosecute the appeal. Petitioner has a meritorious appeal.

The District Solicitor filed answer opposing the petition. The matter came on for hearing at the June 1958 Term before Frizzelle, J., who dismissed the petition on the ground that the Superior Court ". . . has no jurisdiction or authority under G.S. 1-220 to hear the motion . . ." Petitioner appealed. This Court ruled that the judge was in error in dismissing the petition and remanded it for further hearing. *State v. Grundler*, 249 N.C. 399, 106 S.E. 2d 488.

Further hearing upon the petition was had before Parker, J., at the March 1959 Criminal Term of New Hanover County Superior Court. At this hearing it was stipulated that the defendant Jelly "may adopt the original petition filed by . . . Grundler in the original cause and that the State may use the same answer as to Jelly as in the *Grundler* case . . ." It was further stipulated "that the only issue is whether or not the order revoking the order granting a right to appeal in *forma pauperis*, signed by the Hon. Burgwyn, J., should be set aside for mistake, inadvertence, surprise or excusable neglect."

Evidence in support of the petition tends to show: Grundler and Jelly are 22 and 23 years of age, respectively. They are members of the U. S. Marine Corps. Grundler is from New York and Jelly from Massachusetts. They had believed they would be acquitted and were shocked at the verdict and sentence. They were emotionally upset and cried. They were never in court before. They desired to appeal and knew they had been granted 120 days to prepare appeal. They made no request for appeal in *forma pauperis;* their families were and are willing to bear the expense. They were so emotionally disturbed that they did not know until April they had signed away their right to appeal. They knew that upon a new trial they would be tried for the capital offense and had possibility of a death sentence. They are informed they have meritorious grounds for appeal. They waive the relationship of attorney and client and agree that Messrs. Goldberg and Sinclair be called to testify. Grundler's father and Jelly's brother were with them throughout the trial. They too were shocked and emotionally upset by the verdict and judgment, did not realize what transpired thereafter, did not know the

appeal had been withdrawn until weeks later. They have financial means to defray expenses of appeal for their son and brother.

Other evidence adduced at the hearing tends to show: Defendants' attorneys did not promise or guarantee a favorable verdict. About an hour after appeal entries had been made defendants requested their attorneys to withdraw the appeals. Attorneys protested, asked them to take more time to consider and to confer with attorneys in their home states. When defendants insisted on withdrawing appeals, attorneys required that the requests be put in writing. The judge refused to dismiss the appeals on the written requests, had the defendants brought before him, and required them to stand and personally state whether or not they desired the appeals withdrawn. Defendants in person in open court requested the judge to withdraw the appeals. The order was then made. Mr. Goldberg is a lawyer of 31 years experience at the New Hanover County Bar. Mr. Sinclair has been a practicing attorney for 35 years, four years of which he was District Solicitor; he has been defense counsel in 35 capital cases. An assistant clerk of the court saw defendants sign the application to appeal in *forma pauperis* and the requests to withdraw the appeals. In each instance they told him they understood what they were signing and it appeared to him that they did. Several weeks after the trial, Grundler's father and his present attorney from New York went to the office of the District Solicitor and discussed the possibility of a future parole for Grundler. After this the petition herein was filed.

After hearing the evidence, Judge Parker found the following pertinent facts.

> "2. That upon the trial of the cause the defendant Robert J. Grundler was represented by the Honorable Aaron Goldberg, of the New Hanover County Bar, and the defendant Joseph Leonid Jelly was represented by the Honorable David Sinclair, of the New Hanover County Bar; that both attorneys . . . are outstanding, efficient and accomplished Counselors at Law, possessing unquestionable integrity and ability, and at all times concentrated their legal efforts for the best interest of their client."
>
> "5. That each defendant was allowed to appeal to the Supreme Court of North Carolina in *forma pauperis*, which also appears of record.
>
> "6. That thereafter, and within a period of approximately one hour, William Henry Grundler, who had been present during the trial and participated in the conference with Attorney

Goldberg and his son, the defendant, moved the Court to be permitted to withdraw his appeal, which withdrawal was allowed by the Court, after questioning the defendant Grundler in open court, and after the defendant Robert J. Grundler, along with his father, William Henry Grundler, had signed a statement to his attorney, the Honorable Aaron Goldberg, specifically requesting that such motion for withdrawal of appeal be made before the Court by his Attorney Goldberg.

"7. That this motion for withdrawal of appeal was made under protest by Attorney Goldberg, and against his advice, and after the defendant Robert J. Grundler, in the presence of his father, William Henry Grundler, had been fully advised of his rights in the matter of said appeal, as will appear from the evidence in this hearing.

"8. That the defendant Joseph Leonid Jelly, along with his brother Raymond Jelly, who likewise had been present during the trial and participated in the conference with Attorney David Sinclair and his brother, the defendant, moved the Court to be permitted to withdraw his appeal, which withdrawal was allowed by the court after questioning the defendant Joseph Leonid Jelly in open Court, and further the defendant Joseph Leonid Jelly, along with his brother Raymond Jelly, had signed a statement to his attorney, the Honorable David Sinclair, specifically requesting that such motion for withdrawal of appeal be made before the Court by his Attorney, Sinclair.

"9. That this motion for withdrawal of appeal was made under protest by Attorney Sinclair, and against his advice, and after the defendant Joseph Leonid Jelly, in the presence of his brother Raymond Jelly, had been fully advised of his rights in the matter of said appeal, as will appear from the evidence in this hearing."

The court further found that defendants were "fully informed by said counsel of all the facts and circumstances surrounding said orders, and (defendants) fully comprehending and understanding the same." The court concluded that the order dismissing the appeal was not entered because of mistake, inadvertence, surprise and excusable neglect of defendants. Defendants' petition was denied and defendants appealed.

A person convicted of any criminal offense in Superior Court "shall have the right to appeal." G.S. 15-180. An appellant has the right to dismiss his appeal with leave of court. *U. S. v. Griffith* (1890), 141 U.S. 212. An appeal is under the control of the court

for all purposes and appellant does not have absolute right to dismiss it. In capital cases and in other serious felonies it must affirmatively appear that the prisoner advisedly assents to, desires and directs that his appeal be withdrawn and dismissed. *State v. Leak*, 90 N.C. 655. To make the withdrawal effective the court must so order and leave of court is required. 5 C.J.S., Appeal and Error, sections 1350 and 1351, pp. 397-401. Application to withdraw appeal is addressed to the sound discretion of the court. *Luther v. Luther* (Ala. 1924), 100 So. 497, 498; *Dadabaugh v. Just* (Minn. 1947), 30 N.W. 2d 534.

Application to withdraw appeal must be made to the proper tribunal, the court having jurisdiction to dismiss. L.R.A. (1917A) 117. It has been held in this jurisdiction that when appeal entries are noted, the appeal becomes effective *eo instanti*, and the Superior Court is *functus officio* to make orders affecting the merits of the case. *Bailey v. McPherson*, 233 N.C. 231, 239, 63 S.E. 2d 559. But the court in its discretion may, upon application of appellant, dismiss the appeal during the term at which the case was tried. Jurisdiction of all matters pertaining to the settlement of the case on appeal remains in the trial judge. And it has been held that the judge presiding at a later term, after notice and on proper showing, may adjudge that the appeal has been abandoned and proceed in the cause as if no appeal had been taken. *Hoke v. Greyhound Corp.*, 227 N.C. 374, 376, 42 S.E. 2d 407.

"As a general rule, it is within the discretion of an appellate court, upon good cause shown, to reinstate an appeal . . . provided there has been no laches." 3 Am. Jur., Appeal and Error, sec. 759, pp. 327-328. We perceive no good reason why this rule does not apply with equal force to the trial court where it has jurisdiction to hear the matter. In the instant case we have declared that the trial court did have such jurisdiction. *State v. Grundler, supra.* However, in this case the State and the defendants stipulated that the Court should inquire only as to whether the order of dismissal should be set aside for mistake, inadvertence, surprise or excusable neglect. It is clear that the parties brought themselves within the framework of G.S. 1-220. The matter will be considered here upon the same theory as that adopted by the parties below. *Waddell v. Carson*, 245 N.C. 669, 673, 97 S.E. 2d 222; *Paul v. Neece*, 244 N.C. 565, 570, 94 S.E. 2d 596. We state parenthetically that the judge below had authority to reinstate the appeal upon any ground which might have seemed satisfactory and just to him in the exercise of his sound discretion.

The pertinent portion of G.S. 1-220 provides: "The judge shall,

upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect . . ."

Defendants' first four assignments of error relate to the failure of the court to find in fact and in law that the order dismissing the appeal was obtained through their mistake, inadvertence, surprise or excusable neglect. They contend that such failure and the contrary finding by the court was error. They contend that because of the verdict and judgment they were in a state of shock and emotional instability to the extent that they could not and did not comprehend the advice of counsel and the acts done and things said by them at the time in question. The court found to the contrary. The findings of fact by the court are based on competent evidence. We have consistently held in a long line of cases that the findings of fact by the trial court upon the hearing of a motion to set aside a judgment for mistake, inadvertence, surprise or excusable neglect, G.S. 1-220, are conclusive on appeal when supported by any competent evidence. *Sanders v. Chavis,* 243 N.C. 380, 385, 90 S.E. 2d 749; *Perkins v. Sykes,* 233 N.C. 147, 151, 63 S.E. 2d 133; *Hanford v. McSwain,* 230 N.C. 229, 233, 53 S.E. 2d 84; *Craver v. Spaugh,* 226 N.C. 450, 452, 38 S.E. 2d 525; *Carter v. Anderson,* 208 N.C. 529, 531, 181 S.E. 750; *Helderman v. Mills Co.,* 192 N.C. 626, 628, 135 S.E. 627.

"The findings of fact by the judge are conclusive, except when there is no evidence to support them. (Citing authorities). Whether the facts found constitute excusable neglect is a conclusion of law reviewable on appeal. But if there is excusable neglect, whether the judge shall then set aside the judgment or not rests 'in his discretion,' . . . from which an appeal lies only when there has been a clear abuse of such discretion. (Citing cases). The discretionary power only exists when excusable neglect has been shown. (Citing cases)." *Morris v. Insurance Co.,* 131 N.C. 212, 42 S.E. 577. The discretion is held to be a legal discretion and therefore reviewable. But it will not be reviewed except in cases of gross abuse. *Rierson v. York,* 227 N.C. 575, 578, 42 S.E. 2d 902.

In the case at bar the findings of fact support the legal conclusion that "there was no mistake, inadvertence, surprise or excusable neglect in regard to . . . the withdrawal of said notice of appeal and appeal by the defendants." We find no error of law in this legal conclusion.

The judge was not required to adopt defendant's version of the

facts. The facts were in dispute. The court found the facts in accordance with the evidence favorable to the State's position. This the court had a right to do. Defendants in their brief and in the argument here failed to point out any error of law on the part of Judge Parker with respect to the hearing and the judgment entered by him. Appellants must show error. *Johnson v. Heath,* 240 N.C. 255, 258, 81 S.E. 2d 657.

The fifth assignment of error urges that Judge Parker abused his discretion in refusing to relieve defendants from the order dismissing the appeal. Actually upon the facts as found the judge was not called upon to exercise a discretion. Upon the whole record no abuse of discretion appears and defendants do not point out any respect in which discretion was abused.

In the sixth and last assignment of error defendants attempt to raise a constitutional question on this appeal. They assert that at the hearing and in the judgment they were denied due process and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

A careful scrutiny of the record discloses that no such question was raised in defendants' petition or at any time during the hearing below. This matter was injected for the first time on appeal. The assignment of error refers to no exception taken and to no ruling of the court. Furthermore, defendants entered into a stipulation at the hearing "that the only issue is whether or not the order . . . should be set aside for mistake, inadvertence, surprise or excusable neglect." Under certain circumstances a constitutional right may be waived. *In re Steele,* 220 N.C. 685, 18 S.E. 2d 132; *Jennings v. Illinois,* 342, U.S. 104, 109. A defendant may waive a constitutional right relating to a mere matter of practice and procedure. *Miller v. State,* 237 N.C. 29, 48, 74 S.E. 2d 513. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464.

The purported question was injected for the first time on appeal. The attempt to smuggle in new questions is not approved. *Irvine v. California,* 347 U.S. 128, 129. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones,* 242 N.C. 563, 564, 89 S.E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. *Edelman v. California,* 344 U.S. 357, 358.

In support of defendants' contention that they have been denied "due process" and "equal protection of the laws" reliance is made

almost entirely on the case of *Griffin v. Illinois*, 351 U.S. 12. They quote extensively therefrom. It will be observed that the decision in the *Griffin* case is by a divided court and there is no majority opinion. This case simply decides that where a State provides for an appeal to an appellate court from a criminal conviction the poor must have the same adequate appellate review as is accorded the rich even if it requires that the expense of transcript, prosecution of the appeal and other costs be borne by the State. With this proposition our Court is in thorough accord and the law of this State so provides. G.S. 15-181. In the instant case the trial court granted the right to appeal in *forma pauperis* and ordered that transcript, case on appeal, briefs and counsel be provided at public expense. The *Griffin* case has no application to the facts in this case. Defendants attempt to draw the unwarranted conclusion that the *Griffin* case guarantees adequate appellate review at any time and under such terms as appellant chooses and without regard for the rules of the court and the requirements of procedure. If defendants' contention is carried to its logical conclusion, it would be compulsory to grant an appeal to every defendant convicted of a serious felony whether he wanted to appeal or not. Compliance with rules of court is uniformly required by appellate courts. *Brown v. Allen*, 344 U.S. 443. Defendants advisedly withdrew their appeals. It would seem that they were motivated by fear of the possible consequences of a new trial. They have since changed their minds and seek to be relieved of their own solemn decision, suggesting some vague and sinister deprivation of constitutional rights.

Defendants' appeal might well have been dismissed without discussion. The assignments of error refer to no exceptions taken and we find no numbered exceptions in the record. Rule 19(3) of the Rules of Practice in the Supreme Court of North Carolina, 221 N.C. 553 *et seq.*

The judgment below is affirmed.

It is apparent that Judge Parker gave no consideration to the question as to whether or not defendants had a meritorious appeal. There are two very good reasons why he did not deal with this subject. In the first place it was removed from his consideration by the stipulation above referred to. Secondly, his findings of fact rendered it unnecessary that he consider the question. Ordinarily an order or judgment will not be set aside unless it appears that there is merit and that a different result probably will be reached by so doing. *Craver v. Spaugh, supra.*

Perhaps defendants were influenced in entering into the stipula-

tion restricting the scope of Judge Parker's inquiry by the fact that they had petitioned this Court for *certiorari*. A petition for the writ must show merit or that error was probably committed below. *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown. *Womble v. Gin Company*, 194 N.C. 577, 579, 140 S.E. 230.

We are constrained to allow the petition. We wish to emphasize that we are not induced so to do by reason of any error on the part of Judge Parker, for there was none. Defendants have filed with their petitions for writ of *certiorari* the record proper, the proceedings, the transcript of the evidence (in narrative form as required by our rules—Rule 19(4)) and the charge of the court had upon the criminal trial. They have also filed briefs pointing out what they conceive to be prejudicial errors in the trial. For the purpose of considering the matters thus raised we grant the writ. We do not deem further argument here of value. In their arguments heretofore heard by this Court counsel have pointed out and discussed what they consider to be the merits of their proposed appeals.

The following is a brief statement of the facts:

State's evidence tends to show: Prosecutrix is the wife of a member of the U. S. Marine Corps serving overseas. She lives in Wilmington with her brother. On the night of 1 February 1958 she went to a movie. Afterwards she rode about two blocks with a friend, Ronnie Wingate, a marine. She then went to a cafe on Market Street for coffee. The defendants came into the cafe and approached her. Jelly asked her to go out with them. Grundler said nothing. Prosecutrix told them to leave her alone. She left the cafe without finishing her coffee. A waitress in the cafe heard and observed the occurrence. There were no other marines in the cafe. Jelly followed her. It was snowing. Grundler paid for his and Jelly's orders, left the cafe, drove their car to a street corner where prosecutrix would pass. Jelly accosted prosecutrix, offered her money and was told she was not for sale. At the car Jelly stopped her and took her arm. She screamed He hit her in the face and placed his hand over her mouth. She screamed again and he struck her a second time and forced her into the car. It was about 11:30 P. M. Grundler drove away. Two members of the U. S. Air Force, who were about 60 yards away, heard her scream and saw Jelly strike her and drag her into the car. They immediately reported the incident to the police. A search for the car was begun. When prosecutrix was examined next morning by physicians her jaw was swollen, she had three loose teeth and her cheek bone was fractured in three places. Grundler drove them to a rural

area. Jelly held her down and took off her underclothes. She begged him not to rape her. When she offered resistance, he told her if she wasn't quiet and didn't lie still he would strike her again. She was afraid he would kill her. He then had an act of sexual intercourse. Grundler then stopped the car and got in the back seat with her and asked her to yield to him. She told him not to have intercourse. When he insisted, she told him if he was going to have intercourse to hurry up and take her to a doctor. Grundler then performed the act. Jelly then asked her to perform an unnatural act of intercourse. She told him her jaw was broken. They put her out of the car in the country several miles from her home. She was picked up by a passing car and carried home. Her scarf and gloves were bloody and two buttons were missing from her dress. She related the occurrence to her brother but did not notify police. A highway patrolman stopped defendants' car nine miles north of Wilmington. There was blood on the door post and back seat. Defendants stated they had been to Myrtle Beach in South Carolina and the blood came from one of their buddies who had had trouble there. At request of the patrolman defendants returned to Wilmington. Blood stains were found on Jelly's hand and jacket. The buttons from prosecutrix's dress were found in the car. Grundler later told of the occurrence but denied that prosecutrix had been raped or assaulted to his knowledge.

Defendants' evidence tends to show: Members of the U. S. Marine Corps, Konieczny and Wenzell, had known prosecutrix for some time and had taken her out for rides on three occasions. On this night they had taken her out and remained parked with her in a rural area for about forty-five minutes. She had told them she was widow of a marine who had been killed. After they returned her to Wilmington and put her out, they saw defendants and told them prosecutrix was at the cafe. Defendants proceeded to the cafe and talked to prosecutrix who was friendly. Jelly walked from the cafe and up the street with his arm about her waist. Merrigan and McCollum, marines, were in the cafe and witnessed the occurrence. At the car prosecutrix slipped and fell and Jelly helped her up and into the car. She did not scream. Jelly had intercourse with her first. She was cooperative. She took off her underclothes voluntarily. She consented for Grundler to have intercourse. Afterwards she wanted money. They put her out at her request. She said she lived near there. She never said she was hurt or frightened. She was bleeding.

In rebuttal prosecutrix testified that Merrigan and McCollum were

not in the cafe at any time while she was there and that she did not know Konieczny and Wenzell and had never been out with them.

We consider defendants' assignments of error in order.

(1) Defendants contend the court was in error in consolidating the cases for trial. They insist there should have been a severance. The record does not disclose that defendants excepted to the consolidation or that they moved for a severance. The rule of law with respect to consolidation of indictments is stated in *State v. Bryant,* 250 N.C. 113, 115, 108 S.E. 2d 128, quoting from *State v. Combs,* 200 N.C. 671, 674, 158 S.E. 252, as follows: "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). (Citing cases)." It is so obvious that the indictments in this case fall within this rule that further discussion is deemed unnecessary. The material evidence is equally pertinent to both indictments.

(2). After testifying on direct examination that he had a date with prosecutrix on the night of 1 February, 1958, and had remained parked with her about forty-five minutes, the witness Konieczny was asked whether or not he had sexual intercourse with her on that occasion. The State objected and the court sustained the objection. Had he been permitted to answer he would have testified that he did. Defendants assert that this evidence was competent on the question as to whether or not the prosecutrix consented in the case *sub judice.*

As to whether specific acts of sexual intercourse with third parties are admissible in cases of rape as evidence tending to show likelihood of consent, courts are in disagreement. ". . . (W)hile some authority holds that specific acts of intercourse or lewdness committed by the prosecutrix with other persons may be shown, other authority requires prosecutrix' want of chastity to be shown by evidence of general reputation for unchastity and not by proof of specific acts." 75 C.J.S., Rape, sec. 63, pp. 535-536. This question is fully annotated in 140 A.L.R., 364 *et seq.* "Without exception, the cases hold that previous want of chastity may be shown by proof of reputation." *(ibid,* p. 380). It would seem that the greater weight of authority is that specific acts of unchastity are inadmissible (*ibid,* p. 383). "In perhaps the greater number of cases it is held that while the general reputation for chastity of a complaining witness may be shown, both as attacking the truth of her testimony and the question of whether she has consented to the intercourse, specific acts of unchastity are held

to be inadmissible. The reason generally given in the cases where the one class of evidence is admitted and the other is refused, is that the witness will be prepared to meet attacks on her general reputation, while she may be taken by surprise and not able to defend herself against specific charges." *State v. Wood* (Ariz. 1942), 122 P. 2d 416, 140 A.L.R. 361. "Basis of rule limiting evidence of unchastity of prosecutrix in prosecution for rape to proof of general character in that respect is the unwisdom of opening door to collateral issues tending rather to hinder than promote justice." *Stone v. State* (Ala. 1943), 11 So. 2d 386.

Our Court has held that for the purpose of impeachment the prosecutrix may be cross-examined concerning specific acts of unchastity. *State v. Murray,* 63 N.C. 31, 32. And that where the chastity of the prosecuting witness is directly in question, her reputation for chastity may be shown. *State v. Connor,* 142 N.C. 700, 705-6, 55 S.E. 787; *State v. Daniel,* 87 N.C. 507, 508-509. But we have held that specific acts of unchastity with persons, other than defendant, are inadmissible in rape cases. *State v. Jefferson,* 28 N.C. 305, 307. This case is listed in 140 A.L.R., 386, annotation referred to above, as supporting the minority view. We do not so construe it. In that case it is said: "No doubt, too, that it would have been proper to receive evidence, that the woman was a strumpet, upon similar grounds; and particularly, that she had illicit intercourse with other(s) . . . But that ought only to be done upon general evidence . . ." The court in the instant case did not commit error in excluding evidence of specific acts of unchastity with persons, other than defendants.

(3). The court over the objection of defendants permitted law enforcement officers, seven in number, to testify that they had never seen prosecutrix in establishments where beer was sold. This evidence was incompetent. The State may only prove her general character—it may not offer proof of particular traits of character. North Carolina Evidence: Stansbury, sec. 110, p. 206, and cases there cited. However, His Honor promptly withdrew this evidence from the considerations of the jury and instructed them not to consider it either for or against the defendants. "The power of the court to withdraw incompetent evidence and to instruct the jury not to consider it has long been recognized in this State . . . In *McAllister v. McAllister,* 34 N.C., 184, *Ruffin, C. J.,* said: 'It is undoubtedly proper and in the power of the court to correct a slip by withdrawing evidence from the consideration of the jury. . . .' " *State v. Green,* 251 N.C. 40, 46, 110 S.E. 2d 805, and the many cases there cited. If the matter complained of by defendants is error, it is not prejudicial error.

(4). Defendants complain that the court permitted police officer Sykes to repeat on the witness stand statements made to him by members of the U. S. Air Force who had theretofore testified in the case. These statements had not originally been made in the presence of defendants. The statements were competent to corroborate the Air Force witnesses, and the court specifically restricted the evidence to that purpose. This exception is without merit.

(5). Defendants assert that the court erred in interrogating some of the witnesses, that the judge thereby expressed opinion as to the weight of the evidence. The record discloses no objection or exception thereto. Nevertheless, we have carefully considered these questions and answers. We find that they were only for clarification. *State v. Stevens,* 244 N.C. 40, 44, 92 S.E. 2d 409; *State v. Carter,* 233 N.C. 581, 583, 65 S.E. 2d 9.

(6). The final exceptions are to the court's instructions to the jury. The charge, when considered conjunctively and contextually, properly declared and explained the law arising on the evidence. G.S. 1-180. *State v. Hodgin,* 210 N.C. 371, 378-379, 186 S.E. 495. There were no requests for special instructions. *State v. Coal Co.,* 210 N.C. 742, 755, 188 S.E. 412. If there were minor errors and discrepancies in the giving of contentions of the parties, these must be called to the attention of the court at the time so that correction may be made. None were called to the attention of the court. *State v. Bowser,* 214 N.C. 249, 255, 199 S.E. 31. Equal stress was given to the contentions of the State and defendants. *State v. Smith,* 237 N.C. 1, 27, 74 S.E. 2d 291. We find no error in the court's charge to the jury.

In the trial of these cases we find no error.

On the appeal, affirmed.

In the trial, no error.

HIGGINS, J., not sitting.

J. M. FAIRES, EMPLOYEE
v.
McDEVITT AND STREET COMPANY,
EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 11 November, 1959)

1. Master and Servant § 40g—

Injury resulting in a hernia is compensable only if it is definitely proven that the hernia was the result of an injury arising out of and in the course of employment, that it occurred suddenly, that it was accompanied by pain, that the hernia immediately following an accident, and that the hernia did not exist prior to the accident. G.S. 97-2 (r).

2. Same—

Where an injury resulting in hernia is suffered by employee while performing his usual duties in the regular and customary manner, such injury is not caused by accident, but if the employee's routine is interrupted in such manner as to introduce unusual conditions likely to result in unexpected consequences, and hernia results therefrom, the injury causing the hernia is the result of an accident within the meaning of the Compensation Act.

3. Same— Evidence held sufficient to support finding that hernia resulted from an accident.

Evidence tending to show that the employee was a carpenter and customarily did the work of a carpenter, that in removing concrete forms carpenters usually "stripped" the forms and laborers lifted and removed them, that on the occasion in question other carpenters and helpers had been withdrawn from the job, that the lifting of the forms was usually and customarily done by two men, and that while the employee was attempting to lift one of the forms by himself, requiring extreme exertion and strain in a confined and difficult place of work, he felt a sharp pain which continued until he had received medical treatment for the hernia, *is held* sufficient to support a finding of the Industrial Commission that the employee suffered an injury by accident arising out of and in the course of his employment, resulting in the hernia.

4. Same—

Testimony of a physician that he treated plaintiff for several months prior to the accident and did not find what he thought was a definite hernia, together with testimony of the surgeon who treated the employee after the accident that from the history given him by the employee the hernia on the left side had no relation to the accident but that the employee then had a hernia on both sides, is sufficient to support the finding of the Industrial Commission that the hernia on the right side did not exist prior to the accident.

5. Master and Servant § 55d—

Where there are no exceptions in the record on appeal to the Supreme Court to the failure of the Superior Court to pass upon certain ob-

jections and exceptions taken by the party in the hearing before the Industrial Commission, the matter is not before the Supreme Court on the appeal taken by the adverse party.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Sharp, S. J.*, March, 1959 Special Civil Term, of MECKLENBURG.

This proceeding was instituted by plaintiff employee under the Workmen's Compensation Act to recover compensation for hernia which he alleges resulted from accident arising out of and in the course of his employment by defendant employer.

After due notice a hearing was had 5-7 March 1957 before Gibbs, Commissioner, in Charlotte. It was stipulated that the employer-employee relation existed between plaintiff and defendant, that all parties are subject to and bound by the Workmen's Compensation Act, and Travelers Insurance Company is insurance carrier for employer.

Plaintiff's evidence in summary tends to show: Plaintiff is 61 years old and is a carpenter. On 6 September 1956 he was working on a drain in a basement at the Park Road Shopping Center. He and a "bunch of fellows" were stripping forms. The forms were concrete forms, known as "Universal forms." They had been set in the drain and concrete had been poured. The carpenters and helpers were using crowbars and hammers to remove the forms from the concrete and pull nails from the bottoms of the forms. In the afternoon all the workers were sent elsewhere except plaintiff and a helper, who were left to continue the work in the drain. The drain was an "L" shaped hole or tunnel, 4 feet wide and 5 feet deep. One end of the "L" was about 20 feet long, the other end about 25 feet. There was about 4 inches of water in the bottom of the tunnel. After the other workers left it was the task of plaintiff and his helper to lift the forms out of the tunnel. Plaintiff remained in the tunnel to hand the forms to the helper outside and at the rim of the tunnel. The forms were 2 feet wide, 5 feet long and about 3 inches thick; they had metal binding around them with facings of 5/8 inch plywood. They weighed 110 pounds, but when wet and smeared with concrete, as these were, they weighed much more. Plaintiff put down 4 or 5 forms to stand on so he would not have to stand in water. This put the bottoms of the forms he had to lift 6 inches below his feet. To lift a form he would bend over and stand it on end, take hold of the metal about 18 inches from the bottom and lift the form to his left knee, then while in a squatting position take the bottom by both hands, at which time the helper would take the top and together they would lift it upward, and

plaintiff would lift and shove until his hands were straight up above his shoulders 6 inches above his head. The second form plaintiff lifted in this manner was wet and slick, had a film of concrete on it and weighed about 150 pounds. Plaintiff weighed 150 pounds. As he lifted it from his knee in a squatting position, he felt a sharp pain in the right side about the groin, a "pull" in his side. This was about 3:00 P. M. It continued to hurt as he lifted the form. He made an outcry. His side continued to hurt and pain him that afternoon. He worked until quitting time, 4:30 P.M. After he was hurt he lifted 12 or 15 more of the forms. The job he was doing at the time he felt the sharp pain was a laborer's job. Plaintiff's customary duty as a carpenter was to strip the forms, not to lift them. The lifting job he was doing was customarily done by two men, not one as in this case. Lifting forms was not a part of his regular duties. The forms were too heavy for one man to handle. He was suffering pain when he went home that night. He was sore, his groin was swollen and he had a "ridge" from groin to groin. He hurt continuously through the night and until he went to the doctor on September 11. He did not report the matter on the day he first experienced the pain. He worked the next day but did not report it then. He did not return to work until after his operation on October 10. Upon examination by the doctors it was found that he had a double hernia. In the preceding August he had complained of straining himself while putting up ceiling and had gone to a doctor, but the doctor did not find a hernia then. The hernia was corrected by surgery and he did not return to work for several weeks and then did only light work.

The hearing Commissioner found as a fact: ". . . that plaintiff was employed . . . as a carpenter; that his regular duties were to do general carpenter work; that he was 61 years old and weighed approximately 150 pounds; that his foreman assigned him the duty of lifting concrete forms out of a ditch . . . that this work was usually done with the help of an assistant . . . that plaintiff did not have an assistant on this day . . . about 3 P. M. on said day, plaintiff lifted a wet concrete form which weighed approximately 150 pounds; that he lifted and handled this form in the same manner in which he had lifted and handled the other forms on said day . . . that when he lifted this particular form from his knees upward, being in the same strained, stooped, and awkward position he had been in when he lifted the other forms, he felt a sharp pain in his right groin and suffered an injury thereto. . . . that in the way and manner above described plaintiff sustained an injury by accident arising out of and in the course of his employment by the defendant employer, resulting in a right

inguinal hernia; that said hernia appeared suddenly; that it was accompanied by pain; that it immediately followed an accident; and that it did not exist prior to the accident for which compensation is claimed." There were also findings of fact concerning the size and condition of the ditch or tunnel, the size, shape, weight and condition of the forms, the manner of lifting the forms and the nature of the hernia and the operation for correction thereof, all in accordance with the evidence hereinbefore summarized.

The hearing Commissioner then concluded as follows: "That on September 6, 1956, plaintiff sustained an injury by accident arising out of and in the course of his employment by the defendant employer, resulting in a right inguinal hernia; that said hernia appeared suddenly; that it was accompanied by pain; that it immediately followed an accident; and that it did not exist prior to the accident for which compensation is claimed. G.S. 97-2(f); G.S. 97-2(r); *Smith v. Creamery Co.*, 217 N.C. 468; *Edwards v. Publishing Co.*, 227 N.C. 184." There were other conclusions of law not pertinent to this appeal.

Upon the findings of fact and conclusions of law compensation was awarded on 12 April 1957.

Defendant and carrier appealed to the Full Commissoin. After hearing, the Full Commission on 27 August 1957 adopted as its own the findings of fact and conclusions of law and award of the hearing Commissioner, and so ordered.

From the award of the Full Commission defendant and carrier appealed to the Superior Court.

At the term above indicated, Judge Sharp heard the appeal and entered judgment, the pertinent parts of which are as follows:

". . . the undersigned . . . is of the opinion, and so holds, that there is no competent evidence disclosed on said transcript and record to show that the performance of the labor of the plaintiff, J. M. Faires, at the time he suffered the hernia, was being performed in other than the usual and customary manner; and that the conclusion of law of the North Carolina Industrial Commission that the plaintiff suffered an injury by accident arising out of and in the course of his employment, resulting in a hernia, is not supported by any competent evidence.

"It is therefore, ORDERED, ADJUDGED AND DECREED that the plaintiff recover nothing of the defendants, or either of them, and that the Orders or Awards of the North Carolina Industrial Commission dated August 28, 1957, be and the same are hereby vacated and this action dismissed."

From the foregoing judgment plaintiff appealed to Supreme Court, assigning errors.

Carswell & Justice and Richard E. Thigpen, Jr., for plaintiff, appellant.

B. Irvin Boyle and J. J. Wade, Jr., for defendants, appellees.

MOORE, J. This appeal poses one question: Does the evidence in the record support the findings of fact of the Industrial Commission and its conclusions of law based thereon that plaintiff suffered an injury *by accident* arising out of and in the course of his employment, resulting in a hernia?

An employee's injury resulting in a hernia is compensable only if it be definitely proven: (1) that he received an injury arising out of and in the course of his employment, resulting in hernia; (2) that the hernia appeared suddenly; (3) that it was accompanied by pain; (4) that the hernia immediately followed an accident; and (5) that the hernia did not exist prior to the accident. G.S. 97-2(r). *Hensley v. Cooperative*, 246 N.C. 274, 277, 98 S.E. 2d 289; *Rice v. Chair Co.*, 238 N.C. 121, 123, 76 S.E. 2d 311.

Appellant contends that all five requirements are proven by competent evidence appearing in the record. Appellees insist that the fourth and fifth requirements have not been shown to exist in this case.

If an employee, while performing his regular duties in the "usual and customary manner," receives an injury resulting in a hernia, such injury is not caused by accident and is not compensable. *Holt v. Mills Co.*, 249 N.C. 215, 105 S.E. 2d 614; *Hensley v. Cooperative, supra.*

Moore v. Sales Co., 214 N.C. 424, 190 S.E. 605, is controlling in the instant case. In the *Moore* case plaintiff was a foreman but was also required to do manual work in installing plumbing. On the day of his injury all workers were laid off except plaintiff and one Sykes, a helper. They were ordered to complete the job. They attempted to lift a steel pipe weighing 400 to 450 pounds. Plaintiff suffered a sharp pain in his abdomen and it was found that he had received a hernia. Prior to that time plaintiff had been doing the same general type of work but with different type of materials and had not previously lifted pipes of this type and weight. *Seawell, J.*, speaking for this Court said at pages 429 and 430:

> "In the case at bar the evidence discloses that while the operation of handling and lifting pipes was done in the ordinary manner, and even that the plaintiff had lifted pipes in that way before, two things occurred which, taken together, were out of the ordinary, and are sufficient, we think, to bring into the transaction the element of unusualness and unexpectedness from which accident might be inferred. In this particular case, by order of a

superior, all other employees except plaintiff and Sykes were discharged, and these were left alone to do the heavy lifting. While Sykes had handled that type of pipe and perhaps piping of that weight before, the plaintiff had not. On the contrary, he was required to lift piping of a type and of a weight he had never before lifted, and it may be inferred from the testimony of Sykes that this was caused by the laying off of all other employees, which left them short-handed. From the evidence, his effort to lift the pipe was immediately followed by an injury.

"In the case at bar, there is in the foregoing sufficient evidence of the interruption of the routine of work, and the introduction thereby of unusual conditions likely to result in unexpected consequences, and these were of such a character as to justify the Industrial Commission in finding that plaintiff's injury was the result of accident."

It will be observed that the elements constituting "accident" as set out in the *Moore* case were "the interruption of the routine of work, and the introduction thereby of unusual conditions likely to result in unexpected consequences." The same elements exist with equal definiteness in the case at bar. The work plaintiff was doing at the time he received his injury was usually done by laborers. As a carpenter he did not customarily do this type of work. On a job of this kind carpenters usually "stripped" the forms and laborers lifted and removed them. On this occasion the other carpenters and helpers had been withdrawn from the job. Furthermore, the task plaintiff was performing in lifting the forms was usually and customarily done by two men. The forms were heavy and the lifting required extreme and unaccustomed exertion and strain. The fact that there were numerous forms to be lifted in this unusual task is not important. The crucial facts are: (1) plaintiff's routine of work had been interrupted and he was required to undertake a task that was not usual and customary; and (2) unusual conditions likely to result in unexpected consequences were introduced—an unusual task, requiring extreme exertion and strain in a confined and difficult place to work, which task was usually performed by two men instead of one. Therefore the resulting injury immediately followed an accident. See *Rice v. Chair Co., supra.*

We next inquire as to whether or not the hernia existed before the accident. The Commission found that it did not.

Dr. H. L. Seay gave testimony that he treated plaintiff for several months before the accident and examined him afterwards. He stated that plaintiff was suffering from hypertension and congestive heart. The doctor further testified: "He consulted me . . . for pain or hurt-

ing in the groin on either side. I believe that was on August 20th. . . . I did not find what I though was a definite hernia or rupture and I did not attach too much importance to it. He was complaining of chronic constipation and arthritis in the neck, some shortness of breath and a discomfort in his stomach. . . . I did casually examine the abdomen and groins on August 20th but did not give him any intensive examination. I did not see a hernia on either side at that time. I did not see any obvious evidence of hernia such as a bulge or swelling in either groin.

Dr. John P. Kennedy, the surgeon who performed the operation, testified: "I examined him on September 11th and he had a small inguinal hernia on the left side and a beginning inguinal hernia on the right side. In my opinion the lifting of these forms in the manner in which the plaintiff said he lifted them could or might have caused the condition I found. . . . From the history he gave me the hernia on the left side had no relation to this injury he said he suffered on September 6, 1956. As far as I know it was not related. . . . he did have hernia on both sides."

The Commission awarded compensation only for the hernia on the right side. The foregoing evidence is competent and supports the finding that the hernia on the right side did not exist prior to the accident on September 6, 1956.

In appellees' brief the following question is asked: "If the Supreme Court reverses the ruling of the Superior Court, then may the Supreme Court consider those objections and exceptions of the Appellees to the Order and Award of the North Carolina Industrial Commission which were not passed upon by the Superior Court but which appear fully in this record?"

The record does not disclose that any exception was taken to the failure of the judge in Superior Court to pass upon these objections and exceptions. They are not before us. *Tanner v. Ervin*, 250 N.C. 602, 614, 109 S.E. 2d 460. However, consideration has been given to the matters referred to and they are found to be without merit. The Commission's findings of fact are supported by competent evidence and these findings support its conclusions of law and award.

The judgment below is reversed and this cause is remanded with instructions that a judgment be entered affirming the Commission's award.

Reversed and remanded.

HIGGINS, J., not sitting.

WALDRON BUICK COMPANY v. GENERAL MOTORS CORPORATION AND LEE A. FOLGER, INC.

(Filed 11 November, 1959.)

1. Appeal and Error §§ 3, 4—

Only a party aggrieved may appeal, G.S. 1-271, and a party aggrieved is one whose rights have been directly and injuriously affected by the action of the court.

2. Same—

The appeal of certified public accountant to the refusal of his motion to quash a subpoena *duces tecum* on the ground that its effect would be to compel the divulgence of confidential information will be dismissed as premature if the order does not affect a substantial right of the witness, and, neither of the parties to the action having appealed, the exception of one of the parties to the refusal of the motion to quash the subpoena is not presented unless and until it appeals from the final judgment.

3. Bill of Discovery § 1—

G.S. 8-71 does not contemplate the taking of a deposition of a person disqualified to give evidence in the case, and confers no right to investigate or inquire into matters which the court could not investigate and inquire into in the actual trial.

4. Same: Appeal and Error § 3— Denial of motion to quash subpoena duces tecum held not to affect substantial right of accountant.

Defendant had examined plaintiff's books under court order. Thereafter plaintiff obtained the issuance of a subpoena *duces tecum* directing the public accountant who had examined plaintiff's books for defendant to bring memoranda and reports and give evidence in regard thereto. Motion to quash the subpoena was denied by order which expressly provided that the accountant should not be required to disclose instructions given him by defendant's counsel or to disclose or produce particular analyses made by the accountant on instructions of defendant's counsel, or conclusions from such analyses, etc. *Held:* The accountant was not disqualified to give evidence with respect to facts and data obtained by him directly from the books and records of plaintiff and the accountant was not required to disclose any information or instructions given him by defendant's counsel, or any analyses made by him in accordance therewith and, therefore, no substantial right of the accountant is directly and injuriously affected by the denial of the motion to quash, and his appeal is dismissed.

HIGGINS, J., not sitting.

PARKER, J., dissents.

APPEAL by Sterling Hudson and A. M. Pullen & Company, petitioners, from order entered April 14, 1959, by *Sharp, Special Judge,* presiding at April 6, 1959 Special Term, of MECKLENBURG.

Waldron Buick Company, plaintiff, instituted this action January

18, 1957, to recover damages allegedly caused by wrongful acts of General Motors Corporation and Lee A. Folger, Inc., defendants, in pursuance of a conspiracy in restraint of trade to destroy plaintiff's business. Defendants, in separate answers, denied plaintiff's essential allegations; and, in addition, each defendant pleaded special defenses. The foregoing, for present purposes, will suffice to indicate the general nature of *the controversy between the parties.*

By subpoena *duces tecum,* issued and served March 19, 1959, Sterling Hudson was summoned to appear before a designated Notary Public, at specified time and place, "to give evidence in a deposition then and there to be taken" in this action, and "to have with him then and there . . . Such memoranda and reports, or copies thereof, as reflect his analysis of the books and records of Waldron Buick Company, Concord, North Carolina, which were submitted to him by the defendant General Motors Corporation in connection with the above entitled action."

Defendant General Motors Corporation moved "that the subpoena served on Mr. Sterling Hudson be quashed, revoked and vacated." Thereupon, the clerk signed an order dated March 20, 1959, providing that the subpoena "is hereby temporarily stayed until such time as the Court shall have ruled on the (said) Motion . . . to quash, revoke and vacate said Subpoena *Duces Tecum.*"

Sterling Hudson and A. M. Pullen & Company, represented by their own counsel, filed a verified petition, in which they prayed "for an order quashing the said subpoena *duces tecum,* and directing that neither Mr. Hudson nor any other partner, agent or employee of the firm of A. M. Pullen & Company be compelled to appear and give testimony at the taking of any deposition on behalf of the plaintiff, or to produce and make available any of the memoranda and reports of the analysis of plaintiff's books and records, or to give any testimony with respect thereto."

These are the facts stated in said verified petition:

> "1. Sterling Hudson is a partner in the firm of A. M. Pullen & Company, a firm of Certified Public Accountants, serving through the State of North Carolina and elsewhere. Mr. Hudson is himself a Certified Public Accountant in the State of North Carolina.
>
> "2. In November 1958, A. M. Pullen & Company was retained by . . . counsel for the defendant General Motors Corporation, to perform certain professional accounting services in connection with the above case. Since that time Mr. Hudson, who was assigned by his firm to perform this service has worked

in his professional capacity and conducted an analysis of certain books and accounting records of the plaintiff Waldron Buick Company, under the supervision of and subject to the control of counsel for defendant General Motors Corporation.

"3. In performing the services for which he was retained as aforesaid, Mr. Hudson utilized those books of accounts and other records of the plaintiff company which were made available to him, and obtained no information from any other source except information which was relayed to him from time to time by counsel for said defendant. From the plaintiff's records Mr. Hudson has prepared an analysis for the information of counsel for said defendant, which analysis is not as yet completed.

"4. As a part of his service to counsel for said defendant, Mr. Hudson has also counseled and advised such attorney from time to time concerning accounting procedures and other matters of importance in connection with the above case. He has also been taken into said counsel's confidence with respect to the plans for the trial of such case, and the presentation of the defense thereto by counsel for said defendant. Such information came to Mr. Hudson in connection with his employment by said counsel as aforesaid, and in no other way.

"5. Except for the information obtained from the plaintiff's records, and the confidential information given to Mr. Hudson by counsel for defendant General Motors Corporation as set forth above, neither Mr. Hudson nor his firm, A. M. Pullen & Company, have any knowledge of any facts concerning the things and matters in controversy in such case.

"6. (Relates to issuance of subpoena *duces tecum*, contents thereof, notice for taking deposition.)

"7. Petitioners are advised by their counsel that any questions directed to Mr. Hudson relating to his analysis of the books and records of the plaintiff herein would not be competent inasmuch as he worked in his professional capacity for the attorneys for the defendants in this matter, and for no one else. They are further advised that the subpoena *duces tecum* issued as aforesaid should be quashed and dismissed because the memoranda and reports sought therein are a part of the work product of counsel for said defendant who employed them, and are therefore privileged. Petitioners are further advised that any other information which Mr. Hudson has concerning the above case has come to him in confidence because of his employment in a professional capacity by counsel for the said de-

fendant. Petitioners are finally advised that they may seek the aid of this Court to protect them from being compelled to submit to process of this Court illegally or improperly issued, and from being compelled to answer questions concerning privileged matters."

The record shows: "The Court having stated that it intended to enter an order denying the motion of the defendant General Motors Corporation to quash the subpoena *duces tecum* served on Sterling Hudson and that said order insofar as it related to the said Sterling Hudson would provide in substance as follows": (There follows a statement of the substance of what the court intended to incorporate in the order.) Defendant *General Motors Corporation* then moved, in writing, directing attention to particular provisions, "that the Court in its proposed order specify particularly the proper scope of the proposed examination of Sterling Hudson."

The order of Judge Sharp has eight divisions (I-VIII, inclusive), each of which relates solely to the particular motion or motions referred to therein. Division I thereof is the only portion of the order pertinent to said motion of defendant General Motors Corporation and to said petition of Sterling Hudson and A. M. Pullen & Company to quash said subpoena *duces tecum*. With reference to said motion and to said petition, the order provides:

"The defendant's motion is denied, and Sterling Hudson is directed to appear on the 30th day of April 1959 at 9:30 a.m., in the County Commissioners' Room of the Mecklenburg Courthouse, or such other place as may be agreed upon by counsel, to be examined by the plaintiff, relating to his examination of the books and records of the plaintiff, which were submitted by the plaintiff to the defendants for inspection and copies, under the orders of this Court, PROVIDED HOWEVER, Mr. Hudson is required to testify only with respect to facts and data obtained by him directly from the books and records of the plaintiff; and is not required:

"(a) To disclose information given him by counsel for this defendant.

"(b) To disclose instructions given to him by counsel for this defendant as to particular studies or analyses to be made as part of the preparation for the defense of this action.

"(c) To disclose or to produce particular studies or analyses made on specific instructions of counsel for this defendant.

"(d) To disclose conclusions drawn from studies and analyses made upon specific instructions of counsel for this defendant, or

"(e) To disclose defendant's plans for the defense of this action or defendant's theories, evidence, or analyses of evidence which have been communicated to him by counsel for this defendant,

"To the failure of the Court to revoke in its entirety the Subpoena Duces Tecum, issued to Sterling Hudson, the defendant, General Motors Corporation, objects and excepts. To the action of the Court, in limiting the scope of the examination, as above set out, the plaintiff objects and excepts.

"The Petition of Sterling Hudson and A. M. Pullen & Company, to quash the Subpoena Duces Tecum is denied but the scope of the examination is limited as above set out in the ruling on the defendant's motion to quash the Subpoena Duces Tecum."

Sterling Hudson and A. M. Pullen & Company excepted to the court's denial of their petition "to revoke and vacate in its entirety the subpoena *duces tecum* directing Sterling Hudson to appear and give evidence by deposition and to produce certain memoranda and reports, all as set forth in said subpoena," and excepted to the order as entered by the court, and gave notice of appeal from said order.

Blakeney, Alexander & Machen for plaintiff Waldron Buick Company.

Lassiter, Moore & Van Allen and H. A. Berry, Jr., for petitioners, appellants.

Kennedy, Covington, Lobdell & Hickman, counsel for General Motors Corporation, as amici curiae.

Allen & Hipp, counsel for North Carolina Association of Certified Public Accountants, as amici curiae.

BOBBITT, J. Only a "party aggrieved" may appeal from the superior court to the Supreme Court. G. S. 1-271; *Langley v. Gore*, 242 N.C. 302, 87 S.E. 2d 519. "(A) 'party aggrieved' is one whose right has been directly and injuriously affected by the action of the court." McIntosh, North Carolina Practice and Procedure, § 675; *Freeman v. Thompson*, 216 N.C. 484, 5 S.E. 2d 434. "An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal infer-

ence, . . . which affects a substantial right claimed in any action or proceeding . . ." G.S. 1-277; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377.

"There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer 'right and justice . . . without sale, denial, or delay.' N. C. Const., Art. I, Sec. 35." *Ervin, J.,* in *Veazey v. Durham, supra.*

General Motors Corporation's exception to Judge Sharp's order will be for consideration in the event of an appeal by General Motors Corporation from an adverse judgment. We do not now consider whether Judge Sharp's order was erroneous. The only question now before us is whether any substantial right of Sterling Hudson and A. M. Pullen & Company is directly and injuriously affected by Judge Sharp's order.

In *Yow v. Pittman,* 241 N.C. 69, 84 S.E. 2d 297, this Court said that the deposition statute, G.S. 8-71, notwithstanding its broad provisions, "does not contemplate the taking of deposition of a person disqualified to give evidence in the case. It confers no right to investigate or inquire into matters which the court could not investigate and inquire into in the actual trial." It was held that the defendants could not take the deposition of *plaintiff's physician* because, under G.S. 8-53, he was disqualified to testify as to information he acquired in attending plaintiff in a professional capacity.

Here, under the pleadings, the contents of plaintiff's books and records are germane to the issues. Plaintiff, under court order, was required to submit its books and records to defendants "for inspection and copies"; and, pursuant to employment of A. M. Pullen & Company by counsel for General Motors Corporation, Sterling Hudson, a Certified Public Accountant and member of said firm, made an examination thereof. He thus acquired knowledge of the contents of plaintiff's books and records. A certified public accountant who has knowledge of the contents of plaintiff's books and records is not *disqualified* to give evidence in the case "with respect to facts and data obtained by him directly from the books and records of the plaintiff." Under Judge Sharp's order, this is all Sterling Hudson is required to do. The admissibility of his testimony, as to competency and relevancy, will be passed upon in accordance with usual practice and procedure.

Appellants' petition for order quashing the subpoena *duces tecum* is based solely on the ground that they should not be required to disclose information and instructions given to them in confidence by counsel for General Motors Corporation. As to this, it appears that Judge Sharp granted appellants' petition. Her order specifically provides that Hudson is not required to disclose any information or instructions given him by counsel for General Motors Corporation or any studies or analyses made by him in accordance therewith; and, as we interpret the order, Hudson is not required to make such disclosure either by testimony or by disclosing the contents of any memoranda or reports.

It is noted that appellants' exceptions and assignments of error constitute a broadside challenge of Judge Sharp's order. No specific ground of objection is stated therein.

We are of opinion, and so hold, that no substantial right of appellants is directly and injuriously affected by Judge Sharp's order. Hence, their purported appeal is dismissed.

It is noted: No brief was filed in this Court in behalf of plaintiff. The only appearance in behalf of plaintiff was a motion filed by its counsel to dismiss summarily the purported appeal on the several grounds stated in the motion. This Court, pursuant to consideration in conference, denied plaintiff's said motion on October 2, 1959. Upon further consideration, we are of opinion that, for the reasons stated above, the purported appeal should be dismissed. Hence, this Court's order of October 2, 1959, is stricken.

Appeal dismissed.

HIGGINS, J., not sitting.

PARKER, J., dissents.

STATE v. LEONARD BARHAM.

(Filed 11 November, 1959.)

1. Criminal Law § 108—

The defendant's assignment of error that the court failed to give equal stress to his contentions as compared with those of the State *held* not supported by the record.

2. Criminal Law § 139—

In a criminal case as well as in a civil case an appeal is an exception to the judgment and in a criminal case presents the question whether the verdict is sufficient to support the judgment.

3. Assault and Battery § 11—

A warrant charging that defendant, being a male over eighteen years of age, unlawfully assaulted a named person, without specifying the sex of such person, does not charge an assault upon a female, notwithstanding that the person named is a female.

4. Assault and Battery § 17—

Where the warrant upon which defendant is tried does not charge assault on a female and the evidence discloses that no serious injuries were inflicted on her, the punishment may not exceed a fine of $50.00 or imprisonment for thirty days, notwithstanding that the person assaulted is a female and the charge of the court on the warrant relates to assault on a female, the verdict of the jury being guilty of assault as charged in the warrant.

HIGGINS, J., not sitting.

APPEAL by defendant from *Mallard, J.*, Special May 4 Term, 1959, of VANCE.

The defendant was tried upon three warrants consolidated for trial and judgment in the Recorder's Court of Vance County. From a verdict of guilty and sentence imposed the defendant appealed to the Superior Court where there was a trial *de novo*.

Upon motion of the solicitor the cases were consolidated for trial. The defendant entered a plea of not guilty to the crimes charged in the three separate warrants.

In case No. 3452 the warrant charged that the defendant, Leonard Barham, "did unlawfully and wilfully assault Betty Jean Gupton, a female (he being a male person over the age of 21 years), by turning over, or assisting others in turning over the automobile in which Betty Jean Gupton was riding," etc.

In case No. 3453 the warrant charged that this defendant "did unlawfully and wilfully assault Harvey T. Gupton (he being a male person over 18 years of age), by turning over, or by assisting others in turning over the automobile in which Harvey Gupton was riding." A second count in said warrant charged that the defendant "did unlawfully and wilfully and wantonly damage and injure the personal property of Harvey T. Gupton, to wit: a 1955 Plymouth automobile," etc.

The warrant in case No. 3454 charged that this defendant "did unlawfully and wilfully assault Mae Davis (he being a male over 18 years of age), by turning over or assisting others to turn over the automobile in which Mae Davis was riding," etc.

The jury returned a verdict that Leonard Barham "is guilty as charged in each of the separate warrants."

In case No. 3452 the court imposed a sentence of twelve months,

to be confined in the common jail of Vance County and to be assigned to work under the supervision of the State Prison Department. In case No. 3453 the court imposed a sentence of thirty days on the first count and a sentence of twelve months on the second count, to be confined in the common jail of Vance County and to be assigned to work under the supervision of the State Prison Department. These sentences to run concurrently with the sentence imposed in case No. 3452. In case No. 3454 the court sentenced the defendant to be confined in the common jail of Vance County for a period of nine months to work under the supervision of the State Prison Department. This sentence to begin at the expiration of the sentences imposed in cases Nos. 3452 and 3453.

The defendant appeals, assigning error.

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

W. M. Nicholson, James B. Ledford, L. Glen Ledford, and James J. Randleman for defendant.

DENNY, J. The defendant assigns as error, that the court failed to give equal stress to the contentions of the defendant as compared to those of the State. An examination of the charge leads us to the conclusion that the assignment of error is not supported by the record. Hence, it is overruled. *S. v. Adams,* 245 N.C. 344, 95 S.E. 2d 902; *S. v. Morgan,* 245 N.C. 215, 95 S.E. 2d 507.

In a civil action an appeal constitutes an exception to the judgment rendered and raises two questions: (1) Do the facts support the judgment, and (2) does any error in law appear upon the face of the record? *Goldsboro v. Railroad,* 246 N.C. 101, 97 S.E. 2d 486; *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592; *Moore v. Crosswell,* 240 N.C. 473, 82 S.E. 2d 208; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320.

Likewise, in a criminal case an appeal itself is an exception to the judgment, and if the judgment is regular in form and within the limits of the statute and is predicated upon a verdict sufficient to support it, such judgment will be upheld. *S. v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403; *S. v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738. It follows, as a matter of course, that if the verdict is not sufficient to support the judgment it will not be upheld.

It will be noted that the warrant in case No. 3454 does not charge the defendant with an assault on a female. However, the evidence discloses that Mae Davis is the mother-in-law of Harvey T. Gupton, the prosecuting witness in case No. 3453. Moreover, she testified in

behalf of the State in the trial below and the judge charged the jury as follows: "As to case #3454, against Leonard Barham, I instruct you that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on the 23rd day of February, 1959, that Leonard Barham by turning the car over in which Mae Davis was riding, thereby committed an assault on the prosecuting witness Mae Davis, and that she is a female person, as I have heretofore defined the offense of assault to you, then it will be your duty to render a verdict of guilty against the defendant Leonard Barham, for an assault on a female, if you are satisfied beyond a reasonable doubt that the defendant is over the age of 18 years. If you fail to so find, it will be your duty to render a verdict of not guilty. * * *"

In the case of *S. v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861, the defendant was tried upon a bill of indictment charging that on the 7th day of November, 1957, he "did unlawfully, wilfully, and feloniously rape, ravish and carnally know Shirley Allen, a female, forcibly and against her will," etc. The defendant was tried at the December 2, 1957 Regular Term of the Superior Court of Mecklenburg County and the jury returned a verdict of "guilty of an assault on a female." The defendant testified in the course of the trial that he was at that time nineteen years of age. We upheld the verdict.

In the present case, notwithstanding the instruction of the trial judge to the effect that if the jury found from the evidence and beyond a reasonable doubt that the defendant committed an assault on Mae Davis, "and that she is a female person * * * then it will be your duty to render a verdict of guilty against the defendant Leonard Barham, for an assault on a female, if you are satisfied beyond a reasonable doubt that the defendant is over the age of 18 years, * * *" the jury did not return a verdict of guilty of an assault on a female, but returned a verdict that the defendant Leonard Barham "is guilty as charged in each of the separate warrants."

Since the warrant in case No. 3454 fails to charge an assault on a female, as provided in G.S. 14-33, and the evidence discloses that no serious injuries were inflicted on Mae Davis, the prosecuting witness, the punishment that may be imposed on the verdict in this case may not exceed "a fine of Fifty Dollars ($50.00) or imprisonment for thirty days." Therefore, the Court *ex mero motu* remands case No. 3454 for proper judgment.

In cases Nos. 3452 and 3453—No error.

In case No. 3454—Remanded for proper judgment.

HIGGINS, J., not sitting.

STATE v. HARVEY A. HALL.

(Filed 11 November, 1959.)

1. Criminal Law § 31: Evidence § 3—

It is a matter of common knowledge that pregnant women sometimes miscarry, sometimes have stillbirths, and that a child born alive sometimes dies very shortly after birth.

2. Criminal Law § 1—

A person may not be punished for an offense he may commit in the future, and a charge of crime must be supported by the facts as they existed at the time the charge is formally laid.

3. Parent and Child § 9—

In order for a father to be guilty under G.S. 14-322 for failure to support his child, such failure must be willful, that is, intentionally and without just cause or excuse.

4. Same—

A warrant charging a father with willful failure to support his child must be supported by the facts as they existed at the time the warrant was drawn and cannot be supported by evidence of willful failure supervening between the time the charge was made and the time of the trial.

5. Same—

Where the sole evidence is testimony that the wife advised him almost nine months before the birth of the child that she was pregnant, the evidence does not permit the fair inference that he knew or had notice of the existence of a living child on the date of the issuance of the warrant, and therefore nonsuit should have been allowed for the insufficiency of the evidence to show that his failure to support the child was willful.

HIGGINS, J., not sitting.

APPEAL by defendant from *Bickett, J.*, 2 February, 1959 Term, of FRANKLIN.

Criminal prosecution on an amended warrant charging defendant on 15 January 1958 with wilful neglect and refusal to provide adequate support for his child in violation of G.S. 14-322. The warrant was issued on 3 November 1958, and was amended in the Superior Court, where the case was heard anew and *de novo* on appeal by defendant from the Recorder's Court of Franklin County. G.S. 15-177.1.

Plea: Not Guilty. Verdict: Guilty.

From the judgment imposed, defendant appeals.

Malcolm B. Seawell, Attorney General, and Claude L. Love, Assistant Attorney General for the State.

John F. Matthews for defendant, appellant.

PARKER, J. The State's evidence tends to show the following facts: Defendant and Lillie Cash were married on 7 July 1957. They lived together for about six months, and separated around 15 January 1958. About six weeks after 15 January 1958 defendant's wife saw him on the street, and told him she was pregnant. Defendant asked her what color it was, black or white? That is the only conversation she had with him from the date of separation, until the latter part of November or the first of December 1958. The wife gave birth to a child on 4 October 1958. Defendant is the father of the child. About the last of November or the first of December 1958 defendant came to his wife's house, and looked at the child in a crib. Defendant has provided no support for the child, since his birth. He is regularly employed, and earns about $65.00 a week.

There is no evidence in the record defendant knew or had any notice on the date of the issuance of the warrant, to wit, 3 November 1958, and prior thereto, that his wife had given birth to a live child and the child was living, unless such an inference can be fairly drawn from his wife's telling him on the street she was pregnant some six weeks after their separation on 15 January 1958. It is a fact of common and general knowledge that pregnant women sometimes miscarry, sometimes have stillbirths, and that sometimes children born alive die very shortly after birth. In our opinion, the wife's statement on the street to the defendant about six weeks after their separation on 15 January 1958 that she was pregnant, does not permit the fair inference that defendant knew or had notice on 3 November 1958, the date of issuance of the warrant, and prior thereto, that his wife had given birth to a live child that lived.

In criminal procedure a person can only be punished for an offense he has committed—never for an offense he may commit in the future. "The charge must be supported by the facts as they existed at the time it was formally laid in the court, and cannot be supported by evidence of wilful failure supervening between the time the charge was made and the time of trial—at least, when the trial is had, as it was here, upon the original warrant." *S. v. Summerlin*, 224 N.C. 178, 29 S.E. 2d 462, a case where defendant was charged with wilfully refusing to provide support for his bastard child.

In a prosecution under G.S. 14-322 the failure by a defendant to provide adequate support for his child must be wilful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and

this essential element of the offense must be alleged and proved. *S. v. Lucas,* 242 N.C. 84, 86 S.E. 2d 770; *S. v. Carson,* 228 N.C. 151, 44 S.E. 2d 721; *Hyder v. Hyder,* 215 N.C. 239, 1 S.E. 2d 540; *S. v. Johnson,* 194 N.C. 378, 139 S.E. 697; *S. v. Smith,* 164 N.C. 475, 79 S.E. 979.

Defendant's assignment of error to the failure of the trial court to allow his motion for judgment of nonsuit made at the close of the State's evidence—the defendant offered none—is sustained, for the reason that while the State has offered evidence tending to show that defendant is the father of the child, which his wife gave birth to on 4 October 1958, the State has introduced no evidence, so far as the record shows, nor is there an inference to be fairly deduced from the evidence offered, tending to show that defendant wilfully neglected and refused to provide adequate support for his child, in that there is no evidence in the record, nor any inference to be fairly drawn from the evidence offered, tending to show that on the date of the issuance of the original warrant, to wit, on 3 November 1958, and prior thereto, defendant had any knowledge or notice of the birth and existence of his child. *S. v. Summerlin, supra.*

G.S. 14-322 provides that the wilful neglect or refusal of a father to provide adequate support for his child or children constitutes "a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen (18) years."

It is to be clearly understood that in our consideration of the evidence on the motion for judgment of nonsuit, we have no opinion, and have expressed none, as to whether defendant is the father of Addie Allen Hall or has wilfully neglected and refused to provide adequate support for him. That question is for another day and another forum, if the State decides to proceed further.

The manifest error as to the date of the offense alleged in the original warrant and the amended warrant demonstrates the necessity for the exercise of care in the drawing and amending of warrants. As to this error, see G.S. 15-155.

Reversed.

HIGGINS, J., not sitting.

MARCUS EVAN CAMPBELL v. MARGARET BROWN.

(Filed 11 November, 1959.)

1. Compromise and Settlement—

Judgment sustaining defendant's plea in bar based on a settlement made by plaintiff's insurer with defendant without the knowledge or consent of plaintiff, reversed on authority of *Lampley v. Bell*, 250 N.C. 713.

APPEAL by plaintiff from *Phillips, J.*, April Term, 1959, of RANDOLPH.

Civil action to recover property damages allegedly caused by the negligence of defendant, growing out of a collision on July 14, 1958, at a street intersection in Randleman, N. C., between automobiles owned by plaintiff and by defendant. Evan D. Campbell, plaintiff's minor son, was operating plaintiff's car; and Jerry Brown, defendant's minor son, was operating defendant's car.

Plaintiff moved to strike the allegations of defendant's "Second Further Defense" wherein defendant alleged, in bar of plaintiff's action, the payment to defendant by plaintiff's liability insurance carrier of $250.00 in full settlement of defendant's claims against plaintiff, Evan D. Campbell and said insurance carrier, and the execution by defendant of a release.

There was a hearing with reference to defendant's said plea in bar in which the parties stipulated, *inter alia*, that the insurance carrier made the settlement and obtained defendant's release "without the knowledge or consent of the plaintiff." The court ruled that, upon the stipulated facts, plaintiff's action was barred; and judgment, dismissing the action and taxing plaintiff with costs, was entered. Plaintiff excepted and appealed.

Ottway Burton and Don Davis for plaintiff, appellant.
Coltrane & Gavin for defendant, appellee.

PER CURIAM. In *Lampley v. Bell*, 250 N.C. 713, 110 S.E. 2d 316, opinion filed September 23, 1959, this Court fully considered the identical question; and, upon authority thereof, the judgment of the court below is reversed. Indeed, by stipulation filed in this Court, the parties agree that *Lampley v. Bell, supra*, controls decision here and requires such reversal.

It is noted that *Lampley v. Bell, supra*, had not been decided when the court entered the judgment (April 13, 1959) from which this appeal is taken.

Reversed.

LYNWOOD JOHNSON v. THOMAS HERBERT RHODES.

(Filed 11 November, 1959.)

1. Automobiles § 41g—

Plaintiff's evidence to the effect that he was traveling on a servient street, stopped before entering the intersection with the dominant street, looked in each direction and, seeing no traffic approaching, proceeded into the intersection, and after he had traveled more than half the intersection was struck by defendant's vehicle which entered the intersection along the dominant street at a speed of 40 to 50 m.p.h. in a 35 m.p.h. zone *held* sufficient to take the issue of negligence to the jury.

APPEAL by defendant from *Sharp, S. J.*, March 23, 1959 Term, of WAKE.

Plaintiff was awarded damages for personal injuries sustained in a collision of an automobile owned and operated by defendant in a southwardly direction on West Street in Raleigh with an automobile owned and operated by plaintiff in a westward direction on Hargett Street.

Vehicles traveling on Hargett Street are required to stop before entering its intersection with West Street.

To support his claim for damages plaintiff alleged excessive speed and failure to keep a proper lookout by defendant.

Defendant denied negligence on his part and, as a further defense pleaded excessive and unlawful speed by plaintiff and a failure to stop before entering the intersection as contributory negligence barring recovery.

Bunn, Hatch, Little & Bunn for plaintiff, appellee.

Teague, Johnson and Patterson, Howard F. Twiggs, and Wright T. Dixon for defendant, appellant.

PER CURIAM. Defendant's motion to nonsuit, made at the conclusion of the evidence, was overruled. The only question presented by this appeal is the correctness of the ruling on that motion.

The parties stipulated the speed limit was 35 m.p.h. Plaintiff's testimony fixed defendant's speed at 40-50 m.p.m. Plaintiff testified that he stopped before entering the intersection, moved a child from the front seat to the back seat, and, after looking in each direction and seeing no traffic on West Street, proceeded into the intersection at a speed of 5-10 m.p.h. His vision on West Street at the intersection was limited to 150 to 200 feet. The streets are 40 feet wide. Plaintiff, according to his version, had traveled more than half the intersection

and was 12 feet from the west curb line of West Street when struck by defendant.

Defendant's evidence contradicted plaintiff's testimony and painted an entirely different picture.

What the true facts were was a question to be determined by the jury, not by the court.

No error.

STATE v. LESLIE THEODORE BROWN.

(Filed 11 November, 1959.)

APPEAL by defendant from *Williams, J.*, at March 23, 1959 Term, of WAKE.

Criminal prosecution upon warrant issued out of City Court of Raleigh, N. C., charging that defendant Leslie Theodore Brown did willfully, maliciously and unlawfully drive an automobile on the public highways of Raleigh Township and on the public streets of the city while under the influence of intoxicating liquor on the 1800 block of Wilshire Avenue against the statute in such cases made and provided, etc. Tried in City Court of Raleigh and adjudged guilty, and given 60 days suspended upon payment of $100.00 and costs and surrender driver's license for revocation for 1 year. Notice given of appeal to Superior Court. There defendant pleaded not guilty; but was found guilty by jury, upon which it is adjudged that defendant pay a $100.00 fine and costs.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney General Seawell, Assistant Attorney General Claude L. Love for the State.

Taylor & Mitchell for defendant, appellant.

PER CURIAM. Defendant assigns in the main two groups of exceptions: (1) As to denial of his motion to nonsuit; and (2) failure of the court to charge the jury in conformity to provisions of G.S. 1-180. Considering these, the evidence offered by the State is abundantly sufficient to carry the case to the jury and to support the verdict and judgment rendered. And when the charge given by the court to the jury is read contexually, no prejudicial error appears. Indeed, no reason for disturbing the verdict and judgment is made to appear in the record and case on appeal.

No error.

STATE v. WILLIAM H. BRYANT.

(Filed 11 November, 1959.)

APPEAL by defendant from *Williams, J.*, June, 1959 Regular Criminal Term, WAKE Superior Court.

Criminal prosecution upon a bill of indictment which charged the defendant with the crime of bribery.

The evidence before the jury disclosed the defendant paid two Raleigh police officers money for the purpose of having them "lay off his numbers business." The officers reported the defendant's proposition to their superior officer. They later met the defendant at his request outside the city at night and accepted a fifty dollar bill, at which time the defendant said he would meet them again "in two weeks—at the same time and place for another pay-off." The officers received the money but promised nothing. At the trial the defendant did not offer testimony. He excepted to the refusal of the court to allow his motions to dismiss.

From a verdict of guilty and judgment thereon, the defendant appealed.

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

Thomas W. Ruffin, Robert L. McMillan, Jr. for defendant, appellant

PER CURIAM. The evidence before the jury was ample to establish all essential elements of the offense charged and to support the judgment imposed. The assignments of error with respect to the admissibility of evidence are without merit. The defense of entrapment interposed by the defendant is not supported by the evidence. The record discloses

No error.

HARRIET COTTON MILLS v. LOCAL UNION NO. 578, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); JOHNNY ROSE, CHARLIE THOMAS DUKE, CLINT ROBERSON, HILTON PARRISH, WALTER C. WATKINS, ANDREW PENDERGRASS, LEROY WILLIAMSON, WOODROW GOODING, JOHN HENDERSON, HOMER ROBERTS, JR., DOUGLAS ROSE, CARL NEAL, LEE HARRIS, HENRY HARRIS, CHARLIE HARRIS, HERBERT PARRISH, RANSOM HARGROVE, JOYCE R. MEDLIN, ESTHER C. ROBERSON, RACHEL PIRTLE, BOSHER EUBANKS, ETTA AYSCUE, LEWIS WRIGHT, CLYDE WOODLIEF, GEORGE ROSE, MRS. GEORGE ROSE, EDITH J. PEOPLES, BLANCHE LEWIS, WARREN WALKER, SALLY JOE WALKER, ALBERTA ROSE, RUBY R. CURRIN, MILTON CURRIN, DORTITH THOMPSON, WILLIE JARRELL, FRED LEE COLLIER, WILLIAM CHOPLIN, DAVID SAMUEL PULLEY, DARRELL HEDGEPETH, LEWIS CLAYTON, MILO CLEATON, EARL BENNETT, THOMAS STARNES, HERBERT INSCOE, CLARENCE AYSCUE, ANDREW MEDLIN, OSCAR FAULKNER, RANDELL SMITH, LAWRENCE PEACE, CURTIS ROSE, JOHN FAUCETT, RALPH FAUCETT, JESSIE ROBERSON, LOU VENE B. COGHILL, VIRGINIA R. PEOPLES, SARAH D. PACE, ALVIN C. BREEDLOVE, LULA BARHAM, DORSEY EATMAN, JAMES EATMAN, WILLIAM C. VOYLES, MYRTLE JOHNSON, MYRTLE P. PEOPLES, BRANSOM BLAKE, MILDRED BLAKE, HAROLD VIVERETTE, LONNIE FAISON, JOHNNY MARTIN, TOM WILLIAMS, BENNIE EDWARDS, HORACE FAULKNER, MARY M. WEAVER, LEROY NORRIS, JAMES HOLMES, MILDRED McGHEE, BASIL GREEN, JOE JARRELL, FORREST McGHEE, CHESLEY YARBOROUGH, ZOLA MAE AYSCUE, GOLDA GREY AYSCUE, DAYLON AYSCUE, BLANCHE WHITE, JAMES R. ADCOX, JR., ANNIE TURNER, RAYMOND B. HUDSON, ENGENE HUDSON, LILLIE JONES, MATTIE A. PARRISH, RUBY C. ROSE, JOE FOWLER, ROBERT PARRISH, MAUDE JARRELL, FLORENCE ROBERSON, JOE ROBERSON, LIJAH PEOPLES, JAMES FREEMAN, OSCAR HEDGEPETH, JR., JIM STEVENSON, HOMER ROBERTS, JR., CHARLIE RAINES, JOE PACE, MARVIN GRIFFIN, VOLLIE MANNING, ROY FRANCIS, ROBERT GRISSOM, ALBERTA R. McGHEE, BOBBY JONES, CHARLIE WEST, FRED LEE COGHILL, ROBERT RAINES, CLAUDIA GUPTON, ELIZABETH MARKS, JAMES TART, ANDREW RAINES, BUD DUKE, MORTON ROBERSON, THURSTON LIGGON, EDWARD F. TUCKER, WILLIAM K. HARRIS, HOMER ROBERTS, SR., AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME.

(Filed 25 November, 1959.)

1. **Appeal and Error § 22—**

An exception to the findings of fact and conclusions of law and the judgment of the court is a broadside exception which does not present for review the admissibility of the evidence on which the findings were made or the sufficiency of the evidence to support the findings.

2. **Appeal and Error § 2—**

The Supreme Court may review the merits of a cause and decide the

questions sought to be presented by the appeal when the matter is of wide public interest and concern, notwithstanding that the exceptions are insufficient to present the questions.

3. Constitutional Law §§ 23, 24: Contempt of Court § 6—

A person denying his asserted violation of a restraining order in contempt proceedings has the right under the provisions of Art. I, Section 17 of the Constitution of North Carolina, synonymous with due process of law under the Federal Constitution, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established.

4. Constitutional Law §§ 4, 37—

In criminal as well as in civil actions a person may, subject to certain exceptions, waive a constitutional right by express consent, by failure to assert such right in apt time, or by conduct inconsistent with the purpose to insist upon such right.

5. Same: Constitutional Law § 31—

The right of confrontation may be waived by defendant himself in prosecutions for felonies other than capital, and in prosecutions for misdemeanors he may waive such right through counsel with the consent of the court.

6. Contempt of Court § 3—

Knowledge of a person of the substance and meaning of a restraining order is sufficient knowledge of the order as the basis for a prosecution for contempt, and it is not required that such person have knowledge of the exact words used in the order.

7. Same—

Service of a restraining order on a defendant is sufficient to fix him with knowledge of its provisions as the basis for a prosecution for contempt.

8. Contempt of Court § 6—

The testimony of respondents, together with the other evidence heard by the court, *held* sufficient to sustain the court's findings that each respondent had knowledge of the substance and meaning of a restraining order theretofore issued in the cause and, with such knowledge, willfully and intentionally violated its terms.

9. Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—

In proceedings under an order to show cause why respondents should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by each respondent in violation of the order will not be *held* for error when respondents do not challenge the admission of the affidavits or indicate any desire to cross-examine any affiant, and when no objection is made until after judgment, since defendants will be held to have waived their rights of confrontation.

10. Contempt of Court § 6—

Respondents, who with knowledge of a restraining order, willfully participate in a violation of its provisions are subject to punishment for their contumacious acts, but where the evidence is insufficient to support a finding that one of the respondent's had knowledge of the restraining order the judgment for contempt must be reversed as to him.

HIGGINS, J., not sitting.

APPEAL by Johnny Martin, Charlie T. Duke, Douglas Rose, Johnny Rose, Curtis Rose, Charlie C. Harris, Dorsey Eatman, Willie S. Jarrell, Clinton (Clint) Roberson, Leonard Barham, Willie H. Anstead, Gilbert Lee Clayton, George Newcomb Edwards, William M. Jarrell, Tommy Currin, James M. (J. M.) Morefield, Willie Furman Tart, Wayne Vick, Edward Moseley, Jimmy J. Mulchi, and George Anstead, from orders entered by *Bickett, J.*, in Chambers in VANCE on 17 April 1959, adjudging each in contempt of court, docketed and argued here as No. 385.

On 13 February 1959 Harriet Cotton Mills, a domestic corporation operating a cotton mill in Henderson, instituted an action in the Superior Court of Vance County against two labor unions and 122 named individuals. Contemporaneously with the issuance of summons, plaintiff filed a verified complaint in which it alleged that beginning 15 November 1958 defendants had engaged in mass picketing of its plant, thereby preventing free access thereto by those lawfully entitled to enter; that on 9 February 1959 and since that date defendants had not limited their activities to mass picketing but by threats, assaults, and other acts of violence had prevented employees desiring to do so from working at its plant and by similar conduct had prevented merchants and transportation agencies from delivering cotton and other supplies to its mill. The complaint alleged specific acts of violence by the named defendants. Section 12 of the complaint charged: "That defendants have combined together, and with others whose names are unknown to plaintiff and are combining together to prevent by unlawful means, including, among others, the acts of force and violence and threats of force and violence as hereinabove alleged, the operation by plaintiff of its plant, and to prevent or impede other persons lawfully seeking to work therein, or to enter and leave said premises." Asserting inadequate legal remedies, plaintiff prayed for injunctive relief.

On the afternoon of the 13th, Judge Bickett, presiding over the courts of the Ninth Judicial District, issued an order which in part provided: ". . . that the named defendants, and each of them, and

all persons acting in concert with them, or under their direction or the direction of any of them, and all other persons to whom notice and knowledge of this order may come, are, until the merits of this cause are determined, and until this Court orders otherwise, hereby enjoined and restrained as follows:

"1. From interfering in any manner with free ingress and egress to and from the plaintiff's premises.

"2. From assaulting, threatening, abusing, damaging the property of or in any manner intimidating persons to work or seek to work in or lawfully seek to enter plaintiff's plant, whether on the plaintiff's premises or streets, or thoroughfares adjacent thereto, or away from said premises.

"3. From assembling together in a motor vehicle or vehicles, and pursuing or following employees or agents of plaintiff riding to and from their work or other lawful business at plaintiff's plant, whether on private roadways on plaintiff's property or on public highways leading to and from said plant.

"4. From having more than eight persons at any one time as peaceful pickets at any gate to the plaintiff's plant, provided that no person, including pickets, may approach closer to any gate or entrance to the plaintiff's plant than 75 feet, and provided further that no person or persons shall block driveways or walkways leading to the gates or other entrances to said plant by picketing, barricades, automobiles or otherwise; provided further there shall be no pickets except at the entrance gates to plaintiff's premises or plant.

"It is the intent and purpose of this paragraph 4 that no person, whether engaged in picketing or not, other than persons lawfully seeking to approach and enter the plaintiff's premises for the purpose of transacting lawful business or lawfully traveling along thoroughfares adjacent thereto, shall approach closer to any gate of plaintiff's plant than 75 feet, and no automobiles shall be parked within 75 feet of plaintiff's gates.

"5. No person shall abuse, intimidate, strike, threaten, or use any vile, abusive, violent, or threatening language at or towards any person on the plaintiff's premises or any person entering or leaving said premises, or any employees of plaintiff anywhere, and shall in no manner interfere with or impede any motor vehicles, wagon, cart, truck, or animal, in approaching or leaving the plaintiff's premises, and shall in no manner interfere with the free ingress and egress of any person or vehicle or animal to or from the plaintiff's plant, or along and over any of the streets, road, or walkways adjacent or leading to the plaintiff's plant.

"The acts which persons are hereby enjoined and restrained from doing, they and each of them likewise are hereby enjoined and restrained from aiding or procuring or causing to be done."

The sheriff was directed to serve "and post copies of this order in conspicuous places at and in the vicinity of plaintiff's plant, and particularly at all the entrance gates to said plant and office."

The caption of the order, after listing the 122 named defendants, is directed to "all other persons to whom notice and knowledge of this action may come."

The order directed defendants to appear at the courthouse in Vance County on 5 March and show cause why it should not remain in force until a final determination of the issues. This order was, on 16 February, served on 114 of the 122 named defendants including Johnny Martin, Charlie T. Duke, Douglas Rose, Johnny Rose, Curtis Rose, Charlie C. Harris, Dorsey Eatman, Willie S. Jarrell, and Clinton Roberson, hereinafter designated as defendant appellants.

The named defendants answered the complaint. They admitted a strike by plaintiff's employees but denied the existence of and participation in any breaches of the peace or other wrongful conduct.

On 5 March Judge Bickett, on motion of plaintiff, continued the restraining order to the final hearing. He recited in his order that the attorney for defendants did not resist plaintiff's motion.

On 25 March plaintiff, as the basis for a show cause and contempt order, filed a petition with Judge Bickett reciting that 26 named individuals, including defendant appellants and George Anstead, Willie H. Anstead, Leonard Barham, Gilbert Lee Clayton, Tommy Currin, George Newcomb Edwards, James M. Morefield, Edward Moseley, Jimmie J. Mulchi, Willie Furman Tart, and Wayne Vick, not parties, and hence hereinafter designated as respondent appellants, had willfully disobeyed the provisions of the restraining order by described acts of violence. Plaintiff filed with its petition and motion numerous affidavits particularizing acts of each appellant constituting a violation of the restraining order.

On 26 March Judge Bickett issued an order reciting the filing of the petition which asserted a willful violation of the restraining order by appellants "after having actual notice and knowledge of said Restraining Order." He required appellants to appear before him at Henderson on 1 April and show cause why they should not be held for contempt. This order, with copies of plaintiff's petition and motion and the affidavits accompanying the same, was served on appellants.

Defendant appellants and respondent appellants filed a joint answer

which was duly verified. To relieve them of the charge of contempt, they say:

"That respondents, and each of them . . . respectively represent to this Honorable Court, that they had no intent to commit any act of violence, to participate in or incite a riot or mob action, as described and set forth in said petition and affidavits.

"That said respondents, and each of them, respectfully represent that if they are guilty of anything at all, which is denied, it was being present at the time and place described in said petition and affidavits when such alleged action or overt acts alleged to have happened and by their presence in or near the scene of such occurrence made them an involuntary and non-participant in the matters and things described in the petition and affidavits.

"That respondents, and each of them, respectfully represent to this Honorable Court, that they had no intent at any time to commit a voluntary and willful act in violation of said restraining order.

"Wherefore, having fully answered Notice to Show Cause, respondents pray that Notice to Show Cause be dismissed and that they not be held in contempt of this Honorable Court."

On 1 April, the return date of the show cause order, the hearing was, at the request of counsel for appellants, continued to 2 April. It was not completed on that date and was again, at the request of counsel, continued. Hearings were had on 10, 11, and 17 April. On the 17th the court entered orders holding 21, of the 26 cited, for contempt. The record does not disclose what disposition was made with respect to the charges against the remaining five.

Each order contains specific findings of fact with respect to the acts done by the person therein named and a finding that the act or acts were done with a willful intent to violate the restraining order and, as to defendant appellants, knowledge of its provisions by reason of service.

Knowledge of the restraining order by respondent appellants was based on (a) admission by appellants on the witness stand that they knew about the restraining order, and (b) findings that the order had been posted at the mill gates, published in the local paper, and its contents publicized over the radio.

Based on the findings, the court imposed punishment by way of fines varying from $100 to $250, and in addition, imposed prison sentences on five for 20 days and on three for 30 days.

When the orders adjudging appellants in contempt were entered, they noted the following exception:

"To the foregoing Order the respondents and each of them except

to the findings of fact and conclusions of law of the Court, and respondents and each of them except to the judgment rendered against each of them . . ." Notice of appeal was given and 60 days was allowed appellants to serve statement of case on appeal.

Perry & Kittrell, Chas. P. Green, and A. W. Gholson, Jr., for plaintiff, appellee.

W. M. Nicholson, James B. Ledford, James J. Randleman, and L. Glen Ledford for appellants.

RODMAN, J. The exception quoted in the statement of facts is the only one appearing in the record. Nonetheless, appellants, in the assignments of error, attempt to break this single exception into four parts and refer to four exceptions.

The single exception is broadside. It does not draw into focus any particular finding of fact. It deprives this Court of that assistance it is rightfully entitled to expect if an appellant seriously intends to challenge the sufficiency of the evidence to support the findings of fact. It does not challenge the admissibility of the evidence on which the findings are made nor the probative value of the evidence to establish the facts found. See Rules 19(3) and 21 of this Court, 221 N.C. 546, Vol. 4A, p. 171 *et seq.* of the General Statutes; *Columbus County v. Thompson*, 249 N.C. 607, 107 S.E. 2d 302; *Caldwell v. Bradford*, 248 N.C. 48, 102 S.E. 2d 399; *In re McWhirter*, 248 N.C. 324, 103 S.E. 2d 293; *In re Estate of Cogdill*, 246 N.C. 602, 99 S.E. 2d 785; *Weddle v. Weddle*, 246 N.C. 336, 98 S.E. 2d 302; *Kovacs v. Brewer*, 245 N.C. 630, 97 S.E. 2d 96; *Putnam v. Publications*, 245 N.C. 432, 96 S.E. 2d 445; *Travis v. Johnston*, 244 N.C. 713, 95 S.E. 2d 94; *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242; *Grandy v. Walker*, 234 N.C. 734, 68 S.E. 2d 807; *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351.

The questions presented in this and related appeals heard at this term grow out of a strike of employees at cotton mills in Henderson. The strike began in 1958. Early in 1959 the situation at Henderson was tense. There was much violence. Local law enforcement officers were unable to cope with the situation and maintain order. A large segment of the Highway Patrol was assigned to the Henderson area so that they might assist the local officers. Finally it became necessary to send the National Guard to Henderson. No one wished a declaration of martial law. To the contrary, every one wanted civil authorities to continue in control and civil liberties to continue in force. To accomplish this purpose and to make effective use of the

Guard, the Legislature gave the Guard, when called to duty by the Governor, "such power of arrest as may be reasonably necessary to accomplish the purpose for which they have been called out." c. 453, S.L. 1959. The Legislature made a special appropriation of $750,000 for the purpose of defraying expenses of the National Guard in emergencies. c. 1053, S.L. 1959.

Because of the wide interest and importance in this and related cases and the nature and character of questions attempted to be presented, we feel justified in relaxing the rule so as to consider the factual situation described by the evidence as well as the legal questions enumerated in the assignments of error.

The orders holding appellants in contempt are based on events occurring on 2 and 16 March. Some of appellants participated in the acts occurring on 2 March, others in the acts occurring on 16 March.

The order holding Douglas Rose in contempt is based on findings that he took part in prohibited acts on each of these days. Because descriptive of conditions and typical of the facts found by the court which form the basis for the orders punishing for contempt, we quote from the findings in the Douglas Rose order: ". . . the said Douglas Rose willfully, knowingly, and intentionally on March 2, 1959, shortly after 3 o'clock p.m. violated the Restraining Order by being a member of a group or mob of approximately fifteen or twenty people, which group or mob followed Marcus Davis, an employee of the Harriet Cotton Mill, from the plaintiff mill's gate to his home, and which group or mob stood in the street in front of Marcus Davis' house and threw bricks and bottles at the said Marcus Davis' car, one of which objects hit his car and damaged the same.

"That the Court further finds as a fact that the said Douglas Rose willfully, knowingly and intentionally on March 16, 1959, at or about 3 o'clock p.m. violated the terms of the Restraining Order by throwing rocks or other objects at cars of persons who work in or seek to work in plaintiff's plant, and was a member of a group or mob of approximately fifty or sixty men, the members of which mob were armed with sticks, rocks, bottles, bricks and clubs, and which said mob was threatening employees of plaintiff, and were stoning the cars of employees of plaintiff as they were leaving work, and blocking Alexander Avenue so that the cars of employees and persons working in the Harriet Cotton Mills could not pass along said street but had to come to a complete stop for several minutes. It is further found as a fact that Douglas Rose, while a part of this mob, participated directly in blocking Alexander Avenue, and was also acting in concert with others in this group or mob in furtherence of the com-

mon purpose of willfully, knowingly and intentionally intimidating and threatening persons working in the Harriet Cotton Mills, interfering with the free egress from plaintiff's premises, assaulting, damaging and abusing the property of persons who work in the Harriet Cotton Mills, and interfering with and impeding motor vehicles leaving plaintiff's premises, and that the said Douglas Rose was a party to what the other members of the mob did in violation of the Restraining Order.

"The Court further finds that the above acts committed by the said Douglas Rose were committed for the purpose of willfully, knowingly and intentionally intimidating employees and persons who work in or seek to work in plaintiff's plant, and interfering with and impeding motor vehicles leaving plaintiff's premises, and interfering with free ingress and egress to and from plaintiff's plant. That respondent, Douglas Rose, on the 16th day of March, 1959, did willfully, knowingly and intentionally violate the terms of the Restraining Order theretofore issued in this cause."

The facts found assuredly suffice to hold appellant in contempt, and since the only question presented by the single exception is the validity of the judgment based on the facts found, it follows that the exception is without merit.

But appellants say that conceding the facts found establish a prohibited act, there is no competent evidence to support the findings, and the findings are therefore a nullity.

To support the charge of contempt the State offered in evidence affidavits of Marcus E. Davis, victim of the mob action of 2 March, and Roy Thomas Edwards and Linwood Sledge, victims of the mob action of 16 March. These affidavits stated in detail acts of violence consisting of throwing rocks, bricks, and other missiles, resulting in damage to the motor vehicles they were operating on the streets of Henderson. The affidavit of Marcus Davis gave the names of five persons who were part of that mob. Edwards and Sledge did not name any members of the mob who attacked them. In addition to these affidavits, 22 affidavits made by members of the State Highway Patrol were introduced in evidence. These affidavits describe the conditions observed by them on 2 and 16 March and the parts which the different persons played in the happenings on those days. The conditions described and appellants' participation therein are sufficient to support the findings. An affidavit of the sheriff of Vance County was put in evidence which stated that copies of the restraining orders had been posted at or near the mills and at the courthouse, published in the local newspaper, and publicized over the radio. Copies of all these

affidavits accompanied the show cause order which was served on appellants. No objection was taken when these affidavits were offered in evidence. The record is barren of any suggestion that it was ever intimated to Judge Bickett that the affidavits were not admissible or that it was in any manner inappropriate to use them for the purpose for which they were offered. So far as the record discloses, the first time the right to use the affidavits was questioned was on 3 July when the case on appeal, which included the assignments of error, was served on appellee.

Appellants now urge us to reverse the order holding them in contempt because, as they assert, the affidavits offered to support the findings of fact were incompetent and should have been rejected by the court *sua sponte* since proof in that manner constituted a denial of due process guaranteed by both State and Federal Constitutions.

They assert the conduct charged amounts to criminal contempt, *Galyon v. Stutts*, 241 N.C. 120, 84 S.E. 2d 822; *Bissette v. W. B. Conkey Co.*, 194 U.S. 324, 48 L Ed. 997; hence proof of the charges by the affidavits deprived them of the right of confrontation and cross-examination, rights guaranteed by the Constitution.

As stated by appellants, it has been the practice of courts and litigants in this State to use affidavits in contempt proceedings to establish or negative the commission of the asserted contumacious act. In *In re Deaton*, 105 N.C. 59, respondent had been held in contempt by the mayor of Troy. He appealed to the Superior Court. That court declined to review the findings on which the order holding him in contempt was based. On appeal to this Court, *Clark, J.*, said: "In this class of contempts on appeal from the Superior Court, the findings of the Judge as to the facts are conclusive, and this Court can only review the law applicable to such state of facts. It is otherwise, however, on appeals from a subordinate Court to the Superior Court. In that case, it is the duty of the Judge to review the findings of fact of the Court below, as well as the rulings of law; and when, in furtherance of justice, it may be required, the Judge can hear additional testimony, either orally or by affidavit, in making up his own findings of fact." At least since the decision in that case it appears to have been the practice to use affidavits and parol testimony indiscriminately. *In re Parker*, 177 N.C. 463, 99 S.E. 342; *Erwin Mills v. Textile Workers Union*, 234 N.C. 321, 67 S.E. 2d 372; and *Cotton Mill Co. v. Textile Workers Union*, 234 N.C. 545, 67 S.E. 2d 755, illustrate the practice. Just as in the trial of this case the right to use affidavits has heretofore gone unchallenged. Their use has been looked upon as a means of facilitating disposition of the causes.

Not until this and related cases growing out of the Henderson situation has the right to use affidavits been challenged in this Court. The right to use affidavits for the purpose of establishing contumacious conduct has been considered in a few cases outside of North Carolina. The use of such affidavits has been sanctioned in Georgia, *Warner v. Martin,* 52 S.E. 446, 4 Ann. Cas. 180; Tennessee, *Bowdon v. Bowdon,* 278 S.W. 2d 670; California, *Ex parte Wenzler,* 74 P. 2d 297; Illinois, *O'Neil v. People,* 113 Ill. App. 195; North Dakota, *S. v. Harris,* 105 N.W. 621. They have been held inadmissible in New Jersey, *Staley v. South Jersey Realty Co.,* 90 A 1042, L.R.A. 1917B 113; Connecticut, *Welch v. Barber,* 52 Am. Rep. 567; Texas, *Ex parte Kilgore,* 3 Tex. App. 247; Minnesota, *S. ex rel. Russell v. District Court,* 62 N.W. 831; by the Circuit Court for the 8th Circuit, *New Jersey Patent Co. v. Martin,* 166 F. 1010. The different conclusions reached are noted in 17 C.J.S. 112 and 12 Am. Jur. 441.

In our opinion, the "law of the land" guaranteed by Art. I, §17 of our Constitution, synonymous with due process of law, guarantees to one charged with contempt of court by an asserted willful violation of a restraining order a right, when he denies the asserted violation, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established. Such right of confrontation and cross-examination has been repeatedly declared in analagous situations. *In re Gibbons,* 245 N.C. 24, 95 S.E. 2d 85; *In re Gamble,* 244 N.C. 149, 93 S.E. 2d 66; *Roediger v. Sapos,* 217 N.C. 95, 6 S.E. 2d 801; *Bank v. Motor Co.,* 216 N.C. 432, 5 S.E. 2d 318; *S. v. Hightower,* 187 N.C. 300, 121 S.E. 616; *Cason v. Glass Bottle Blowers Asso.,* 231 P. 2d 6, 21 A.L.R. 2d 1387. Our decisions accord with "due process of law" guaranteed by the Federal Constitution as that phrase has been interpreted by the Supreme Court of the United States. *Re Oliver,* 333 U.S. 257, 92 L. Ed. 682.

But recognition of the right to confront and cross-examine does not establish prejudice to appellants by the method here pursued. Appellants had the privilege of waiving these constitutional rights. "It is the general rule, subject to certain exceptions, that a defendant may waive the benefit of a constitutional as well as a statutory provision," Sedgewick, Stat. and Const. Law, p. 111. And this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *S. v. Mitchell, supra* (119 N.C. 784).

"In this jurisdiction, the more important privilege of being present in person, so as to confront one's accusers on trial for a criminal offense, may, in felonies other than capital, be waived by defendant

himself, but not by his counsel, while in misdemeanors such waiver may be made through counsel with the consent of the court." *S. v. Hartsfield,* 188 N.C. 357, 124 S.E. 629; *S. v. Grundler, ante,* 177; *Cameron v. McDonald,* 216 N.C. 712, 6 S.E. 2d 497; *S. v. Harris,* 181 N.C. 600, 107 S.E. 466; *S. v. Mitchell, supra; Miller v. State,* 237 N. C. 29 cert. den 345 U.S. 930, 97 L. Ed. 1360.

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." *Yakus v. U.S.,* 321 U.S. 414, 88 L. Ed. 834; *Michel v. Louisiana,* 350 U.S. 91, 100 L. Ed. 83; *Jennings v. Illinois,* 342 U.S. 104, 96 L. Ed. 119.

Appellants have been represented throughout by experienced counsel. The briefs here filed and the argument made in behalf of their clients demonstrate their ability. No one would suggest that these attorneys were not aware of the proper way to protect the rights of their clients.

Each appellant, with the exception of Jimmie J. Mulchi, was a witness in his own behalf. Mulchi, so far as the record discloses, did not testify. Each respondent appellant testifying stated that he had knowledge of the restraining order. Their testimony, read in connection with their answer, is sufficient to justify the court's finding that the acts were done willfully, knowingly, and intentionally violated the terms of the restraining order. It was not necessary to establish that they had knowledge of the exact words used in the order. Knowledge of its substance and meaning was sufficient. *Weston v. Lumber Co.,* 158 N.C. 270, 73 S.E. 799. Service of the restraining order on defendant appellants fixed them with knowledge of its provisions.

If appellants wished to challenge the evidence offered for the purpose of establishing their guilt, they should have objected when the evidence was offered. The affidavits came principally from law enforcement officers. Whether they or any of them were in court when the hearing was had does not appear; but we think it certain if appellants had indicated any desire to cross-examine any affiant, permission would have been granted and the affiant brought to court for that purpose. In the absence of an exception the evidence offered was properly received and considered.

"Conceding that, as a piece of independent testimony a mere affidavit was not admissible, it was competent for defendant to waive this objection." *Connecticut Mut. L. Ins. Co. v. Hillmon,* 188 U.S. 208, 47 L. Ed. 446.

Johnson, J., in *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895, quotes Wigmore as follows: "The initiative in excluding improper

evidence is left entirely to the opponent,—so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence; but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence not invoked is waived." *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326; *Grandy v. Walker, supra; Brewer v. Ring and Valk,* 177 N.C. 476, 99 S.E. 358; *Tyner v. Barnes,* 142 N.C. 110; *Holder v. Mfg. Co.,* 135 N.C. 392; *Gudger v. Penland,* 118 N.C. 832; *Gibbs v. Lyon,* 95 N.C. 146; *Williamson v Canal Co.,* 78 N.C. 156; *Goodwin v. Fox,* 129 U.S. 601, 32 L. Ed. 805; *Neal v. Delaware,* 103 U.S. 370, 26 L. Ed. 567, *Evans v. Hettich,* 7 *Wheaton* 453, 5 L. Ed. 496.

Respondent appellants correctly concede that if they had knowledge of the restraining order and willfully participated in a violation of its provisions they are subject to punishment for their contumacious acts. *Erwin Mills v. Textile Workers Union, supra; Cotton Mills v. Abrams,* 231 N.C. 431, 57 S.E. 2d 803; *Ex parte Lennon,* 166 U.S. 548, 41 L. Ed. 1110; *S. ex rel. Lindsley v. Grady,* 195 P. 1049, 15 A.L.R. 383.

Jimmie J. Mulchi is not a party defendant. There is, in our opinion, no evidence in the record sufficient to support the finding that he had knowledge of the restraining order, its purpose, terms and provisions.

The order holding Jimmie J. Mulchi in contempt is

Reversed.

As to the other appellants the orders are

Affirmed.

HIGGINS, J., not sitting.

HARRIET COTTON MILLS v. LOCAL UNION NO. 578, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); JOHNNY ROSE, CHARLIE THOMAS DUKE, CLINT ROBERSON, HILTON PARRISH, WALTER C. WATKINS, ANDREW PENDERGRASS, LEROY WILLIAMSON, WOODROW GOODING, JOHN HENDERSON, HOMER ROBERTS, JR., DOUGLAS ROSE, CARL NEAL, LEE HARRIS, HENRY HARRIS, CHARLIE HARRIS, HERBERT PARRISH, RANSOM HARGROVE, JOYCE R. MEDLIN, ESTHER C. ROBERSON, RACHEL PIRTLE, BOSHER EUBANKS, ETTA AYSCUE, LEWIS WRIGHT, CLYDE WOODLIEF, GEORGE ROSE, MRS. GEORGE ROSE, EDITH J. PEOPLES, BLANCHE LEWIS, WARREN WALKER, SALLY JOE WALKER, ALBERTA ROSE, RUBY R. CURRIN, MILTON CURRIN, DORTITH THOMPSON, WILLIE JARRELL, FRED LEE COLLIER, WILLIAM CHOPLIN, DAVID SAMUEL PULLEY, DARRELL HEDGEPETH, LEWIS CLAYTON, MILO CLEATON, EARL BENNETT, THOMAS STARNES, HERBERT INSCOE, CLARENCE AYSCUE, ANDREW MEDLIN, OSCAR FAULKNER, RANDELL SMITH, LAWRENCE PEACE, CURTIS ROSE, JOHN FAUCETTE, RALPH FAUCETTE, JESSIE ROBERSON, LOU VENE B. COGHILL, VIRGINIA R. PEOPLES, SARAH D. PACE, ALVIN C. BREEDLOVE, LULA BARHAM, DORSEY EATMAN, JAMES EATMAN, WILLIAM C. VOYLES, MYRTLE JOHNSON, MYRTLE P. PEOPLES, BRANSON BLAKE, MILDRED BLAKE, HAROLD VIVERETTE, LONNIE FAISON, JOHNNY MARTIN, TOM WILLIAMS, BENNIE EDWARDS, HORACE FAULKNER, MARY M. WEAVER, LEROY NORRIS, JAMES HOLMES, MILDRED McGHEE, BASIL GREEN, JOE JARRELL, FORREST McGHEE, CHESLEY YARBOROUGH, ZOLA MAE AYSCUE, GOLDA GREY AYSCUE, DAYLON AYSCUE, BLANCHE WHITE, JAMES R. ADCOX, JR., ANNIE TURNER, RAYMOND B. HUDSON, ENGENE HUDSON, LILLIE JONES, MATTIE A. PARRISH, RUBY C. ROSE, JOE FOWLER, ROBERT PARRISH, MAUDE JARRELL, FLORENCE ROBERSON, JOE ROBERSON, LIJAH PEOPLES, JAMES FREEMAN, OSCAR HEDGEPETH, JR., JIM STEVENSON, HOMER ROBERTS, JR., CHARLIE RAINES, JOE PACE, MARVIN GRIFFIN, VOLLIE MANNING, ROY FRANCIS, ROBERT GRISSOM, ALBERTA R. McGHEE, BOBBY JONES, CHARLIE WEST, FRED LEE COGHILL, ROBERT RAINES, CLAUDIA GUPTON, ELIZABETH MARKS, JAMES TART, ANDREW RAINES, BUD DUKE, MORTON ROBERSON, THURSTON LIGGON, EDWARD F. TUCKER, WILLIAM K. HARRIS, HOMER ROBERTS, SR., AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME.

(Filed 25 November, 1959.)

1. Contempt of Court § 6—

A finding of the court in contempt proceedings that respondents with knowledge of the import of a restraining order willfully participated in a violation of its terms is conclusive when supported by the evidence notwithstanding respondents' contentions that they were mere involuntary witnesses when the restraining order was violated by others.

2. Contempt of Court § 3—

Knowledge of a person of the substance and meaning of a restraining order is sufficient knowledge of the order as the basis for a prosecution for contempt, and it is not required that such person have knowledge of the exact words used in the order.

3. Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—

In proceedings under an order to show cause why respondents should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by respondents will not be *held* for error when respondents do not challenge the admission of the affidavits or indicate any desire to cross-examine any affiant, and when no objection is made until after judgment, since respondents will be held to have waived their rights of confrontation.

HIGGINS, J., not sitting.

APPEAL by Lilly Jones, Fred Lee Collier, Johnnie Rose, Lula Barham, Andrew Medlin, Lizzie Cleaton, Daisy Leonard, Sarah Morefield, Hattie Ranes, Leonard Barham, Joseph Finn, Luke Hamm, Carl Neal, Bennie Edwards, Sally Jo Walker, Alberta McGhee, and Hilton Parrish from an order of *Bickett, J.*, entered in Chambers in VANCE on 7 March 1959, adjudging each in contempt of court, docketed and argued here as No. 386.

Perry & Kittrell, Charles P. Green, A. W. Gholson, Jr., and Alton T. Cummings for plaintiff, appellee.

W. M. Nicholson, James B. Ledford, James J. Randleman, and L. Glen Ledford for appellants.

RODMAN, J. On 13 February 1959 a restraining order issued in the action begun by Harriet Cotton Mills against Local Union No. 578 of Textile Workers Union of America, Textile Workers Union of America, Johnny Rose, and numerous other individuals who had been employed by plaintiff. The pertinent provisions of that order are set out in No. 385 entitled *Harriet Cotton Mills v. Textile Workers Union, Johnny Martin, et al*, reported *ante*, 218. The provisions of that order as there quoted are made a part of this opinion by reference. Lilly Jones, Fred Lee Collier, Johnnie Rose, Lula Barham, Andrew Medlin, Carl Neal, Bennie Edwards, Sally Jo Walker, Alberta McGhee, and Hilton Parrish were named as defendants and served with summons and copies of the restraining order. They are hereinafter designated as defendant appellants.

Lizzie Cleaton, Daisy Leonard, Sarah Morefield, Hattie Ranes, Leonard Barham, Joseph Finn, and Luke Hamm were not named as defendants in the original action nor were they served with copies of the restraining order. They are hereinafter designated as respondent appellants.

On 24 February plaintiff moved for an order requiring Carl Neal, Bennie Edwards, Sally Jo Walker, and Alberta McGhee to show cause why they should not be attached for contempt for violating the restraining order. The motion was based on acts described in an affidavit of Harvey T. Gupton.

On 26 February plaintiff moved for an order requiring Lizzie Cleaton, Daisy Leonard, Sarah Morefield, Hattie Ranes, Leonard Barham, Joseph Finn, and Luke Hamm to show cause why they should not be held in contempt. The motion was based on acts described in affidavits of C. C. Harris, Chief of Police of Henderson, and J. R. Wilkerson, Captain of Police of Henderson.

On the same day a similar motion based on an affidavit of C. C. Harris, Chief of Police, was made with respect to Lilly Jones, Fred Lee Collier, Johnnie Rose, Lula Barham, and Andrew Medlin. On 3 March a like motion, based on an affidavit of Harold Watkins was made with respect to Hilton Parrish.

Orders issued based on these motions requiring appellants to appear. The orders, with copies of the affidavits, were served on appellants. They answered. These answers deny commission of the acts charged. They do not deny knowledge of the restraining order. Each appellant verified his answer.

At the hearing plaintiff offered the affidavits on which the show cause orders were issued. No objection was made when the affidavits were offered. Affiants Harris and Wilkerson gave oral testimony at the instance of movant. They were cross-examined by counsel for appellants. No request was made to cross-examine the other affiants.

The violations here charged occurred in close proximity to the mill gates and near the bulletin board on which copies of the restraining order were posted. Each appellant was a witness in his own behalf and in several instances testified in behalf of other appellants. The testimony of appellants is sufficient to support a finding that acts were done at the times named in the affidavits which were prohibited by the restraining order. Their testimony establishes that they were at least witnesses to these acts. They insist that they took no part in the commission of the acts. This assertion is urged as a ground for their discharge. Whether appellants in fact willfully participated in a violation of the order as found by the court or were mere involun-

tary witnesses is a question of fact which was determined adversely to them by the court. The evidence is sufficient to support the finding.

Here, as in the contempt proceedings against Johnny Martin et al., No. 385, *ante*, 218, there is only one exception. It is broadside. The findings are sufficient to support the judgments holding each in contempt. Service of the restraining order fixed defendant appellants with notice of its provisions. There can be no doubt from the testimony of respondent appellants that they had knowledge of the restraining order, the purposes for which it was issued, and the acts prohibited. This is sufficient. It is not necessary to prove knowledge of the words and phrases used by the court to accomplish its purpose.

Appellants urge the same violation of constitutional rights which were asserted in the proceedings against Johnny Martin et al. in No. 385, *ante*, 218. Here there is less ground for the assertion than in that case. Here two of the affiants were present and were cross-examined by appellants.

Affirmed.

HIGGINS, J., not sitting.

HENDERSON COTTON MILLS v. LOCAL UNION NO. 584, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); DOUG ROSE, NICK LANGLEY, RUFUS STRANGE, M. LUTHER JACKSON, VERNON W. BURNETTE, ANDREW C. TURNER, CARL C. MOORE, RALPH F. HARRIS, WILLARD O. FAULKNER, JAMES B. H. ROBERSON, ALBERT L. BATTON, HENRY W. STALLINGS, EDWARD J. OFTEN, JAMES E. REARDON, RICHARD F. PARROTT, CLARENCE E. HARPER, JOHN E. STALLINGS, JOE HALE, JOHN LONG, HARRY HICKS, EDWIN ELLINGTON, COY L. PEGRAM, SHERMAN FERRELL, FRANK O. TURNER, LINVEL NELSON, SIDNEY WALLACE, PHIL HARRIS, ELMORE MURPHY, MACON RENN, JOHN OWEN, CLIFTON CARTER, SANDY SAM ROBERSON, JAMES BARKER, EDWARD MOSELEY, WILLIAM TART, MELVIN BRAME, HERMAN MULCHI, R. TALMADGE HARPER, BILLY THOMPSON, JOHN G. MULCHI, JAMES M. WILKERSON, AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME.

(Filed 25 November, 1959.)

1. Appeal and Error § 38—

Exceptions not discussed in the brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

2. Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—

In proceedings under an order to show cause why respondents should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by respondents in violation of the order will not be held for error when respondents do not challenge the admission of the affidavits, or indicate any desire to cross-examine any affiant, and make no objection until after judgment, since respondents will be held to have waived their rights of confrontation.

3. Appeal and Error § 22—

An exception that the evidence is insufficient to support the findings of the trial court is subject to dismissal as a broadside exception, and is insufficient to challenge the sufficiency of the evidence to support the findings, or any one, or more of them.

4. Contempt of Court § 6—

Findings of the court that the respondents with knowledge willfully violated the restraining order theretofore issued in the cause held supported by evidence and binding on appeal.

HIGGINS, J., not sitting.

APPEAL by respondents Lewis Barnett, Annie Clayton Journigan, Faye Forsythe and Bruce Allen Champion, from *Bickett, J.*, in Chambers, 29 April 1959, VANCE County Superior Court. Docketed in this Court as case No. 389.

These respondents appeal from the respective orders entered against them on 29 April 1959, adjudging each one of them in contempt "for wilfully, knowingly and intentionally" violating the terms of the temporary restraining order issued herein on 13 February 1959 by Judge Bickett, based on facts alleged in the verified complaint filed in this action.

The temporary restraining order issued on 13 February 1959 was in full force and effect on 29 April 1959 by order of 5 March 1959. It was continued in full force and effect until the trial on its merits.

The contents of the restraining order, in pertinent parts, having been set out in the case of *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO), et al, ante*, 240, and docketed in this Court as case No. 393, will not be set out herein.

Service of the summons, complaint and restraining order was promptly made on all the defendants except Nick Langley, Richard F. Parrott, John E. Stallings and James M. Wilkerson.

The respondents Lewis Barnett, Annie Clayton Journigan, Faye Forsythe and Bruce Allen Champion were not named as defendants

in this action, nor were they served with summons, complaint or restraining order prior to the issuance of the show cause order.

On 26 March 1959, based on plaintiff's verified petition and supporting affidavits for an order to show cause, if any there be, why they should not be held in contempt of court, the court issued a show cause order which was served on each of the respondents on 30 March 1959.

The respondents filed a verified answer in which they denied that they had intentionally violated the restraining order, and alleged that they had no intention at any time to commit a "voluntary and wilful act in violation of said order." The respondents, however, did not assert that they, or any of them, did not have full knowledge of the existence of the restraining order and of the contents thereof.

On 1 April 1959, the return date of the order to show cause, the hearing was continued until 2 April 1959 for the convenience of the respondents and their counsel, and thereafter the hearing was continued from time to time until 29 April 1959, at which time plaintiff introduced in evidence the original complaint, restraining order, petition and exhibits for order to show cause, return of service of summons, return of service of restraining order, and return of service of order to show cause.

J. H. Millard, a Highway Patrolman, who was on duty at the Henderson Cotton Mills, stated in his affidavit, " * * * That Lewis Barnett has willfully violated the terms of said restraining order by hitting an automobile belonging to one of the workers at the Henderson Mills with a rock or brick as said automobile approached the Henderson Cotton Mill on William Street on * * * March 4, 1959, at about 6:50 a.m., in the presence of affiant and J. H. Creech, SHP, in complete defiance and against the terms of the aforementioned restraining order."

Lewis Barnett testified: "* * * I am a member of the Union; I did work at the North Henderson Mill but am now on strike. * * * I did not throw a rock or brick or any article at a car; I didn't see a car hit with a rock that morning * * *. There was quite a number of us on the picket line * * *." On cross-examination this witness testified: " * * * when I walk the picket line, I get 75 feet from the gate because that's what the sign on the fence says. I guess that is required of the restraining order, but I have never read the restraining order. I knew I was not supposed to throw rocks and bricks at the people going to work, and I had heard that there was such a thing as a restraining order. I guess the restraining order prohibited you from throwing rocks and bricks at people; I hadn't ever read it, but I knew the re-

straining order kept you from throwing rocks and bricks at people."

Thomas A. Bryan, a Highway Patrolman, who was on duty at the Henderson Cotton Mills, stated in his affidavit: " * * * That Annie Clayton Journigan has willfully violated the terms of said restraining order by throwing a rock or brick at a worker's car as it was on the way to enter the Henderson Cotton Mill on the morning of Wednesday, March 4, 1959, in the presence of affiant, in complete defiance and against the terms of the aforementioned restraining order."

Annie Clayton Journigan testified: " * * * I live * * * in Henderson. I am a member of the Union and out on strike. I threw a rock but I didn't throw it at no car. * * * Luther King's car was the last car that went down the road and he was a right good ways from me when I threw it. * * * I have never been served with a copy of the restraining order, and have never read it. * * *" On cross-examination, this witness testified: " * * * I knew that the restraining order required you not to interfere with people going to and from work and that I was not supposed to interfere with people going to and from work and that court had restrained me and everyone else from interfering. I knew that before this instance."

With respect to Faye Forsythe, there were four supporting affidavits introduced by the plaintiff. These affidavits were made by W. Cecil Kelly, William W. Bishop, Paul E. Nowell and Leamon W. Byrum, and are to the effect that Faye Forsythe, who lives at 576 William Street, over a considerable period of time after the restraining order had been issued, made it a practice to get out in the street in front of cars carrying workers to and from the Henderson Cotton Mills and in loud and boisterous language would curse the drivers of the cars and call them a "G .. d ... yellow S.O.B.," and would use "loud and boisterous language almost every day, either on the picket line or at the workers as they go by her house."

Faye Forsythe testified: "I belong to the Union and am out on strike. * * * I have not been served with a copy of this restraining order." This witness denied cursing W. Cecil Kelly, William W. Bishop, Paul E. Nowell and Leamon W. Byrum, or either of them. On cross-examination this witness testified: "I use bad language sometimes, if I get mad with my husband, just me and my husband. I have been out in front of my house and called them old scabs and everything when they pass. I do this about every day. I called Bishop a scab, and I called Nowell and Byrum, too. I am out every day, mostly on the picket line. When I am out on the picket line, we all stay 75 feet from the gate because this officer said stay about 75 feet. We stayed within the distance required by the restraining order. We knew about

that. I knew I was not supposed to stand in the street and curse people so I did not stand in the street as I knew that this was prohibited by the restraining order." By the court: "Did you know that a restraining order had been issued by the court preventing you from using vile, abusive language? A. Yes, I knew that. Q. And you knew it all the time? A. Yes, sir."

L. H. Smith, a Highway Patrolman, stated in his affidavit: " • • • On the morning of Thursday, March 19, 1959, I was on duty patrolling in the vicinity of the Henderson Cotton Mill, north of Henderson, N. C. About 7:10 o'clock I noticed a light colored 1954 Ford automobile loaded with workers driving north on William Street approaching the Henderson Cotton Mill gate. This was several minutes after the main group of workers had passed into the mill. As the car passed the picket line there was a group of 10 or 15 men and women standing on the west side of William Street between the street and the railroad tracks. I saw one brick and several rocks thrown from the group at this car of workers. I observed Bruce Allen Champion, who was in the group, step from the main body of the crowd and throw a rock about the size of a baseball at this car. The rock which Bruce Allen Champion threw hit the back of this car loaded with workers. • • •"

Bruce Allen Champion testified that he did not throw any rocks at any car on the occasion described in the affidavit of L. H. Smith. On cross-examination he testified: "I am a member of the Union and I did work in the mill; I walk the picket line now; • • • I knew about the restraining order, that's the reason I didn't throw any rocks; I knew the court had issued the order. I also knew that the restraining order prohibited loud and abusive language and throwing rocks and interfering with ingress and egress and people going and coming from the mill."

In four separate orders dated 29 April 1959 the trial judge found as a fact that each of the four individual respondents "wilfully, knowingly and intentionally violated the terms of the restraining order" and did the acts attributed to each of them "with actual knowledge of the restraining order and its contents," with the knowledge being obtained "by means of the said restraining order being conspicuously posted on bulletin boards set 75 feet on either side of each gate of the Henderson Cotton Mills, and two copies of said order being posted on either side of the door of the Vance County Courthouse, and a copy thereof being published in the Henderson Daily Dispatch, a newspaper published in Vance County, on February 14, 1959, and the contents having been publicized over the radio, and copies there-

of being served on Local Union No. 584, Textile Workers Union of America," and as indicated by their individual testimony.

Upon the foregoing findings set out in the respective orders each of the respondents was adjudged in contempt of court, and it was further ordered, adjudged and decreed that the respondents Lewis Barnett and Bruce Allen Champion be confined in the common jail of Vance County for a period of twenty days and pay a fine of $150.00, and that the respondents Annie Clayton Journigan and Faye Forsythe each pay a fine of $150.00.

The respondents excepted to the respective orders of 29 April 1959 and to the findings of fact and conclusions of law set forth therein and appealed, assigning error.

Perry & Kittrell, Charles P. Green, A. W. Gholson, Jr., for plaintiff.

W. M. Nicholson, James B. Ledford, James J. Randleman, L. Glen Ledford for respondents.

DENNY, J. The record shows four assignments of error. However, only two are discussed in the appellants' brief. The others will be deemed as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, at page 562, *et seq.*

The appellants assign as error "That in the hearing and determination of this matter, the respondents were denied the right to face and cross-examine their accusers, contrary to the laws of the State of North Carolina."

Here, as in case No. 385, *Harriet Cotton Mill v. Local Union No. 578, Textile Workers Union of America (AFL-CIO), et al, ante,* 218, these respondents did not object to the introduction of the affidavits in evidence when offered, nor did they move to strike the evidence contained therein, or any part thereof. Moreover, they did not request an opportunity to cross-examine the makers of the affidavits introduced by the plaintiff petitioner, or any one of them, nor did they except to the order of Judge Bickett on the ground set forth in this assignment of error; therefore, on authority of the opinion in case No. 385, referred to above, this assignment of error is overruled.

The appellants' remaining assignment of error is based on their general exception to Judge Bickett's order and to the findings of fact and conclusions of law set forth therein.

The appellants contend that the evidence adduced in the hearing below is insufficient to support the findings of the trial judge that the respective respondents wilfully violated the terms of the restraining order.

The exception on which this assignment of error is based is subject to dismissal as broadside. In *Weaver v. Morgan,* 232 N.C. 642, 61 S. E. 2d 916, this Court said: "The exception in the case in hand is 'to the foregoing findings of fact and judgment.' This, as to findings of fact, is a broadside exception. It fails to point out and designate the particular findings of fact to which exception is taken, and it is insufficient to challenge the sufficiency of the evidence to support the findings, or any one, or more of them. *Vestal v. Moseley Vending Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427." Even so, a careful examination of the record reveals that the facts found by the court below with respect to the wilful violation of the restraining order by each of the respondents are supported by competent evidence and such findings are therefore binding upon appeal. *Goldsboro v. Railroad,* 246 N.C. 101, 97 S.E. 2d 486, *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464.

The findings of fact are sufficient to support the conclusions of law and the orders entered with respect to each of the appealing respondents Hence, the orders will be affirmed.

Affirmed.

HIGGINS, J., not sitting.

HENDERSON COTTON MILLS, PLAINTIFF v. LOCAL UNION NO. 584, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); DOUG ROSE, NICK LANGLEY, RUFUS STRANGE, M. LUTHER JACKSON, VERNON W. BURNETTE, ANDREW C. TURNER, CARL C. MOORE, RALPH F. HARRIS, WILLARD O. FAULKNER, JAMES B. H. ROBERSON, ALBERT L. BATTON, HENRY W. STALLINGS, EDWARD J. OFTEN, JAMES E. REARDON, RICHARD F. PARROTT, CLARENCE E. HARPER, JOHN E. STALLINGS, JOE HALE, JOHN LONG, HARRY HICKS, EDWIN ELLINGTON, COY L. PEGRAM, SHERMAN FERRELL, FRANK O. TURNER, LINVEL NELSON, SIDNEY WALLACE, PHIL HARRIS, ELMORE MURPHY, MACON RENN, JOHN OWEN, CLIFTON CARTER, SANDY SAM ROBERSON, JAMES BARKER, EDWARD MOSELEY, WILLIAM TART, MELVIN BRAME, HERMAN MULCHI, R. TALMADGE HARPER, BILLY THOMPSON, JOHN G. MULCHI, JAMES M. WILKERSON, AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME, DEFENDANTS.

(Filed 25 November, 1959.)

1. Appeal and Error § 38—

Assignments of error not discussed in the brief are deemed abandoned.

2. Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—

In proceedings under an order to show cause why respondent should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by respondent in violation of the order will not be held for error when respondent does not challenge the admission of the affidavits or indicate any desire to cross-examine any affiant on the hearing, or move to strike, or except to the order on such ground, since respondent will be held to have waived his right of confrontation.

3. Contempt of Court § 6—

Evidence tending to show that the restraining order issued in the cause had been conspicuously posted on bulletin boards at plaintiff's plant and at the court house door, had been published in the local newspaper, and its contents publicized by radio and that its import was of general knowledge throughout the county, that the labor union of which respondent was a member had been served with the order, together with respondent's own testimony on the hearing of the order to show cause, *is held* sufficient to support the finding of the court that the respondent had actual notice of the substance of the provisions of the order, it not being required that plaintiff show by positive evidence that respondent had actually read the restraining order or that it had been read to him.

HIGGINS, J., not sitting.

APPEAL by Wiley Harp from *Mallard, J.*, May 25, 1959 Special Criminal Term, of VANCE, docketed in this Court as No. 393.

This appeal is from an order entered May 25, 1959, adjudging Wiley Harp in contempt "for wilfully, knowingly and intentionally" violating, on February 24, 1959, Sections 1, 2 and 5 of a temporary restraining order issued February 13, 1959, by Judge Bickett, based on facts alleged in the verified complaint, in the above-entitled civil action.

The restraining order of February 13, 1959, contains, *inter alia*, the following provisions:

"And upon a consideration of said verified complaint treated as an affidavit, it appearing to the court that the defendants named herein and other persons unknown to the plaintiff, have committed and are committing unlawful acts upon and off the plaintiff's premises near Henderson, North Carolina, and are unlawfully interfering with the conduct of the plaintiff's business and with free and lawful ingress and egress to and from the plaintiff's plant by agents and employees of plaintiff and others; and have threatened and are threatening to continue their unlawful conduct and to continue unlawfully interfering with the plaintiff in the use of its premises and the prosecution of its business, and to interfere with

and molest persons rightfully entering upon the plaintiff's premises; and it appearing to the Court that the plaintiff is entitled to a temporary order restraining and enjoining the defendants from continuing their said unlawful acts and conduct; it is now, therefore,

"ORDERED, ADJUDGED, AND DECREED that the named defendants, and each of them, and all persons acting in concert with them or under their direction or the direction of any of them, and all other persons to whom notice and knowledge of this order may come, are, until the merits of this cause are determined, and until this court orders otherwise, hereby enjoined and restrained as follows:

"1. From interfering in any manner with free ingress and egress to and from the plaintiff's premises.

"2. From assaulting, threatening, abusing, damaging the property of or in any manner intimidating persons to (sic) work or seek to work in or lawfully seek to enter plaintiff's plant, whether on the plaintiff's premises or streets, or thoroughfares adjacent thereto, or away from said premises.

"3. . . .

"4. From having more than 8 persons at any one time as peaceful pickets at any gate to the plaintiff's plant, provided that no person, including pickets, may approach closer to any gate or entrance to the plaintiff's plant than 75 feet, . . .

"5. No person shall abuse, intimidate, strike, threaten, or use any vile, abusive, violent, or threatening language at or towards any person on the plaintiff's premises or any person entering or leaving said premises, or any employees of plaintiff anywhere, and shall in no manner interfere with or impede any motor vehicles, wagon, cart, truck, or animal, in approaching or leaving the plaintiff's premises, and shall in no manner interfere with the free ingress and egress of any person or vehicle or animal to or from the plaintiff's plant, or along and over any of the streets, roads, or walkways adjacent or leading to the plaintiff's plant.

"The acts which persons are hereby enjoined and restrained from doing, they and each of them likewise are hereby enjoined and restrained from aiding or procuring or causing to be done."

It was ordered that (1) the Sheriff of Vance County serve copies of the restraining order on the named defendants, and (2) that he "post copies of this order in conspicuous places at and in the vicinity of the plaintiff's plant, and particularly at all the entrance gates to said plant." It was further ordered that defendants appear before Judge Bickett on March 5, 1959, at designated time and place, to

show cause why the temporary restraining order should not be continued to the trial of the action on its merits.

Service of the summons, complaint and restraining order was promptly made on all (except four individual defendants) defendants.

The temporary restraining order of February 13, 1959, was in full force and effect on February 24, 1959. By order of March 5, 1959, it was continued in full force and effect until trial on the merits.

Wiley Harp was not named as a defendant nor was he served with summons, complaint or restraining order.

On February 25, 1959, based on plaintiff's motion of February 24, 1959, and attached affidavits, Judge Sharp ordered six persons, namely, Richard (Cotton) Parrott, Floyd Ray Harp, Daisy Moser, Gilbert Clayton, Leslie (Bud) Ross and Wiley Harp to appear before Judge Bickett on March 5, 1959, at designated time and place, to show cause why each of them should not be punished for contempt of court for wilful violation of said restraining order.

The affidavits attached to plaintiff's said motion and referred to in Judge Sharp's said order are identified as affidavits of L. W. Byrum, Jesse Meacham, Jack J. Renn, Curtis Strickland, Bradsher Redd, Henry Orr and Lucy W. Ball. An affidavit of Mrs. Lucy W. Ball, sworn to and subscribed February 24, 1959, was offered in evidence at the hearing on May 25, 1959, before Judge Mallard. This is one of the affidavits attached to plaintiff's said motion of February 24, 1959. The affidavits of L. W. Byrum, Jesse Meacham, Jack J. Renn, Curtis Strickland, Bradsher Redd and Henry Orr do not appear in the record either as exhibits attached to plaintiff's said motion of February 24, 1959, or otherwise.

Copies of Judge Sharp's order of February 25, 1959, and of plaintiff's said motion of February 24, 1959, and attached affidavits, were served February 25, 1959, on each of the six respondents. Judge Sharp's order set forth, *inter alia,* that it appeared from the affidavits attached to plaintiff's motion that the six respondents "had full knowledge of the fact that said Temporary Restraining Order had been issued and of the contents thereof."

An answer to said order to show cause, filed in behalf of the six respondents, was verified by each of them. Generally, the respondents denied the alleged misconduct, declared "they had no intent at any time to commit any wilful or unlawful act in violation of said Restraining Order," and prayed that they not be adjudged in contempt and that the order to show cause be dismissed. In addition, each respondent denied that he had committed certain specific acts, evidently specific acts alleged to have been committed by such respondent

in one or more of the affidavits attached to plaintiff's said motion of February 24, 1959. As to Wiley Harp, such provision of the answer is in these words: "That Respondent Wiley Harp denies that he threw a rock or brick or any other missile at Lucy Ball's car on February 20, 24 or any other date." The respondents did not assert that they, or any of them, did not have "full knowledge of the fact that said Temporary Restraining Order had been issued and of the contents thereof."

The hearing on return of said order to show cause, having been continued from time to time, was held by Judge Mallard on May 25, 1959.

At the hearing, plaintiff offered in evidence the court records referred to above, the affidavit of Mrs. Lucy W. Ball and the affidavit of Sheriff E. A. Cottrell. The only evidence offered by respondent Wiley Harp was his personal testimony.

Judge Mallard's order of May 25, 1959, contains, *inter alia,* these findings of fact and provisions:

"That Wiley Harp had actual knowledge of the Restraining Order and the contents thereof issued by Judge William Y. Bickett on February 13, 1959, by means of the said Restraining Order being conspicuously posted on bulletin boards set 75 feet on either side of the gates of the Henderson Cotton Mills, and two copies of said Order being posted on either side of the door of the Vance County Court House, and a copy thereof being published in the Henderson Daily Dispatch, a newspaper published in Vance County, on February 14, 1959, and the contents thereof having been publicized over the radio, that Wiley Harp is and was on February 24, 1959 a member of Local Union No. 584, Textile Workers of America, and that a copy of the Restraining Order issued herein was served on Local Union No. 584 on February 14, 1959.

"And the Court further finds as a fact . . . that at or about 7:00 o'clock A.M. on February 24, 1959 Wiley Harp threw a rock at a taxi in which Lucy Ball was driving to work at Plaintiff's plant at the beginning of the 7:00 o'clock workshift; that Lucy Ball was an employee of the Henderson Cotton Mills on February 24, 1959 and worked in Plaintiff's plant; that the taxi was driven by Lucy Ball's husband; that Wiley Harp was a member of the picket line picketing Plaintiff's plant at or about 7:00 o'clock A.M. on February 24, 1959.

"The Court further finds as a fact . . . that Wiley Harp wilfully, knowingly and intentionally violated the terms of the Restraining Order at or about 7:00 o'clock A.M. on February 24, 1959 by

throwing a rock at a taxi carrying a person who worked in the Henderson Cotton Mills as the said worker was approaching Plaintiff's plant, thereby violating Section 1 of the Restraining Order by interfering with free ingress to Plaintiff's premises, and violating Section 2 of the Restraining Order by assaulting, threatening, and abusing and intimidating a person who works in Plaintiff's plant, and violating Section 5 of the Restraining Order by throwing said rock at a worker's car thereby abusing and intimidating a person seeking to enter Plaintiff's premises and impeding a motor vehicle approaching Plaintiff's premises and interfering with free ingress to Plaintiff's plant.

"The Court further finds that the above acts committed by the said Wiley Harp were committed for the purpose of wilfully, knowingly and intentionally intimidating employees and persons who work in or seek to work in Plaintiff's plant, and interfering with and impeding motor vehicles approaching Plaintiff's premises, and interfering with free ingress to Plaintiff's plant.

"The Court further finds as a fact that Wiley Harp, on the 24th day of February, 1959, at or about 7:00 o'clock A.M. did wilfully, knowingly and intentionally violate the terms of the Restraining Order heretofore issued in this cause.

"NOW THEREFORE, the Court does hereby find, and IT IS ORDERED AND ADJUDGED that Wiley Harp is in contempt of this Court for wilfully, knowingly and intentionally violating the terms of the Restraining Order issued herein.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Wiley Harp be confined to the common jail of Vance County for a period of 20 days, and pay a fine of $100.00."

Respondent Wiley Harp excepted to said order of May 25, 1959, and to the findings of fact and conclusions of law set forth therein, and appealed.

Perry & Kittrell, Charles P. Green, A. W. Gholson, Jr., and Alton T. Cummings for plaintiff, appellee.

W. M. Nicholson, James J. Randleman, L. Glen Ledford and James B. Ledford for respondent, appellant.

BOBBITT, J. While the record shows four assignments of error, only two are discussed in appellant's brief. Assignments of error, under our Rules and decisions, are deemed abandoned when appellant's brief states no reason or argument and cites no authority in support thereof. *S. v. Perry,* 250 N.C. 119, 108 S.E. 2d 447.

Appellant assigns as error: "That the Respondent was denied the right to face and cross-examine their (sic) accusers, contrary to the laws of the State of North Carolina." Here, as in No. 385, *Harriet Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO), et al., ante, 218,* this respondent did not object to the evidence when offered, nor did he move to strike the evidence or any part thereof, nor did he request an opportunity to cross-examine Mrs. Ball or Sheriff Cottrell, nor did he except to the order of Judge Mallard on the ground set forth in this assignment of error; and, on authority of what is stated and held in the cited case, this assignment of error is overruled.

Appellant's remaining assignment of error is based on his general exception to Judge Mallard's order and to the findings of fact and conclusions of law set forth therein. Appellant, *in his brief,* does not contend that the evidence was not sufficient to support the findings as to his conduct on February 24, 1959. Rather, in support of this assignment of error, he contends that, under *Hart Cotton Mills v. Abrams,* 231 N.C. 431, 57 S.E. 2d 803, and *Erwin Mills v. Textile Workers Union,* 234 N.C. 321, 67 S.E. 2d 372, it was "incumbent upon the plaintiff to prove that the respondent 'knew that such order had been issued and knew the contents thereof,'" and that the evidence was not sufficient to support the court's finding to that effect. While appellant's said exception and assignment of error might well be dismissed as broadside, we deem it appropriate to discuss this contention.

There was evidence tending to show these facts: On February 24, 1959, respondent was at the first fire barrel, "on the other side of the 75 foot picket line," in the area where a copy of the restraining order was conspicuously posted on a bulletin board. He was an employee of plaintiff in this particular plant, was a member of defendant Union, and was then on strike. On the morning of February 24, 1959, he was at the picket line at the time of the change of shifts. Respondent knew the restraining order had been issued and that defendant Union, of which he was a member, had been served. He had been told that the picket line "is about 75 feet from the Main Gate." Section 4 of the restraining order expressly prohibited pickets from approaching closer to plaintiff's gate or plant than 75 feet. He knew he "was not supposed to interfere with the people going to and from work . . ." Section 1 of the restraining order prohibited "interfering in any manner with free ingress and egress to and from the plaintiff's premises." Too, respondent's failure, in his answer to the order to show cause, to deny or in any way challenge the allegation therein that he "had full knowledge of the fact that said Temporary Restraining Order had

been issued and of the contents thereof," is a significant circumstance.

This evidence, together with evidence that the restraining order was published in the newspaper, the contents thereof publicized by radio, and that it was a matter of general knowledge throughout Vance County, was sufficient, in our opinion, to support Judge Mallard's finding that respondent "had actual knowledge of the Restraining Order and the contents thereof."

It was not incumbent upon plaintiff to show by positive evidence that respondent actually read the restraining order or that it was read to him. If this were true, all a person need do to avoid attachment for contempt for wilful violation of the restraining order would be to refrain deliberately from reading it or from listening to the reading thereof. *Evidence that respondent had knowledge that the restraining order had been issued and that that he had actual notice of the substance of the provisions thereof which he violated is sufficient.* Applying this test, Judge Mallard's said finding is well supported by the evidence. Indeed, it is based in substantial part on respondent's own testimony.

Decisions in accord, as to the sufficiency of the evidence to support the challenged finding, include: *Nashville Corporation v. United Steelworkers, etc.* (Tenn.), 215 S.W. 2d 818; *Huckaby v. Griffin Hosiery Mills* (Ga.), 52 S.E. 2d 585; *United Packing House Workers of America v. Boynton* (Iowa), 35 N.W. 2d 881.

It is noted: Nothing in the record before us indicates what disposition, if any, has been made of the contempt proceedings in relation to Richard (Cotton) Parrott, Floyd Ray Harp, Daisy Moser, Gilbert Clayton and Leslie (Bud) Ross, appellant's co-respondents.

We are of opinion, and so hold, that there was ample evidence to support Judge Mallard's findings of fact, conclusions of law, and order. Hence, the order will be affirmed.

Affirmed.

HIGGINS, J., not sitting.

HARRIET COTTON MILLS v. LOCAL UNION NO. 578, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); JOHNNY ROSE, CHARLIE THOMAS DUKE, CLINT ROBERSON, HILTON PARRISH, WALTER C. WATKINS, ANDREW PENDERGRASS, LEROY WILLIAMSON, WOODROW GOODING, JOHN HENDERSON, HOMER ROBERTS, JR., DOUGLAS ROSE, CARL NEAL, LEE HARRIS, HENRY HARRIS, CHARLIE HARRIS, HERBERT PARRISH, RANSOM HARGROVE, JOYCE R. MEDLIN, ESTHER C. ROBERSON, RACHEL PIRTLE, BOSHER EUBANKS, ETTA AYSCUE, LEWIS WRIGHT, CLYDE WOODLIEF, GEORGE ROSE, MRS. GEORGE ROSE, EDITH J. PEOPLES, BLANCHE LEWIS, WARREN WALKER, SALLY JOE WALKER, ALBERTA ROSE, RUBY R. CURRIN, MILTON CURRIN, DORTITH THOMPSON, WILLIE JARRELL, FRED LEE COLLIER, WILLIAM CHOPLIN, DAVID SAMUEL PULLEY, DARRELL HEDGEPETH, LEWIS CLAYTON, MILO CLEATON, EARL BENNETT, THOMAS STARNES, HERBERT INSCOE, CLARENCE AYSCUE, ANDREW MEDLIN, OSCAR FAULKNER, RANDELL SMITH, LAWRENCE PEACE, CURTIS ROSE, JOHN FAUCETTE, RALPH FAUCETTE, JESSIE ROBERSON, LOU VENE B. COGHILL, VIRGINIA R. PEOPLES, SARAH D. PACE, ALVIN C. BREEDLOVE, LULA BARHAM, DORSEY EATMAN, JAMES EATMAN, WILLIAM C. VOYLES, MYRTLE JOHNSON, MYRTLE P. PEOPLES, BRANSON BLAKE, MILDRED BLAKE, HAROLD VIVERETTE, LONNIE FAISON, JOHNNY MARTIN, TOM WILLIAMS, BENNIE EDWARDS, HORACE FAULKNER, MARY M. WEAVER, LEROY NORRIS, JAMES HOLMES, MILDRED McGHEE, BASIL GREEN, JOE JARRELL, FORREST McGHEE, CHESLEY YARBOROUGH, ZOLA MAE AYSCUE, GOLDA GREY AYSCUE, DAYLON AYSCUE, BLANCHE WHITE, JAMES R. ADCOX, JR., ANNIE TURNER, RAYMOND B. HUDSON, EUGENE HUDSON, LILLIE JONES, MATTIE A. PARRISH, RUBY C. ROSE, JOE FOWLER, ROBERT PARRISH, MAUDE JARRELL, FLORENCE ROBERSON, JOE ROBERSON, LIJAH PEOPLES, JAMES FREEMAN, OSCAR HEDGEPETH, JR., JIM STEVENSON, HOMER ROBERTS, JR., CHARLIE RAINES, JOE PACE, MARVIN GRIFFIN, VOLLIE MANNING, ROY FRANCIS, ROBERT GRISSOM, ALBERTA R. McGHEE, BOBBY JONES, CHARLIE WEST, FRED LEE COGHILL, ROBERT RAINES, CLAUDIA GUPTON, ELIZABETH MARKS, JAMES TART, ANDREW RAINES, BUD DUKE, MORTON ROBERSON, THURSTON LIGGON, EDWARD F. TUCKER, WILLIAM K. HARRIS, HOMER ROBERTS, SR., AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME.

(Filed 25 November, 1959.)

1. Appeal and Error § 38—

Assignments of error not discussed in the brief are deemed abandoned.

2. Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—

In proceedings under an order to show cause why respondents should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by respondents in violation of the order will not be *held* for error

when respondents do not challenge the admission of the affidavits or indicate any desire to cross-examine any affiant on the hearing, or move to strike, or except to the order on such ground, since respondents will be held to have waived their rights of confrontation.

3. Contempt of Court § 6—

As to certain of respondents it *is held* that the evidence, including their own testimony at the hearing upon the order to show cause, was amply sufficient to sustain the finding that they had actual knowledge of the contents of the restraining order they were charged with willfully violating.

4. Same—

There was no evidence that one of respondents was a former employee of plaintiff, or was on strike, or was a member of defendant union, or that he resided in the county or had been near plaintiff's plant prior to the occurrence in question, and the sole evidence as to his violation of the order was testimony of a witness of acts by the respondent seen through binoculars from plaintiff's plant. *Held:* The evidence of the posting of a similar restraining order at the gates of plaintiff's plant and at the court house, and the publicizing of the order by newspaper and radio in the county, is insufficient to charge the respondent with actual knowledge of the contents of the restraining order, and the judgment in contempt is reversed as to him.

HIGGINS, J., not sitting.

APPEALS by David Samuel (Sambo) Pulley, William Choplin and James (Tee-Tie) Morris from *Bickett, J.*, June Term, 1959, of VANCE, docketed in this Court as No. 388.

Separate orders were entered June 23, 1959, in which each appellant was adjudged in contempt "for wilfully, knowingly and intentionally," violating, on April 6, 1959, the terms of a temporary restraining order issued February 13, 1959, by Judge Bickett, based on facts alleged in the verified complaint, in the above entitled action, which, by order of March 5, 1959, was continued in full force and effect until trial on the merits.

In No. 385, *ante*, 218, involving appeals from other orders entered in the above entitled action, the pertinent facts as to the institution of the action, the pleadings, and the provisions of the restraining order, are stated; and reference is made thereto. Suffice to say, Pulley and Choplin, defendants in the action, were duly served with copies of the summons, complaint and restraining order. Morris was not a defendant nor was he served with summons, complaint or restraining order.

On April 16, 1959, based on plaintiff's petition of April 11, 1959, and attached affidavits, Judge Bickett ordered five persons, namely

David Samuel (Sambo) Pulley, William Choplin, James (Tee-Tie) Morris, Nellie Roberson and Barbara Roberson, to appear before him on April 29, 1959, at designated time and place, to show cause why each of them should not be punished for contempt of court for wilful violation of said restraining order. This order to show cause set forth that it appeared from the verified petition and attached affidavits that each of the respondents, after "actual notice and knowledge of said Temporary Restraining Order," had wilfully violated the terms thereof. Copies of said petition and attached affidavits and of said order to show cause were served April 23, 1959, on each of the five respondents.

An answer to said order to show cause, filed in behalf of the five respondents, was verified by each of them. They denied the alleged misconduct and asserted "that they did not commit and had no intent to commit any act of violence, as described and set forth in said Petition and Affidavits, and that they have not had and do not now have any intent to commit any voluntary and wilful act in violation of said restraining order." They prayed that they not be adjudged in contempt and that the order to show cause be dismissed.

A partial hearing on return to said order to show cause was held April 30, 1959; and the hearing thereon was continued to and completed on June 23, 1959.

Plaintiff offered in evidence the court records referred to above and the affidavits of Thomas D. Peck, Murphy D. Shearin, Herman S. Raines, W. H. Neathery, T. E. Stegal, Albert Thorne, Sheriff E. A. Cottrell, and the testimony of Eugene Allen. Respondent Pulley offered in evidence his own testimony and the testimony of Myrna Viverette and of Ruby Currin. Respondent Choplin offered in evidence his own testimony and the testimony of Ruby Currin. Respondent Morris did not testify or offer evidence.

Each of Judge Bickett's said three orders of June 23, 1959, referring by name to the particular respondent directly affected thereby, contains, *inter alia,* these findings of fact and provisions:

"That (named respondent) had actual knowledge of the Restraining Order and the contents thereof issued by Judge William Y. Bickett on February 13, 1959, . . .

"And the Court further finds as a fact . . . that at or about 12:10 o'clock P.M. on April 6, 1959, (named respondent) by means of a sling shot, shot steel balls across Plaintiff's fence at the cars of persons working in Plaintiff's plant while the same were parked in Plaintiff's parking lot, and at plaintiff's building; that some of the

steel balls struck the cars of persons working in Plaintiff's plant and some of the steel balls struck Plaintiff's buildings.

"The Court further finds as a fact that the said Restraining Order was in full force and effect on April 6, 1959, and that (named respondent) wilfully, knowingly and intentionally violated the terms of the Restraining Order at or about 12:10 o'clock P.M. on April 6, 1959, by shooting steel balls with a sling shot at the cars of persons working in the Harriet Cotton Mill, while the cars of the said workers were parked in Plaintiff's parking lot, and shooting steel balls with a sling shot at Plaintiff's yard office building, striking the same, thereby violating Section 2 of the Restraining Order by abusing and damaging the property of, and intimidating persons who work in Plaintiff's plant while on Plaintiff's premises;

"The Court further finds that the above acts committed by the said (named respondent) were committed for the purpose of wilfully, knowingly and intentionally intimidating employees and persons who work in Plaintiff's plant.

"The Court further finds as a fact that (named respondent) on the 6th day of April, 1959, at or about 12:10 o'clock P.M. did wilfully, knowingly and intentionally violate the terms of the Restraining Order issued herein.

"NOW, THEREFORE, the Court does hereby find, and IT IS ORDERED AND ADJUDGED that (named respondent) is in contempt of this Court for wilfully, knowingly and intentionally violating the terms of the Restraining Order issued herein.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that (named respondent) be confined to the common jail of Vance County for a period of 30 days and pay a fine of $250.00, and 1/5 of the Cost to be taxed by the Clerk."

Each respondent excepted to the order of June 23, 1959, relating specifically to him, and to the findings of fact and conclusions of law set forth therein, and appealed.

Perry & Kittrell, Charles P. Green, A. W. Gholson, Jr., and Alton T. Cummings for plaintiff, appellee.

W. M. Nicholson, James B. Ledford, James J. Randleman and L. Glen Ledford for respondents, appellants.

BOBBITT, J. While the record shows four assignments of error, only two are discussed in appellants' brief. Assignments of error, under our Rules and decisions, are deemed abandoned when appellant's

brief states no reason or argument and cites no authority in support thereof. *S. v. Perry*, 250 N.C. 119, 108 S.E. 2d 447.

Appellants assign as error: "That the Respondents, and each of them, were denied the right to face and cross-examine their accusers, contrary to the laws of the State of North Carolina." Here, as in No. 385, *Harriet Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO), et al., ante,* 218, these respondents did not object to the evidence when offered, nor did they move to strike the evidence or any part thereof, nor did they request an opportunity to cross-examine any of the persons whose affidavits were offered in evidence, nor did they except to the order of Judge Bickett on the ground set forth in this assignment of error; and, on authority of what is stated and held in the cited case, this assignment of error is overruled.

The remaining assignment of error is in these words: "That the record does not support the Judgment as to either Respondent." Appellants, *in their brief,* make no contention that the evidence was not sufficient to support the orders of June 23, 1959, relating specifically to respondents Pulley and Choplin. As to these respondents, there was plenary evidence to support the findings of fact and the orders. Indeed, as to knowledge of the restraining order and the contents thereof, the findings are based in substantial part on their own testimony. Appellants, *in their brief,* do contend the evidence was not sufficient to support the findings of fact and order of June 23, 1959, relating specifically to respondent Morris. While the exception and assignment of error might well be dismissed as broadside, we deem it appropriate to consider this contention.

The only evidence in the record relating in any way to respondent Morris consists of statements in the affidavit of W. H. Neathery, substantially as follows: Between 12:10 and 1:00 p.m. on Monday, April 6, 1959, while watching, by means of binoculars, from an office in the mill building, he saw respondent Morris "shoot one time *toward the building* from which (he) was watching, and heard the ball hit *the side of the building.*" (Our italics)

It is contended in behalf of respondent Morris that the restraining order, if otherwise applicable to him, did not prohibit his said alleged action. The contention is that the restraining order relates to described actions directed against persons entering, upon or leaving plaintiff's premises and *to their property,* not to actions against plaintiff's property. For the reason stated below, we deem it unnecessary to pass upon this particular contention.

Upon this record, we are of opinion, and so hold, that the evidence

is insufficient to support the finding of fact that respondent Morris had actual knowledge of the restraining order and of its contents within the rule stated in No. 393, *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO), et al., ante,* 240.

Judge Bickett found that respondent Morris had actual knowledge of the restraining order and of its contents, "by means of the said Restraining Order being conspicuously posted on bulletin boards set 75 feet *on either side of the gates of the Harriet Cotton Mills,* and two copies of said Order being posted on either side of the door of the Vance County Court House, and a copy thereof being published in the Henderson Daily Dispatch, a newspaper published in Vance County, on February 14, 1959, and the contents thereof having been publicized over the radio." (Our italics)

The only evidence relevant to these findings is the affidavit of Sheriff Cottrell in which he states: ". . . on February 14, 1959, two copies of the Temporary Restraining Order, issued by Judge William Y. Bickett in the case of *HENDERSON COTTON MILLS vs. LOCAL NO. 584, et al,* were conspicuously posted on bulletin boards set up 75 feet *on either side of each gate at the Henderson Cotton Mills,* and two copies posted on either side of the Court House Door in Henderson, N. C.; I also know of my own knowledge that a copy of this Temporary Restraining Order has been published in Henderson, and the contents thereof publicized over the radio, . . ." (Our italics) Obviously, this affidavit relates to a similar restraining order issued by Judge Bickett in a separate action.

There is no evidence, apart from the single incident of April 6, 1959, which purports to identify respondent Morris in any way. He was not a defendant. He was not served with summons, complaint or restraining order. *There was no evidence that he knew a restraining order had been issued.* There was no evidence that he was a former employee of plaintiff or on strike or a member of defendant Union. Indeed, there was no evidence that he resided in Vance County or had been in the vicinity of plaintiff's plant or in Vance County prior to the incident of April 6, 1959. Under these circumstances, we are constrained to hold that the evidence was insufficient to show that he had actual knowledge of the restraining order and of its contents and wilfully violated the terms thereof.

If respondent Morris had testified, perhaps the record would have presented a different factual situation. But, unlike his co-respondents, he did not testify. With good reason, he may reflect upon this state-

ment of William James, the philosopher: "Man's silence power is equal in importance to his word power."

It is noted: Nothing in the record before us indicates what disposition, if any, has been made of the contempt proceedings in relation to Nellie Roberson and Barbara Roberson, co-respondents of appellants.

Affirmed as to respondents Pulley and Choplin.

Reversed as to respondent Morris.

HIGGINS, J., not sitting.

HENDERSON COTTON MILLS v. LOCAL UNION NO. 584, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); DOUG ROSE, NICK LANGLEY, RUFUS STRANGE, M. LUTHER JACKSON, VERNON W. BURNETTE, ANDREW C. TURNER, CARL C. MOORE, RALPH F. HARRIS, WILLARD O. FAULKNER, JAMES B. H. ROBERSON, ALBERT L. BATTON, HENRY W. STALLINGS, EDWARD J. OFTEN, JAMES E. REARDON, RICHARD F. PARROTT, CLARENCE E. HARPER, JOHN E. STALLINGS, JOE HALE, JOHN LONG, HARRY HICKS, EDWIN ELLINGTON, COY L. PEGRAM, SHERMAN FERRELL, FRANK O. TURNER, LINVIL NELSON, SIDNEY WALLACE, PHIL HARRIS, ELMORE MURPHY, MACON RENN, JOHN OWEN, CLIFTON CARTER, SANDY SAM ROBERSON, JAMES BARKER, EDWARD MOSELEY, WILLIAM TART, MELVIN BRAME, HERMAN MULCHI, R. TALMADGE HARPER, BILLY THOMPSON, JOHN G. MULCHI, JAMES M. WILKERSON, AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME.

(Filed 25 November, 1959.)

1. **Appeal and Error § 38—**

Assignments of error not discussed in the brief are deemed abandoned. Rule 28 of the Rules of Practice in the Supreme Court.

2. **Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—**

In proceedings under an order to show cause why respondents should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by respondents in violation of the order will not be *held* for error when respondents do not object to the admission of the affidavits or indicate any desire to cross-examine any affiant on the hearing, or move to strike, or except to the order on such ground, since respondents will be held to have waived their rights of confrontation.

3. **Contempt of Court § 6—**

Evidence tending to show that the restraining order issued in the

cause had been conspicuously posted on bulletin boards at plaintiff's plant and at the court house door, published in the local newspaper, its contents publicized by radio and that the import of the order was of general knowledge throughout the county, that the labor union of which respondents were members had been served with the order, together with respondents' own testimony on the hearing of the order to show cause *is held* sufficient to support the finding of the court that the respondents had actual notice of the substance of the order, it not being required that plaintiff show by positive evidence that respondents had actually read the restraining order or that it had been read to them.

HIGGINS, J., not sitting.

APPEAL by respondents Ned Thomas and Calvin Pegram from *Bickett, J.*, in Chambers, 7 March 1959, at Henderson, VANCE Superior Court, docketed in this Court as case No. 390.

This appeal is from an order entered 7 March 1959, adjudging Ned Thomas and Calvin Pegram and each of them in contempt "for wilfully, knowingly and intentionally" violating the restraining order of 13 February 1959, by Bickett, J., based on facts alleged in the verified complaint filed in this action.

The temporary restraining order issued on 13 February 1959, was in full force and effect on March 7th, 1959. By order of 5 March 1959, it was continued in force and effect until the trial on its merits.

The contents of the restraining order, in pertinent parts, having been set out in the case of *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO) et al, ante,* 240 and docketed in this Court as case No. 393, will not be set out herein.

Service of summons, complaint and restraining order was promptly made on all (except five individuals) defendants.

The respondents Ned Thomas and Calvin Pegram were not named as defendants in this action, nor were they served with summons, complaint or restraining order prior to the issuance of the show cause order.

On 26 February 1959, plaintiff through its attorney representing unto the court that Ned Thomas and Calvin Pegram have wilfully done certain acts and things prohibited by the restraining order of 13 February 1959, as set forth in affidavit of Raymond Ayscue, and that the said Ned Thomas and Calvin Pegram had notice and actual knowledge of the terms, conditions and requirements of the restraining order as would be shown by affidavits attached thereto, moved the court that an order for a show cause be issued and directed to Ned Thomas and Calvin Pegram, ordering them to appear and show

cause, if any there may be, why each of them should not be punished as for contempt of court.

Pursuant thereto and on 26 February 1959, Bickett, J., ordered Ned Thomas and Calvin Pegram to appear before him at 2:30 P.M., on the 3rd day of March, 1959, and show cause, if any there be, why each of them should not be punished as for contempt of court. And the court ordered that this order to show cause be served upon Ned Thomas and Calvin Pegram in manner directed, which was done on 27 February 1959.

The respondents filed answer, duly verified by both of them, to the notice to show cause in which they deny the matters and things complained of in the notice which alleges conduct on their part, or either of them, in the manner charged; that while they were at the Ayscue house, they deny that either of them threatened Ayscue in any manner, but only discussed with him in a moderate and friendly way about not returning to work at the mill; and they represent to the court that they had no intent at any time to commit any wilful or unlawful act in violation of said restraining order and have the utmost respect for the court and its orders and mandates. However the respondents did not aver that they or either of them did not have full knowledge of the existence of the restraining order and of the contents thereof.

And upon the hearing at the time and place designated in the order to show cause, each of the respondents appeared in person and represented by counsel, and having filed answer as hereinabove set forth, and plaintiff being represented by counsel:

The record of case on appeal shows that plaintiff offered in evidence two affidavits of Raymond Ayscue, and one of Sheriff Cottrell. The contents of the first affidavit of Ayscue, dated 25 February 1959, read as follows:

"My name is Raymond Ayscue, and I live at 1284 Walters Street, which is just North East of the Henderson Cotton Mills, I work in the Henderson Cotton Mill in the Spinning Room. I came to work on Monday, February 16, 1959, when the mill opened and have been at work continuously since that time.

"Last Tuesday night, February 24, 1959, about 8:40 P. M., I heard a knock at my door. Before opening the door, I asked who was there, and the voice answered, 'Ned'. I recognized this man by his voice as Ned Thomas. I tried to cut on my porch light, but found they had unscrewed the bulb on the porch. I told him I would not open the door until they put the bulb back in so I could see who was there with him. They put the bulb back in,

and when the light came on, I opened the door and saw Ned Thomas and Calvin Pegram. When I opened the door I stepped back and both Ned Thomas and Calvin Pegram entered my house. I told them both to leave, but they refused. I had my 22 rifle with me when I answered the door, and I was standing in the corner by the door. I could tell from the voices I heard that there were at least two other people outside in the darkness whom I could not recognize. The first thing Ned spoke was, 'We have come to talk to you about going to work.' Pegram said, 'If you go in in the morning we will kill you.' Ned then said, 'You know we do not want you to go in, and if you don't go in we will get a contract.' He then said, 'If you go in, we are going to kill you too.' I ordered them out of my house again. When I ordered them out that time, Calvin Pegram stepped in front of Ned, and he said, 'You know me, Raymond, and I would not go back. If you do go back in that G-d D--m Mill, we are going to kill you.' They stood there, and I asked them again to leave. At that time I had my rifle beside me, but was not pointing it at either of them, and when Pegram came closer to me, then I picked the rifle up and Pegram grabbed the rifle and I snatched it away from him and asked them to leave again, and they told me again, 'If you go in that Mill, we are going to get you.' At that time I picked the rifle up, and asked them to get out. As Calvin Pegram turned to leave, Ned said to me, 'You really meant that thing.' And I said, 'Yes'. My wife closed the door, and they said, 'We will get you tonight.' That was all, and they left."

And the contents of second affidavit of Ayscue dated 3 March 1959, are as follows:

"That the acts of Ned Thomas and Calvin Pegram described in my affidavit of February 25, 1959 were wilful violations of the Temporary Restraining Order issued by Judge William Y. Bickett on February 13, 1959 in the case of *Henderson Cotton Mills v. Local No. 584, et al* and were committed with actual knowledge of said order."

The contents of the Sheriff's affidavit date 3 March 1959, are as follows:

"My name is E. A. Cottrell and I am Sheriff of Vance County; that on February 14, 1959, two copies of the Temporary Restraining Order, issued by Judge William Y. Bickett in the case of *Henderson Cotton Mills v. Local No. 584, et al*, were conspicuously posted on bulletin boards set up 75 feet on either side of each gate at the Henderson Cotton Mills, and two copies post-

ed on either side of the Court House Door in Henderson, N. C.; I also know of my own knowledge that a copy of this Temporary Restraining Order has been published in Henderson, and the contents thereof publicized over the Radio, and that this matter is of general knowledge throughout the County."

The respondent Calvin Pegram testified that he had heard about the restraining order and knew that he was forbidden by the restraining order of the court to threaten Ayscue. He denied doing so.

Following the hearing on the show cause order, the court entered order in open court at Henderson on 7th day of March 1959, in pertinent part as follows: "After hearing the affidavit presented by plaintiff, and counsel for respondents failing to offer any affidavits, but after the testimony of all the witnesses offered by respondents and by counsel for respondents, and counsel having been heard, and upon consideration of all affidavits filed and the oral testimony of both respondents, and argument of counsel, the court now finds the following facts:

"That Ned Thomas and Calvin Pegram by means of the Restraining Order being conspicuously posted on bulletin boards set 75 feet on either side of each gate of the Henderson Cotton Mill, and two copies of said Restraining Order being posted on either side of the Vance County Court House door, and a copy thereof being published in the Henderson Daily Dispatch, a newspaper published in Vance County, on February 14, 1959, and the contents having been publicized over the radio and copies thereof being served on Local Union No. 584, Textile Workers Union of America, and that the said Ned Thomas and Calvin Pegram are members of Local No. 584, Textile Workers Union of America, and from the oral testimony by the said Ned Thomas and Calvin Pegram in said cause that they had actual knowledge of the Restraining Order issued by Judge William Y. Bickett on February 13, 1959.

"That as to Respondent, Ned Thomas, the Court finds as a fact that he wilfully, knowingly and intentionally violated the Restraining Order of February 13, 1959, by going to the home of Raymond Ayscue, an employee of Henderson Cotton Mills, who had been working in said mill continuously since February 16, 1959, when the mills opened, in the night time, and threatening to kill him if he went to work in the Henderson Cotton Mill the next morning, thereby threatening and intimidating an employee of the Henderson Cotton Mill who was seeking to work in plaintiff's plant.

"That as to Respondent Calvin Pegram, the court finds as a fact that he wilfully, knowingly and intentionally violated the Restraining Order of February 13, 1959, by going to the home of Raymond Ayscue, an employee of plaintiff Henderson Cotton Mills, who had been working in said mill continuously since February 16, 1959, when the mill opened, in the night time and threatening to kill him if he went to work in the Henderson Cotton Mill the next morning, thereby threatening and intimidating an employee of Henderson Cotton Mills who was seeking to work in plaintiff's plant.

"The court further finds that the above acts were wilfully, knowingly and intentionally committed by each of the Respondents for the purpose of intimidating and threatening a worker and an employee of said Henderson Cotton Mills who was seeking to work in plaintiff's plant.

"Now, Therefore, the Court does hereby find, and It Is Ordered and Adjudged that the Respondents Ned Thomas and Calvin Pegram and each of them are in contempt of this Court for wilful and intentional violations of the Restraining Order issued by this Court on February 13, 1959.

"It is Further Ordered, Adjudged and Decreed that each of them be punished for the said contempt as follows:

"That Ned Thomas be confined to the common jail of Vance County, North Carolina, for a period of thirty (30) days and pay a fine in the sum of $250.00.

"That Calvin Pegram be confined to the common jail of Vance County, North Carolina for a period of thirty (30) days and pay a fine in the sum of $250.00."

Respondents and each of them except (1) to the findings of fact and conclusions of law of the court, and (2) to the judgment against each of them, and gave notice of appeal to the Supreme Court, and assign error.

Perry & Kittrell, Chas. P. Green, A. W. Gholson, Jr., for plaintiff, appellee.

W. M. Nicholson, James B. Ledford, James J. Randleman, L. Glen Ledford for respondent appellants.

WINBORNE, C. J. Here, as in case No. 385, *Harriet Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO) et al., ante,* 218 and in No. 389, *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO) et al. ante.*

234 and in No. 393, *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO) et al, ante,* 240 all at this term of Supreme Court, the exception quoted in the appeal entries is the only one appearing in the record. Notwithstanding this, appellants, Respondents Ned Thomas and Calvin Pegram in their assignments of error attempt to break this single exception into four parts and refer to four exceptions.

It is noted that only two of these four assignments of error are discussed in appellant's brief. The others therefore are deemed as abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 544, at p. 562, *et seq.* See also like ruling in case No. 389, *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO) et al, ante,* 234 and case No. 393, *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO) et al, ante,* 240.

And of the two assignments of error with respect to which discussion is made in appellant's brief it is contended that the Respondents, and each of them, were denied the right to face and cross-examine their accusers, contrary to the laws of the State of North Carolina. Here as in case No. 385, *Harriett Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO) et al, ante,* 218 and in case No. 393, *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO) et al, ante,* 240 the Respondents did not object to the introduction of the affidavits when offered, nor did they move to strike the evidence contained therein, or any part of it; nor did they request an opportunity to examine Raymond Ayscue or the Sheriff, the makers of the affidavits or either of them; nor did they except to the order of Bickett, J., on the ground set forth in the assignment of error; and, therefore, on the authority of the opinion in case No. 385, referred to above, this assignment of error is overruled.

Appellants' remaining assignment of error is based on their general exception to Judge Bickett's order and to the findings of fact and conclusions of law. This exception is broadside, and therefore subject to denial.

Nevertheless, a careful examination of the record reveals that the facts found by the court with respect to the wilful violation of the restraining order by each of the respondents are supported by competent evidence and such findings are binding upon appeal—as in case No. 389, referred to above, and decisions there cited. Hence on authority thereof, as well as of cases numbers 385 and 393, above referred to,

the order of Bickett, J., dated 7 March 1959, from which this appeal is taken, will be and it is hereby

Affirmed.

HIGGINS, J., not sitting.

STATE v. GILBERT CLAYTON.

(Filed 25 November, 1959.)

1. Criminal Law § 147—

Where defendant's statement of case on appeal is accepted by counsel for the State and no objections or exceptions or countercase are filed, defendant's statement of case on appeal becomes and constitutes the case on appeal to the Supreme Court.

2. Courts § 11—

The General Assembly has authority to provide for the establishment of courts inferior to the superior court, Constitution of North Carolina, Article IV, Sections 2 and 14, but since the effective date of Article II, Section 29 of the State Constitution, the General Assembly can do so only by general act.

3. Criminal Law § 16—

The Recorder's Court of Vance County and the Superior Court have concurrent jurisdiction of prosecutions for the misdemeanors of assault with a deadly weapon and malicious injury to personal property. G.S 7-64.

4. Same—

Where two courts have concurrent jurisdiction of certain offenses the court first exercising jurisdiction in a particular prosecution obtains jurisdiction to the exclusion of the other.

5. Same—

Where the recorder's court of a county having concurrent jurisdiction with the Superior Court of misdemeanors issues its warrant charging defendant with certain misdemeanors, but a *nolle prosequi* is entered in the recorder's court prior to plea, that court loses jurisdiction and the State may proceed upon an indictment found in the Superior Court subsequent to the date of the entry of the *nolle prosequi* and defendant's motion in the Superior Court to remand to the recorder's court is properly denied.

6. Criminal Law § 26—

A *nolle prosequi* entered before arraignment and plea will not support a plea of former jeopardy.

7. Criminal Law § 9: Property § 3—

Where the evidence is to the effect that defendant was acting in con-

cert with others, that the others blocked with their cars the car of the prosecuting witness, and that defendant then threw a brick through the windshield of the car of the prosecuting witness, an instruction of the court that the offense of wanton and willful injury to personal property might be committed by one person acting alone, or might be jointly committed by two or more persons aiding each other and acting together, cannot be held for error. G.S. 14-160.

8. Criminal Law § 159—

Assignments of error not set out in defendant's brief and in support of which no reason or argument is stated or authority cited will be deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

HIGGINS, J., not sitting.

APPEAL by defendant from *Mallard, J.*, 4 May 1959 Special Criminal Term, of VANCE.

Criminal action tried upon a bill of indictment containing two counts. The first count charges the defendant on 20 February 1959 with an assault with a deadly weapon, to wit, a brick about four inches long and two inches wide, on Frank Overby, Bradsher Redd and Charlie Overby. G.S. 14-33. The second count charges the defendant on the same day and place, as alleged in the first count, with wantonly, wilfully, and maliciously injuring the personal property, to wit, an automobile, of Frank Overby. G.S. 14-160.

Plea: Not Guilty. Verdict: Guilty as charged.

From judgments of imprisonment on both counts, defendant appeals.

Malcolm B. Seawell, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

W. M. Nicholson, James B. Ledford, L. Glen Ledford and James J. Randleman for defendant, appellant.

PARKER, J. Before pleading to the bill of indictment, defendant moved that the case be remanded to the Recorder's Court of Vance County for trial, for the reason that the Recorder's Court of Vance County had first taken cognizance of the case, and that said Recorder's Court had jurisdiction thereof to the exclusion of the Superior Court. The trial court denied the motion, and defendant assigns this as error.

Service of defendant's statement of the case on appeal to the Supreme Court was accepted by counsel for the State, and as counsel for the State filed no objections or exceptions thereto, or any countercase, defendant's statement of the case on appeal became, and con-

stitutes the case on appeal to the Supreme Court. G.S. 1-282; *Coral Gables, Inc. v. Ayres,* 208 N.C. 426, 181 S.E. 263.

In reference to the above motion, these facts appear from the case on appeal, and from a stipulation entered into between counsel for the State and the defendant:

Prior to the convening of the 4 May 1959 Special Criminal Term of the Superior Court of Vance County, a warrant was pending for trial in the Recorder's Court of Vance County charging defendant with the same offenses with which he is charged in the indictment upon which he was tried and convicted in the case *sub judice.* Defendant gave bond for his appearance in the Recorder's Court of Vance County, and his case had been set for trial in that court. On the call of his case for trial on the warrant in the Recorder's Court, defendant made a motion for a trial by jury, as provided for by Chapter 262, Public-Local Laws of North Carolina, Session 1917, relating to the Recorder's Court of Vance County, and at that time, pursuant to Chapter 316, 1957 Session Laws of North Carolina, (an act regulating the demand for jury trials in criminal cases in the Recorder's Court of Vance County), deposited with the clerk of that court a fee of twenty dollars.

On the afternoon of 4 May 1959 the State, without notice to defendant, took a *nolle prosequi* as to the case pending against defendant in the Recorder's Court of Vance County, and such an entry was made on the record of that court.

On the morning of 6 May 1959 the grand jury of Vance County Superior Court returned in open court as a true bill of indictment, the bill of indictment upon which defendant was tried and convicted in this case.

Defendant has not requested a refund of the twenty dollars deposited by him with the clerk of the Recorder's Court. However, it will be refunded to him at the end of May 1959.

Chapter 316, 1957 Session Laws of North Carolina, specifically provides that "if the prosecuting officer shall enter a *nolle prosequi,* then said fee of twenty dollars ($20.00) shall be returned or repaid to the defendant."

Chapter 158, Public-Local Laws of North Carolina, Session 1911, is an act which created and established a Recorder's Court to be designated as the Recorder's Court of the Town of Henderson, for the trial of petty misdemeanors committed in the Town of Henderson, Henderson Township, Vance County. The General Assembly at the same session amended Public-Local Act, Chapter 158, by enacting Public-Local Act, Chapter 614, which struck out of Public-Local Act, Chap-

ter 158, the designation of the Recorder's Court and its limited territorial jurisdiction in Vance County for the trial of petty misdemeanors, and inserted in lieu thereof words, which make Section One of Chapter 158 read as follows: "A special court for the trial of petty misdemeanors committed in Vance County, and to be designated as the 'Recorder's Court of Vance County, North Carolina,' is hereby created and established." We omit reference to the civil jurisdiction given by the Acts as immaterial.

Section (d) of Public-Local Act, Chapter 158, as amended by Public-Local Act, Chapter 614, both Acts enacted in the 1911 Session of the General Assembly, gives to the Recorder's Court of Vance County final, exclusive, original jurisdiction over a great number of criminal offenses, *inter alia,* assault and battery with a deadly weapon and malicious injury to real or personal property, both of which are misdemeanors in this jurisdiction. G.S. 14-33 and G.S. 14-160. Section (g) of Public-Local Act, Chapter 158, as amended by Public-Local Act, Chapter 614, provides that every person convicted in the Recorder's Court of Vance County shall have the right to appeal to the Superior Court of Vance County, and upon such appeal the trial in the Superior Court shall be *de novo.*

Sections 2 and 14 of Article IV of the North Carolina Constitution authorize the General Assembly to provide for the establishment of courts inferior to the Superior Court. *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602; *Rhyne v. Lipscombe,* 122 N.C. 650, 29 S.E. 57. This legislative power must now be exercised by the General Assembly through general acts because Section 29 of Article II of the State Constitution, which was adopted in 1916, specifies that "the General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court."

G.S. 7-64, which has been in force for many years, and was and is applicable to Vance County at all times relative to this case and now, reads: "Section 7-64. CONCURRENT JURISDICTION. — In all cases in which by statute original jurisdiction of criminal actions has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof."

The Recorder's Court of Vance County and the Superior Court of Vance County have concurrent jurisdiction over the two offenses charged against the defendant. The Recorder's Court of Vance County having first taken cognizance of these offenses, it is well settled it had jurisdiction thereof to the exclusion of the Superior Court of Vance

County before the State made an entry of *nolle prosequi* in the case against the defendant on the record of the Recorder's Court of Vance County. G.S. 7-64; *S. v. Reavis,* 228 N.C. 18, 44 S.E. 2d 354.

The question confronting us for decision is whether, as between the Recorder's Court of Vance County and the Superior Court of Vance County, Courts of concurrent jurisdiction of the offenses of assault with a deadly weapon and malicious injury to personal property, the Recorder's Court of Vance County in which the prosecution of the defendant for assault with a deadly weapon and malicious injury to personal property was first instituted loses its juridiction by the entering before trial of a *nolle prosequi* therein on the record of the Recorder's Court, so that the Superior Court of Vance County may thereafter acquire jurisdiction of the same offenses. In the consideration of this question, we are advertent to the familiar principle of law, specifically affirmed in G.S. 7-64 as to criminal actions, that where courts have concurrent jurisdiction, the court first acquiring jurisdiction of a case or controversy, its power being adequate to the administration of complete justice, retains its jurisdiction of the case or controversy, and may dispose of the whole case or controversy, and no court of co-ordinate authority is at liberty to interfere with its action. This principle is essential to the orderly administration of the law, and is enforced to avoid unseemly, expensive, and dangerous conflicts of jurisdiction and process. *Childs v. Martin,* 69 N.C. 126; *Haywood v. Haywood,* 79 N.C. 42; *S. v. Williford,* 91 N.C. 529; *S. v. Reavis, supra;* 14 Am. Jur., Courts, Sec. 243; 21 C.J.S., Courts, Sec. 492.

An exhaustive examination on our part has shown that the cases on the subject are not numerous, and are not entirely in harmony. The most accurate statement we have found of the question for decision is set forth in an annotation in 117 A.L.R., page 424, (1938), which is not referred to in the briefs of counsel for the State and for the defendant, and is as follows:

> "Aside from the question of former jeopardy, and in the absence of a statutory provision such as that referred to above, the view finding the greater amount of judicial support is that the court which first acquired jurisdiction when a prosecution was commenced therein loses such jurisdiction by the entering of a *nolle prosequi,* and that thereafter another prosecution may be carried on in another court of co-ordinate jurisdiction. *Rodgers v. State* (1911) 101 Miss. 847, 58 So. 536; *Chandler v. State* (1925) 140 Miss. 524, 106 So. 265 (recognizing rule; dismissal entered by justice of peace in vacation), followed in *Bass v. State* (1931) 159 Miss. 132, 131 So. 830; *Preston v. State* (1928) 109 Tex.

Crim. Rep. 610, 6 S.W. (2d) 757; *Epps v. State* (1936) 130 Tex. Crim. Rep. 398, 94 S.W. (2d) 441; *STATE v. VAN NESS* (Vt.) (reported herewith) *ante,* 415. See also *United States v. Jones* (1926) 7 Alaska, 378; *State ex rel. Mitchell v. Court of Coffeyville* (1927) 123 Kan. 774, 256 P. 804; *State v. McNeill* (1824) 10 N. C. (3 Hawks) 183.

"Compare *Coleman v. State* (1904) 83 Miss. 290, 35 So. 937, 64 L.R.A. 807, 1 Ann. Cas. 406, *infra.*"

This annotation states it is not concerned with the subject of former jeopardy. The words quoted from the annotation "and in the absence of a statutory provision such as that referred to above" have reference to some of the cases included in the annotation "decided under a statutory provision expressly making a dismissal of a prosecution for a misdemeanor a bar to another prosecution for the same misdemeanor."

Our case of *S. v. McNeill,* 10 N.C. 183, decided in 1824, is in accord with the majority view. These are the facts of this case: On 23 September 1822, a warrant issued to apprehend the defendant, who was charged with having committed an assault and battery. On 5 October 1822, he entered into recognizance before a justice of the peace to appear at December Term 1822 of Cumberland County Court, and at that term a bill of indictment was found, on which a *nolle prosequi* was entered at the same term. At the term of Cumberland Superior Court which commenced on 28 October 1822, the bill of indictment in the case *sub judice* was found against the defendant for the same offense, to which at Spring Term 1823 he pleaded his apprehension by warrant, and the finding of the bill in the county court, to which the solicitor for the State replied the *nolle prosequi,* and defendant demurred. The Trial Judge sustained the demurrer, and gave judgment for the defendant, from which the State appealed. This Court reversed the lower court, and said in its opinion:

"The Court is of opinion that a bill of indictment having been found against the defendant in the county court at December sessions in 1822, for the same offense, is no defense against the present indictment in the Superior Court, inasmuch as it appears on the pleadings that a *nolle prosequi* had been entered on the said first indictment prior to the time of pleading in this. That as the effect of a *nolle prosequi* is to put the defendant, without day, upon that indictment, he becomes while he is so, amenable to another indictment in any court having jurisdiction of the offense; otherwise a *nolle prosequi* would operate as a bar to any other prosecution."

The County Court of Cumberland County and the Superior Court of

Cumberland County had concurrent jurisdiction over the offense with which McNeill was charged. *S. v. Yarbrough,* 8 N.C. 78 (1820).

In *Smithey v. State,* 93 Miss. 257, 46 So. 410, the Court said *S. v. Tisdale,* 19 N.C. 159, is a case directly in point, and quoted from it, part of which quotation is as follows: "Until he had a day in court on that indictment, he was not *vexatus* thereby, and stood in relation thereto on the same footing as if he had been put without day by a *nolle prosequi* thereon, in which last case it is laid down in *McNeill's* case that he would be amenable on another indictment in *any court* having jurisdiction of the offense."

In *Bottom v. State,* 155 Ark. 113, 244 S.W. 334, on the rehearing, which was denied, this is said by the Chief Justice speaking for the Court:

> "Our attention is now called to a decision of the Supreme Court of Mississippi in *Coleman v. State,* 83 Miss. 290, 35 South. 937, 64 L.R.A. 807, 1 Ann. Cas. 406, holding, under a statute conferring concurrent jurisdiction on the courts of two counties, jurisdiction acquired by one of the counties cannot be relinquished or abandoned, so as to permit the assumption of jurisdiction by a court in the other county. The doctrine of that case does not seem to us to be sound, nor does it find support in any other authorities. In fact, the case appears to be in conflict with later decisions of the same court. In the case of *Rodgers v. State,* 101 Miss. 847, 58 South. 536, after stating the rule to be that, 'where concurrent jurisdiction is vested in two courts, the court first acquiring jurisdiction acquires exclusive jurisdiction,' it was said:
>
> " 'The reason of the rule is to prevent confusion and conflicts in jurisdiction, and to prevent a person from being twice tried for the same offense, but no defendant has a vested right to be tried in any particular court of concurrent jurisdiction. When one court of concurrent jurisdiction has acquired jurisdiction and voluntarily relinquishes it by a *nolle pros.* or dismissal of the case, there can be no legal or logical reason for preventing the other court from proceeding under such circumstances; there can be no confusion or conflict between the courts for the reason that only one court then has jurisdiction, or is trying to exercise it.'
>
> "See, also, *State v. McNeill,* 10 N.C. 183; *State v. Tisdale,* 19 N. C. 159; 16 Corpus Juris, p. 148."

The Mississippi cases of *Rodgers* and *Coleman* are cited in the A.L.R. quotation from which we have quoted above.

In *S. v. Norris,* 206 N.C. 191, 173 S.E. 14, the defendant was tried in the Superior Court on a bill of indictment found against him by the

Grand Jury at the January Term 1933 of the Superior Court of Columbus County charging him with the unlawful sale, possession, etc., of intoxicating liquor. The term at which the indictment was found appears in the record of the case on file in the office of the Clerk of this Court. Defendant entered a plea of not guilty and a plea of former jeopardy. On his plea of former jeopardy "defendant offered and the State admitted in evidence judgment docket No. 4, county recorder's court, Columbus County, judgment No. 4214, which reads as follows: *State v. W. C. and Jetty Norris,* 11 October 1932; N. P. Docketed 11 October, 1932. The notation 'N. P.' was admitted by the State to indicate a *nolle prosequi.*" The defendant moved that the jury be instructed, upon all the evidence, that as a matter of law the defendant should be discharged as having been placed in jeopardy in the trial in the recorder's court. Motion overruled, and defendant excepted. From a verdict of guilty and judgment imposed thereon, defendant appeals. From the opinion of the Court it appears that the Recorder's Court for Columbus County was created by authority of Chapter 27, Courts, Art. 19, County Recorders' Courts, C. S. 1563. C. S. 1567 gave that court exclusive original jurisdiction of the offenses with which defendant is charged. At all times relevant to the case C.S. 1437 (now G.S. 7-64) was applicable to Columbus County — statute as to concurrent jurisdiction. The Court in overruling defendant's motion that the jury be instructed as a matter of law upon all the evidence that the defendant should be discharged as having been placed in jeopardy in the Recorder's Court, said:

> "In *S. v. Thornton,* 35 N.C. 256 (257-258): 'A *nolle prosequi* in criminal proceedings, is nothing but a declaration, on the part of the prosecuting officer, that he will not at that time prosecute the suit further. Its effect is to put the defendant without day—that is, he is discharged and permitted to leave the court, without entering into a recognizance to appear at any other time—1 Ch. Cr. L., 480; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. 6 Mod., 261; 1 Sal., 21.' *S. v. Smith,* 129 N.C. 546; *S. v. Faggart,* 170 N.C. 737 (744); *Wilkinson v. Wilkinson,* 159 N.C., 265."

It seems clear that this Court thought the Superior Court had jurisdiction by reason of the entry of the *nolle prosequi* in the Recorder's Court, in that it did not dismiss the action *ex mero motu,* for, in the absence of objection, this Court will *ex mero motu* take notice of lack of jurisdiction, and stop the proceeding. *Baker v. Varser,* 239 N.C.

180, 79 S.E. 2d 757, where many cases are cited; *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700.

In *S. v. Dennington,* 145 A. 2d 80 (Superior Court of Delaware, 24 September 1958), the opinion states: "The basic point for decision is whether the State, having brought and later *nolle prossed* a criminal charge in one Court, may thereafter prosecute the same defendant upon the same charge in another Court of concurrent jurisdiction without consent of the defendant and without disclosing any reason for so doing." The opinion answered the point for decision Yes, and said:

"Of course, the problem now before this Court is not primarily whether the *nolle prosequis* were properly entered but rather whether the State can prosecute here after having entered those *nolle prosequis* without giving any reasons therefor. There are few reported cases dealing with the precise point raised here. The majority of them are adverse to the position taken by the defendants, unless some statute is involved. Illustrations of these decisions are *Rodgers v. State,* 101 Miss. 847, 58 So. 536; *Preston v. State,* 109 Tex. Cr. R. 610, 6 S.W. 2d 757; *State v. Van Ness,* 109 Vt. 392, 199 A. 759, 117 A.L.R. 415; *State ex rel. Mitchell v. Court of Coffeyville,* 123 Kan. 774, 256 P. 804. The cases are collected and discussed in 117 A.L.R. 423.

"Perhaps, the strongest case in defendants' favor is *State v. Milano,* 138 La. 989, 71 So. 131. There it was conceded that the only purpose of the District Attorney was to transfer the case from the first Court, which had taken jurisdiction, to the second Court. The Supreme Court pointed out that there was no provision in the law for the transfer of a criminal action from the one Court to the other and said that the action taken was merely an attempt to accomplish indirectly what could not be done directly. In Delaware, there is likewise no statute for the transfer of a criminal action from the Common Pleas Court of Kent County to the Superior Court. The opinion in the *Milano* case relies principally upon *Coleman v. State,* 83 Miss. 290, 35 So. 937, 64 L.R.A. 807, and *Ex parte Baldwin,* 69 Iowa 502, 29 N.W. 428. A careful reading of the *Baldwin* case shows that it is in fact authority only for the proposition that, where two Courts in different counties have concurrent jurisdiction over a matter, the one in which suit is first brought will retain its control to the exclusion of the other. We cannot quarrel with that holding but it is hard to understand its significance here, for the entry of the *nolle prosequi* terminated all proceedings in the Court of Common Pleas. That leaves no

question of double jeopardy or of conflict of jurisdiction. *State ex rel. Mitchell v. Court of Coffeyville, supra; Rodgers v. State, supra.*

"In the *Coleman* case, *supra,* the decision was expressly based upon a statute dealing with crimes commenced in one County and completed in another. This statute was interpreted as requiring the prosecution to be carried through in the County in which any action was first instituted. Obviously, because of the effect of the statute, the decision was not based upon the common law. Whatever may have been said in that opinion as supporting the view taken by the Louisiana Court in *State v. Milano,* it is clearly no longer the law of Mississippi, independently of statute. See *Rodgers v. State, supra,* and *Chandler v. State,* 140 Miss. 524, 106 So. 265, wherein the Court recognized the rule of the *Rodgers* case.

"Also cited in the *Milano* opinion are two Kansas decisions, *State v. Chinault,* 55 Kan. 326, 40 P. 662, and *State v. Brannon,* 6 Kan. App. 765, 50 P. 986. The law of Kansas, however, as announced in the more recent case of *State ex rel. Mitchell v. Court of Coffeyville, supra,* is directly opposed to the *Milano* holding.

"Without further discussion of the authorities, I will simply say that I consider the majority rule to be the proper one, except as it may be affected by statute. Fear has been expressed that this rule permits an Attorney General to cause great harassment to a man by taking him back and forth between two courts an unlimited number of times. It is believed that this possibility is more theoretical than real. I am satisfied that the Courts are not powerless to put a stop to such harassment, should the occasion arise."

In 16 C. J., Criminal Law, page 437, note 1, *S. v. Williford,* 91 N. C. 529, is cited to sustain the principle that "the State cannot, after filing an indictment or information in a court having jurisdiction, enter a *nolle prosequi* and file an indictment or information charging the same crime in another court having concurrent jurisdiction." The *Williford* case is no authority for such a statement: in that case no *nolle prosequi* was entered. Note 1 also cites as authority *Coleman v. State,* 83 Miss. 290, 35 So. 937, 64 L.R.A. 807, 1 Ann. Cas. 406, which appears to be in conflict with later decisions of that Court, as set forth above; *S. v. Milano,* 138 La. 989, 71 So. 131; *Ex Parte Baldwin,* 69 Iowa 502, 29 N.W. 428; two Kansas decisions, all discussed in *S. v. Dennington, supra,* and the early Wisconsin case of *S. v. Pauley,* 12 Wis. 537. No *nolle prosequi* was entered in the *Pauley* case. It

merely holds, so far as relevant here, that where a mortal blow is struck in one county, and death ensues therefrom in another, that court, in either county, which first takes cognizance of the offense, has exclusive jurisdiction thereof, and no other court can acquire any jurisdiction of it, except by a change of venue, as provided by statute. Of all the cases cited by C. J. to support the quoted statement from 16 C. J., page 437, it seems now, by reason of later decisions in Mississippi, and a later decision in Kansas, such statement is supported only by *S. v. Milano,* 138 La. 989, 71 So. 131.

The same statement quoted from 16 C. J., page 437, is repeated in 22 C.J.S., Criminal Law, page 711, which cites in support thereof, *S. v. Milano, supra,* 16 C. J., page 437, note 1, and one additional case, *Friend v. State,* Md., 2 A 2d 430 (1938). These are the facts in the *Friend* case: Defendant was tried, convicted, and sentenced by a Justice of the Peace Court for Caroline County on a warrant charging him with receiving stolen goods under the value of $25.00, knowing them to have been stolen. From the sentence, defendant appealed to the Circuit Court. The Justice of the Peace for Caroline County had jurisdiction concurrent with the Circuit Court to try the offense charged. While the appeal was pending in the Circuit Court, the Grand Jury of the Circuit Court found an indictment against the defendant for the same offense for which defendant was tried by the Justice of the Peace. After the indictment was found the State's Attorney entered a *nolle prosequi* of the case pending on the appeal. Defendant was tried and convicted on the indictment found in the Circuit Court, and from an adverse judgment appealed. The Court of Appeals held that when the indictment was found, the case stood on the appeal docket for trial, by order of the defendant, and the State had no authority to dismiss this appeal, that was the right of the accused, and had he seen fit to exercise it the Magistrate's judgment and sentence would have stood, that the entry of the *nolle prosequi* under the facts of the case was improper and ineffective, and left undisposed of defendant's case on appeal, and his trial and conviction in the Circuit Court for the same offense placed defendant in double jeopardy. The judgment of the Circuit Court was reversed. The Court of Appeals in its opinion makes no reference to any of the cases we have cited above deciding the exact question we are considering. This case is clearly not in point here.

The statement we have quoted from 16 C. J., page 437, and which is repeated in 22 C.J.S., page 711, represents at the present time the view of a distinct minority of the Courts that have decided the precise question before us, which view, in our opinion, is unsound.

In *S. v. Van Ness*, 109 Vt. 392, 199 A. 759, 117 A.L.R. 415, (1938), the Supreme Court of Vermont has this to say about the cases cited to support the quotation we have made from 16 C. J., page 437: "We are not impressed with their reasoning and are not content with their conclusions. The rule adopted seems to us to be unnecessarily and unreasonably restrictive." In the *Van Ness* case the Court held that the institution in one court of a criminal prosecution as to which a *nolle prosequi* was subsequently filed does not make it improper for another court of concurrent jurisdiction to take jurisdiction of an information charging the identical offense forming the subject of the first prosecution.

Defendant entered no plea in the Recorder's Court of Vance County, and no trial there was had of his case. At the time defendant was tried in the Superior Court, the Recorder's Court of Vance County had dismissed the case from its docket by the entry of a *nolle prosequi* on its record, and was making no effort to claim or exercise jurisdiction of the case. Defendant very properly makes no contention that he was placed in jeopardy in the Recorder's Court of Vance County.

It is our opinion, that when before trial a *nolle prosequi* was entered upon the record of the Recorder's Court of Vance County in the cases pending in that Court against the defendant, that Court lost jurisdiction, and that thereafter the State could institute and carry on an indictment and prosecution against the defendant for the same offenses in the Superior Court of Vance County, a Court of concurrent jurisdiction over these offenses with the Recorder's Court of Vance County, which opinion is in accord with the decisions of a large majority of the Courts deciding the same precise question, and with our decision of *S. v. McNeill*, and is a sound and better view. The cases relied on by defendant have been studied, and are clearly distinguishable. The Trial Court properly denied defendant's motion, to remand the case to the Recorder's Court of Vance County for trial.

The only other assignment of error brought forward and discussed in the brief is this: The Court erred in charging the jury as follows: "The offense of wanton and willful injury to personal property under this statute may be committed by one person acting alone, or it may be jointly committed by two or more persons aiding each other and acting together."

The State's evidence tends to show these facts, so far as this assignment of error is concerned: On 20 February 1959 Bradsher Redd, Frank Overby and Charlie Overby left the Harriet-Henderson Cotton Mill in Henderson in an automobile, the property of Frank Overby. In the street their automobile was blocked by automobiles, and they

had to stop. About 25 people were in the vicinity of their automobile, when the brick was thrown. Bradsher Redd, a witness for the State, pointed the defendant out in the courtroom, and testified: "He (the defendant) picked up a brick, and said, 'you g.d. s. o. b.'s, I will get you,' and threw the brick right through the windshield." Frank Overby, a witness for the State, testified to the effect that a man driving a 1955 Ford got out, and threw a brick through the windshield of his automobile, breaking it out, that he could not swear it was the defendant. Charlie Overby, a witness for the State, testified: "We came out of the mill gate, took a left turn and a 1955 Ford got in front of us, and Gilbert Clayton got behind us. When they did that we took a right turn and went around the block and headed back to the mill gate; and when we got back, Gilbert Clayton came in from the right and some more cars came from the left and blocked us, and a 1952 or 1953 Ford came in behind us. Gilbert got out of his car and said, 'We will get the sons of bitches,' and that is when he picked up the brick and threw it through the windshield. Bradsher Redd was driving the car."

In *S. v. Martin*, 141 N.C. 832, 53 S.E. 874, the Court said in respect to the offense of wanton and willful injury to personal property: "We do not perceive, . . . why the original defendants could not have jointly committed the offense, one doing the act and the other, as principal, aiding and abetting him, or participating with him." In *S. v. Hobbs*, 216 N.C. 14, 3 S.E. 2d 431, the Court said: "The court charged the jury in effect that if the defendant intentionally threw a brick at the prosecuting witness and struck and broke the windshield of the truck he was driving, although he may not have stricken the witness the defendant was guilty of an assault with a deadly weapon, and further, that if the defendant was personally present aiding, abetting and encouraging another, who intentionally threw a brick at the prosecuting witness and broke the windshield of the truck he was driving, he was guilty of an assault with a deadly weapon. This was a correct statement of the law applicable to the facts which the evidence for the State tended to establish." The assignment of error to the charge is overruled.

The other assignments of error in the record are not set out in defendant's brief, and in support of which no reason or argument is stated or authority cited, and, therefore, they will be taken as abandoned by defendant. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 563; *S. v. Bunton*, 247 N.C. 510, 101 S.E. 2d 454; *S. v. Atkins*, 242 N.C. 294, 87 S.E. 2d 507; *S. v. Cox*, 217 N.C. 177, 7 S.E.

2d 473; *S. v Lea,* 203 N.C. 13, 164 S.E. 737; *S. v. Bryson,* 173 N.C. 803, 92 S.E. 698; *S. v. Smith,* 164 N.C. 475, 79 S.E. 979.

Defendant was sentenced to imprisonment on each count in the indictment, both sentences to begin at the expiration of the service of the imprisonment sentence imposed upon defendant at the same term of Court for the offense of engaging in a riot in Case No. 3478. Case No. 3478 was decided this day, *S. v. Moseley* (the defendant here is one of the defendants in that case) post, 285, 111 S.E. 2d 299, and no error was found in the trial.

In the instant case there is plenary evidence to carry the case to the jury, and to support the verdict. Defendant makes no contention in his brief that any evidence was improperly admitted or excluded, or that any of his constitutional rights either under the State or United States Constitution were violated in the trial below. No prejudicial error in the charge is shown. The sentences imposed are well within the limits authorized by the applicable statutes.

No error.

HIGGINS, J., not sitting.

STATE v. HILTON PARRISH.

(Filed 25 November, 1959.)

1. Criminal Law § 16—

The Recorder's Court of Vance County and the Superior Court have concurrent jurisdiction of prosecutions for the misdemeanors of assault with a deadly weapon and malicious injury to personal property. G.S. 7-64.

2. Criminal Law § 16—

Where the recorder's court of a county having concurrent jurisdiction with the Superior Court of misdemeanors issues its warrant charging defendant with certain misdemeanors, but a *nolle prosequi* is entered in the recorder's court prior to plea, that court loses jurisdiction and the State may proceed upon an indictment found in the Superior Court subsequent to the date of the entry of the *nolle prosequi,* and defendant's motion in the Superior Court to remand to the recorder's court is properly denied.

3. Criminal Law § 101—

If there is any substantial evidence, direct or circumstantial, or both,

tending to prove each material element of the offense charged, it is sufficient to withstand motion to nonsuit, it being for the jury to determine in regard to circumstantial evidence whether it tends to prove guilt beyond a reasonable doubt and excludes every reasonable hypothesis of innocence.

4. Assault and Battery § 14: Property § 3—

Testimony of the driver of a car that as he was driving through a group on either side of a street his car was hit by several objects, resulting in appreciable damage, together with testimony of an occupant of the car that the car was struck two times on the occasion in question, and testimony of an officer that he recognized defendant and saw the defendant throw a rock when the defendant was about twenty feet from the car, and heard the following thump, although he did not see the rock hit the car, *is held* sufficient to be submitted to the jury on the charge of assault with a deadly weapon and the charge of malicious injury to personal property.

5. Criminal Law § 9: Property § 3—

Where the evidence is to the effect that defendant was acting in concert with others, that the others blocked with their cars the car of the prosecuting witness, and that defendant then threw a brick through the windshield of the car of the prosecuting witness, an instruction of the court that the offense of wanton and willful injury to personal property might be committed by one person acting alone, or might be jointly committed by two or more persons aiding each other and acting together, cannot be held for error. G.S. 14-160.

6. Criminal Law § 159—

An assignment of error not set out in the brief and in support of which no reason or argument is stated or authority cited will be deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

HIGGINS, J., not sitting.

APPEAL by defendant from *Mallard, J.*, 4 May 1959 Special Criminal Term, of VANCE.

Criminal action tried upon a bill of indictment containing two counts. The first count charges the defendant on 26 February 1959 with an assault with a deadly weapon, to wit, a large rock approximating eight inches in diameter, on Thomas D. Peck. G.S. 14-33. The second count charges the defendant on the same day and place, as alleged in the first count, with wantonly, willfully, and maliciously injuring the personal property, to wit, a 1950 Pontiac automobile, of Thomas D. Peck. G.S. 14-160.

Plea: Not Guilty. Verdict: Guilty as charged.

From a judgment of imprisonment of twelve months on each count in the indictment, the sentence on the first count to begin at the expiration of sentence this day imposed in Case No. 3400, and the

sentence on the second count to run concurrently with the sentence on the first count, defendant appeals.

Malcolm B. Seawell, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

W. M. Nicholson, James B. Ledford, James J. Randleman and L. Glen Ledford for defendant, appellant.

PARKER, J. Before pleading to the bill of indictment, defendant moved that the case be remanded to the Recorder's Court of Vance County for trial, for the reason that the Recorder's Court of Vance County had first taken cognizance of the case, and that said Recorder's Court had jurisdiction thereof to the exclusion of the Superior Court. The trial court denied this motion, and defendant assigns this as error.

Counsel for the State and the defendant agreed upon the case on appeal.

In reference to the above motion, these facts appear from the agreed case on appeal, and from a stipulation entered into between counsel for the State and defendant:

Prior to the convening of the 4 May 1959 Special Criminal Term of the Superior Court of Vance County, a warrant was pending for trial in the Recorder's Court of Vance County charging defendant with the same offenses with which he is charged in the indictment upon which he was tried and convicted in the case *sub judice*. Defendant gave bond for his appearance in the Recorder's Court of Vance County to answer the charges in the warrant issued against him, had requested a jury trial in that court, and had made the required deposit for a jury. At 3:35 p. m. on 4 May 1959, without any notice to defendant, the State before trial of the case against defendant in the Recorder's Court of Vance County entered a *nolle prosequi* upon the record of the Recorder's Court of Vance County. At 3:45 p. m. on 4 May 1959 the Grand Jury of the Superior Court of Vance County returned the bill of indictment in this case.

The Recorder's Court of Vance County and the Superior Court of Vance County had concurrent jurisdiction of the offenses charged, the jurisdiction to be exercised by the Court first taking cognizance thereof. Chapter 158, Section (d), Public-Local Laws of North Carolina, Session 1911, as amended by Chapter 614, Public-Local Laws of North Carolina, Session 1911; G.S. 7-64.

Defendant very properly makes no contention that he was placed in jeopardy in the Recorder's Court of Vance County. *S. v. Clayton.*

ante, 261, 111 S.E. 2d 299, decided this day, is directly in point, and upon the authority of that case defendant's assignment of error to the refusal of the trial court to remand the case to the Recorder's Court of Vance County for trial is overruled.

Defendant assigns as error the refusal of the trial court to allow his motion for judgment of nonsuit made at the close of the State's evidence: defendant offered no evidence.

The State's evidence tends to show the following facts: Thomas D. Peck has been a resident of Henderson for 25 years. He knows the defendant. About 9:00 a. m. on 26 February 1959, he saw defendant at the east side of Harriet Cotton Mill No. 1 on Harriet Street standing between the street and the mill's premises. He was one of a group of 10 or 15 or more persons gathered in the area at the east end of the mill on Harriet Street. Some of the group were on the mill side of the street, and others were on the other side, to the right and left of Peck, when he drove his 1950 Pontiac automobile through the group to see an employee about coming to work. Defendant watched Peck as he drove by. Peck stopped at Marcus Davis' house, and blew his horn. Davis did not come out, so Peck turned around, and came back through the group. Peck testified: "My car was hit by a couple of heavy objects one foot above the rear glass and right rear fender. On the top of the car was a couple of dents which took the paint off. The blow that hit on the side flattened out a piece of chrome that ran along the rear fender. It chipped the paint off and made an indentation into the metal of the car. When I stopped my car I saw rocks and bricks out in the street, several of them. It was then that my car was hit a foot above the rear glass and on the right fender. I did not see the objects that struck my car. The one on top made a couple of dents and took paint off. It would be hard to estimate the depth of the indentation. The one that hit the car on the side flattened out the piece of chrome that runs parallel to the ground along the fender of my 1950 Pontiac. It was flattened out about an inch and a half. I stopped the car about 25, maybe 50 feet from the group and got out to inspect the damage, but I didn't see all of the injuries until I parked the car back in the mill lot. I saw the one on top then and it was then I knew it had been hit on top. When I stopped the car on Harriet Street I saw some rocks and bricks, maybe three of them. They were off to the side of my car. Mr. Ollie Harris was with me in the seat beside me. I was driving so I don't know what Parrish was doing when my car was struck." On cross-examination Peck testified: "The rocks I saw in the street were approximately 50 feet from where my car was struck." On redirect examination, he testified: "The rocks

were lying in the area where I was hit in relationship to the crowd, that is, they were in front of the crowd. I'd estimate I was less than 10 feet from the persons in that crowd on both sides, when my car was struck."

Harold U. Watkins, a police officer of Henderson and a witness for the State, testified: "When Mr. Peck's car came back up the street Mr. Parrish darted quickly between two cars parked end to end in front of one and behind the other. By darted I mean from the side of the automobile next to the street or in the street. He moved fast. He was moving faster than walking but not exactly running, a fast gait, away from the street, toward the mill fence. He moved toward the mill fence which put him on the opposite side of the vehicle from the side he was on. He ducked momentarily and as Mr. Peck's car passed he threw a rock about the size of my fist. I saw it in his hand, I saw it leave his hand and traveling through the air. I did not see it hit the car but I heard a thump. I saw Mr. Peck apply his brakes and stop his automobile. . . . After he threw the rock Parrish walked on back up to Alexander Avenue toward W. E. Ramsey's store, in front of the mill. Mr. Peck stopped beside where we were parked and we told him we saw what happened. I didn't see the rock after it struck the automobile, and I don't know where Parrish got it. The first I saw it was in his hand. He was about 20 feet at most from the car when he threw the rock. The others in the crowd stayed on the street side of the parked cars when Parrish ducked behind them."

Ollie Harris, who was riding with Peck, testified as a witness for the State: "I don't know what hit his car, but something hit it. I can't say which side of the car it hit. I didn't get out. I say two somethings hit the car." He testified on cross-examination: "I am sure the car was struck two times, one on the right and one on the left."

This is said in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431: "We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both.

To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury."

In *S. v. Hobbs,* 216 N.C. 14, 3 S.E. 2d 431, the State's evidence tended to show these facts: Willard Jackson was driving an oil truck on the public highway between Wilmington and Charlotte. He recognized the defendant, and saw him in company with another man whom he did not recognize. He testified: "They made a motion to throw something and just at that time I threw up my hand over my face, and something busted my windshield. I don't know whether it was a brick or a rock or what, but it broke the windshield to the right of the center. . . . I do not know which one actually threw the brick or rock or whatever it was; both motioned. Both men made a throwing motion with the arm. . . . I did not stop to investigate." Defendant was tried on appeal in the Superior Court on a warrant that charged him with assaulting Willard Jackson with a deadly weapon, to wit, a brick. Defendant assigned as error the refusal of the trial court to grant his motion for judgment of nonsuit made after all the evidence in the case was concluded. This Court said this assignment of error cannot be sustained. The trial court charged the jury in effect: "That if the defendant intentionally threw a brick at the prosecuting witness and struck and broke the windshield of the truck he was driving, although he may not have stricken the witness, the defendant was guilty of an assault with a deadly weapon, and further, that if the defendant was personally present aiding, abetting and encouraging another, who intentionally threw a brick at the prosecuting witness and broke the windshield of the truck he was driving, he was guilty of an assault with a deadly weapon." This Court said: "This was a correct statement of the law applicable to the facts which the evidence for the State tended to establish."

In considering the motion for judgment of nonsuit as to the first count in the indictment, the fact, that in the instant case the State's evidence tends to show that Peck's automobile was struck by a rock one foot above the rear glass and right rear fender and also struck on the top, and that in the *Hobbs* case the missile broke the windshield of the oil truck, makes no material difference.

In *S. v. Perry,* 226 N.C. 530, 39 S.E. 2d 460, defendant threw a

brick into the store at the prosecuting witness, but did not hit him. This Court said: "In the instant case, under the evidence, we think his Honor would have been justified in holding as a matter of law that the manner in which the defendant used the brick, it was a deadly weapon."

The evidence was sufficient to carry the case to the jury on both counts in the indictment, and the trial court properly denied defendant's motion for judgment of nonsuit.

The only other assignment of error brought forward and discussed in defendant's brief is to this part of the charge of the trial court to the jury: "The offense of wanton and wilful injury to the personal property of another under this statute may be committed by one person acting alone, or jointly committed by two or more persons aiding each other and acting together." The assignment of error is overruled on authority of *S. v. Clayton,* decided this day, *ante,* 261, 111 S.E. 2d 299.

The other assignment of error in the record is not set out in defendant's brief, and in support of it no reason or argument is stated or authority cited, and, therefore, it will be taken as abandoned by defendant. Rule 28, Rules of Practice in the Supreme Court, 221 N. C. 544, 563; *S. v. Clayton, supra,* and the cases there cited.

In the case *sub judice* the evidence is sufficient to carry the case to the jury on both counts in the indictment, and to support the verdict. Defendant makes no contention in his brief that any evidence was improperly admitted or excluded, or that any of his constitutional rights were violated either under the State or United States Constitution. No prejudicial error in the charge is shown.

No error.

HIGGINS, J., not sitting.

STATE v. DOUGLAS ROSE, CHARLIE C. HARRIS, J. M. MOREFIELD, DORSEY EATMAN, WAYNE VICK, CLINT (BLACK BOY) ROBERSON AND LUTHER LASSITER.

(Filed 25 November, 1959.)

1. Criminal Law § 16—

Where the recorder's court of a county having concurrent jurisdiction with the Superior Court of misdemeanors issues its warrant charging defendant with certain misdemeanors, but a *nolle prosequi* is entered in the recorder's court prior to plea, that court loses jurisdiction and the State may proceed upon an indictment found in the Superior Court subsequent to the date of the entry of the *nolle prosequi* and defendant's motion in the Superior Court to remand to the recorder's court is properly denied.

2. Riot § 2—

An indictment charging that defendants did unlawfully assemble on a public street, bearing weapons, with the mutual intent to aid and assist each other against lawful authority and others who opposed them, etc. sufficiently charges an unlawful assembly constituting an essential of the offense of riot.

3. Criminal Law § 84—

The affidavits of officers testifying for the State are competent for the purpose of corroborating the testimony of the officers, and the action of the court in admitting such affidavits for the restricted purpose of corroboration if the jury should find that the affidavits did in fact corroborate the witnesses cannot be held for error.

4. Criminal Law § 159—

An assignment of error not brought forward and argued in the brief is deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

HIGGINS, J., not sitting.

APPEAL by defendants Douglas Rose and Dorsey Eatman from *Mallard, J.*, May 4, 1959, Special Criminal Term, of VANCE.

This is a criminal action tried upon a bill of indictment charging the defendants with engaging in a riot.

The indictment charges that Douglas Rose, Charlie C. Harris, J. M. Morefield, Dorsey Eatman, Wayne Vick, Clint Roberson, and Luther Lassiter, of the County of Vance, on 16 March 1959, with force and arms, at and in the County aforesaid, "unlawfully, wilfully, violently, riotously, tumultously, together with a large crowd numbering fifty or more persons, did assemble, gather together upon a public street, bearing weapons consisting of bricks, stones, clubs and missiles, making loud noises and with loud voices to the terror of the good citizens residing, and being so assembled, did then and there, with the mutual intent to aid and assist each other and others assembled against law-

ful authority and those who opposed them, did then and there violently throw and hurl such weapons as rocks, bricks and missiles at persons and automobiles, lawfully traveling upon the public street, violently striking the same breaking therefrom glasses and inflicting other damage thereto which continued for a period of 15 minutes or more and did thereby unlawfully engage in riot against the form of the statute in such cases made and provided and against the peace and dignity of the State."

Before pleading to the bill of indictment, the defendants moved the court to remand the cause to Vance County Recorder's Court for trial. The defendants were charged in warrants in the Recorder's Court for the same crime charged in the bill of indictment. However, the State took a *nol pros* in the Recorder's Court in each case prior to the return of the bill of indictment by the Grand Jury in the Superior Court of Vance County.

Before empaneling the jury, each of the defendants entered a plea of not guilty to the crime charged in the bill of indictment.

After the selection of the jury and before the presentation of any evidence, defendants J. M. Morefield, Wayne Vick, and Luther Lassiter, through their counsel, each moved the court that they be permitted to withdraw their plea of not guilty and to enter a plea of *nolo contendere* to the crime charged in the bill of indictment, which pleas were accepted by the State and judgments pronounced pursuant thereto.

At the close of the State's evidence the defendant Clint Roberson, through his counsel, requested the court to permit him to withdraw his plea of not guilty and to enter a plea of *nolo contendere* to the crime charged in the bill of indictment, which plea was accepted by the State and judgment imposed thereon.

Upon the evidence adduced in the trial below, the jury returned a verdict of guilty as charged against Douglas Rose and Dorsey Eatman, and a verdict of not guilty as to Charlie C. Harris.

From the judgments imposed, the defendants Rose and Eatman appeal, assigning error.

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

W. M. Nicholson, James B. Ledford, James J. Randleman, and L. Glen Ledford for defendants.

DENNY, J. The first assignment of error is based on the refusal of the court below to remand to Vance County Recorder's Court for

trial. This same question was presented in the case of *S. v. Clayton,* decided this day, *ante,* 261. On authority of the opinion in that case, this assignment of error is overruled.

The appellants filed in this Court, before the case was argued, a motion in arrest of judgment on the ground that the indictment does not charge an unlawful assembly, which is a constituent and necessary part of the offense of riot, citing *S. v. Cole,* 249 N.C. 733, 107 S.E. 2d 732; *S. v. Hoffman,* 199 N.C. 328, 154 S.E. 314; *S. v. Hughes,* 72 N.C. 25; *S. v. Stalcup,* 23 N.C. 30.

There is but one crime charged in the bill of indictment in this case and it clearly charges that these defendants "unlawfully * * * together with a large crowd numbering fifty or more persons, did assemble * * * upon a public street, bearing weapons consisting of bricks, stones, clubs and missles * * * with the mutual intent to aid and assist each other and others assembled against lawful authority and those who opposed them, did then and there violently throw and hurl such weapons as rocks, bricks and missiles at persons and automobiles, lawfully traveling upon the public street, violently striking the same breaking therefrom glasses and inflicting other damage thereto which continued for 15 minutes or more and did thereby unlawfully engage in riot against the form of the statute in such cases made and provided * * *."

In *S. v. Stalcup, supra,* an unlawful assembly was charged, but there was no charge that the parties assembled for the purpose of doing a lawful act in an unlawful manner or of doing an unlawful act. However, the authorities hold an unlawful assembly may be created deliberately or by chance. In any event, the unlawful assembly must precede the conduct which constitutes participation in a riot. In considering what constitutes a riot or civil commotion, this Court, in *Spruill v. Insurance Co.,* 46 N.C. 126, said: "A riot is where three or more persons actually do an unlawful act, either with or without a common cause. To this, Chitty, in his note, says, 'The intention with which the parties assemble, or, at least, act, must be unlawful,' and this qualification of Mr. Chitty is recognized by this Court in the case of *S. v. Stalcup,* 23 N.C. 30."

In the instant case, the bill of indictment not only charges that the assembly was unlawful but that the defendants and others gathered upon a public street, bearing weapons, with the mutual intent to aid and assist each other against lawful authority and others who opposed them, etc. *S. v. Cole, supra.* The motion in arrest of judgment is denied.

Assignment of error No. 2 is based on exception No. 2, to the ad-

mission of the affidavit of F. P. Barnhart, made on 17 March 1958 and on exception No. 7, to the admission in evidence of a similar affidavit made by W. C. Blalock on 18 March 1958.

Both Barnhart and Blalock were Highway Patrolmen and were on duty at the Harriet Cotton Mill in Henderson, North Carolina, at the time of the riot charged in the bill of indictment. They both testified as witnesses for the State in the trial below. While the respective defendants were on the witness stand, each was questioned about his former affidavit. The respective affidavits were identified and admitted in evidence, at which time the court charged the jury as follows: "Members of the jury, the affidavit is offered and received for the sole purpose of corroborating the witness if you find it does corroborate him, and for no other purpose you being the sole judge of what the testimony of the witness is. It is not substantive evidence and will not be considered by you as such."

After the affidavits were admitted, the defendants' counsel cross-examined each of these witnesses with respect to the contents of his affidavit.

It has been held repeatedly that it is competent to corroborate a witness by showing that he had previously made the same statement as to the incident or transaction as that given by him in his testimony at the time. *S. v. Brown,* 249 N.C. 271, 106 S.E. 2d 232; *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Maultsby,* 130 N.C. 664, 41 S.E. 97; *Burnett v. Railroad,* 120 N.C. 517, 26 S.E. 819; *Gregg v. Mallett,* 111 N.C. 74, 15 S.E. 936; *S. v. McKinney,* 111 N.C. 683, 16 S.E. 235.

In *S. v. Litteral, supra,* it is said: "The prosecutrix also made a statement to the officers which was reduced to writing and signed by her. Although she, while on the stand, did not refer to this writing, there was other evidence tending to identify it as her written statement. The court admitted it as corroboratory testimony and was careful to instruct the jury fully as to the nature of the testimony and the manner in which it should be considered. It was competent for the purpose for which it was offered and was properly admitted."

Likewise, in *Gibson v. Whitton, supra,* we said: "The application of the rules regulating the reception and exclusion of corroborative testimony * * * so as to keep its scope and volume within reasonable bounds, is necessarily a matter which rests in large measure in the discretion of the trial court."

The affidavits to which the appellants object were competent as corroborative of the testimony of the witnesses testifying at the trial

insofar as they did so corroborate such testimony and they were so limited by the trial judge. The affidavits were admissible for the purpose for which they were admitted, and this assignment of error is overruled.

The appellants have failed to bring forward and argue their remaining assignments of error. Hence they are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. at page 562, *et seq.*

In the trial below we find

No error.

HIGGINS, J., not sitting.

STATE v. EDWARD JOSEPH MOSELEY, FERMAN GILL ABBOTT, GEORGE NEWCOMB EDWARDS, HENRY CLAY HARRIS, JOSEPH A. HALE, WILLIAM M. JARRELL, WILLIE S. JARRELL, MILLARD CHARLES WILLIAMSON, CURTIS ROSE, LEONARD BARHAM, JIMMIE JAMES MULCHI, GEORGE CLARENCE ANSTEAD, GILBERT LEE CLAYTON, WILLIE FURMAN TART, WILLIE HOWARD ANSTEAD.

(Filed 25 November, 1959.)

1. Criminal Law § 16—

Where the recorder's court of a county having concurrent jurisdiction with the Superior Court of misdemeanors issues its warrant charging defendant with certain misdemeanors but a *nolle prosequi* is entered in the recorder's court, prior to plea that court loses jurisdiction and the State may proceed upon an indictment found in the Superior Court subsequent to the date of the entry of the *nolle prosequi* and defendant's motion in the Superior Court to remand to the recorder's court is properly denied.

2. Criminal Law § 84—

The affidavits of officers testifying for the State are competent for the purpose of corroborating the testimony of the officers, and the action of the court in admitting such affidavits for the restricted purpose of corroboration if the jury should find that the affidavits did in fact corroborate the witnesses cannot be held for error.

3. Riot § 1—

The elements of riot are unlawful assembly, intent to mutually assist against lawful authority, and acts of violence.

4. Riot § 2—

Evidence tending to show that defendants were members of a large group which gathered outside the gates of a mill at which a strike had

been called, that members of the group threw a number of rocks, bottles and other missiles at cars carrying workers from the mill and cursed and threatened the officers when they arrived on the scene, *is held* sufficient to be submitted to the jury on a charge of riot as to those defendants arrested from the group by the officers.

5. Criminal Law § 99—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State.

6. Same—

Matters of defense are not to be considered on motion to nonsuit.

7. Same—

Discrepancies in the State's evidence do not justify nonsuit.

8. Riot § 2—

An indictment charging that defendants did unlawfully assemble on a public street, bearing weapons, with the mutual intent to aid and assist each other against lawful authority and others who opposed them, etc. sufficiently charges an unlawful assembly constituting an essential of the offense of riot.

HIGGINS, J., not sitting.

APPEAL by defendants Edward Joseph Moseley, Ferman Gill Abbott, George Newcomb Edwards, William M. Jarrell, Curtis Rose, Leonard Barham, Gilbert Lee Clayton and Willie Furman Tart from *Mallard, J.*, May, 1959 Special Criminal Term, of VANCE.

This is case number 3478 of the criminal docket of Vance County Superior Court, and this number appears on the bill of indictment. The bill of indictment was found and returned into court by the Grand Jury at the above designated term and charged that appellants and others named therein engaged in a riot on 16 March, 1959. Defendants entered pleas of not guilty. The jury returned verdict of guilty as to each of the appellants.

From judgment imposing prison sentences defendants, appellants, appealed and assigned error.

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

W. M. Nicholson, James B. Ledford, James J. Randleman and L. Glen Ledford for appellants.

MOORE, J. It was stipulated that before the bill of indictment was found and returned in Superior Court warrants for appellants had been issued and executed charging the identical offense charged in

the bill, that these warrants were docketed in the Recorder's Court of Vance County and that defendants had made deposits as required by law for jury trials in Recorder's Court on the warrants. It was further stipulated that the State, prior to the finding and return of the bill of indictment in Superior Court, made the following entry on the record in Recorder's Court in this case then pending there: "The State takes a *nol. pros.*" The deposit for jury trial had not been refunded at the time of the return of the bill of indictment in Superior Court.

Defendants in apt time moved that the cause be remanded to Recorder's Court for trial. The court denied the motion. Appellants contend that the court was in error in refusing to remand and assert that since "Recorder's Court had first taken cognizance . . . Recorder's Court had jurisdiction thereof to the exclusion of the Superior Court."

We hold that the refusal of the court to remand was not error. This identical question was considered and decided in *State v. Clayton, ante* 261. The question is fully discussed therein with full citations of authority and further discussion here would serve no useful purpose.

R. C. Duncan, B. L. Radford and B. H. Jackson, members of the State Highway Patrol, testified for the State. The court admitted in evidence, over objection of defendants, affidavits previously made by these witnesses "for the sole purpose of corroborating the witness(es) . . . and for no other purpose, if . . . the jury find that (they do) corroborate (their) testimony, (the jury) being the sole judge of what that testimony was." The witnesses were cross-examined about the matters contained in the affidavits.

In the admission of the affidavits we find no error. The court restricted this evidence as indicated by the matter in quotations above and further instructed the jury that the affidavits are not substantive evidence and that the jury should not consider them as such. This identical question was decided in *State v. Rose, ante,* 281. Legal authorities are fully cited therein.

Defendants Moseley, Edwards, Rose and Clayton assign as error the denial of their motions for nonsuit at the close of the evidence. G.S. 15-173.

The evidence in its aspect most favorable to the State tends to show: Henderson Cotton Mills is situate on the south side of Alexander Street in the City of Henderson. The street runs east and west. Former mill workers were on strike and the mill was operating with other workers. The mill changes "shifts" at 3:00 P. M. About 2:45 P. M. on 16 March, 1959, a group of 50 to 60 men came from behind a church on Alexander Street approximately 300 yards west of the

mill gate. All the men in the group were carrying in their hands rocks, brickbats, bottles, clubs and other objects. They proceeded westwardly along the sidewalk on the north side of Alexander Street to a point about 500 yards from the mill gate. They waited at this point until cars carrying workers from the mill began to pass. When the first car passed a shower of rocks, bottles and other missiles were thrown by the group and the car was hit by 15 to 20 of these. The group was cursing and threatening the occupants. As the second and third cars passed there were similar incidents. The third car was struck by about 25 missiles. A few highway patrolmen were on the scene and grabbed 4 or 5 of the group but did not arrest them then because they were "pulling back." The group was cursing. About 35 more patrolmen appeared on the scene and 26 men from the group were arrested. The others fled. The group cursed and threatened the officers. George Newcomb Edwards was in the group, was present when the missiles were being thrown at the cars and was one of those arrested. Gilbert Lee Clayton was a member of the group and had a stick in his hand at the time of his arrest. Curtis Rose was in the group when it came from behind the church and was one of those arrested; he carried a stick in his hand. Edward Joseph Moseley was a member of the group that came from behind the church; he was present when the missiles were thrown; when the patrolman attempted to arrest him he ran but was overtaken and arrested; a slingshot was found stuck in his belt inside his shirt.

The offense of riot is composed of three necessary and constituent elements: (1) unlawful assembly; (2) intent to mutually assist against lawful authority; and (3) acts of violence. *State v. Hoffman,* 199 N.C. 328, 332, 154 S.E. 314. All of these elements are present in the instant case. Under the facts herein the State was entitled to go to the jury as against Moseley, Edwards, Rose and Clayton at least on the theory that they were present and were aiding and abetting the rioters. The court instructed the jury fully and correctly as to the requirements of the law to constitute one an aider and abettor. Upon a motion to nonsuit the facts must be considered in the light most favorable to the State. *State v. Troutman,* 249 N.C. 395, 396, 106 S.E. 2d 569. Matters of defense will not be considered on a motion for nonsuit. *State v. Harrison,* 239 N.C. 659, 662, 80 S.E. 2d 481. Discrepancies in the State's evidence will not justify the granting of a motion for nonsuit. *State v. Bryant,* 250 N.C. 113, 117, *108* S.E. 2d *128.*

In this Court appellants move for arrest of judgment on the ground that the bill of indictment fails to allege assembly for an unlawful purpose as a necessary constituent of unlawful assembly. This motion

is denied on authority of *State v. Rose, supra.* The bill of indictment in the instant case is the same in content as that in the *Rose* case.

In the trial we find

No error.

HIGGINS, J., not sitting.

MRS. NORA WALTERS v. CHARLOTTE WALTERS BRIDGERS AND HUSBAND, PAUL F. BRIDGERS, VIVIAN WALTERS INGRAM AND HUSBAND, CLARENCE P. INGRAM.

(Filed 25 November, 1959.)

1. Cancellation and Rescission of Instruments § 9: Fraud § 3—

The mere relationship of parent and child does not raise the presumption of undue influence.

2. Cancellation and Rescission of Instruments § 10— Evidence held insufficient to show that deed was procured by fraud and undue influence.

This action was instituted by plaintiff, widow, to cancel a conveyance to two of her daughters. Plaintiff's evidence tended to show that she was old and infirm and could not drive her car, that defendant daughter, who lived one-quarter of a mile distance, drove her into town to make a will, that the daughter stated that if plaintiff left her property to her children equally that none of them would get anything, that the daughter had an attorney come to plaintiff in the car, that plaintiff herself talked with the attorney, and that plaintiff thereafter signed an instrument under the belief that she was signing a will whereas in fact it was the deed. There was no evidence that this daughter had anything to do with the preparation of any instrument for plaintiff or that plaintiff was mentally incompetent, and the evidence disclosed that the recorded deed was mailed to plaintiff and remained in her possession, that some years prior to the time plaintiff asserted she discovered the instrument to be a deed plaintiff on one occasion sold timber from the land and, upon being advised that she had theretofore deeded the land to her daughters, divided the proceeds of the sale, after adding $200.00 of her own money thereto, among each of her daughters, and that on another occasion plaintiff went into town for the purpose of having a will prepared rather than for the purpose of changing her will or adding a codicil thereto. *Held:* The evidence is insufficient to be submitted to the jury on the issue of fraud and undue influence, and nonsuit was correctly entered.

3. Cancellation and Rescission of Instruments §§ 1, 9: Quieting Title § 1—

An action by plaintiff to set aside a deed executed by her, plaintiff having offered the deed in evidence and contending that its execution was procured by fraud and undue influence, is not an action by plaintiff

to quiet title but is an action to cancel and rescind the deed, and the burden is upon plaintiff to prove her case by the preponderance or greater weight of the evidence.

HIGGINS, J., not sitting.

APPEAL by plaintiff from *Morris, J.*, 27 January Civil Term, 1959, of WAYNE.

This is a civil action instituted by the plaintiff, Mrs. Nora Walters, to have a certain paper writing purporting to be a deed from her to three of her seven living children, Charlotte Walters Bridgers, Vivian Walters Ingram, and Nola Walters Peele, which deed was executed on 8 February 1945 and filed for registration in the office of the Register of Deeds for Wayne County on 15 February and registered in Book 295, Page 103, set aside and declared null and void.

The plaintiff, a widow, was 70 years of age in 1945 and she was the owner in fee simple of two tracts of land in Wayne County: one for 104 acres which she conveyed to three of her seven children in the deed referred to above, and the other tract containing 71 acres was conveyed by deed dated 8 February 1945 to two of her daughters, namely, Lena Walters Lynch and Janie Walters Dail, which deed was duly recorded in the office of the Register of Deeds for Wayne County on 15 February 1945 in Book 295, page 102.

Mrs. Emma Walters Newsome and Mrs. Hannah Walters Gray, the others daughters of the plaintiff, were not included as grantees in either of the above deeds.

In January 1945 the defendant Vivian Walters Ingram was living with her mother. The defendant Charlotte Walters Bridgers and her husband, Paul F. Bridgers, were living in their home about one-quarter of a mile from the home of the plaintiff. The plaintiff testified that Charlotte "came to see me once a week, or two weeks, something like that * * * Paul and Charlotte Bridgers helped advise me with my affairs some. I think I relied on Charlotte mostly.

"In 1945 I had arthritis and neuritis. I have been walking with crutches, I don't know how many years. I have been feeble, I don't know how many years. I go to the doctor regularly, all the time, and have for 20 to 25 years. My blood pressure has been bad, too. I have to go to the doctor for that.

"I saw Charlotte during the month of January 1945. We came to town several times. I thought I was going to have a will made. She had Mr. Best come out and talk with me. I told him what I wanted done. I told him that I was fixing to fix papers, but told

him what to put down. I told him to make a will. He had a tablet and pencil, and put that down, and went on off. Not much of anything was said between Charlotte and me. I told her we were going to fix a will, and she said, 'If we all share alike, wouldn't any of them get anything, if I fixed it for all to have something there wouldn't anybody get anything.'

"I did not go to Mr. Best's office. I sat in the car. Charlotte went up there, and got him to come down. After I talked to him in the car, which, I think, was before the deeds were written, I did not see Mr. Best any more. It was a long time after that, and right good while before I signed the papers. We went up to Gerney Jinnette's office to sign them. * * *

"I am 83 years of age. I know she was with me because nobody else came with me. She brought me to town when I came. I own an automobile. It has been so long since I drove it, I do not remember. People had to drive for me. It was the same car that I have now. The doctor won't let me drive. After I signed the paper I don't remember who took them. I didn't see anybody take them. I thought we left them lying on the table.

"Last May a year ago, Charlotte came by my house; I was worried out with the farm, and told her I was going to sell out, that I wasn't able to attend to it. She said, 'Mamma, you can't, you willed it to us.' I said, 'What?' She said I couldn't. * * *

"As soon as she told me I couldn't sell the land, as soon as my daughters came that morning, I told them I wanted them to bring me to town. I found it was deeds. That was last May, was a year ago. From the time that the papers were signed until then, I had never seen them, or known of their contents. I didn't even look at them. This is the paper that I signed before Jinnette.

"The first time that I knew it had been recorded was last May a year ago, when I went and got them. I did not put on it the notification, 'Not to be published,' and did not instruct anybody to put it there. * * *

"After I found out these paper writings were deeds, and not a will, I went after Charlotte Bridgers and Vivian Ingram to make a deed to me, to have them back, in order that all the children might share alike. I took a paper around to get them all to sign it. Lena and Janie signed it back to me (the 71-acre tract) * * *. Mrs. Peele signed one-third of the place where I live back to me. * * *

"On or about January 19, 1955 I came to town with my daughter, Mrs. Bridgers, in regard to a third paper writing, purporting to be a will. Nobody that I know of knew anything about it, other than

Charlotte. So far as I know I did not mention it to my other children. I can't tell you who brought my mail at that time, first one and then the other brings it to the house to me. I did not see the deeds after they were recorded before 1957, and after Mrs. Bridgers told me that she had the land, so that I could not sell it. I had seen it, but had not opened them. The deeds were in an envelope, but I did not open it. * * * I thought the paper was a will."

The testimony of this witness further shows that in 1951 she sold $4,000 worth of timber off of the 71-acre tract of land, and when informed that she had deeded the property away and that she had no right to sell the timber, she took $200.00 of her own money and the $4,000 received for the timber, and gave each of her seven daughters $600.00. In this connection she testified, "I was told that I didn't have no right to sell it, after I sold it. I don't remember what year it was when we sold the timber. I gave Mrs. Bridgers a part of the money for the timber on the other place. I divided it, equally, between all seven." On cross-examination, the plaintiff testified, "That is my signature on Exhibit 1 (the deed.). I can read and write. The timber that I spoke of was sold to Broadhurst Pearce, about 1951."

The plaintiff offered the deed she was attempting to have set aside in evidence generally rather than for the purpose of attack. This is plaintiff's Exhibit No. 1. She introduced as Exhibit No. 2 a deed of the same date, conveying the 71-acre tract to her daughters Lena Walters Lynch and Janie Walters Dail. Plaintiff also introduced as Exhibit No. 3 a deed dated 19 July 1957 from Nola Walters Peele and her husband, Horace Peele, to the plaintiff of one-third undivided interest in the 104-acre tract. The plaintiff likewise introduced in evidence a deed dated 19 July 1957 from Lena Walters Lynch and her husband, J. L. Lynch, and Mrs. Janie Walters Dail (widow), reconveying to plaintiff the 71-acre tract. These deeds were introduced without objection, and the plaintiff is presently the owner in fee simple of the 71-acre tract and a one-third interest in the 104-acre tract.

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

J. Faison Thompson & Son for plaintiff.
Paul B. Edmundson, Jr., Braswell & Strickland for defendants.

DENNY, J. The plaintiff's assignments of error based on except-

ions to the exclusion of evidence or the limiting of certain evidence as against the defendant Charlotte Walters Bridgers only, have been carefully considered and they are without merit and are overruled.

The only remaining assignment of error is based on an exception to the allowance of defendants' motion for judgment as of nonsuit, made at the close of the plaintiff's evidence.

It is alleged in the complaint herein that Charlotte Walters Bridgers knew that her mother, by reason of her physical and mental condition. was incapable of knowing and did not know how to transact business; and through fraud and undue influence took advantage of her mother's physical and mental condition, and contrary to the will and desire of her mother, "caused a paper writing, purporting to be a will, to be prepared, and caused her mother to go through the form of acknowledgment of her signature to the paper writing, purporting to be a deed" for the 104-acre tract of land, to Charlotte Walters Bridgers, Vivian Walters Ingram, and Nola Walters Peele.

It is further alleged that at the time of the execution of said deed, Mrs. Nora Walters was infirm and had been for several years prior thereto; that this fact was well known to Charlotte Walters Bridgers "who claims to own a one-third undivided interest in the property, under the pretended deed; that the said Charlotte Walters Bridgers * * * procured her to execute the deed for the real property, representing to this plaintiff that the paper writing * * * was a will; * * * that this plaintiff relied upon her daughter, Charlotte Walters Bridgers and, without consideration, signed the said paper writing; that the said Charlotte Walters Bridgers, by reason of the confidential relationship existing between her and this plaintiff, her mother, and for the further reason that Charlotte Walters Bridgers was strong and vigorous in mind and body, exercised a strong influence over the mind and body of this plaintiff; that this plaintiff was grossly ignorant of her act, and relied upon the representation of Charlotte Walters Bridgers, and is entitled to relief."

As we interpret the evidence introduced in the trial below, it does not support the plaintiff's allegations of fraud and undue influence. Moreover, the mere relation of parent and child does not raise the presumption of undue influence. *In re Craven,* 169 N.C. 561, 86 S.E. 587; *Gerringer v. Gerringer,* 223 N.C. 818, 28 S.E. 2d 501; *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493; *Davis v. Davis,* 236 N.C. 208, 72 S.E. 2d 414. *Cf. McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615.

The plaintiff's daughter, Mrs. Bridgers, lived about a quarter of a mile from her. The plaintiff owned an automobile but was physi-

cally unable to drive it. She called on Mrs. Bridgers to drive for her on numerous occasions. According to plaintiff's own testimony, when she called on Mrs. Bridgers to take her to town to see her attorney in January 1945, "not much of anything was said between Charlotte and me." The evidence supports the conclusion that she sent Mrs. Bridgers to the office of her attorney to get him to come to the car and confer with her. She testified that she gave her attorney instructions as to what she wanted done and that he wrote down those instructions. There is no evidence tending to show that Mrs. Bridgers participated at all in the conversation between the plaintiff and her attorney on that occasion, or that she acted in any other capacity than that requested of her by her mother when she later took her mother to Mr. Jinnette's office on 8 February 1945 to execute the papers which had been prepared by her attorney. Likewise, there is no evidence tending to show that Mrs. Bridgers had the deeds recorded or that she requested that the deeds filed for registration were "not to be published." The evidence does support the view that after the deeds were recorded by the Register of Deeds they were mailed to the plaintiff and that she has had continuous possession of them since that time.

Furthermore, the record reveals that the plaintiff sold $4,000 worth of timber from the 71-acre tract of land in 1951, and after she found that she had conveyed this property to two of her seven children she added $200.00 to the proceeds from the sale of the timber and gave each of her daughters the sum of $600.00.

It likewise appears that thereafter, in January 1955, she again went to town with Mrs. Bridgers for the purpose of having a will written, notwithstanding the fact that she testified she thought she had a will in her possession, prepared in 1945, and that she did not discover otherwise until May 1957. The evidence does not indicate any intent to change her will or to add a codicil thereto; her purpose, according to her testimony, was to have a will prepared.

The plaintiff is relying principally on the case of *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202, for a reversal of the judgment below. The factual situation in the Vail case is unlike the facts in the instant case. In the Vail case there was competent evidence to the effect that the mother authorized one of her sons to have a deed prepared, for her execution, for the purpose of conveying to him a lot on Vail Alley, in High Point, which was worth about $1,200. Instead of carrying out his mother's instructions, he had a deed prepared to the Vail homeplace located on South Main Street in the City of High Point, which was worth about $16,000. Certainly that

evidence, together with other evidence tending to show that the defendant had acted on numerous occasions as agent for his mother, was sufficient to carry the case to the jury on the issue of fraud and deceit.

In the instant case, there is not a scintilla of evidence that tends to show that the defendant Mrs. Bridgers ever had anything to do with the preparation of any instrument for her mother; and the fact that she said to her mother on the way to town, "If we all share alike, wouldn't any of them get anything," etc., is not sufficient to establish fraud or undue influence.

If Mrs. Bridgers did assert any undue influence or practice any fraud on the plaintiff in the procurement of the deed in controversy, the plaintiff has failed to offer any competent evidence sufficient to support the allegations with respect thereto.

In the case of *Jernigan v. Jernigan, supra,* in a case similar to that before us, *Chief Justice Stacy* said: " * * * the petitioners contend that they were not allowed the benefit of a factual presumption of fraud or undue influence which arises from the relationship of the parties, to wit, parent and child. *McLeod v. Bullard,* 84 N.C. 516; *Lee v. Pearce,* 68 N.C. 76; *Abbitt v. Gregory,* 201 N.C. 577, 160 S.E. 898. In answer to this position, it suffices to point out that while the adult daughter acquired the 42-3/4 acres of land from her mother in 1941, there is no evidence of any confidential or fiduciary relation, existing between them at the time, which would give rise to a presumption of fraud. *Gerringer v. Gerringer,* 223 N.C. 818, 28 S.E. 2d 501; *In re Will of Atkinson,* 225 N.C. 526; *In re Craven,* 169 N.C. 561, 86 S.E. 587. The mother lived in her home; the daughter lived in hers a quarter of a mile away. The mother managed her own affairs; the daughter helped her in her old age. This seems to be all. *In re Craven, supra.* 'The mere relation of parent and child does not raise the presumption of undue influence.' *Gerringer v. Gerringer, supra.*"

What was said in the Jernigan case seems to apply with equal force to the present case.

The plaintiff contends that this is an action to quiet title and that she is entitled to judgment as a matter of law upon a plea of confession and avoidance if the defendants fail to prove the new matter alleged by them as an affirmative defense, citing *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16. We agree with what was said in that case; that case, however, is not controlling here. Here, the plaintiff alleged and offered evidence tending to show that the record title to the premises in controversy is in the defendants, except the one-

third undivided interest therein which Nola Walters Peele and her husband, who live in Florida, reconveyed to the plaintiff. Consequently, this is simply an action to set aside a deed allegedly procured by fraud and undue influence. There is no plea of confession and avoidance involved here as there was in *Wells v. Clayton, supra.* Therefore, the burden rested upon the plaintiff in the trial below to prove not by clear, cogent and convincing evidence that the deed was procured by fraud or undue influence, *Ricks v. Brooks,* 179 N.C. 204, 102 S.E. 207, but by the preponderance or greater weight of the evidence. *Bolich v. Insurance Co.,* 206 N.C. 144, 173 S.E. 320.

The judgment of the court below is

Affirmed.

HIGGINS, J., not sitting.

MRS. C. J. FETNER, SISTER; HELEN J. WRIGHT, GUARDIAN; PRESTON T. WRIGHT, BROTHER; MARVIN F. WRIGHT, EMPLOYEE, v. ROCKY MOUNT MARBLE & GRANITE WORKS, NON-INSURER (EMPLOYER); UNITED STATES FIDELITY & GUARANTY COMPANY, CARRIER.

(Filed 25 November, 1959.)

1. Master and Servant § 66—

An employee is capable of further injury from exposure to silica dust so long as he lives and breathes.

2. Same—

G.S. 97-57 creates an irrebuttable legal presumption that the last thirty days of work within seven consecutive calendar months in an employment subjecting an employee to the hazards of silica dust, is the period of last injurious exposure. Therefore, the Industrial Commission may not select any other thirty days of employment within the seven months' period as the last period of exposure even though there be testimony that the employee was incapacitated from performing any normal labor in such employment prior thereto.

3. Master and Servant § 79—

Where an employee works in his occupation subjecting him to the hazards of silica dust for fifty-two days during the two months thirteen days after the termination of the policy of compensation insurance of the employer, the insurer in such policy is not on the risk during the last thirty days of exposure, and therefore is not liable for compensation.

4. Waiver § 2—

The essentials of a waiver are the existence at the time of the alleged waiver of a right, advantage or benefit, and an intention to relinquish such right, advantage or benefit.

5. Master and Servant § 69a—

Under G.S. 97-61, prior to the 1955 and 1957 amendments, an employee does not forfeit his right to compensation for silicosis unless he has received temporary compensation under the provisions of that section.

6. Same—

A waiver of an employee's right to compensation for silicosis signed by the employee upon his employment by one employer does not apply to or waive the employee's right to compensation for silicosis upon his subsequent employment by an entirely separate employer.

7. Same—

Whether compensation for death from silicosis should be reduced when the death is complicated by tuberculosis rests in the sound discretion of the Industrial Commission.

8. Master and Servant § 94—

The jurisdiction of the Superior Court on appeal from the Industrial Commission is limited to matters of law, and the Superior Court may not find additional facts or make an award.

HIGGINS, J., not sitting.

APPEAL by Rocky Mount Marble & Granite Works and United States Fidelity & Guaranty Company from *Frizzelle, J.*, May 1959 Civil Term, of NASH.

This is a proceeding under the Workmen's Compensation Act to recover compensation for the death of Marvin F. Wright from silicosis.

The evidence before the Hearing Commissioner is summarized as follows:

Marvin F. Wright, hereinafter referred to as "employee," had been a stonecutter in the granite industry for approximately 31 years prior to his death. It was stipulated that he was exposed to silica dust in North Carolina in excess of two years within the ten years immediately preceding the date of his death. He was first examined by a physician of the Industrial Hygiene Department on 19 October 1939. Prior to 1949 he had been issued a work card authorizing his employment in the dusty industry. He was examined by Dr. Swisher of the Industrial Hygiene Department on 4 March 1949, and was found to be affected by silicosis in the early second stage. He was advised of his condition and was refused a work card. He was again examined on 9 August 1950 and was then found to be in the early third stage of silicosis. On 10 August 1950 he requested permission from the Industrial Commission to accept employment by Cole-Willard Stone Company of Raleigh and signed a waiver of compensation in accordance

with the provisions of G.S. 97-61. The Commission approved the waiver and granted permission for him "to enter the employment as stated, until 20 December 1950 and no further." He was employed by Cole-Willard Stone Company from 26 July 1950 to 19 October 1950. Rocky Mount Marble and Granite Works, hereinafter referred to as "defendant," employed him as stonecutter from 4 November 1950 to 29 September 1951. The United States Fidelity & Guaranty Company, hereinafter referred to as "carrier," was compensation insurance carrier for defendant from 16 April 1951 to 16 July 1951. After 16 July 1951 defendant was not insured. Employee was examined by Dr. Swisher on 5 July 1951 and was found to be in the third stage of silicosis. Dr. Swisher testified: "In my opinion Mr. Wright was incapacitated from performing any normal labor as a stonecutter on July 5, 1951." Employee worked regularly and continuously while employed by defendant. The record shows that during the period from 4 November 1950 to 16 July 1951 he worked 162 full eight-hour days and a part of 7 days and was absent 6 days. It also shows that during the period from 16 July 1951 to 29 September 1951 he worked 52 full eight-hour days and a part of 1 day and was absent 2 days. In his work as a stonecutter for defendant he was exposed to silica dust. After 29 September 1951 he was not employed anywhere. He went to the home of his sister, one of the plaintiffs, on 6 October 1951. He was unable to work. She nursed him. He had "shortness of breath and could scarcely walk up and down the steps; he was very pale and had very little appetite; he had a dry cough and complained of pains in his chest." He died 22 November 1951. Dr. Brown, who treated him in his last illness, testified: ". . . he had chronic and acute pulmonary disease . . . disease of the lungs." Dr. Brown stated in the death certificate that silicosis was the "disease or condition directly leading to death," and that "possible tuberculosis" was a contributing condition. Dr. Swisher defined and discussed silicosis as follows:

"Silicosis is the inhalation of silica dust from granite and from other rock that contain silicious dust it affects the lungs. There are three stages of diagnosed silicosis, first, second and third; and progression may continue even if the man is taken out of the dust, but if he continues to inhale the dust he is more susceptible to a rapid development. The third stage, just a more concentration of the dust affecting more of the lung space. . . . The physical symptoms and manifestations of silcosis in the third stage are: Lips are cyanotic, nails are cysnotic and bowed, chest expansion is greatly reduced, extremely short of breath, loss of weight as a rule, sometimes heart will

show decompensation, breath sounds are greatly diminished, appetite poor, cough which is generally productive, difficult to sleep at night lying on their back, blood pressure occasionally increased. . . . (T)here is no cure."

It was stipulated that from 16 July 1951 to 30 September 1951 defendant and employee were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act.

The Hearing Commissioner found facts in substance as set out in the foregoing summary. He concluded as a matter of law *inter alia:* (1) "that deceased was last exposed to the hazards of inhaling dust containing silica or silicates in employment during thirty working days or parts thereof during seven consecutive calendar months immediately preceding 29 September 1951 while employed by the defendant . . . and that this constituted his last injurious exposure to the hazards of silicosis"; (2) "That on 29 September 1951 the deceased became actually incapacitated by reason of silicosis from performing his normal labor in the last occupation in which he was remuneratively employed"; (3) that petitioners are entitled to ordinary compensation for death of employee pursuant to G.S. 97-58 and G.S. 97-38 and that defendant is liable therefor; and (4) that defendant has no rights under the waiver signed by employee on 10 August 1950 and the amount of compensation is not limited by the provisions of G.S. 97-61. The award dismissed carrier as a party defendant and adjudged that defendant pay the compensation.

Plaintiffs and defendant applied for review by the Full Commission. After hearing, the Full Commission on 13 September 1955 adopted as its own the findings of fact and conclusions of Law of the Hearing Commissioner and affirmed the award theretofore entered.

Plaintiffs and defendant appealed to Superior Court. The cause was heard in Superior Court by Frizzelle, J. The court overruled defendant's exceptions and concluded as a matter of law that the Commission was in error in dismissing carrier as a party defendant, adjudged that defendant and carrier pay compensation and proceeded to make an award.

From the judgment rendered by Frizzelle, J., defendant and carrier appealed and assigned errors.

Ruark, Young, Moore & Henderson and A. A. Reaves for plaintiffs, appellees.

I. Weisner Farmer for defendant Rocky Mount Marble & Granite Works, appellant.

Thomas A. Banks and R. L. Savage for defendant United States Fidelity & Guaranty Company, appellant.

MOORE, J. The first question for decision is whether or not the insurance carrier was on the risk during the period of employee's "last injurious exposure" to silica dust so as to impose liability on the carrier.

Defendant employer insists that employee became disabled as disablement is defined by G.S. 97-54 on 5 July 1951. Dr. Swisher testified: "In my opinion Mr. Wright was incapacitated from performing any normal labor as a stonecutter on July 5, 1951." Carrier was on the risk from 16 April 1951 to 16 July 1951. Defendant contends that the testimony of Dr. Swisher by fixing the date of disablement fixes the time of last injurious exposure, that the last day of injurious exposure was 5 July 1951, that the Commission should have found accordingly, that the Commission was in error in dismissing the carrier, and that the Superior Court was correct in reversing the Commission on this point.

Employee worked regularly from 16 July 1951 to 29 September 1951 for defendant and during this period was exposed to the hazards of silicosis. During this period he worked 52 full eight-hour days. Silicosis is a progressive and often fatal disease. *Bye v. Granite Co.*, 230 N.C. 334, 336, 53 S.E. 2d 274; *Young v. Whitehall Co.*, 229 N.C. 360, 369, 49 S.E. 2d 797. Dust accumulates in and affects the lungs during exposure over long periods of time. Realizing this, the Legislature fixed by statute a rule for the guidance of the Industrial Commission in determining the period of last injurious exposure and placed liability upon the employer for whom employee was working during such period. It is important to both employer and employee that there be a definite rule for such determination. G.S. 97-57 provides that ". . . the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable. For the purpose of this section when an employee has been exposed to the hazards of . . . silicosis for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious." This rule in its application to the instant case may be paraphrased as follows: The period of last injurious exposure is the last thirty days of employment while exposed to silica dust, provided employee works for the same employer as much as thirty days or parts thereof in a period of seven months. An employee is capable of further injury so long as there is any sound tissue in the lungs to be scarred by the cutting particles of dust and reduced to a fibroid state; the law takes the

breakdown where it occurs. *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 170, 22 S.E. 2d 275. We must hold, as in the *Haynes* case, that employee was capable of further injury from silicosis up to and including 29 September 1951 because he still lived and breathed. G.S. 97-57 creates an irrebuttable presumption—a presumption of law. The last day of work was the date of disablement and the last thirty days of work was the period of last injurious exposure in the case at bar. The Commission may not arbitrarily select any 30 days of employment, other than the last 30 days, within the seven months period for convenience or protection of any of the parties, even if there is some evidence which may be construed to support such selection. *Hartsell v. Thermoid Co.*, 249 N.C. 527, 107 S.E. 2d 115; *Mayberry v. Marble Co.*, 243 N.C. 281, 90 S.E. 2d 511; *Willingham v. Rock & Sand Co.*, 240 N.C. 281, 82 S.E. 2d 68; *Stewart v. Duncan*, 239 N.C. 640, 80 S.E. 2d 764; *Bye v. Granite Co., supra; Haynes v. Feldspar Producing Co., supra.*

In the case at bar the United States Fidelity & Guaranty Company was not on the risk during the period of last injurious exposure and the Commission properly dismissed it as party defendant. However, we wish to make it clear that there must be disablement as defined by G.S. 97-54 before ordinary compensation may be awarded in silicosis cases. The time when disablement is deemed to have occurred depends upon the factual situation under consideration. *Young v. Whitehall Co., supra; Singleton v. Mica Co.*, 235 N.C. 315, 69 S.E. 2d 707; *Honeycutt v. Asbestos Co.*, 235 N.C. 471, 70 S.E. 2d 426. In the instant case G.S. 97-57 fixes the time of disablement and the period of last injurious exposure when applied to the facts.

Defendant insists that it is not liable for payment, in any event, for the reason that employee waived compensation in writing.

It is true that employee on 10 August 1950 applied to the Commission for leave to accept employment with Cole-Willard Stone Company of Raleigh and waived his rights to compensation for any aggravation of his then physical condition, "other than the right to claim compensation for disability or death or both as now provided" in G.S. 97-61, "in the event that continued exposure to silicosis incidental to *such employment* should result in disability or death, in which event compensation shall be payable for a period not to exceed one hundred weeks." (Emphasis ours). The Commission permitted employee "to enter the employment as stated, until 20 December 1950 and no further." Pursuant thereto employee worked for Cole-Willard Stone Company until 19 October 1950. There was no such request, waiver and permission with respect to the employment by defendant.

The essential elements of a waiver are: (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit. 56 Am. Jur., Waiver, sec. 12, p. 113. Applying these principles to the situation at hand, it is clear that defendant did not rely on and may not claim any benefit under the waiver signed by employee on 10 August 1950. At that time employee had no rights with respect to compensation from defendant and contemplated none so far as the record discloses. There is no indication that employee ever intended to relinquish any rights that he might have to compensation by and through defendant. Defendant was not a party to the waiver of 10 August 1950 and is not mentioned therein. It was limited by its terms to employment by Cole-Willard Stone Company.

Furthermore, the signing of the waiver in order to obtain employment by Cole-Willard Stone Company did not reduce the compensation for the death of employee from ordinary compensation to that provided by G.S. 97-61. G.S. 97-61 was rewritten as 97-61.1 to 97-61.7 by Session Laws 1955, chapter 123, and by Session Laws 1957, chapter 1217. We consider it here as it existed prior to 1955. G.S. 97-61 makes provision for compensating and rehabilitating employees, not actually disabled, who would be benefited by being taken out of the dusty trade. It provides for temporary compensation until employment may be obtained in another occupation and payment for training purposes in a new trade. It provides as follows: "*If an employee has been so compensated* . . . and he thereafter engages in any occupation which exposes him to the hazards of silicosis . . . without first having obtained the written approval of the Industrial Commission, neither he, his dependents, personal representatives nor any other person shall be entitled to any compensation for disablement or death from silicosis . . . : Provided, however, that an employer so affected, as an alternative to forced change of occupation, may, subject to the approval of the Industrial Commission, waive in writing his right to compensation for aggravation of his condition that may result from his continuing in his hazardous occupation; but in the event of total disablement or death . . . compensation shall nevertheless be payable, but in no case . . . for a longer period than one hundred (100) weeks." (Emphasis ours).

Employee in the case at bar did not at any time receive any compensation under G.S. 97-61 and therefore did not forfeit his right to compensation thereunder. Employee did not waive in writing his right to compensation when he was employed by defendant and the Com-

mission did not approve his employment by defendant. Therefore, plaintiffs are entitled to ordinary compensation herein. *Bye v. Granite Co., supra.*

Defendant might have avoided liability, had it so desired, by insisting that employee be examined and a prompt report be made before it received him into service. The refusal of employee to submit to such examination would have barred him from compensation. G.S. 97-60; *Willingham v. Rock & Sand Co., supra; Haynes v. Feldspar Producing Co., supra.*

G.S. 97-65 provides that "In case of disablement or death due primarily from silicosis . . . and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payment may be reduced one-sixth." Whether the award should be so reduced rests in the discretion of the Industrial Commission. *Stewart v. Duncan, supra.*

There was competent evidence to support the findings of fact by the Industrial Commission and its conclusions of law are supported by the findings of fact.

On appeal from the Industrial Commission, the Superior Court has only appellate jurisdiction to review an award of the Industrial Commission for errors of law. It may not find additional facts or make an award. *Brice v. Salvage Co.*, 249 N.C. 74, 82, 105 S.E. 2d 439.

This case is remanded to the end that an order be made affirming the award of the Industrial Commission.

On defendant's appeal — affirmed.

On carrier's appeal — reversed.

HIGGINS, J., not sitting.

WILLIE J. TAYLOR, (EMPLOYEE) PLAINTIFF, v. J. D. DIXON, JAMES DIXON, JR., AND JOE EDDIE DIXON, (ALLEGED EMPLOYERS), NON-INSURERS, DEFENDANTS.

(Filed 25 November, 1959.)

1. **Master and Servant § 58—**

Where an employee is employed solely for a particular job, such as operating a chain saw, and is positively forbidden to perform another job connected with the work, such as operating a tractor, an injury received while performing the forbidden task does not arise out of a hazard of the employment and is not compensable.

2. **Master and Servant § 94—**

It is error for the Industrial Commission to fail or refuse to make specific findings of fact in respect to a specific defense set up by the employer, and where it fails to make such findings and it is apparent that the findings made were made under a misapprehension of the applicable law, the findings must be set aside and the cause remanded for findings from the evidence considered in its true legal light.

HIGGINS, J., not sitting.

APPEAL by defendants from *Parker, J.*, at January Term, 1959, of NEW HANOVER.

Proceeding in North Carolina Industrial Commission under North Carolina Workmen's Compensation Act for compensation as result of injury to claimant's left leg—heard on appeal to Superior Court for errors of law contained in the opinion and award of Hearing Commissioner, and from the opinion and award of the Full Commission, notice of which was sent to and received by defendant.

The case on appeal by defendants from the judgment in favor of plaintiff upon an appeal from the Full North Carolina Industrial Commission discloses that at the hearing before the Hearing Commissioner the following evidence in pertinent part was offered: Willie J. Taylor, claimant, testified: " * * * My regular job was to saw down trees and cut off the tops with a chain saw."

James Dixon, Sr., testified: "I was working for my boy, James Dixon, Jr., at the time. When he (Taylor) started off on the tractor I said to him 'Leave that tractor alone.' We needed some poles cut, and he said he was going to drive the damn tractor that day, and I kept on at him 'the way you are driving that tractor through the fields and woods you are going to kill yourself' and he said 'Old man, I will get down and whip your * * * if you don't hush up. I know what I am doing * * *.'

"Q. What was his regular job? A. Power saw, we had to take a

cross-cut saw and cut the poles we cut that day. He wouldn't saw. He said he won't going to saw that day.

"I have known Taylor for 15 or 20 years and he has worked for me. He plowed, and he was slapping that left foot just like he does now and it was that way before the tractor turned over * * * ."

And James Dixon, Jr., testified: "Taylor's job was running the chain saw sawing down trees and topping them. * * * I told him not to drive the tractor. He told me he was going to drive the tractor, that he was not going to run the chain saw that day * * * The reason I told him not to drive the tractor was because that was not his job. He was employed to run the chain saw— not to operate the tractor * * * I didn't hire him as a tractor driver. He has never operated a tractor for me. He never operated a tractor in this tract of woods. He was running a chain saw *when he was* working for me."

The record shows that based upon the stipulations of the parties and the evidence in the case the Hearing Commissioner found facts, *inter alia:*

"3. That on and prior to November 26, 1956, plaintiff was regularly employed by James Dixon, Jr. * * *

"5. That on November 26, 1956, plaintiff was driving a tractor, pulling logs in the woods; that he struck a stump with a tractor which caught in the equipment and turned the tractor over on him, the steering wheel striking him on his left leg * * *

"That in the way and manner set out above plaintiff sustained an injury by accident arising out of and in the course of his employment * * * ."

And "based upon the foregoing findings of fact, the Hearing Commissioner makes the following conclusions of law" (not pertinent to present challenge).

And "based upon the foregoing findings and conclusions the Hearing Commissioner enters" an award.

The record shows that defendant James D. Dixon gave notice of appeal and made application for review in this case to the North Carolina Industrial Commission, sitting as the Full Commission, assigning as error on the part of the Hearing Commissioner that:

"1. He did not find that Willie J. Taylor had stepped outside the boundaries defining the work for which he was employed, to wit: Operating a chain saw, sawing down trees and sawing off the tops and was operating a tractor which he had been forbid to do.

"2. The Commissioner should have found that Taylor had no duties with the tractor which he was on when hurt.

"3. For that it should have been found that Taylor's slapping his

foot was not a result of the injury; that it had existed a long time before the date in question.

"4. That it should have been found that Taylor had no duty connected with the tractor, was acting according to his own will, that his injury did not result as a hazard incident to his employment.

"5. That it should have been found and held that the accident and injury to Taylor did not arise out of his employment by James Dixon, Jr., and was not the result of a risk incident to the employment."

And in opinion of the Full Commission, pursuant to review, it is set forth that "After the Full Commission carefully reviewed all the competent evidence, findings of fact, conclusions of law and award heretofore made, the Full Commission is of the opinion that there is competent evidence in the record to support the findings of fact and conclusions of law of the Hearing Commissioner. Therefore the Full Commission adopts as its own the findings of fact and conclusions of law of the Hearing Commissioner and orders that the results reached by him be and the same is hereby affirmed."

Commissioner Peters dissents on the grounds stated. And the record shows appeal by defendant to Superior Court, assigning "the objections and exceptions constituting errors of law * * * assigned and objected to and excepted to as follows, to wit:

"1. The commission did not have jurisdiction of this case, for that: The injury to the plaintiff Taylor did not arise out of and in the course of his employment, for that * * * his regular job was to run a chain saw and saw down trees, and he was injured while driving a tractor which he had been specifically forbidden to do.

"2. For that the Hearing Commissioner and the Full Commission should have found that plaintiff Willie J. Taylor had stepped outside the boundaries defining the work for which he was employed, to wit: Operating a chain saw, sawing down trees, and sawing off the tops, and was operating a tractor which he had been forbidden to do.

"3. For that: The Hearing Commissioner and Full Commission should have found that plaintiff Taylor had no duties with the tractor which he was on when hurt, and that his injury did not result as a hazard incident to his employment.

"4. For that: It should have been found by the Hearing Commissioner that plaintiff Taylor's slapping his foot was not the result of the injury but that it had existed a long time before the date in question, and that there was no evidence that it had not existed a long time before the injury and that there was no evidence that his slapping his foot was caused by the injury.

"5. For that: The Hearing Commissioner and the Full Commission

erred in finding that the plaintiff Taylor was in need of further medical treatment which would tend to lessen his period of disability, for that: There is no evidence to sustain such a finding or that there is any disability arising from any accident, arising out of or in the course of his employment.

"6 The hearing Commissioner and the Full Commission were in error in finding and concluding as a matter of law that plaintiff may have some permanent disability, for that there is no evidence to sustain such a finding.

"7. The Hearing Commissioner and the Full Commission were in error in adjudging that James Dixon, Jr., shall pay all medical, hospitalization and other treatment bills incurred by plaintiff on account of his injury, for that: The injury did not arise out of an accident arising out of the course of his employment.

"8. For that: The Hearing Commissioner and the Full Commission were in error in ordering that James Dixon, Jr., shall provide such further medical treatment at the hands of Dr. M. H. Bullock as in his opinion will tend to lessen plaintiff's period of disability, to wit: The slapping of his foot * * * for that: Same was not caused by any accident or injury arising out of the course of his employment.

"9. The Hearing Commissioner and the Full Commission were in error in ordering James Dixon, Jr., to pay the costs, for that: The injury did not arise out of the course of plaintiff's employment and the Commission had no jurisdiction.

"Wherefore the defendant James Dixon, Jr., prays that this cause be certified to the Superior Court of New Hanover County for hearing upon this appeal, and that plaintiff Taylor recover nothing, and that the award of the Hearing Commissioner and the Full Commission be stricken out and the case dismissed. * * *

"Service notice of appeal accepted June 6th, 1958."

The record shows that the cause coming on to be heard before the presiding judge, upon appeal from the judgment of the Full Commission, the plaintiff and the defendant being represented as indicated, and "the court having reviewed the record and heard arguments of counsel setting forth their contentions, and the court being of the opinion that there is evidence in the record to support the findings of fact and conclusions of law of the Full Commission: Whereupon the court adopts as its own the findings of fact and conclusions of law of the Full Commission and orders the same be in all respects affirmed." And the presiding judge ordered that an award issue accordingly, and "the defendant pay the costs and the provisions as to attorneys' fees be held in abeyance until final judgment is rendered."

The Superior Court rendered judgment as so set out in the record. Defendant excepts thereto and appeals to Supreme Court, and assigns error.

Rodgers & Rodgers for plaintiff, appellee.
I. C. Wright for defendant, appellant.

WINBORNE, C. J. This is the sole question presented on this appeal: When a defendant in a proceeding under the North Carolina Workmen's Compensation Act sets up a specific defense, as in the present case may the Industrial Commission fail or refuse to make specific findings of fact in respect thereto in the light of the evidence offered. The answer is "No."

Here the defendant contends plaintiff was employed to operate a chain saw and, though forbidden to do so, undertook to operate a tractor.

In this connection, "if", as stated in Larson's Workmen's Compensation Law Vol. 1, p. 463, "the unrelated job is positively forbidden, all connection with the claimant's own employment disappears, for he has stepped outside the boundaries defining, not his method of working, but the ultimate work for which he is employed." To like effect is *Morrow v. Highway Comm.*, 214 N.C. 835, 199 S.E. 265, where a painter on a bridge, after being forbidden to do so, undertook to recover a brush which had fallen in the river, was drowned. Recovery was not allowed.

Hence in the case in hand defendants are entitled to have the Industrial Commission, in finding the facts, consider the evidence in the light of these legal principles. It is apparent that this has not been done. Indeed, facts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light. *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324, and cases cited.

Therefore the case is remanded to the end that the North Carolina Industrial Commission, applying the legal principles here declared, may proceed to findings of fact and a determination of the claims in accordance with prescribed practice.

Error and remanded.

HIGGINS, J., not sitting.

STATE OF NORTH CAROLINA v. WILLIAM HAZARD SHEFFIELD AND ERNEST LEE PARTIN.

(Filed 25 November, 1959.)

1. **Constitutional Law § 33: Criminal Law § 80—**

Where a defendant voluntarily testifies in his own behalf he is subject to cross-examination and impeachment as any other witness, since the constitutional inhibition against self-incrimination, Art. I, Sec. 11, of the Constitution of North Carolina, applies to compulsion and does not protect a defendant when he voluntarily becomes a witness for the very purpose of having the jury consider his testimony in determining his guilt or innocence.

2. **Criminal Law § 80—**

Where a defendant testifies in his own behalf it is competent for the solicitor on the cross-examination to ask him for the purpose of impeachment if he had not theretofore been convicted and sentenced to imprisonment for another crime, and the affirmative answer of the defendant to such question is competent as affecting his credibility as a witness, and in its charge the court may state what each defendant admitted as a fact on such cross-examination.

3. **Criminal Law § 46—**

Flight is competent evidence to be considered by the jury in connection with other circumstances in passing upon the question of defendant's guilt.

4. **Same—**

Where defendants as witnesses in their own behalf have testified on cross-examination as to the fact that they had fled the State, it is proper for the court to charge the jury on the contention of the State based upon such flight without having instructed defendants of their right to offer rebuttal evidence upon this specific aspect, it appearing that the court, when the State rested its case, advised defendants that they could put any witnesses they had on the stand, and there being no intimation by defendants that they had any witnesses to testify upon the matter.

APPEAL by defendants from *Sink, E. J.*, 16 February 1959 Term, of WAKE.

Criminal prosecution upon a bill of indictment charging defendants on 15 November 1958 with robbery with firearms and other dangerous weapons, implements or means, a violation of G.S. 14-87.

Plea: Not Guilty by both defendants. Verdict: Each defendant is guilty as charged.

From judgments of imprisonment of each defendant, each defendant appeals.

Malcolm B. Seawell, Attorney General, and Claude L. Love, Assistant Attorney General for the State.

Taylor & Mitchell for defendants, appellants.

PARKER, J. The State's evidence shows these facts: About 10:45 p. m. on 15 November 1958 Ray Murray saw defendants at the corner of Swain Street in the city of Raleigh, when he was going west in the 500 block of East Edenton Street. He stepped out into the culvert to go around them. When he had passed them about 15 or 20 feet, defendants turned, and one of them hollered, and asked what he had on him. He replied, "nothing." They came towards him, and he started running. Murray testified: "They jumped me, and drew a knife on me and one of them hit me in the stomach and one of them went through my pockets. They put the knife across my neck, and I was struggling with both of them at the time, when one of them struck me in the stomach. I went to the ground then and was rolling over trying to get up and they both fled then around the corner through that alleyway between Edenton Street and New Bern Avenue, next to Swain Street. I had probably about $16.00 on me at the time. . . . My pocketbook was taken, and I never recovered it, and I never recovered the money. I don't know how many times they hit me but they did hit me and kept pounding on me until I was down on the ground. They were pounding me with their fists. I was not struck by anything while I was on the ground, I was only just kicked. I was kicked while I was on the ground, and was kicked in the stomach." About 9:30 on the 17th or 18th of November 1958, Murray identified defendants in a lineup of five men as the men who robbed him.

Defendant Partin testified in his own behalf as follows: "At the time of the robbery, which was at about the same time another robbery took place here in town, I believe, I think another robbery took place that same night here in Raleigh. All I can say is, we were both at my grandfather's house at the time. . . . I was at his house at the time of this robbery, and I don't really know anything about it, and I guess that's it." On cross-examination he testified: "Right after this happened, a man was robbed, and I was tried and convicted in this court, and was given 18 months on the road for larceny. . . . Two terms of court ago, the judge continued this case, as I did not have a lawyer, but I did not say anything about witnesses, I said a lawyer. Right soon after that court, I escaped from prison, and we were apprehended 20 hours afterwards."

Defendant Sheffield testified in his own behalf as follows: "Well,

as Mr. Ernest Partin has already stated, both of us were over at his grandfather's house on the 15th. We left there that day, and returned there just before dark; it was around 7:00 or 7:30, I don't know the exact time we got back there. Then we stayed at the house there all that night. . . . We spent the night there, all that time we were down there. That's about it." On cross-examination, he testified: "Just last week I received a sentence of 2 to 4 years for armed robbery in this court for a robbery which occurred about 20 minutes after this robbery occurred. . . . We were brought into this courtroom at the January Term of Court, and the case was continued so that we could get some witnesses. And when the case was called, we had escaped. We were later brought back here, and tried last week for armed robbery."

The only assignments of error are to the charge of the court to the jury.

The first assignment of error is to this part of the charge: "The State alleges that, according to the evidence here, that they were involved in another robbery on the same night for which they were tried and penalized."

After the State had rested its case, the learned judge, in accord with G.S. 8-54, stated to the defendants, "either one of you defendants may take the stand and testify in your own behalf, if you wish to do so, but you do not have to do so, and if you do not testify in your own behalf, it will not be considered by the jury to your prejudice so I will instruct them, but whether you will testify or not is for each of you to say, and this applies to you Sheffield and to you Partin. . . . If you have any witness you may put him on the stand too." Whereupon, each defendant, according to the record, voluntarily and at his request, became a witness in his own behalf, and, therefore, was subject to cross-examination and impeachment as any other witness, and to the advantages and disadvantages of being a witness. G.S. 8-54; *S. v. Hawkins,* 115 N.C. 712, 20 S.E. 623; *S. v. Wentz,* 176 N.C. 745, 97 S.E. 420; *S. v. Colson,* 194 N.C. 206, 139 S.E. 230; *S. v. Farrell,* 223 N.C. 804, 28 S.E. 2d 560.

There is a distinction to be observed between the statement made by a prisoner on his preliminary examination before a magistrate under G.S. 15-89, and his testimony given under G.S. 8-54, as a witness on the trial of the cause. *S. v. Farrell, supra; S. v. Hawkins, supra.* On the former, he is advised of his rights, and such examination is not to be an oath. On the latter, the defendant, at his own request, but not otherwise, is competent but not compellable to testify,

and, of course, his testimony thus given is received under the sanction of an oath.

It is said in *S. v. Farrell, supra:* "The constitutional inhibition against compulsory self-incrimination, Art. I, Sec. 11, (North Carolina Constitution) is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial."

Each defendant voluntarily became a witness for himself for the very purpose of having the jury consider his testimony in determining his guilt or innocence. Having done so, it was proper for the Solicitor for the purpose of impeaching each defendant to ask each one on cross-examination, if he had not been convicted and sentenced to imprisonment for the crime of robbery. The answer of each defendant that he had been so convicted and sentenced for robbery was clearly competent as affecting his credibility as a witness. *S. v. Lawhorn,* 88 N.C. 634; *S. v. Holder,* 153 N.C. 606, 69 S.E. 66; *S. v. Colson, supra; S. v. King,* 224 N.C. 329, 30 S.E. 2d 230.

The challenged portion of the charge is merely a statement of what each defendant admitted as a fact on cross-examination, and the assignment of error thereto is overruled.

The only other assignment of error, except a formal one to the judgment, which is not discussed in defendant's brief, is to this part of the charge: "Since this alleged violation occurred, and the State contends that while awaiting trial they fled and the State contends, and the Court charges you that they having fled that is evidence to be considered by you as having bearing upon their guilt in this case, the State's contending that such flight has a bearing upon their guilt or innocence in this case, the State contending that because of their guilt they fled, and the State says and contends that you should be satisfied beyond a reasonable doubt that each of these defendants. William Hazard Sheffield and Ernest Lee Partin, is guilty as charged in the bill of indictment."

Defendant Partin testified on cross-examination: "Two terms of court ago, the judge continued this case, as I did not have a lawyer, but I did not say anything about witnesses, I said lawyer. Right soon after that court, I escaped from prison, and we were apprehended 20 hours afterward."

Defendant Sheffield testified on cross-examination: "We were brought into this courtroom at the January Term of Court, and the case was continued so that we could get some witnesses. And when the case was called, we had escaped. We were later brought back here and tried last week for armed robbery."

This Court said in *S. v. Payne,* 213 N.C. 719, 197 S.E. 573: "Flight is competent evidence to be considered by the jury in connection with other circumstances in passing upon the question of guilt," citing many decisions of the Court in support of the statement.

Defendants make this contention in their brief: "Appellants do not contend that evidence of flight from custody after indictment is not admissible against a defendant. Appellants do contend and argue on this appeal, however, that in the instant case where appellants were not represented by counsel, that it was error for the trial court to instruct the jury upon this principle where the court has not instructed appellants of their right to offer rebuttal evidence or testimony upon this matter."

Counsel for defendants have cited no authority to support their contention, nor do we know of any. Defendants in their brief have not a word as to how the testimony of some imaginary witness or witnesses — there is no suggestion they have any — could benefit them in any way on the question of flight from custody, which flight each defendant admitted on cross-examination. When the State rested its case, the judge told defendants, *inter alia,* if they had any witness, they could put him on the stand. No prejudicial error is shown as to this assignment of error, and it is overruled.

In the trial below, we find

No error.

JOHN HARRIS AND WALTER JENKINS v. CITY OF RALEIGH.

(Filed 25 November, 1959.)

1. Municipal Corporations § 33: Trespass to Try Title § 3—

In an action to establish plaintiffs' title to certain land and to have assessments for public improvements made by defendant municipality declared invalid on the ground that the paved area was not a street but plaintiffs' property, the burden is upon plaintiffs to establish their cause of action.

2. Boundaries § 5—

Where the owner of land has subdivided same and prepared and recorded a map showing lots and named streets, the location of a street so shown may not be established by the description in a deed in the chain of title executed subsequent to such division by the original owner, since a junior instrument may not be used to establish the location of a boundary fixed by a senior instrument.

3. Boundaries § 3—

Where the description in a deed calls for a beginning corner and then only courses and distances from such corner without otherwise pointing

out any other corner or referring to any corner of an adjacent tract, the beginning corner may not be established by reversing the call.

4. Adverse Possession § 15—

A deed cannot constitute color of title to lands not embraced within its description.

5. Adverse Possession § 23—

Plaintiffs can acquire no title by adverse possession when their own evidence establishes that less than twenty years elapsed between the time they took possession and the institution of the action and that the claim could not be maintained under color of title.

6. Municipal Corporations § 30—

A municipality does not have to pave the entire area owned by it for street purposes in order to assess land abutting the street for improvements.

APPEAL by plaintiffs from *Thompson, J.*, February, 1959 Civil Term, of WAKE.

This is an action to try title to a small piece of land in Raleigh. Plaintiffs allege they own a lot described in deeds to them as:

"BEGINNING at a point in the western side of Butler Street, in the Village of Oberlin, Alonza Haywood's northeast corner, and running thence westwardly along Haywood's northern boundary line, 260 feet; thence northwardly 60 feet; thence eastwardly in a line parallel with said Haywood's line 260 feet to the western boundary line of Butler Street; thence southwardly with said Butler Street, 60 feet to the BEGINNING."

Defendant admits plaintiffs' ownership of the described property except that part which was mapped and designated as Butler Street when the area known as San Domingo was subdivided. Butler Street is now known as Chester Road.

The area in controversy was paved as a part of Butler Street or Chester Road. A part of the cost of paving was assessed against plaintiffs as abutting property owners. They challenge the validity of the assessment for that the area paved was not a street but their property. A restraining order issued to prevent enforcement of the paving assessment.

At the conclusion of plaintiff's evidence defendant's motion to nonsuit was allowed and the restraining order was dissolved. Plaintiffs appealed.

Bailey & Dixon for plaintiff appellants.
Paul F. Smith for defendant, appellee.

RODMAN, J. The pleadings placed the burden on plaintiffs to establish ownership of the land in controversy.

The stipulations and evidence suffice to establish: Amelia Whitaker and other members of the Whitaker family, on 14 October 1873, conveyed to W. H. Morgan a parcel of land "designated as Lots 45, 46, and 47 on said (San Domingo) map fronting on Butler Street or Avenue, adjoining the lands of Tom Johnson and Solomon Taylor and containing about one and one-quarter acres"; a map of San Domingo, prepared for the Whitaker estate showing a subdivision into lots and named streets was duly recorded in the office of the Register of Deeds of Wake County; when the land was sudivided and when W. H. Morgan purchased from the Whitakers, San Domingo was not an incorporated area, but by enlargement of Raleigh's boundaries it became a part thereof in 1920; Raleigh took over the maintenance of Chester Road in 1940 and paved it in 1953; by duly recorded deeds, title to lots 45 and 46 shown on the subdivision passed from W. H. Morgan and vested in Parker Realty Company; it, in 1915, conveyed to John Ivey by the description set out in the complaint; plaintiffs trace title to John Ivey by deeds containing the identical description given in the deed to him; they acquired title in 1938; in 1915 Alonza Haywood was the owner of lot 44 shown on the map of San Domingo; that map shows Butler Street to be the eastern boundary of lots 44, 45, 46, and 47; lot 46 is shown to have a frontage of 32 feet on Butler Street, the others 105 feet each; all extend westwardly 250 feet from the street.

Defendant does not challenge plaintiffs' location of the western, or back line of lots 45, 46, and 47.

To establish ownership of the disputed area, plaintiffs begin at the southwest corner of lot 45 and measure eastwardly 260 feet, the distance given in the deed to them. This they say establishes the location of Alonza Haywood's northeast corner in Butler Street, the beginning corner called for in the deed to them. They maintain the right to so locate their beginning corner because, as they say, there was in fact no Butler Street when San Domingo was subdivided, and in fact no street in actual existence until 1940 when the City took over and assumed maintenance. They contend the evidence shows the stake marking Alonza Haywood's northeast corner was destroyed in 1953 when the paving work was in progress, and since they are unable to establish that corner they are entitled to begin at a subsequent corner called for in their deed and reverse to locate their beginning.

The reasoning is fallacious. The parties trace their rights to a common source, the Whitakers. The San Domingo map told where and how to locate Butler Street if the back lines of the lots were known, and Butler Street did not in fact exist on the ground.

The divergent rights were acquired prior to 1915. Plaintiffs cannot, by using a description originating in 1915 or subsequent thereto, locate a line previously established. *Coffey v. Greer,* 249 N.C. 256, 106 S.E. 2d 209, *s. c.* 241 N.C. 744, 86 S.E. 2d 441; *Goodwin v. Greene,* 237 N.C. 244, 74 S.E. 2d 630; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326; *Euliss v. McAdams,* 108 N.C. 507.

Not only do plaintiffs not have the right to use the junior instrument to establish the location of a boundary fixed by a senior instrument; but to begin at a posterior corner for the purpose of locating the anterior corner, it must appear that the anterior corner is not established and known and the location of the posterior corner is known and established. That condition does not here exist. True the back, or western line of lot 45 is known and established. No controversy exists with respect to its location. But the description in the instrument which they would use does not refer to the back line of lot 45. It directs the line run from the beginning corner on Butler Street "westwardly along said Haywood's northern boundary line, 260 feet; thence northwardly 60 feet" etc. It points to nothing which marks the termination of the 260 feet. It is a pure assumption on the part of plaintiffs that the distance called for terminated at the southwest corner of lot 45 shown on the map of San Domingo. That assumption is based on the fact that the grantor was the owner of lot 45 and is not known to have owned any other land. But if he had intended to stop his deed at the western line of lot 45 or to extend it to that line, that fact should appear in the deed. Where the 260 feet ends can only be found by beginning on Butler Street at Haywood's northeast corner. The very description itself demonstrates that there can be no reversal of the calls to establish the location of the beginning corner. The subsequent corners, by the terms of the description, must be located by running in the order given. *Batson v. Bell,* 249 N.C. 718, 107 S.E. 2d 562; *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759; *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Lindsay v. Austin,* 139 N.C. 463.

The parties stipulated that the City took over the maintenance

of the street in 1940. Plaintiffs acquired title in 1938. Manifestly they could not have acquired title by adverse possession. If their description does not cover the land in controversy, the deed does not constitute color of title. Less than twenty years elapsed between the time plaintiffs took possession and the beginning of the action. Plaintiffs' evidence demonstrates they acquired no title by adverse possession.

The City did not have to pave the entire area owned by it for street purposes in order to assess plaintiffs as abutting property owners. They could pave only a portion of the street and make a valid assessment. *Salisbury v. Barnhardt,* 249 N.C. 549, 107 S.E. 2d 297; *Anderson v. Albemarle,* 182 N.C. 434, 109 S.E. 262.

The judgment is affirmed.

STATE v. OSCAR CAMPBELL.

(Filed 25 November, 1959.)

1. Criminal Law § 107: Homicide § 27—

A charge on the question of self-defense which includes therein a statement of the law applicable when a defendant wrongfully assaults his adversary or provokes the difficulty or commits a breach of the peace and engages in the affray willingly, is prejudicial when there is no evidence in the case upon which to predicate such statement of the law, since the court is required to apply the law arising on the evidence in the particular case and not upon a set of hypothetical facts.

HIGGINS, J., not sitting.

APPEAL by defendant from *Clarkson, J.,* at Regular June 15, 1959 Criminal Term, of MECKLENBURG.

Criminal prosecution upon a bill of indictment charging defendant Oscar Campbell with the crime of murder in the first degree of one Curtis Williams on the night of 21 February 1959.

The Solicitor announced in open court upon the call of the case 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 whatever the evidence might justify.

Plea: Not guilty.

Upon the trial in Superior Court the State offered the testimony of three witnesses: Ruth Elizabeth Falls, who testified she was present when the homicide took place, and two officers, Mac D. Earn-

hardt and L. E. Robinson, to whom defendant made statements pertinent to the case.

While defendant offered no evidence he invoked the principle of self-defense, contending that there was no quarrel between him and deceased, and that he had done nothing to bring on the difficulty leading to the homicide, and that he acted only when deceased fired a shot gun beside the automobile in which defendant was riding, spattering the car with mud, and threatening to kill him—stepping back a few steps. Whereupon defendant reached for a pistol and fired out of the car window. And the evidence tends to show that at the time the front seat of the standing automobile was occupied by the operator in the driver's seat, Ruth Elizabeth Falls in the middle, and he, the defendant, on the right, within three or four feet of deceased, with no avenue of escape to him.

The case was submitted to the jury on the evidence introduced, and upon the charge of the court.

Verdict: Guilty of manslaughter.

Judgment: Confinement in the State's Prison for not less than four (4) nor more than five (5) years. Defendant gave notice of appeal in open court, and appeals to Supreme Court and assigns error.

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

Warren C. Stack, William E. Graham for defendant, appellant.

WINBORNE, C. J.: Among the several assignments of error, brought up by defendant, the fourth and fifth, based upon exceptions five and six, directed to portions of the charge, when tested by decisions of this Court, appear to be well taken, and constitute error for which a new trial must be granted. See *S. v Glenn*, 198 N.C. 79, 150 S.E. 663; *S. v. Robinson*, 213 N.C. 273, 195 S. E. 824; *S. v. Bryant*, 213 N.C. 752, 197 S.E. 530; *S. v. Moore*, 214 N.C. 658, 200 S.E. 427, and cases cited.

The portions of the charge to which these exceptions relate are these: "But the court instructs you that the defense of excusable homicide is not available; first, where one who has wrongfully assaulted another or committed a battery upon him and in consequence killed; or, second, where one has provoked the present difficulty by either language or conduct intended to bring about an assault; or third, when one who has committed a breach of the peace or engaged in an affray willingly in the sense of doing so voluntarily

and without lawful excuse." And, continuing: "When these elements or either of them appear in the case, the court instructs you that the prisoner may not successfully maintain the position of a perfect self-defense unless he may be able to show you that, at the time prior to the killing, he abandoned the combat and signified such act to the adversary because in law he is said to have brought about, by his own act, the necessity of taking life."

The vice pointed out in these assignments of error is, that though they may be free from error when applied to hypothetical situations, they are inapplicable to case in hand for the reason that the evidence introduced does not admit of the application of such principle. See *S. v. Alston*, 228 N.C. 555, 46 S.E. 2d 567; *S. v. Street*, 241 N.C. 689, 86 S.E. 2d 277, and cases cited.

Indeed, in the *Street* case, *supra*, in opinion by *Denny, J.*, the Court speaking of the provisions of G.S. 1-180 said: "The statute requires the Court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts."

For other authorities see Strong's N. C. Index to Criminal Law Section 107 — on subject that "An instruction which presents an erroneous view of the law or an incorrect application thereof, is prejudicial * * *."

Other assignments of error point to exceptions to matters that may not recur upon the retrial. Hence it is not deemed necessary to elaborate on them.

For error pointed out there must be a

New trial.

HIGGINS, J., not sitting.

STATE v. JAMES R. SEARCY
AND
STATE v. McKINLEY MILLER
AND
STATE v. STANLEY MORROW.

(Filed 25 November, 1959.)

1. **Constitutional Law § 28—**

A defendant may not be tried initially in the Superior Court even for a misdemeanor without an indictment unless he waives the finding and return of an indictment in accordance with the provisions of G.S. 15-140, and where the record fails to show that defendant's counsel, if any he had, consented to the waiver of indictment, the judgment entered in the cause must be arrested. Constitution of North Carolina. Article 1, section 12.

2. **Same: Criminal Law § 18—**

Where defendant has been tried in an inferior court for a misdemeanor he may be tried in the Superior Court *de novo* on appeal upon the original warrant.

3. **Criminal Law § 169—**

Where sentences for misdemeanors are made to run consecutively and the judgment upon which the first sentence is based is arrested, the cause must be remanded for proper sentence for the other offenses.

Defendants jointly petition for *certiorari* to obtain appellate review of trial records and judgments rendered by *McLean, J.*, in specified criminal actions in Superior Court, August and September Terms, 1959, of BUNCOMBE.

Defendant Searcy was tried in the Police Court of the City of Asheville on three separate warrants charging public drunkenness. He appealed to Superior Court. On 18 August 1959, these cases were tried on the warrants in Superior Court as cases numbered 59-634, 59-680 and 59-711. He entered plea of guilty in each of these cases. At the same time he was tried in cases numbered 59-634A, 59-680A and 59-711A. With respect to each of these the minutes of the court show an entry as follows; "By and with consent of defendant, waived the bill of indictment and tenders a plea of guilty to unlawful possession of whisky." There are no other entries relating to the waiver of bills of indictment. The court imposed prison sentences in the cases as follows: 59-634, 30 days; 59-634A, 6 months; 59-680, 30 days; 59-680A, 6 months; 59-711, 30 days; and 59-711A, 6 months. It was provided that these sentences should run consecutively and in the order listed here. The prison sentences were suspended upon condition that defendant "not own, possess or drink any intoxicating

liquors" during the ensuing five year period (and other conditions not pertinent here). Defendant was returned to Superior Court at term on 2 September 1959, and the court, after hearing evidence, found as a fact that defendant was publicly drunk on a street in Asheville on 19 August 1959. Upon this finding the court made an order putting the prison sentences into effect. Defendant gave notice of appeal.

Defendant Miller was tried in the Police Court of the City of Asheville on three separate warrants charging public drunkenness. He appealed to Superior Court. On 18 August 1959, he was tried upon the warrants and the cases were numbered 59-702, 59-703 and 59-710. He entered pleas of guilty therein. At the same time he was tried in cases numbered 59-702A, 59-703A and 59-710A. With respect to each of these the court minutes show an entry as follows: "By and with consent of the defendant, waives the bill of indictment and tenders a plea of guilty to unlawful possession of whiskey." There are no other entries relating to the waiver of bills of indictment. The court imposed prison sentences in the cases as follows: 59-702, 30 days; 59-702A, 6 months; 59-703, 30 days; 59-703A, 6 months; 59-710, 30 days, and 59-710A, 6 months. It was adjudged that these sentences run consecutively and in the order listed here. The prison sentences were suspended on condition that defendant "not own, possess or drink any intoxicating liquors" during the ensuing five years. The defendant was returned to court at term on 2 September 1959, and the court, after hearing evidence, found as a fact that defendant had been publicly drunk on a street in Asheville in violation of the condition above recited. Pursuant to this finding the court made an order putting the prison sentences into effect. Defendant gave notice of appeal.

Defendant Morrow was tried in Police Court of the City of Asheville on a warrant charging public drunkenness. He appealed to Superior Court. He was tried on the warrant, case number 59-778, in Superior Court on 19 August 1959. He entered a plea of guilty. He was also tried on this date in case number 59-778A. In this case the court minutes show the following entry: "Defendant waives the finding of a bill of indictment and tenders a plea of guilty to unlawful possession of whiskey." This is the only entry with respect to waiving bill of indictment. The court entered judgment imposing a prison sentence of 30 days in case number 59-778 and 18 months in case number 59-778A, the 18-months sentence to begin at the expiration of the 30-days sentence. The prison sentences were suspended on condition that the defendant "not own, possess or drink

any intoxicating liquor" during the two years next ensuing. Defendant was returned to court at term on 3 September 1959, and the court, after hearing evidence, found as a fact that defendant had been publicly drunk on a street in Asheville in violation of the condition above referred to. The court ordered that the prison sentences be put into effect. Defendant gave notice of appeal.

Defendants complain that, though the court fixed the amounts of appeal and appearance bonds, they are unable to furnish the bonds and are confined in jail without means or assistance for perfecting their appeals.

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

No counsel contra.

PER CURIAM. Article I, section 12, of the Constitution of North Carolina provides that "no person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment or impeachment, but any person, when represented by counsel, may, under such regulations as the Legislature shall prescribe, waive indictment in all except capital cases."

G.S. 15-140 provides that a defendant, when the offense charged is a misdemeanor, may waive bill of indictment but that he may not do so "unless by consent of the defendant's counsel in such action who shall be one either employed by defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court." In the instant cases the minutes of the court do not affirmatively disclose that counsel for defendants, if any they had, consented to the waiving of the finding and return into court of the bills of indictment. We must assume that the record is true and correct and no such consent was given. The purported waivers of bills of indictment were not in accordance with the statute and are invalid and in the absence of bills of indictment found and returned into court by the Grand Jury in cases numbered 59-634A, 59-680A, 59-711A, 59-702A, 59-703A, 59-710A, and 59-778A, the court was without authority to proceed to trial or to enter judgment. *State v. Thomas*, 236 N.C. 454, 459, 73 S.E. 2d 283. No warrants had been issued in these cases, charging defendants with "unlawful possession of whiskey," and defendants had not been tried in an inferior court on such charges.

The judgments are arrested in cases numbered 59-634A, 59-680A, 59-711A, 59-702A, 59-703A, 59-710A, and 59-778A. If the State so elects, defendants may be again tried in the cases enumerated next

above provided proper bills of indictment are returned by the Grand Jury or bills of indictment are properly waived.

In the cases, numbered 59-634, 59-680, 59-711, 59-702, 59-703, 59-710 and 59-778, warrants were issued and executed, charging public drunkenness, and defendants were tried in the City Court of Asheville and appealed. In Superior Court defendants were tried *de novo* on the warrants. In these cases the court had jurisdiction to entertain the pleas and enter judgments. *State v. Thomas, supra,* at page 460. Prison sentences were imposed and suspended on conditions. The court has found as a fact that conditions have been breached and has ordered the sentences to be served.

Since the judgments in the cases in which defendants were charged with unlawful possession of whiskey, enumerated above, have been arrested, this renders uncertain and indefinite the time of beginning of the sentences in cases numbered 59-680, 59-711, 59-703 and 59-710; and these cases are remanded for proper sentences. *State v. Austin,* 241 N.C. 548, 85 S.E. 2d 924.

We affirm the judgments in cases numbered 59-634, 59-702 and 59-778, and the orders putting prison sentences into effect. Commitments shall issue in these cases.

If defendants have already been committed, they shall be credited with time served. *State v. Austin, supra.*

On petition of Searcy: Case No. 59-634, judgment and order affirmed; Cases Nos. 59-634A, 59-680A and 59-711A, judgments arrested; Cases Nos. 59-680 and 59-711, remanded for proper sentences.

On petition of Miller: Case No. 59-702, judgment and order affirmed; Cases Nos. 59-702A, 59-703A and 59-710A, judgments arrested; Cases Nos. 59-703 and 59-710, remanded for proper sentences.

On petition of Morrow: Case No. 59-778, judgment and order affirmed; Case No. 59-778A, judgment arrested.

MRS. RACHEL EVANS v. QUEEN CITY COACH COMPANY AND S. J. LITTLE.

(Filed 25 November, 1959.)

1. Trial § 49½—

A motion to set aside a verdict on the ground that the award of damages is excessive or inadequate is addressed to the sound discretion of the trial judge and his decision upon the motion will not be disturbed in the absence of manifest abuse.

2. Appeal and Error § 38—

Assignments of error not discussed in the brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

APPEAL by defendants from *Sharp, S. J.*, 24 August 1959 Regular Civil Schedule A Term, of MECKLENBURG.

Civil action to recover damages for alleged personal injuries.

The jury found by its verdict that plaintiff was injured by the negligence of the defendants, as alleged in her complaint, and awarded damages of $5,000.00.

From a judgment entered on the verdict, defendants appeal.

Warren C. Stack and William E. Graham, Jr., for plaintiff, appellee.

John F. Ray and Robinson, Jones & Hewson for defendants, appellants.

PER CURIAM. Defendants have brought forward and discussed in their brief four assignments of error to the charge of the court. These four assignments of error have been carefully considered by us, and prejudicial error sufficient to warrant a new trial is not shown in any one of them. These assignments of error are overruled.

Defendants' only other assignment of error brought forward and discussed in their brief is the refusal of the trial court to grant their motion to set aside the verdict for the reason that the damages awarded by the jury are excessive and disproportionate to the injuries sussained by plaintiff. The granting or denial of a motion to set aside a verdict and award a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge. *Hinton v. Cline*, 238 N.C. 136, 76 S.E. 2d 162, and the many cases there cited. His decision on the motion will not be disturbed on appeal, unless it is obvious that he abused his discretion. *Hinton v. Cline, supra; Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E. 2d 49; *Francis v. Francis*, 223 N.C. 401, 26 S.E. 2d 907;

Freeman v. Bell, 150 N.C. 146, 63 S.E. 682. An abuse of discretion by the trial judge does not appear in this case.

The assignments of error in the record not set out in defendants' brief, and in support of which no reason or argument is stated or authority cited, are taken as abandoned by defendants. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 563; *In re Will of Knight*, 250 N.C. 634, 109 S.E. 2d 470.

In the trial below, we find

No error.

JOHN E. TURNER, EMPLOYEE v. BURKE HOSIERY MILL, EMPLOYER; THE TRAVELERS INSURANCE CO., CARRIER.

(Filed 25 November, 1959.)

1. Master and Servant § 63—

Decision denying compensation for injury to claimant's back while doing repetitive work of the same type he had been doing theretofore affirmed on the authority of *Hensley v. Cooperative*, 246 N.C. 274.

APPEAL by plaintiff from *Armstrong, J.*, July Civil Term, 1959, of RANDOLPH.

The plaintiff filed claim under the North Carolina Workmen's Compensation Act against the Burke Hosiery Mill and its carrier, The Travelers Insurance Company, alleging an injury to his back on 24 September 1957, while he was working as a knitter on a double diamond hosiery machine in the Burke Hosiery Mill, Asheboro, North Carolina. The matter was heard before a deputy commissioner of the Industrial Commission.

The plaintiff had been employed as a knitter in the Burke Hosiery Mill for more than four years. For a period of at least one month prior to the alleged injury he had been knitting double diamond hosiery. According to the plaintiff's evidence, during the evening of 24 September 1957 he leaned over the bank of the knitting machine to make a change, which required the unlocking of the friction and carrier. "* * * I was making a change on the machine, unlocking the friction and pulling the friction and carrier out together. In doing so I felt that I had done something to my back. I had a stinging sensation and some little pain at the time, but I went on working that night. * * *"

The witness gave a written statement shortly thereafter to the ef-

fect that "when I was moving the friction I felt a pain in my back. At this time I was either in an awkward position or on one foot." At the hearing, in response to the question, "Were you or were you not in an awkward position?" his answer was: "I say it is possible that I could have been."

The plaintiff's further testimony was to the effect that he had to make "a change like we were doing on September 24 from 12 to 15 times a day. I was doing the same type of work that I had been doing for 4 years."

The deputy commissioner found as a fact that the plaintiff on 24 September 1957 sustained an accident arising out of and in the course of his employment and awarded compensation.

Upon appeal to the full Commission, the Commission found as a fact, "That on the occasion complained of plaintiff did not sustain an injury by accident arising out of and in the course of his employment."

On appeal to the Superior Court, his Honor upheld and affirmed the decision of the full Commission, The plaintiff appeals, assigning error.

Coltrane & Gavin for plaintiff.
Sapp & Sapp for defendants.

PER CURIAM. After a careful examination of the plaintiff's assignments of error we are constrained to hold that this case falls within the purview of our decision in *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289. and on authority of that case the judgment below is

Affirmed.

JOHN GODWIN, JR. v. WALTER E. VINSON.

(Filed 25 November, 1959.)

1. Partnership § 8—

One partner may not sue in his own name upon a cause of action in favor of the partnership, and where the evidence discloses that the action by a single individual was on a partnership claim nonsuit is properly entered.

APPEAL by plaintiff from *Phillips, J.,* March, 1959 Term, ROWAN Superior Court.

GODWIN *v.* VINSON.

Civil action to recover $1,065.80 which the plaintiff alleged was the total amount of loans he made to the defendant from April 19, 1957, until March 27, 1958. The defendant denied the material allegations of the complaint and set up as a further defense that he was employed by, did work for, and all his transactions were with Godwin Brothers; that Godwin Brothers failed and refused to make advances in accordance with the terms of their contract, which failure forced him to seek other employment.

The plaintiff testified he did not claim the amount sued on was due him individually. "Well, it is owed to the Godwin Brothers, which is a name we go under. . . . It is a family business and my brother and my father and I all have an equal share in it."

At the close of the evidence the defendant moved to dismiss upon the ground the action was not brought in the name of the real party in interest. The plaintiff then moved that the partnership, namely Godwin Brothers, be made a party plaintiff, and the court in its discretion denied the motion.

The court entered an order dismissing the action. The plaintiff excepted to the refusal of the court to allow the amendment, and appealed.

Graham M. Carlton for plaintiff, appellant.
George L. Burke, Jr., for defendant, appellee.

PER CURIAM. The appeal brings up for review the order refusing the amendment and the order dismissing the action. It is settled law in this State that one partner may not sue in his own name, and for his benefit, upon a cause of action in favor of a partnership. The plaintiff's own evidence shows the partnership is the real party in interest. The plaintiff cannot maintain this action, hence nonsuit was proper. *Chapman v. McLawhorn,* 150 N.C. 166, 63 S.E. 721.

Affirmed.

STATE v. SAPHRONIA SMITH.

(Filed 25 November, 1959.)

1. Criminal Law § 79—

Evidence discovered in the course of a search under a duly issued search warrant is competent, G.S. 15-27, notwithstanding the contention that the officers conducted the search in an unreasonable manner in entering the premises forcibly without first giving notice of their identity or authority to make the search, the common law rule except as modified by statute being applicable.

APPEAL by defendant from *Hall, J.*, June Term, 1959, of RANDOLPH.

Upon trial in superior court, the jury found the defendant guilty of (1) unlawful possession, and (2) unlawful possession for the purpose of sale, of intoxicating liquor; and from judgment, imposing a prison sentence, defendant appealed.

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

Hammond & Walker for defendant, appellant.

PER CURIAM. Defendant does not challenge the sufficiency of the evidence to support the verdict and judgment. Her sole contention is that, upon objection aptly made, the court should have excluded and suppressed the evidence upon which the State based its case, *i.e.*, facts discovered and evidence obtained by officers in the course of their search of defendant's residence.

The officers searched defendant's premises under authority of a search warrant. Defendant does not challenge the validity of the search warrant. Her contention is that the officers conducted the search in an unreasonable manner in that they entered her premises forcibly without first giving sufficient notice of their identity as officers or of their authority to make the search.

Under the common law rule the evidence was competent; and, except as modified by G.S. 15-27, the common law rule controls. *S. v. McGee*, 214 N.C. 184, 198 S.E. 616. Suffice to say, G.S. 15-27 does not make incompetent facts discovered or evidence obtained in the course of a search authorized by a duly issued search warrant. Hence, defendant's contention is without merit.

No error.

LEE CAMPBELL v. JAMES S. CURRIE, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 2 December, 1959.)

1. Taxation § 23½—

G.S. 105-262 empowers the Commissioner of Revenue to classify and determine by administrative regulation that sales of articles of tangible personal property used in direct production or extractive processes inside a mine should be considered as sales of mill machinery, mill machinery parts or accessories within the purview of G.S. 105-164.13 (12) and subject to the wholesale rather than retail sales tax, such regulation not being in conflict with the statute.

2. Taxation § 30—

Lumber used in constructing vertical shafts and horizontal tunnels for mining operations, which lumber is either splintered by blasting or abandoned in the shaft after the vein of minerals is exhausted, is used in the direct production or extractive processes inside a mine and is not housing placed under ground within the purview of Sales and Use Tax Regulation No. 4 of the Commissioner of Revenue, and therefore the sale of such lumber to the mining company is subject to the wholesale and not the retail sales tax rate.

3. Taxation § 23½—

While a decision or regulation of the Commissioner of Revenue interpreting a taxing statute is not controlling, the Commissioner of Revenue is authorized by G.S. 105-262 to implement taxing statutes, with certain specific exceptions, and his interpretation is made *prima facie* correct, G.S. 105-264, and such interpretive regulation will ordinarily be upheld when it is not in conflict with the statute and is within the authority of the Commissioner to promulgate.

4. Same—

A person paying a tax computed in accordance with a regulation of the Commissioner of Revenue in effect for more than fifteen years without change or modification by statute or otherwise, will ordinarily be protected against an additional assessment regardless of whether the 1957 amendment to G.S. 105-262 has retroactive effect or not, since the amendment expressly shows the legislative intent to protect a taxpayer from additional assessment where he has paid his tax in accordance with and in reliance upon the terms of a regulation duly promulgated.

HIGGINS, J., not sitting.

APPEAL by defendant from *Hall, J.*, April Term, 1959, of GRANVILLE.

This is a civil action instituted in the Superior Court of Granville County by the plaintiff to recover of defendant taxes paid under protest.

The taxes in question were sales taxes assessed by the defendant at the retail rate of three per cent on sales of lumber made by the

plaintiff to Tungsten Mining Corporation for use in its mining operations.

The plaintiff contends that the sales come under the classification of "sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants," as defined by the Sales and Use Tax Regulation No. 4, and thus taxable at the wholesale rate of 1/20 of one per cent.

The parties stipulated the facts essential to a determination of the controversy. It was stipulated, among other things, that (1) during the period from 1 July 1955 to 31 December 1957 the plaintiff made sales of lumber both at retail and wholesale to the Tungsten Mining Corporation for which the plaintiff received $126,023.85. (2) That as of 6 February 1958 the defendant levied against the plaintiff an assessment for $3,329.87, purportedly plaintiff's additional sales tax liability for the period involved. Plaintiff drew a check on the Union National Bank of Oxford, North Carolina, on 30 August 1958, in the sum of $3,426.38, which check included accrued interest, paying said assessment under protest, and the check was paid on 12 September 1958 by said bank. (3) Demand was made in apt time for refund. The defendant did not comply with the demand, and this action was brought pursuant to the provisions of G.S. 105-267 to recover the aforesaid sum of $3,426.38 with interest, less an amount included in the figure $3,426.38, of $64.52 which is not included in the controversy, leaving the sum of $3,361.86 with interest which the plaintiff seeks to recover. (4) That 98.6% of the lumber sold by the plaintiff to Tungsten Mining Corporation during the period involved was used by said mining corporation in the removal of tungsten ore from beneath the earth's surface. (5) In the mining process of Tungsten Mining Corporation two vertical shafts in close proximity to each other are sunk from the surface to a predetermined depth or depths. Next, at levels or intervals of 200 feet each, tunnels are extended out from these shafts, usually of the dimensions of 8 feet by 8 feet. These tunnels out from the shafts begin at the 200 foot level below the surface. (6) In mining parlance, the method used is known as stoping and the successive intervals or lifts comprise a stope. When the vein runs out or the surface is reached, all of the lumber used in the stoping process remains where it was placed, except such as may be broken or splintered in the blasting. This broken or splintered lumber is shoveled into the chute with the ore and is carried in cars to the shaft and hoisted to the surface, where it is separated from the ore. This broken or splintered lumber has no value and is discarded. (7) After the vein runs out or the surface is reached, the entire stope is filled with waste

rock or sand or both and none of the lumber is recovered, and such lumber is abandoned for all time and purposes. (8) The 98.6 per cent of all lumber sold by the plaintiff to Tungsten Mining Corporation during the period involved was not joined together in any definite manner, but its use necessarily lent itself to the conditions encountered in the stopping process at various levels and intervals. (9) That recovery of any part of the lumber so used was and is wholly impracticable and an effort to recover any part of such lumber would be fraught with dangerous possibilities.

Upon the facts stipulated, which the court found to be the facts in the case, the court further found and concluded:

"1. That 98.6% of the lumber sold and delivered by plaintiff to Tungsten Mining Corporation during the period July 1, 1955 to December 31, 1957, both inclusive, was used in the direct production and extractive process inside the mine in the mining operations conducted by said Tungsten Mining Corporation.

"2. That such lumber is and shall be considered tangible personal property and its sale by the plaintiff to Tungsten Mining Corporation for the use made as aforesaid by Tungsten Mining Corporation is considered and found by the court to be embraced within the term sales of mill machinery, mill machinery parts and accessories and subject to the wholesale rate of tax of 1/20 of 1 per cent.

"3. That the plaintiff is entitled to have and recover of the defendant the sum of $3,361.86, with interest from September 12, 1958, and his costs of this action to be taxed."

Judgment was entered accordingly. The defendant appeals, assigning error.

Royster & Royster for plaintiff.

Attorney General Seawell, Assistant Attorneys General Abbott and Pullen for defendant.

DENNY, J. The defendant's assignment of error No. 1 is based on finding of fact No. 1 as set forth in the judgment herein. It is clear that this finding of fact is supported by the facts stipulated by the parties and, therefore, this assignment of error is overruled.

Assignment of error No. 2 is based on finding of fact No. 2 to the effect that the lumber involved shall be considered tangible personal property and by reason of the use made of it by Tungsten Mining Corporation it is considered and found to be embraced within the term sales of mill machinery, mill machinery parts and accessories and subject to the wholesale rate of tax of 1/20 of one per cent.

The Legislature in the enactment of our Revenue laws has recognized the necessity of authorizing the Commissioner of Revenue to promulgate regulations implementing and clarifying the meaning of our Revenue statutes not inconsistent with existing laws.

G.S. 105-262 authorizes the Commissioner of Revenue to "initiate and prepare such regulations, not inconsistent with law, as may be useful and necessary to implement the provisions of all the articles of subchapter I (except article 8B) and article 36 of subchapter V * * *."

The Sales and Use Tax Regulation No. 4 upon which the plaintiff is relying, was promulgated on 15 July 1944 by the Commissioner of Revenue of North Carolina, pursuant to the authority granted in §§ 423 and 931 of the Revenue Act of 1939, as amended, and in compliance with Chapter 754 of the Session Laws of North Carolina of 1943.

The regulation under consideration deals with "sales and purchases of tangible personal property for use in connection with manufacturing and other industrial processing," and the pertinent part with respect to Mining and Quarrying in Section VII thereof reads as follows: "Sales of articles of tangible personal property used in direct production or extractive processes inside the mine shall be considered sales of mill machinery, mill machinery parts and accessories, and subject to the wholesale tax of one-twentieth of one per cent. However, sales or purchases of items such as caps, lights, gloves or other belongings or devices paid for and owned by employees but which are used in connection with their work are taxable at the rate of three per cent."

Regulation No. 4 in a preceding section reads as follows: "Materials going into buildings and structures are subject to tax of three per cent."

The appellant contends that the lumber sold by the plaintiff to Tungsten Mining Corporation was used to make stopes; that the lumber became floors, walls and ceilings within which the miners worked and was equivalent to housing placed under, around and above a manufacturing plant and therefore taxable at three per cent.

The appellant further contends that regulation No. 4 goes beyond the authority granted by the Legislature to the Commissioner of Revenue in classifying mill machinery, mill machinery parts and accessories.

There is no disagreement about the fact that 98.6 per cent of the lumber purchased by the Tungsten Mining Corporation from the plaintiff was used and became obsolescent in connection with the re-

moval or extraction of ore from beneath the earth's surface. The stipulated facts compel this conclusion; and in our opinion the right to implement the provisions of all articles of subchapter I (except article 8B) and article 36 of subchapter V, as provided in G.S. 105-262, gave the Commissioner of Revenue the right to construe, classify and determine that under the provisions of the Revenue Act sales of articles of tangible personal property used in direct production or extractive processes inside a mine may be classified or considered as sales of mill machinery, mill machinery parts and accessories, and subject only to the wholesale tax. Moreover, such interpretation has been in effect and promulgated in a regulation pursuant to the provisions of G.S. 105-262 for more than fifteen years. In light of the stipulated facts, we do not construe the use made of this lumber to constitute a building or structure within the meaning of our tax laws.

Moreover, G.S. 105-264 reads in part as follows: "It shall be the duty of the Commissioner of Revenue to construe all sections of this subchapter (except article 8B) and all sections of article 36 of subchapter V; provided, such construction shall not be inconsistent with applicable regulations duly promulgated under the provisions of G.S. 105-262 * * *. Such decisions by the Commissioner of Revenue shall be *prima facie* correct, and a protection to the officers and taxpayers affected thereby. * * *"

The construction placed upon the Revenue Act by the Commissioner of Revenue will be given due consideration by the courts, although we have repeatedly held that such construction is not controlling. *Cannon v. Maxwell,* 205 N.C. 420, 171 S.E. 624; *Powell v. Maxwell,* 210 N.C. 211, 186 S.E. 326; *Valentine v. Gill,* 223 N.C. 396, 27 S.E. 2d 2; *Bottling Co. v. Shaw,* 232 N.C. 307, 59 S.E. 2d 819; *Rubber Co. v. Shaw,* 244 N.C. 170, 92 S.E. 2d 799. Therefore, our courts are not restricted with respect to the interpretation of the provisions of the Revenue Act by reason of any decision made or regulation promulgated by the Commissioner of Revenue. If there should be a conflict between the interpretation placed upon any of the provisions of the Revenue Act by the Commissioner of Revenue and the interpretation of the courts, the interpretation or construction by the latter will prevail.

The cases of *States' Rights Democratic Party v. Bd. of Elections,* 229 N.C. 179, 49 S.E. 2d 379; *S. v. Curtis,* 230 N.C. 169, 52 S.E. 2d 364, and similar cases cited by the appellant, are not controlling on the facts presented on this record

In the case of *Field v. Clark,* 143 U.S. 649, 36 L. Ed. 294, the Court said: "The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state

of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." The foregoing was cited with approval by this Court in the case of *Provision Co. v. Daves,* 190 N.C. 7, 128 S.E. 593. See also *United States v. Grimaud,* 220 U.S. 506, 55 L. Ed. 563 and *Bailey v. Evatt,* 142 Ohio St. 616, 53 N.E. 2d 812.

Since the interpretation placed upon the statute was promulgated in a regulation more than fifteen years ago and has not been changed by legislative act or otherwise modified, and the regulation is made *prima facie* correct by G.S. 105-264, we are constrained to uphold the decision of the court below.

The General Assembly of 1957, Session Laws of North Carolina, Chapter 1340, amended G.S. 105-264 by adding at the end thereof the following: "Whenever the Commissioner of Revenue shall construe any provisions of the revenue laws administered by him and shall issue or publish to taxpayers in writing any regulation or ruling so construing the effect or operation of any such laws, such ruling or regulation shall be a protection to the officers and taxpayers affected thereby and taxpayers shall be entitled to rely upon such regulation or ruling. In the event the Commissioner of Revenue shall change, modify, repeal, abrogate, or alter any such regulation or ruling any taxpayer who has relied upon the construction or interpretation contained in the Commissioner's previous ruling or regulation shall not be liable for any additional assessment on account of any tax not paid by reason of reliance upon such ruling or regulation and which might have accrued prior to the date of the change, modification, repeal abrogation, or alternation by the Commissioner, and during the effective period of such prior ruling or regulation."

In view of the conclusion we have reached, it is not necessary to decide whether or not the above amendment was intended to be retrospective as well as prospective. 1957 Session Laws of North Carolina, Chapter 1340, section 16. However, in any event, it became effective on 1 July 1957 and, in our opinion, expressly shows an intent on the part of the Legislature to protect a taxpayer from an additional assessment where such taxpayer has made his returns and paid the taxes in accord with the terms of a regulation promulgated by the Commissioner of Revenue and in reliance thereon.

The remaining assignments of error are based on exceptions to the conclusion that the plaintiff is entitled to recover of the defendant the

sum of $3,361.86 with interest, and to the signing of the judgment. These assignments of error are overruled.

The judgment below is

Affirmed.

HIGGINS, J., not sitting.

HENDERSON COTTON MILLS v. LOCAL UNION NO. 584, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); DOUG ROSE, NICK LANGLEY, RUFUS STRANGE, M. LUTHER JACKSON, VERNON W. BURNETTE, ANDREW C. TURNER, CARL C. MOORE, RALPH F. HARRIS, WILLARD O. FAULKNER, JAMES B. G. ROBERSON, ALBERT L. BATTON, HENRY W. STALLINGS, EDWARD J. OFTEN, JAMES E. REARDON, RICHARD F. PARROTT, CLARENCE E. HARPER, JOHN E. STALLINGS, JOE HALE, JOHN LONG, HARRY HICKS, EDWIN ELLINGTON, COY L. PEGRAM, SHERMAN FERRELL, FRANK O. TURNER, LINVEL NELSON, SIDNEY WALLACE, PHIL HARRIS, ELMORE MURPHY, MACON RENN, JOHN OWEN, CLIFTON CARTER, SANDY SAM ROBERSON, JAMES BARKER, EDWARD MOSELEY, WILLIAM TART, MELVIN BRAME, HERMAN MULCHI, R. TALMADGE HARPER, BILLY THOMPSON, JOHN G. MULCHI, JAMES M. WILKERSON, AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME.

(Filed 2 December, 1959.)

1. Appeal and Error § 22—

An exception to the findings of fact and conclusions of law by the court and to the judgment rendered is a broadside exception which does not challenge the sufficiency of the evidence to support the findings of fact.

2. Appeal and Error § 2—

The Supreme Court may review the merits of a cause and decide the questions sought to be presented by the appeal when the matter is of wide public interest and concern, notwithstanding that the exceptions are insufficient to present the questions.

3. Appeal and Error § 49—

Findings of fact supported by competent evidence are as conclusive on appeal as the verdict of a jury.

4. Contempt of Court § 6—

The court's findings of fact, supported by competent evidence, held to support the conclusions of law that appellants willfully violated the terms of a restraining order theretofore issued in the cause and served upon them.

5. Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—

In proceedings under an order to show cause why respondents should not be held in contempt of court for a willful violation of a restraining order, the admission of affidavits tending to show specific acts done by respondents in violation of the order will not be held for error when respondents on the hearing do not object to the admission of the affidavits in evidence, make no motion that they be stricken, and make no request that they be permitted to cross-examine affiants.

HIGGINS, J., not sitting.

APPEAL by respondents, Linvel Nelson, Clifton Carter and Edwin Ellington, from *Bickett, J.*, in Chambers, 12 March 1959 Superior Court, of VANCE.

This case is docketed in this Court as No. 391.

The judgment appealed from decrees that Linvel Nelson, Clifton Carter and Edwin Ellington (hereinafter referred to as "appellants") are in contempt of court "for wilful and intentional violation of the restraining order issued" in this cause on 13 February 1959.

The pertinent portions of the restraining order are set out in the case of *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO); Doug Rose, et al., ante*, 240, our case No. 393, decided at this term.

This action was instituted 13 February 1959 and summons, copy of complaint and copy of restraining order were served on each of appellants on 14 February 1959. After notice, duly served on appellants and other defendants, the court, at a hearing in which appellants were represented by counsel, signed an order, dated 5 March 1959, continuing the restraining order until the case should be "heard on its merits." The restraining order was in full force and effect on all dates involved on this appeal.

On 24 February 1959 plaintiff filed a motion in writing and alleged that each of the appellants had violated terms of the restraining order and asked that they be required to show cause why they should not be adjudged in contempt. Affidavits of Henry A. Orr, Jack J. Renn and Curtis Strickland were attached to the motion. On 25 February 1959 the court signed a show cause order. The order together with copy of the affidavits of Orr, Renn and Strickland were personally served on each of the appellants. Appellants filed answer denying the alleged contemptuous acts set out in the affidavits and disclaiming any wilful violation of the restraining order.

There was a hearing on the show cause order before Bickett, J., on 12 March 1959. The affidavits referred to above and an affidavit of

Frank L. Weaver, Jr., were introduced in evidence by movant. Each of the appellants gave testimony in his own behalf; eleven witnesses testified for appellants. The court made findings of fact, concluded that appellants had wilfully violated the restraining order and decreed punishment as follows: (1) Linvel Nelson, 20 days in jail and $150.00 fine; (2) Clifton Carter, 10 days in jail and $150.00 fine; and (3) Edwin Ellington, 20 days in jail and $150.00 fine.

From the foregoing judgment appellants appealed and assigned error.

Perry & Kittrell, Chas. P. Green, and A. W. Gholson, Jr., for plaintiff, appellee.

W. M. Nicholson, James B. Ledford, James J. Randleman and L. Glen Ledford for respondents, appellants.

MOORE, J. The sole exception in the record is "to the findings of fact and conclusions of law by the court, and . . . to the judgment rendered." This is a broadside exception in that it fails to point out and designate the particular findings of fact excepted to and is inadequate to challenge the sufficiency of the evidence to support the findings of fact. *Kovacs v. Brewer,* 245 N.C. 630, 634, 97 S.E. 2d 96; *Weaver v. Morgan,* 232 N.C. 642, 646, 61 S.E. 2d 916. Ordinarily such exception requires us only to determine whether the findings of fact support the conclusions of law and whether there is error on the face of the record. *Kovacs v. Brewer, supra; Putnam v. Publications,* 245 N.C. 432, 434, 96 S.E. 2d 445. Since this is one of a series of cases heard at this term involving a large number of persons and questions of unusual public importance, we are disposed to relax the rule in this instance and make a thorough examination of the evidence heard in the court below.

Appellants, formerly employees of Henderson Cotton Mills, were on strike. The mill was operating with other employees. Appellants had been forbidden by the restraining order to interfere with free ingress and egress of workers to and from the mill and forbidden to assault, threaten or abuse any person or damage any property entering or leaving the mill premises.

Movants' evidence, consisting of the affidavits referred to, tends to show: On 23 February 1959 about 3:00 P. M., as Elmer Jenks' car came out of the mill gate into Main Street and headed east, Edwin Ellington and Linvel Nelson threw rocks at the car; Jenks stopped the car and got out; "they continued to throw rocks at his car and hit it several times after it had stopped." The windows in the car were

broken. Nelson threw a rock and hit one of the car windows. They also threw rocks and hit William R. Collier's car. On the morning of 24 February 1959 Ellington threw a rock that hit the top of Henry A. Orr's car while Orr was driving toward the mill to go to work. At the same time Clifton Carter rose up from behind a car and threw rocks at Orr's automobile.

Appellants' evidence contradicted movant's evidence in every material particular.

The findings of fact by the court were in accordance with movant's evidence summarized above. The evidence was sufficient to support the court's findings of fact. When thus supported, findings of fact by a judge are as conclusive on appeal as the verdict of a jury. *Milk Commission v. Galloway,* 249 N.C. 658, 663, 107 S.E. 2d 631. The findings of fact amply support the conclusions of law that appellants wilfully violated the terms of the restraining order.

Even so, appellants assign as error the hearing of the cause on affidavits and the denial to them of the opportunity to confront and cross-examine their accusers. This assignment is not based on any exception taken at the hearing. The record shows that there was no objection to the admission of the affidavits in evidence, no motion that they be stricken and no request that appellants be permitted to cross-examine affiants. Appellants were represented by eminent counsel. Had they desired the personal testimony of affiants, request would have been made therefor. The identical question here raised was considered and fully discussed in *Harriett Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO); Johnny Rose, et al., ante,* 218, being case No. 385 of our docket, decided at this term. Further discussion here will serve no useful purpose. The assignment of error is without merit.

The judgment below is

Affirmed.

HIGGINS, J., not sitting.

STATE v. JAMES ALFORD JOHNSON.

(Filed 2 December, 1959.)

1. Criminal Law § 139—

The Supreme Court will take notice *ex mero motu* of want of jurisdiction in the court entering the judgment appealed from.

2. Criminal Law § 18—

Where defendant has not been tried and convicted in the recorder's court, he may not be tried upon the original warrant upon the transfer of the cause to the Superior Court, and the judgment of the Superior Court will be arrested and the appeal therefrom dismissed.

APPEAL by defendant from *Johnston, J.*, at April, 1959 Term, of MOORE.

Criminal prosecution upon a warrant issued by J. B. Edwards, Justice of the Peace of Sandhill Township, Moore County, North Carolina, upon affidavit charging that on or about the 26th day of July, 1959, defendant, James Alford Johnson, did unlawfully and willfully operate a motor vehicle upon the public highway of North Carolina (1) at an excessive rate of speed, (2) recklessly, and (3) while under the influence of intoxicants or narcotics; and did resist a lawful officer all as more fully set out therein—and commanding any lawful officer of Moore County to arrest, and safely keep and have him "before me at my office in said county immediately, to answer about complaint, and be dealt with as the law directs. Aberdeen Recorder's Court 8-1-58."

But the record fails to show that defendant was tried and convicted either before the Justice of the Peace, who issued the warrant, or by Aberdeen Recorder's Court. And the Clerk of Superior Court makes certificate, which the court treated as return to writ of *certiorari*, issued upon suggestion of diminution of record, as follows:

"In this matter of *State v. James Alford Johnson*, the warrant was sent to this court from the Recorder's Court of Aberdeen, N. C. in said County.

"The Clerk of the Recorder's Court reported to this Court that James Alford Johnson appeared in the Recorder's Court at Aberdeen, N. C. without counsel, that he stated to the court that he desired to waive hearing in the Recorder's Court, that he did not want to be tried in the Aberdeen Court, and asked that the matter be sent to the Superior Court of Moore County. The Clerk of the Court at Aberdeen then forwarded to this court the warrant against the said defendant Johnson, and said warrant was placed on the criminal court calendar of the Superior Court of Moore County."

The Supreme Court has before it what purports to be certificate of the Clerk of Municipal Recorder's Court of Aberdeen further certifying this narrative of record of proceeding had therein, to wit: "That this case originally came into this (the Recorder's) court on August 1, 1959, and at that time it was continued for the defendant and his attorney, Mr. H. F. Seawell, Jr., of Carthage, N. C. At the next term of this court, August 8, 1959, Mr. H. F. Seawell, Jr., and his client, the defendant, James A. Johnson, of Hoffman, N. C., appeared in court shortly after the opening thereof, and the case was called for trial by the Solicitor of this court, and when the Solicitor had read the warrant and asked for the defendant's plea thereto, Mr. Seawell addressed the court and announced that he was making a motion for trial by jury and further stated that (he) in this county trial by jury would have to be in the Superior Court, and that he was waiving all rights in the Aberdeen Recorder's Court and moving for trial by jury in the Superior Court in this County and giving notice of appeal to Superior Court. The judge of this court having made inquiry of the arresting officer announced that trial having been waived in this court and motion made by defendant for jury trial in the Superior Court that the defendant's motion was granted, and the case was bound over to the next term of the Superior Court in Carthage, N. C."

The record and case on appeal show that apparently defendant was tried upon the original warrant in Superior Court and both the State and the defendant introduced evidence, and the case was submitted to the jury under the charge of the court; and that the jury returned a verdict of guilty as charged, and that judgment imposed a prison term, from which defendant gave notice of appeal, and appealed to Supreme Court and assigns error.

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

H. F. Seawell, Jr., for defendant, appellant.

WINBORNE, C. J. In the light of what transpired in the Municipal Recorder's Court of Aberdeen and in Superior Court of Moore County as reflected by the foregoing statement of the case, the Supreme Court is impelled, *ex mero motu,* to inquire into the jurisdiction of the Municipal Recorder's Court of Aberdeen and the legality of proceedings had.

In this connection this Court has before it what purports to be a copy of Resolution of Board of Commissioners of The Town of Aberdeen, certified by Clerk of Municipal Recorder's Court of Aberdeen,

establishing "by virtue of Chapter 7, Articles 24 and 29A, and other applicable Articles of the General Statutes of North Carolina," "the Municipal Recorder's Court of Aberdeen with jurisdiction as set forth in said chapter of the General Statutes, namely Chapter 7 * * * to attach as of 9:00 P. M., on Wednesday, August 6, 1956."

Assuming this to be the establishment and the vesting of jurisdiction of the Municipal Recorder's Court of Aberdeen, we turn to the pertinent provisions of General Statutes:

(1) Criminal jurisdiction is set forth in G.S. 7-190;

(2) Provision for appeal to Superior Court is found in G.S. 7-195, as follows: "Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the Superior Court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace * * * "; and

(3) Pertaining to jury trial, G.S. 7-204, it appears that "in all trials in the court, upon demand for a jury trial by the defendant or the prosecuting attorney representing the State, the recorder shall try the same as is now provided in actions before justices of the peace wherein a jury is demanded, and the same procedure as is now provided by law for jury trials before justices of the peace shall apply * * * ."

Thus it appears that a jury trial may be had in the Municipal Recorder's Court of Aberdeen, and that from a conviction of any offense of which the recorder has final jurisdiction an appeal may be taken to the Superior Court of the county. Since neither course was followed, the Superior Court was without authority to proceed to trial on the original warrant in this case. Hence the judgment from which appeal is taken is arrested, and the cause remanded to Superior Court of Moore County with direction to transmit and deliver the warrant issued against the defendant to the Municipal Recorder's Court of Aberdeen for further proceedings as to justice appertains and the law directs.

Judgment arrested and, in accordance with *S. v. Banks*, 241 N.C. 572, 86 S.E. 2d 76, and *S. v. Hunter*, 245 N.C. 607, 96 S.E. 2d 840.

Appeal dismissed.

STATE v. JACK WOMACK.

(Filed 2 December, 1959.)

1. Bastards § 1—

Failure to support an illegitimate child is a continuing offense, and the date of birth of such child is immaterial if the action is instituted within the time prescribed by statute, G.S. 49-4, and demand for the support of the child is made a reasonable time before the action is instituted.

2. Criminal Law § 150—

Where no error appears on the face of the record and the judgment is supported by the verdict an appeal upon the sole exception to the denial of defendant's motion to nonsuit will be dismissed when the evidence produced at the trial is not contained in the record.

APPEAL by defendant from *Bickett, J.*, 24 August 1959 Criminal Term, of WAKE.

This is a criminal action which was instituted in the Wake County Domestic Relations Court on 20 April 1959. The defendant having been tried and convicted therein, appealed to the Wake County Superior Court where there was a trial *de novo* on the original warrant.

The warrant charges that "on or about the 18th day of February, 1959, Jack Womack, he being the parent and father of Debbie Sue Jones born 2/18/59, with force and arms, at and in the County aforesaid, did unlawfully and wilfully neglect and refuse to support and maintain the said Debbie Sue Jones, his illegitimate child, against the statute in such cases made and provided," etc.

According to the record, issues were submitted to the jury and answered as follows:

"1. Is the defendant Jack Womack the father of the illegitimate child, Debbie Sue Jones, begotten upon the body of Emily Gale Jones? Answer: Yes.

"2. Has the defendant, Jack Womack, unlawfully and wilfully, neglected and refused to support and maintain said illegitimate child, Debbie Sue Jones? Answer: Yes.

"3. Is the defendant, Jack Womack, guilty of unlawfully and wilfully neglecting and refusing to support and maintain his illegitimate child, Debbie Sue Jones? Answer: Yes."

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

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

Charles W. Daniel and Jack Senter for defendant.

DENNY, J. The only exceptions in the record are to the denial of the defendant's motion to dismiss as of nonsuit at the close of the State's evidence and renewed at the close of all the evidence, and to the signing of the judgment.

The only reference to any evidence taken in the trial below appears in the statement of case on appeal and reads as follows: "The prosecutrix in the Superior Court trial testified that her illegitimate child, by the alleged father, Jack Womack, defendant, was born February 18, 1959; that she first gave written notice and made demand of defendant for support of the said child on April 3, 1959, and that the same was the first and only notice and demand made by her upon defendant for support of said child; that issues set out in the record proper were submitted to the jury following this and other evidence."

The failure to support an illegitimate child is a continuing offense, and the date such child was born is immaterial provided the action is instituted within the time prescribed by statute, G.S. 49-4, and that demand for the support of such child was made a reasonable time before the action was instituted. *S. v. Perry,* 241 N.C. 119, 84 S.E. 2d 329; *S. v. Chambers,* 238 N.C. 373, 78 S.E. 2d 209; *S. v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157; *S. v. Oliver,* 213 N.C. 386, 196 S.E. 325; *S. v. Johnson,* 212 N.C. 566, 194 S.E. 319.

When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. Rule 19 (4), Rules of Practice in the Supreme Court, 221 N.C. at page 556. *S. v. Griffin,* 246 N.C. 680, 100 S.E. 2d 49; *S. v. Powell,* 238 N.C. 550, 78 S.E. 2d 343; *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560; *S. v. Tyson,* 133 N.C. 692, 46 S.E. 838.

The evidence set out in the statement of case on appeal is not sufficient to enable this Court to pass on the merits of the motion for judgment as of nonsuit. Furthermore, the judgment is supported by the verdict and the exception thereto cannot be sustained. *S. v. Barham, ante* 207; *S. v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403; *S. v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738; *S. v. Oliver, supra.*

Appeal dismissed.

MRS. CALLIE C. YORK v. JOSEPH O. COLE AND WIFE, SARAH FRANCES COLE.

(Filed 2 December, 1959.)

1. Appeal and Error § 12: Receivers § 8—

The pendency of an appeal from an order allowing petitioner to file an amended complaint does not deprive the Superior Court of jurisdiction to appoint a receiver based on the allegations in the amended complaint.

2. Receivers § 7—

Allegations to the effect that plaintiff was induced by fraud to convey certain property to defendants, supplemented by plaintiffs affidavit that defendants were insolvent, is sufficient to support the appointment of a receiver upon motion and notice, upon the court's findings that plaintiff had established an apparent right to the property and was in danger of losing rents and profits if the property were left in defendants' possession. G.S. 1-502.

APPEAL by defendants from *Preyer, J.*, July 13, 1959 Assigned Criminal Term, of GUILFORD (High Point Division).

John W. Hinsdale and Thomas Turner for plaintiff, appellee.
Allen Langston and James B. Lovelace for defendant, appellants.

PER CURIAM. Defendants appeal from an order appointing a receiver.

The record of this appeal does not show an appeal from a prior order in this action. However, reference to our records shows that an appeal was taken from an order allowing plaintiff to amend her complaint when defendants' demurrer was sustained to the original complaint. That appeal, docketed as No. 598 at this term, was dismissed 3 November 1959.

The pendency of the appeal from an order allowing plaintiff to file an amended complaint did not deprive the Superior Court of jurisdiction to appoint a receiver based on allegations in the amended complaint. G.S. 1-294; *Scott v. Jordan*, 235 N.C. 244, 69 S.E. 2d 557.

The amended complaint alleges plaintiff, the owner of three partially furnished houses in High Point and an automobile, conveyed the houses and automobile to defendants, who took possession of the houses and furniture therein; the conveyance was procured by fraud and duress which is particularly described in the complaint. Plaintiff gave defendants notice that she would move for the appointment of a receiver to take possession of the property and collect the rents pending determination of the rights of the parties. She accompanied

her motion by her affidavit that defendants were insolvent.

The complaint, supplemented by plaintiff's affidavit, sufficed to support a finding that plaintiff had established an apparent right to the property, and if the property were left in defendants' possession plaintiff was in danger of losing the rents and profits. This sufficed to authorize the order appointing a receiver. G.S. 1-502; *Bank v. Waggoner,* 185 N.C. 297, 117 S.E. 6. Defendants were informed by the motion and notice that they could give bond as provided by G.S. 1-503. They did not seek the benefit of that statute.

Affirmed.

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 2 December, 1959.)

1. Appeal and Error § 53—

A petition to rehear addressed solely to the question which was argued and fully considered by the court on the former hearing will be dismissed.

PETITION by Charles M. Ivey, Jr., administrator of the estate of John W. Hadnot, to rehear this case, reported in 250 N.C. 89, 108 S. E. 2d 63.

McLendon, Brim, Holderness & Brooks; L. P. McLendon, Jr.; C. T. Leonard, Jr. for petitioner.

Smith, Moore, Smith, Schell & Hunter for respondent.

PER CURIAM. A petition to rehear was submitted to the Court in Conference by the Justices to whom it was referred. *Greene v. Lyles,* 187 N.C. 598, 122 S.E. 297.

The petition to rehear is based on the failure of the Court to apply the doctrine of *res ipsa loquitor* to the facts in the case. No other question is raised.

Under our decisions, the doctrine of *res ipsa loquitor* is not applicable in this case. *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411; *Pemberton v. Lewis,* 235 N.C. 188, 69 S.E. 2d 512; *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477; *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251.

"Generally, a defendant's negligence will not be presumed from the

mere happening of an accident, but, on the contrary, in the absence of evidence on the question, freedom from negligence will be presumed." *Etheridge v. Etheridge, supra; Williamson v. Randall,* 248 N.C. 20, 102 S.E. 2d 381.

The question as to whether or not the doctrine of *res ipsa loquitor* applied to the facts in this case having been argued by counsel for the appellant and fully considered by the Court on the former hearing, the Court will not disturb its judgment. *Weston v. Lumber Co.,* 168 N.C. 98, 83 S.E. 693.

The petition to rehear is therefore dismissed.

Petition dismissed.

STATE v. JAMES L. McKINNEY.

(Filed 2 December, 1959.)

APPEAL by defendant from *Crissman, J.,* February 24, 1959 Criminal Term, Greensboro Division of GUILFORD Superior Court.

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

J. Kenneth Lee for defendant, appellant.

PER CURIAM. On August 14, 1958, in a criminal prosecution in the Municipal-County Court of Greensboro, defendant was found guilty of the unlawful possession of whiskey for the purpose of sale; and a prison sentence of twelve months, imposed by the court's judgment, was suspended upon the condition, *inter alia,* that defendant "shall not have in his possession any type of alcoholic beverage unless prescribed by a physician for personal consumption for a period of Five (5) years." Later, the said municipal-county court and also Judge Crissman, after *de novo* hearing on defendant's appeal as provided by G.S. 15-200.1, found as a fact that defendant on November 22, 1958, violated said condition on which the prison sentence was suspended and ordered that defendant serve said prison sentence.

Defendant's appeal to this Court is without merit. The evidence heard by Judge Crissman was sufficient to support his findings of fact and these findings of fact are sufficient to support his judgment.

Affirmed.

STATE v. EUGENE TATE.

(Filed 2 December, 1959.)

APPEAL by defendant from *Crissman, J.*, 13 April 1959 Criminal Term, of GUILFORD, Greensboro Division.

Criminal prosecution on a bill of indictment charging the defendant in one count with the larceny of a sander of the value of $366.00, the property of Herman Adams; and in another count with receiving the said sander knowing it to have been stolen.

Plea: Not Guilty. Verdict: Guilty of larceny as charged in the bill of indictment.

From a judgment of imprisonment, defendant appeals.

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

Martin & Whitley for defendant, appellant.

PER CURIAM. All of defendant's assignments of error are to the charge of the court to the jury. The court's definition of the crime of larceny is in substantial accord with our decisions defining larceny. A careful reading of the charge in its entirety fails to show that the court implied or intimated an opinion in respect to the evidence. All of defendant's assignments of error have been carefully considered, and are overruled. Defendant has failed to show prejudicial error in the charge that would justify a new trial.

No error.

ALMA S. BROWN v. R. G. OWENS AND A. G. MANESS.

(Filed 2 December, 1959.)

1. Judgments § 25—

The procedure to attack a consent judgment on the ground that a party thereto did not in fact consent to the judgment as entered is by motion in the cause.

2. Judgments § 19—

Where a judgment is regular upon its face the procedure to attack it on the ground that it is in fact void is by motion in the cause.

3. Mortgages § 36—

G.S. 45-21.38 has no application to an unsecured note, with endorsers, given by the purchaser of land in addition to a cash payment obtained by the purchaser on a note executed to a third party and secured by a deed of trust.

APPEAL by plaintiff from *Phillips, J.*, April Term, 1959, of RANDOLPH, docketed in this Court as No. 525.

Plaintiff appeals from a judgment (1) sustaining defendants' demurrer *ore tenus* to complaint for failure to state facts sufficient to constitute a cause of action, (2) dissolving a temporary restraining order, and (3) dismissing the action.

This is an independent action, instituted February 11, 1959, to restrain proceedings under an execution issued January 15, 1959, to enforce payment, by the sale of plaintiff's property, of a judgment entered November 25, 1957, by Judge F. Donald Phillips, in a civil action instituted May 4, 1957, entitled "*R. G. Owens and A. G. Maness, Plaintiffs, v. Lonnie Voncannon and wife, Doris Voncannon, Leonard Voncannon and Alma S. Brown, Defendants,*" wherein it was adjudged "that the plaintiffs have and recover of the defendants, jointly and severally, the sum of Two Thousand Dollars," plus interest and costs.

An appeal from a judgment denying the motion of "defendant Alma S. Brown" in said separate civil action to set aside said judgment of November 25, 1957, entered therein, is docketed in this Court as No. 524; and the two appeals were argued together in this Court.

Attached to the complaint herein, and by reference made a part thereof, are copies of the complaint, answer and judgment of November 25, 1957, filed and entered in said separate civil action.

The allegations of the complaint herein, summarized or quoted, are set forth below.

Owens and Maness, defendants herein, contracted to sell to Lonnie Voncannon and wife, Doris Voncannon, for $11,800.00, described real property in Asheboro. During their negotiations, it was discovered that

$9,000.00 was the maximum amount the Voncannons could borrow on the property. In addition to a cash payment of $800.00 and the $9,000.00 to be borrowed on the property, defendants required that the Voncannons sign a $2,000.00 "side note," and procure the signatures of two endorsers, the said $2,000.00 note to be a "down payment" and "a portion of the purchase price." Defendants prepared the $2,000.00 note of October 15, 1956, payable to defendants "six months or 180 days after date." The $2,000.00 note was signed by the Voncannons. Plaintiff endorsed her name, "Alma S. Brown," on "the back side of the $2,000.00 note," "at the request of the Voncannons."

Defendants required the Voncannons to sign the $2,000.00 note, "as well as the plaintiff to endorse the note," for the purpose of evading, and as a fraudulent scheme to evade, "the North Carolina Deficiency Judgment Law as set forth in G.S. 45-21.38."

The property was conveyed to Lonnie Voncannon and wife, Doris Voncannon. The Voncannons made payment of the purchase price therefor in this manner: (1) $800.00 cash. (2) $9,000.00, borrowed by the Voncannons from the Equitable Life Assurance Society of the United States, the payment of which was secured by their deed of trust to G. E. Miller, Trustee, on the property. (3) Their $2,000.00 "side note," which plaintiff signed as endorser.

The separate action, instituted by Owens and Maness on May 4, 1957, to recover on said $2,000.00 note, was a fraud on the jurisdiction of the Superior Court of Randolph County in that the Superior Court of Randolph County had no jurisdiction of such action because recovery on said $2,000.00 note was precluded by G.S. 45-21.38.

An answer was filed in said separate action, "which answer constituted a general denial of the liability of Alma S. Brown on the $2,000.00 note." (This answer, as shown by copy attached to complaint herein, appears to have been filed in behalf of all defendants by Sam W. Miller, their attorney.)

The judgment of November 25, 1957, entered in said separate action by Judge Phillips, which purports to have been consented to by Sam W. Miller, as attorney for defendants, is void in that she (Alma S. Brown) did not at any time consult with Mr. Miller and did not give him authority to consent to a judgment against her.

On January 17, 1958, G. E. Miller, Trustee, sold the property under the power of sale in the deed of trust securing the indebtedness of the Voncannons to the Equitable Life Assurance Society of the United States. Owens and Maness became the last and highest bidder at $9,400.00. Owens assigned his interest in the bid to Maness. Upon com-

pletion of the foreclosure, the property was conveyed to Maness. Thereafter Maness sold the property for $9,900.00.

The execution issued January 15, 1959, to enforce payment of said purported judgment, is a part of the original scheme of Owens and Maness to evade G.S. 45-21.38.

Plaintiff assigns as error the entry of said judgment.

Don Davis and Ottway Burton for plaintiff, appellant.
Miller & Beck for defendants, appellees.

BOBBITT, J. Plaintiff may not attack by independent action the judgment of November 25, 1957, entered in said separate civil action, on the ground that its validity is dependent upon her consent and she did not consent thereto. The said judgment may be attacked on this ground only by motion in the cause.

"While it is a settled principle of law in this jurisdiction that a consent judgment cannot be modified or set aside without the consent of the parties thereto, except for fraud or mutual mistake, and the proper procedure to vacate such judgment is by an independent action; it is equally well settled that when a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause." *King v. King,* 225 N.C. 639, 35 S.E. 2d 893, and cases cited.

The said judgment of November 25, 1957, is regular on its face. If void in fact, plaintiff's remedy is by motion in the cause. *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311, and cases cited; *Henderson v. Henderson,* 232 N.C. 1, 10, 59 S.E. 2d 227.

Notice is taken of the fact that the $2,000.00 note, on which the judgment of November 25, 1957, was based, was not, according to plaintiff's allegations, secured by a balance purchase price mortgage or deed of trust. Hence, G.S. 45-21.38 has no application. *Brown v. Kirkpatrick,* 217 N.C. 486, 8 S.E. 2d 601. We perceive no reason why a seller of real estate may not require, in lieu of cash, that the purchaser assure payment of the deferred portion of the purchase price, in whole or in part, by giving a note therefor, with endorsers, rather than by giving a balance purchase price note, with mortgage or deed of trust on the property as security therefor.

Affirmed.

R. G. OWENS AND A. G. MANESS v. LONNIE VONCANNON AND WIFE, DORIS VONCANNON, LEONARD VONCANNON AND ALMA S. BROWN.

(Filed 16 December, 1959.)

1. Judgments § 8—

A judgment by consent is the agreement of the parties entered upon the record with the sanction of the court, and the power of the court to sign such judgment depends upon the unqualified consent of the parties thereto at that time.

2. Judgments § 25—

Where the agreement of the parties to a consent judgment is signed by the attorneys of record it is presumed valid and is not void upon its face, and the burden is upon the party attacking its validity to prove want of consent and that the attorney signing it for her had no authority to consent thereto in her behalf.

3. Same—

A party is bound by a consent judgment assented to by her duly authorized attorney, but if such party did not assent to the judgment and did not authorize the attorney either directly or through her agent to assent to the judgment in her behalf, the consent judgment is void as to her and she is entitled to have it set aside without showing a meritorious defense.

4. Judgments § 22—

If a consent judgment is set aside as to one of the defendants as being void as to her for want of authority of the attorney representing the other defendants to represent movant and file answer and consent to the judgment in her behalf, whether the court should permit such party to file answer after the expiration of the time prescribed is addressed to the discretion of the court, and it may properly consider whether such party's failure to file answer may be properly attributed to excusable neglect and whether she has a meritorious defense.

5. Appeal and Error § 49—

Where the findings of fact by the court are insufficient to support its order, or it is apparent that the facts were found under misapprehension of the pertinent principles of law, the cause must be remanded for further proceedings.

PARKER, J., concurring.

RODMAN, J., dissenting.

APPEAL by defendant Alma S. Brown from *Thompson, Special J.*, May Term, 1959, of RANDOLPH, docketed in this Court as No. 524.

This appeal is from a judgment denying appellant's motion of May 19, 1959, in which she prayed (1) that a judgment entered

herein on November 25, 1957, be vacated, (2) that proceedings under an execution issued January 15, 1959, to enforce payment of said judgment by the sale of her property, be stayed, (3) that the court order the clerk to accept and file an answer tendered in her behalf on March 10, 1959, and (4) that the cause be placed on the civil issue docket for trial.

An appeal from a judgment entered in the independent action entitled *"Alma S. Brown, Plaintiff, v. R. G. Owens and A. G. Maness, Defendants,"* is docketed in this Court as No. 525; and the two appeals were argued together in this Court.

Plaintiffs instituted this action May 4, 1957, to recover on a $2,000.00 promissory note dated October 15, 1956, payable to their order "six months or 180 days after date," allegedly executed by defendants Lonnie Voncannon and Doris Voncannon, as makers, and by defendants Leonard Voncannon and Alma S. Brown, as endorsers.

The summons and complaint were duly served on the defendants, including defendant Alma S. Brown, on May 4, 1957.

On June 3, 1957, the clerk granted the defendants (additional) twenty days in which to answer, demur or otherwise plead.

An answer, signed by Sam W. Miller, "Attorney for Defendants," and verified by defendant Lonnie Voncannon on June 24, 1957, purporting to be in behalf of all defendants, was filed. It was admitted therein "that the defendants Lonnie Voncannon and wife, Doris Voncannon, executed and delivered a promissory note to the plaintiffs." With reference to plaintiffs' specific allegation that the $2,000.00 promissory note was endorsed by defendants Leonard Voncannon and Alma S. Brown, the answer was in these words: "3. The defendants, not having full knowledge that the allegations of paragraph 3 are as alleged, therefore deny the same." Except as stated, there was a general denial of all essential allegations of the complaint.

On November 25, 1957, when the cause came on for trial before F. Donald Phillips, Judge presiding, judgment was entered "that the plaintiffs have and recover of the defendants, jointly and severally, the sum of Two Thousand Dollars," with interest and costs. The judgment recites: ". . . and it appearing to the Court that the defendants do not resist judgment in the matter, and, through counsel, agree that judgment may be entered as prayed for in the complaint." Sam W. Miller, "Attorney for Defendants," consented in writing to the entry of said judgment.

The factual allegations in appellant's verified motion of May 19, 1959, are, in substance, as set forth in the following numbered paragraphs.

1. Execution to enforce payment of said judgment was issued January 15, 1959. Appellant owns real and personal property subject to sale under execution and the Sheriff of Randolph County has taken steps to sell her property.

2. Appellant instituted an independant action against plaintiffs herein to enjoin proceedings under said execution; but at April Civil Term, 1959, a demurrer to her complaint therein was sustained and the temporary restraining order was dissolved. She appealed from the judgment entered in said independent action.

3. She did not retain Sam W. Miller, Attorney at Law, of Asheboro, North Carolina, to represent her. She has never consented that a judgment be taken against her.

4. On March 10, 1959, Don Davis, her attorney, tendered an answer in her behalf to the Clerk of the Superior Court of Randolph County for filing; but said clerk, because said judgment had been entered, refused to accept for filing said tendered answer. A copy of the verified answer so tendered is attached to her motion.

She averred that no valid judgment had been rendered against her.

The judgment denying appellant's said motion of May 19, 1959, is based on the findings of fact set forth therein, *viz.:*

"(a) This action was commenced upon the issuance of a summons which was served upon this moving defendant on May 4, 1957;

"(b) An answer was filed on her behalf by her counsel of record and she left the matter of defense up to her son-in-law Lonnie Voncannon, one of the defendants herein;

"(c) A judgment in said cause was duly entered on November 25, 1957, by his Honor F. Donald Phillips, Judge Presiding, and consented to by the defendant's attorney of record;

"(d) More than one year has elapsed from the entry of said judgment to the date of the notice and motion now before the Court;

"(e) The moving defendant has not established the existence of mistake, inadvertence, surprise or excusable neglect;

"(f) No meritorious defense to said cause exists in favor of the defendant."

Appellant excepted to findings of fact (b), (c), (e) and (f), and excepted to the judgment, and appealed.

Miller & Beck for plaintiffs, appellees.

Don Davis and Ottway Burton for defendant Alma S. Brown, appellant.

BOBBITT, J. There is no controversy as to what Sam W. Miller did as appellant's purported "attorney of record." Appellant's motion presented for determination these questions of fact: 1. Did she, directly or through Lonnie Voncannon, authorize Sam W. Miller to file answer in her behalf? 2. If so, did she, directly or through Lonnie Voncannon, authorize Mr. Miller to consent to the judgment of November 25, 1957? As to burden of proof, see *Gardiner v. May*, 172 N.C. 192, 89 S.E. 955. In our view, the determinative questions of fact are not sufficiently answered by the court's findings.

If appellant, directly or through Lonnie Voncannon, authorized Mr. Miller to file the answer of June 24, 1957, the case, as to appellant, was for trial on November 25, 1957, on the issues raised by the answer filed by Mr. Miller in her behalf. If, under these circumstances, she did not authorize Mr. Miller, directly or through Lonnie Voncannon, to consent to said judgment of November 25, 1957, the judgment, as to her, is *void*; and, if void, she was not required, as a prerequisite to having it set aside, to show that she had a meritorious defense.

"The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." *King v. King*, 225 N.C. 639, 641, 35 S.E. 2d 893. Moreover, when a purported consent judgment is void because the consent is by an attorney who has no authority to consent thereto, the party for whom the attorney purported to act is not required to show a meritorious defense in order to vacate such void judgment. *Bath v. Norman*, 226 N.C. 502, 505, 39 S.E. 2d 363, and cases cited.

True, a judgment bearing the consent of a party's attorney of record is not void on its face. Indeed, it is presumed to be valid; and the burden of proof is on the party who challenges its invalidity. *Gardiner v. May, supra.* But if and when, absent ratification by the party, the court finds as a fact that the attorney had no authority to consent thereto, the essential element upon which its validity depends is destroyed.

"A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court. (Citation) It is not a judicial determination of the rights of the parties and *does not purport to represent the judgment of the court,* but merely records the pre-existing agreement of the parties." (Our italics) *McRary v. McRary*, 228 N.C. 714, 719, 47 S.E. 2d 27, and cases cited. Whether plaintiffs were, on November 25, 1957, or are now, entitled

to judgment, is beside the point. The question is whether the judgment of November 25, 1957, is valid *as a consent judgment.*

If appellant did not, directly or through Lonnie Voncannon, authorize Mr. Miller to file the answer of June 24, 1957, no answer was filed or tendered in her behalf until March 10, 1959. In such case, absent her consent thereto, the judgment of November 25, 1957, as to her, is void; but, under these circumstances, the court, in determining whether in the exercise of its discretion it will permit appellant to file belatedly the answer tendered in her behalf on March 10, 1959, and thereby obviate plaintiffs' right to judgment by default, will take into consideration whether her failure to file answer within the time prescribed by statute (G.S. 1-89, G.S. 1-125) may be properly attributed to excusable neglect and whether she has a meritorious defense.

Of course, if appellant, directly or through Lonnie Voncannon, authorized Mr. Miller (1) to file answer in her behalf and (2) to consent to said judgment of November 25, 1957, appellant's motion to set aside the judgment of November 25, 1957, should be denied.

Where rulings are made under a misapprehension of the pertinent principles of law, the practice is to vacate such rulings and remand the cause for further proceedings. *Calaway v. Harris,* 229 N.C. 117, 47 S.E. 2d 796; *Youngblood v. Bright,* 243 N.C. 599, 91 S.E. 2d 559, and cases cited.

Because of the insufficiency of the findings of fact and the apparent misapprehension of the pertinent principles of law, the judgment, including all findings of fact set forth therein, is vacated; and the cause is remanded for hearing *de novo* on appellant's said motion in accordance with the legal principles stated herein.

Judgment vacated and cause remanded.

PARKER, J., concurring in the majority opinion. This is an appellate Court, and our duty is to review alleged errors of the trial court. *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488; Art. IV, Section 8, of the North Carolina Constitution.

"This Court cannot find the facts: it has no authority to do so. In such a case, it is the duty of the Superior Court to find the facts upon which its orders and judgments rest, and to set them forth in the record. This is necessary to the orderly course of procedure." *Bank v. Blossom,* 89 N.C. 341.

When the motion was heard by Judge Thompson, movent was the only witness: no other evidence was offered. Her testimony was to the effect that she never authorized Sam W. Miller to consent to the judgment entered against her.

A joint answer appears in the record filed in apt time by movent and the other defendants. Judge Thompson in his judgment finds as a fact that "an answer was filed on her (movent's) behalf by her counsel of record."

In my opinion, the basis of the decision in *Town of Bath v. Norman*, 226 N.C. 502, 39 S.E. 2d 363, is sound. A purported consent judgment by one having no authority is void, and a showing of merit as to the defense is not required to vacate a void judgment. " 'A void judgment is no judgment, and may always be treated as a nullity.' A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions." *Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283.

The lower court has not ruled on movent's motion and evidence that she never consented to the judgment entered against her. No matter how busy the Superior Court may be, due process and fair play require a ruling below on movent's contention that she never consented to the judgment entered against her, regardless of what the ultimate result may be.

In my opinion, the Judge below in deciding the motion acted under a misapprehension of the applicable law. Such being the case, the proceeding should be remanded to the Superior Court for further hearing. *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324; *S. v. Grundler*, 249 N.C. 399, 106 S.E. 2d 488.

RODMAN, J., dissenting: Since I am unable to agree with the conclusions reached by my brethren in this case, it is proper that I should briefly explain my reasons for dissenting.

The facts are stated in the opinion of the Court. Movant asserts the answer was filed by an impertinent intermeddler who had no authority to consent to a judgment. If the attorney who filed the answer was without authority to do so, plaintiffs were entitled to a default judgment. The mere fact that the court, instead of so denominating it, declared it a consent judgment under a mistake of facts, should not defeat plaintiffs' rights. If the answer was filed by an attorney authorized to answer for movant, he became her agent, and the mere fact, if as movant asserts, that he exceeded his authority does not render the judgment void. The act of an agent in making a contract beyond the authority given him by his principal is voidable, not void. A void contract is an absolute nullity and may be disregarded everywhere. It is not subject to ratification. A voidable contract, e.g., a contract made by an infant or incompetent, is subject to ratification and is binding if not vacated by affirmative action taken in due time. The distinction is at times, as here, im-

portant. At other times the distinction is not important and "void" is frequently used when "voidable" would be more appropriate. The distinction has been repeatedly recognized in decisions of this Court. See *McNeill v. R.R.*, 135 N.C. 682; *Millsaps v. Estes*, 137 N.C. 535; *Chandler v. Jones*, 172 N.C. 569, 90 S.E. 580; *Hogan v. Utter*, 175 N.C. 332, 95 S.E. 565; *Beeson v. Smith*, 149 N.C. 142; *Barger v. Finance Co.*, 221 N.C. 64, 18 S.E. 2d 826; *Reynolds v. Earley*, 241 N.C. 521, 85 S.E. 2d 904; 17 C.J.S., 331; 12 Am. Jur. 507.

Hall, J., more than a century ago, said in *Williams v. Woodhouse*, 14 N.C. 257: "Judgments are the solemn determinations of judges upon subjects submitted to them, and the proceedings are recorded for the purpose of perpetuating them. They are the foundations of legal repose." Substantially similar definitions have been given by this Court on numerous occasions. Before a judgment can be rendered, a court must have jurisdiction of the parties and the asserted cause of action. If either is lacking, the judgment is void. Where the court has jurisdiction of the parties and causes, it may be irregular—that is voidable, or erroneous. It is erroneous when the court acts upon a mistaken view of the law. It is irregular when entered contrary to the course and practice of the court because of some mistake of fact, as for instance, the capacity of the parties to assent to a contract. The distinction between void, voidable or irregular, and erroneous judgments has been repeatedly pointed out. *Carter v. Rountree*, 109 N.C. 29; *Finger v. Smith*, 191 N.C. 818, 133 S.E. 186.

If, as movant asserts, the attorney who filed the original answer was a mere officious intermeddler without authority to answer, the court had the power to render a default judgment. The fact that, instead of so denominating it, it is named a consent judgment, should not, standing alone, suffice to impair its validity. If the attorney was authorized to answer but not authorized to consent, the judgment was voidable because entered under mistake of fact. In either event, a meritorious defense ought to be shown as a condition to vacating the judgment. It is said in Freeman on Judgments, 5th ed., vol. 3, p. 2762: "In support of an application to open a judgment there must be a sufficient showing by affidavit or other appropriate method, of a meritorious defense, unless the judgment is wholly void for lack of jurisdiction."

Hoke, J., later *C. J.*, said in *Gough v. Bell*, 180 N.C. 268, 104 S.E. 535: ". . . it has been held with us in numerous decisions that, in order to (obtain) such relief in case of judgments *voidable for irregularity* it is incumbent on defendant that he should move with

reasonable promptness and make a reasonably probable show of merits." (Emphasis supplied.)

The cases in our reports requiring showing of merit to vacate judgment rendered under a misapprehension of fact are multitudinous. The following are illustrative: *Jeffries v. Aaron,* 120 N.C. 167; *LeDuc v. Slocomb,* 124 N.C. 347; *Stockton v. Mining Co.,* 144 N.C. 595; *Minton v. Hughes,* 158 N.C. 587, 73 S.E. 810; *Miller v. Curl,* 162 N.C. 1, 77 S.E. 952; *Hyatt v. Clark,* 169 N.C. 178, 85 S.E. 389; *Chemical Co. v. Bass,* 175 N.C. 426, 95 S.E. 766; *Cahoon v. Brinkley,* 176 N.C. 5, 96 S.E. 650. The rule requiring a meritorious defense as condition for vacating a judgment rendered by mistake is but an illustration of the rule so frequently applied that harmless error is not sufficient to destroy a judgment.

I recognize that it was said in *Town of Bath v. Norman,* 226 N.C. 502, 39 S.E. 2d 363, that a consent judgment was void in the absence of consent and hence a meritorious defense was not necessary. Without questioning the correctness of the ultimate result of that case, I do not think it is predicated on a sound foundation, namely that meritorious defense is not necessary where the judgment is voidable rather than void.

In the companion case of *Brown v. Owens,* we hold that plaintiff has no meritorious defense. Why then should the time of the Superior Court, so badly needed for the trial of other cases, be taken to hear a cause when the ultimate result will not vary from the judgment which has been rendered? Plaintiffs are entitled to the judgment. They should not be deprived of their rights nor should the court be toyed with.

WILLIAM A. TILLIS, SR. v. CALVINE COTTON MILLS, INC., A CORPORATION, AND LEON SALKIND, AND CALVINE COTTON MILLS, INC., A CORPORATION, v. WILLIAM A. TILLIS, SR.

(Filed 16 December, 1959.)

1. Contracts § 21—

Each party to an executory contract impliedly promises not to do anything to prejudice the other in the performance of his part of the agreement and where one party does an act which makes performance on the part of the other party impossible, such other party may treat such renunciation as a breach and sue for his damages at once, provided the renunciation covers the entire contract.

2. Contracts § 27—

Evidence tending to show the existence of a contract between the parties and that defendant performed an act rendering it impossible for plaintiff to perform his part of the agreement repels nonsuit, since such act constitutes a breach of the contract by defendant entitling plaintiff to nominal damages at least.

3. Contracts §§ 24 and 27—

Where plaintiff brings action on a contract against two defendants but nonsuit is allowed as to one of them upon plaintiff's evidence tending to show that the agreement was made with the other alone, nonsuit as to such other defendant on the ground of variance is properly denied, since the joinder of the unnecessary party in no way affects the proof of the cause of action against the other.

4. Abatement and Revival § 8—

Where a contract carrier brings an action for damages for the loss of profits resulting from the shipper's breach of a contract for carriage of goods by wrongfully seizing plaintiff's vehicle in claim and delivery, nonsuit should be entered upon his counterclaim thereafter filed in the claim and delivery setting up the identical grounds for damage, the pendency of the prior independent action having been pleaded by reply in the claim and delivery proceedings.

5. Claim and Delivery § 5—

If the jury should determine that plaintiff's seizure of the chattel in claim and delivery was wrongful, but the return of the chattel is impossible, the deterioration of the chattel while in plaintiff's possession is not an element of damages, but the measure of damages for the wrongful taking is the value of the chattel at the time it was seized by the sheriff, with interest. G.S. 1-230, G.S. 1-475.

6. Contracts § 29—

In order to recover substantial damages for breach of an executory contract, plaintiff must offer evidence tending to show with reasonable certainty not only the amount of damages but also that the items of

damage claimed naturally resulted from the breach of the contract and were within the contemplation of the parties at the time the contract was executed.

7. Same—

Ordinarily the measure of damages for breach by the shipper of an executory contract for the carriage of goods is the revenue the carrier would have received for the services less the cost and expenses of transportation.

8. Same: Evidence § 35—

In an action by a contract carrier to recover for the breach by the shipper of an executory contract for the carriage of goods, it is error to permit the plaintiff to testify as to what net profit he would have realized from the contract in the absence of evidence as to the cost and expenses involved in the hauling of the goods, including wages, repair costs, fuel, taxes, insurance, etc., since in the absence of evidence of the predicate facts plaintiff's testimony as to the amount of profits of which he was deprived amounts to no more than a mere guess or opinion.

9. Trial § 31b—

It is not sufficient for the court to state merely the general law applicable to the controversy but it is required that the court apply the law to the various factual situations adduced by the evidence.

10. Contracts § 29—

In an action to recover damages for a breach of an executory contract, it is not sufficient for the court to state the general rule that plaintiff is entitled to recover such damages as fairly and naturally arise as a result of the breach which were in the contemplation of the parties at the time of the execution of the contract, but the court should instruct the jury with particularity as to what is to be considered in arriving at the probable net profit of which plaintiff was deprived as a result of defendant's breach of the agreement.

11. Same—

In an action to recover loss of profits arising from the breach by the shipper of an executory contract for the carriage of goods, not only should all items of expense which would necessarily arise in the performance of the contracts by the carrier be deducted from the contract price, but also, where the contract contemplates that plaintiff carrier himself would devote his full time in performing the agreement, the earnings by plaintiff in other employment during the contract period should be deducted.

12. Evidence §§ 15, 58— Evidence having sole purpose of inciting prejudice or sympathy is incompetent.

In this action against a corporation for breach of an executory contract there was no allegation of fraudulent conveyance of property by

the corporation. *Held:* The cross-examination of the president of defendant corporation to establish that he was an officer and stockholder of the defendant corporation suffices for the purpose of showing his interest and bias, and the action of the court in permitting the further cross-examination of the witness in regard to the subsequent merger of the defendant corporation with another corporation and the interest of the witness in other corporations elsewhere, tending to suggest wrongdoing on the part of the corporation and the president, is error, since such matter is wholly irrelevant and its only effect was to excite prejudice against defendant or sympathy for plaintiff.

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

APPEAL by Calvine Cotton Mills, Inc., from *Froneberger, J.*, November 3, 1958 Term, of MECKLENBURG.

There are two cases involved on this appeal.

Calvine Cotton Mills, Inc., (hereinafter called "Calvine") instituted an action against William A. Tillis, Sr. (hereinafter referred to as "Tillis") on 30 March 1950. Summons and claim and delivery proceedings were issued and duly served. Thereafter Calvine filed complaint and alleged that it was the owner of a tractor-trailer combination, Tillis had wrongfully taken possession thereof and had converted same to his own use. Tillis previously had been employed by Calvine and while so employed had caused repairs to be made to the tractor-trailer in the amount of $1837.48 without authority and against Calvine's orders and Calvine had been required to pay for these repairs. Calvine asked for possession of the tractor-trailer and judgment against Tillis in the amount of $1837.48. The sheriff took the tractor-trailer from Tillis and delivered it to Calvine when Tillis failed to make bond for retention thereof.

Before answering the complaint in the claim and delivery suit, Tillis filed an independent action against Calvine and Leon Salkind, president of Calvine. Summons was issued 26 April 1950 and duly served. Tillis alleged in his complaint, in substance, that Calvine was engaged at a plant in Charlotte, N. C., in the manufacture of textile products which were shipped north and there marketed; that Salkind and Calvine's stockholders owned mills in Connecticut which shipped some of their products south; Tillis, under a prior agreement, had conveyed to Calvine and Salkind a tractor-trailer (the same one involved in Calvine's claim and delivery suit); on 28 March 1950, Tillis entered into a contract with Calvine and Salkind whereby the tractor-trailer was to be reconveyed to Tillis and Tillis was to haul by motor truck the entire output of Calvine Mills to the mills in Connecticut and the part of the output of the mills in Connecticut which was to be shipped south, at the rates published

by the Interstate Commerce Commission; from the freight thus received Tillis was to repay Calvine an indebtedness of $8,646.00, at the rate of 30 cents per hundred weight of goods hauled; the contract was to continue in force for one year or until full repayment of the indebtedness was made if more than a year was required therefor; the tractor-trailer was conveyed to Tillis pursuant to the contract; Tillis prepared for a trip north and drove the tractor-trailer to the Charlotte plant ready to load for the first trip; it was then demanded for the first time that Tillis give a chattel mortgage on the equipment to secure the debt he owned Calvine—this being no part of the original agreement; Tillis countered with a proposal that the entire contract be put in writing and this was refused; Calvine and Salkind then repudiated the contract, declined to permit Tillis to perform his agreement and caused the equipment to be seized by claim and delivery; Tillis would have made a net profit of $30,260.08 under the contract and he was at all times ready, able and willing to carry out the contract on his part. Tillis prayed for $30,260.08 actual damages and $10,000.00 punitive damages.

Tillis also filed answer to Calvine's complaint in the claim and delivery action, denied the material allegations thereof and pleaded as a counterclaim the breach of the contract in substantially the same language as in the separate action referred to in the preceding paragraph. He alleged in the counterclaim that he had been damaged $1,000.00 per month because of seizure of the tractor-trailer and $200.00 per month for "deterioration in the use of the tractor and trailer" and that he was "being damaged in the amount of not less than $1200.00 per month by reason of the wrongful conduct on the part of the plaintiff (Calvine) in breaching the contract as aforesaid by wrongfully taking possession of defendant's property and by converting them to its own use."

Calvine and Salkind answered the complaint in Tillis' action and denied the material allegations. Calvine replied to Tillis' counterclaim and asked for dismissal thereof on the ground that it stated the same cause of action as that contained in Tillis' independent action.

The two cases were consolidated for trial. Tillis and Calvine offered evidence. The court nonsuited the Tillis action as to the defendant Leon Salkind. In Calvine's suit the jury, upon the issues submitted, found that Calvine was not the owner of the tractor-trailer and had wrongfully seized it and awarded damages of $4000.-00 to Tillis. In the Tillis suit the jury, upon the issues submitted, found that the contract had been made as alleged, it was breached

by Calvine, and Tillis is entitled to recover $20,000.00 for the breach.

From judgments, conforming to the verdicts, Calvine appealed and assigned errors.

Clayton & London for Calvine Cotton Mills, Inc., appellant.

Carswell & Justice and Richard E. Thigpen, Jr., for William A. Tillis, Sr., appellee.

MOORE, J. This is the fourth time this case has been here. See *Tillis v. Cotton Mills,* 236 N.C. 533, 73 S.E. 2d 296; *Tillis v. Cotton Mills,* 238 N.C. 124, 76 S.E. 2d 376; and *Tillis v. Cotton Mills,* 244 N.C. 587, 94 S.E. 2d 600.

At the close of the evidence Calvine moved for judgment of involuntary nonsuit. The court properly overruled the motion. Parties to an executory contract for the performance of some act or services in the future impliedly promise not to do anything to the prejudice of the other inconsistent with their contractual relations and, if one party to the contract renounces it, the other may treat renunciation as a breach and sue for his damages at once, provided the renunciation covers the entire performance to which the contract binds the promisor. *Pappas v. Crist,* 223 N.C. 265, 268, 25 S.E. 2d 850; *Edwards v. Proctor; Proctor v. Edwards,* 173 N.C. 41, 43-44, 91 S.E. 584. Tillis gave testimony of a contract, breach thereof, and damages. "In a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least." *Bowen v. Bank,* 209 N.C. 140, 144, 183 S.E. 266.

Calvine contends that Tillis alleged a contract with Salkind and Calvine, testimony at the trial showed only a contract with Calvine and this is a fatal variance that justifies nonsuit. We have carefully examined the cases cited by appellant in support of this proposition. They correctly state the law with respect to the factual situations therein presented but are not germane to the case at hand. In the case at bar, if there had in fact been a contract in which Calvine and Salkind were jointly bound, Tillis might at his option have sued both or only one. G.S. 1-72. "Under statutory provisions . . . authorizing actions to be brought against any one or more of the parties to a joint contract, proof of a several contract is not fatal, although a joint contract is alleged." 17 C.J.S., Contracts, section 576, p. 1214. Under the facts in the case *sub judice* the existence of Salkind as a party is not essential to any material element of the entire contract between Calvine and Tillis. Therefore, the variance complained of is not ground for nonsuit.

There was also motion for nonsuit of the counterclaim of Tillis in the claim and delivery action. The court was in error in overruling this motion. The counterclaim is bottomed upon the breach of the hauling contract. It alleges as completely the breach of the contract as does the independent suit. And it states in part that Tillis was "damaged in the amount of not less than $1200.00 per month by reason of the wrongful conduct on the part of the plaintiff (Calvine) in breaching the contract . . ." The counterclaim is in every particular the same suit as the independent action theretofore filed by Tillis to recover for breach of contract. Calvine's reply properly alleged that a suit was pending on the same cause of action. The court should have dismissed the counterclaim. McIntosh, North Carolina Practice and Procedure, 2d Ed., section 236 (4), Vol. 1, p. 671.

Even if the counterclaim could be construed as a cause of action for damages for deprivation of the use of the tractor-trailer, the result is the same. There is no evidence as to damages in this respect other than the evidence relating to the breach of the contract. Furthermore, Tillis may not recover damages for breach of the contract involving the use of the equipment and at the same time recover damages for being deprived of its use in other connections. To permit him to do so would constitute double damages since, in the contract upon which he relies, the constant use of the tractor-trailer was contemplated in the hauling for Calvine.

It is true that Tillis alleged in his counterclaim that he was damaged in the sum of $200.00 per month for "deterioration in the use of the tractor-trailer." Upon the facts in this case deterioration in use by Calvine is not an element of damages. The tractor-trailer cannot be returned. If upon a new trial it should be determined by the jury that Calvine was not the owner and was not entitled to the possession of the equipment, the measure of damages for the wrongful taking is the value of the tractor-trailer at the time it was seized by the sheriff, with interest. G.S. 1-230 and G.S. 1-475. *Credit Corp. v. Saunders,* 235 N.C. 369, 371, 70 S.E. 2d 176; *C. I. T. Corporation v. Watkins,* 208 N.C. 448, 450, 181 S.E. 270. Attention is directed to the evidence in the case at bar that the tractor-trailer was sold under foreclosure by a mortgagee thereof to satisfy a debt due by Tillis. If true, judgment in favor of Tillis in this action should be reduced by the amount of the mortgage indebtedness, not to exceed the amount for which the equipment sold at the foreclosure sale. This is true for the reason that Tillis has had the benefit thereof in discharge of or as a credit on the indebtedness due by him to the mortgagee. The determination of the facts here discussed is, of course, for the jury. If Tillis is so advised, he may move to amend

his answer in the claim and delivery suit so as to make proper allegations with reference to matters discussed in this paragraph.

While Tillis was testifying in his own behalf, his counsel propounded to him the following hypothetical question:

"Q. Now, based on your experience in the business of hauling goods in your own equipment, do you have an opinion satisfactory to yourself as to what net profits you would have made from your contract with Calvine Cotton Mills to haul from 85,000 to 90,000 pounds of unfinished cotton goods from Charlotte to Niantic, Connecticut, per week and return trips of 20,000 pounds each trip for these three trips a week that you would make up there, of finished cotton goods going to West Virginia, Kentucky and North and South Carolina on your return trip to Charlotte, had you been allowed to perform that contract for the period of a year?"

Calvine objected and the court overruled the objection. This is the basis of Calvine's twelfth assignment of error. Tillis answered: "Yes, from $30,000 to $31,000 a year." The court erred in overruling the objection.

In connection with the twelfth assignment of error, we also consider and discuss the seventy-fourth assignment. This relates to the court's instruction to the jury with reference to damages and the measure of damages in this case. The court instructed the jury as follows: "When two parties have made a contract, which one of them has broken, the damage which the other party is entitled to receive in respect to such breach of contract should be such sum as may fairly and reasonably be considered either arising naturally, that is according to your account of things, from such breach of contract, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it." As a general statement of law, the instruction is correct. This was the only rule given for the direction of the jury on the question of damages. Its fault lies in its inadequacy as a specific guide for the jury in considering the evidence at the trial. It is necessary that the court state the law arising on the various phases of the evidence. *Wilson v. Wilson*, 190 N.C. 819, 821, 130 S.E. 834.

"The general rule is that a party to a contract, who has been injured by the breach, is entitled as compensation therefor to be placed, in so far as this can be done by money, in the same position he would have occupied if the contract had been performed, and where the breach of contract consists in preventing its performance, the party injured, on proper proof, may recover the profits he would have realized had the contract not been breached.

" 'The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed.' *Machine Co. v. Tobacco Co.*, 141 N.C. 284, 53 S.E. 885." *Chesson v. Container Co.*, 215 N.C. 112, 115, 1 S.E. 2d 357.

Where the action is for gains prevented by breach of contract, the plaintiff must show by the greater weight of the evidence that he was ready, willing and able to perform on his part and if he fails to do so, he may not recover substantial damages but may recover only nominal damages. *Baird v. Ball*, 204 N.C. 469, 168 S.E. 667 (headnote). For the breach of an executory contract plaintiff may recover only such substantial damages as can be ascertained and measured with reasonable certainty. *Perkins v. Langdon*, 237 N.C. 159, 171, 74 S.E. 2d 634. ". . . (D)amages must be certain, and this certainty which is required does not refer solely to their amount, but also to the question whether they will result at all from the breach." *Machine Co. v. Tobacco Co.*, 141 N.C. 284, 290, 53 S.E. 885. Absolute certainty is not required, but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion. *Unruh v. Smith* (Cal. 1954), 267 P. 2d 52. Ordinarily the measure of damages for breach of an executory contract for transporting goods, where the breach prevents plaintiff from hauling the goods, is the revenue plaintiff would have received for the services less the costs and expenses of transporting the goods.

If any of the factors involved in revenue and costs are estimated, the estimates must be based on facts. *Goforth v. Smith*, (Okla. 1952), 244 P. 2d 304. A witness will not be permitted to give a mere guess or opinion, unsupported by facts, as to the amount of damages arising upon a breach of contract. The amount of damages is the ultimate issue to be determined by the jury. It is incumbent upon the plaintiff to present facts, as to all reasonable factors involved, that the jury may have a basis for determining damages. *Rankin v. Helms*, 244 N.C. 532, 94 S.E. 2d 651; *Norwood v. Carter*, 242 N.C. 152, 87 S.E. 2d 2.

In the *Rankin* case, *supra*, plaintiff sued defendant contractor for damages for breach of contract in construction of a residence and alleged that the construction was not completed and some of the

work had not been done according to contract. Plaintiff was permitted to testify that defendant was indebted to him in a specified amount without having offered evidence of the cost of completing the building and without factual basis for the testimony. The Court said: "It is manifest that plaintiff's answer . . . is, if not a mere guess, a statement of his mere opinion or conclusion as to the amount of damages he has suffered, where no proper basis for the receipt of such evidence has been shown." In the *Norwood* case, *supra,* plaintiff, a widow, sued defendant for breach of his contract to provide for her needs during the rest of her life. She had conveyed a tract of land to defendant in return for his promise to so provide for her. Defendant had breached the contract. Referring to damages the Court said, quoting from 25 C.J.S., 496: "However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they can be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered."

We assume that some factual basis was laid for determining the total revenue which might have been reasonably expected under the contract in the instant case, though the freight rates, the routing and destination of goods to be hauled on the trips south are somewhat *nebulous.* According to the evidence, plaintiff had one tractor-trailer combination which could make one and one-half trips per week. Another would be required. He relied on Kilgo Transfer Co., Inc., a common carrier of freight by truck, to furnish the additional equipment and drivers. Would Kilgo share profits with Tillis as to this extra service? This question is unanswered. There is no evidence as to the costs and expenses involved in the hauling of the goods. In order to arrive at a reasonable conclusion, the jury must hear facts with reference to the cost of wages, equipment repair, reserve for equipment replacement, gasoline, oil, greasing and servicing equipment, the charge to be paid for the use of I. C. C. rights of regular carriers through which Tillis must have operated, license and property taxes, tolls, social security taxes, cargo and liability insurance, workmen's compensation insurance and other similar costs. Besides, the 30 cent per hundred weight to be deducted for discharge of Tillis' indebtedness to Calvine must either be added to costs or subtracted from revenue.

There is another matter related to damages which must be considered. The case was tried on the theory that Tillis would devote his time as a driver. He is required by law to exercise reasonable diligence to

minimize damages. *Chesson v. Container Co., supra,* at page 114. He testified that he was and remained employed during the year following the breach of the contract. His earnings during this period should be deducted from any damages which might be recovered by him in this action.

The matters discussed in the five preceding paragraphs were not adequately explained to the jury either in giving the contentions or in applying the law to the evidence. G.S. 1-180. The hypothetical question was inadmissible for no proper factual basis had been laid therefor.

Since there must be a new trial, we advert to one final matter involved on appeal. Over the objection of Calvine, counsel for Tillis was permitted to question Salkind at great length concerning the merger of Calvine Cotton Mills, Inc., with another corporation, the interest of Salkind in Calvine and the resultant corporation, the names of the stockholders in the resultant corporation, the present stockholders, what interest Calvine had in corporations in Connecticut and elsewhere and many other similar matters. In addition, the court, over objection of Calvine, permitted counsel for Tillis to argue these matters at length to the jury and to make statements, such as: "Now there is more confusion about these companies than anything I have ever heard in my life. . . . They have testified, Mr. Salkind, about Calvine Mills and Calvine Cotton Mills, and Smitherman Mills and Marshall Mills and Botany, which is a conglomeration that would take a Philadelphia lawyer to figure out and it would take more than nine years. . . . What was the purpose of picking up everything that a mill had after it was sued and moving it over to another mill and issuing the same kind of stock that they had in that mill? Why was that necessary? What was the purpose of it? What were they doing it for? That is something in a thousand languages." The evidence adduced by the interrogations referred to and the argument of counsel were not pertinent to the issues in these cases and were prejudicial. ". . . (I)f the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial . . ." Stansbury, North Carolina Evidence, sec. 80, p. 143; *Shepherd v. Lumber Co.*, 166 N.C. 130, 81 S.E. 1064.

Tillis contends that the evidence in question was competent to show the interest and bias of Salkind. Proof that he was president and stockholder of Calvine would have sufficed for this purpose. There was no allegation of fraudulent conveyance of property to defeat creditors. Yet the line of questioning suggests strongly some wrongdoing on the

part of Calvine and Salkind and is calculated to deprive them of a fair and impartial trial.

As to both cases there must be a

New trial.

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

MARY JANE WALTERS, EXECUTRIX OF THE ESTATE OF LOU W. WINSTEAD, AND MARY JANE WALTERS, INDIVIDUALLY, v. BAPTIST CHILDREN'S HOME OF NORTH CAROLINA, INC., A. M. BURNS, JR., L. C. BRADSHER AND FRANK HOWARD, TRUSTEES OF ROXBORO BAPTIST CHURCH; RUTH STEPHENS, MARY ALLISON LATHAM, LOUISE BARNETTE PENRY, MAMIE LOVE BARNETTE, MARGARET DUNCAN, GERTRUDE DUNCAN AND EXIE DUNCAN.

(Filed 16 December, 1959.)

1. **Wills § 17—**

Exclusive original jurisdiction of proceedings for probate of wills is in the Clerk of the Superior Court and the probate of instruments in common form by the clerk is conclusive evidence of the validity thereof as a will until vacated on appeal or declared void by a competent tribunal in a proceeding instituted for that purpose. G.S. 31-32, *et seq.*

2. **Same: Declaratory Judgment Act § 1—**

The Superior Court has jurisdiction of a proceeding under the Declaratory Judgment Act to construe a duly probated will but the validity of the probated instruments as constituting a will may not be collaterally raised therein, and the Superior Court is without jurisdiction to permit a party to amend his pleadings in the action under the Declaratory Judgment Act for the purpose of bringing in issue the validity of the probate of one of the instruments, and the Supreme Court will take notice of such want of jurisdiction *ex mero motu*. G.S. 1-253, G.S. 1-254.

3. **Wills § 33a—**

The will in question devised and bequeathed all of testatrix's property to testatrix's sister. By codicil testatrix expressed her desire that particular beneficiaries should have particular items of personalty but added that she wanted her sister to do as she wished with everything as long as she lived, and by a second codicil stated that she was leaving all of her property to her sister "to do as you please with it". *Held:* The general bequest of the personalty with power of disposition transfers the property absolutely, and any contrary provisions will be disregarded as repugnant to the absolute bequest. G.S. 31-38.

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

WALTERS *v.* CHILDREN'S HOME.

APPEAL by defendant Baptist Children's Home from *Hobgood, J.*, in Chambers at ROXBORO, N. C., 21 August 1959, judgment dated 1 September 1959.

Civil action instituted by plaintiff executrix of Lou W. Winstead, under Uniform Declaratory Judgment Act, Article 26 of Chapter 1 of General Statutes, G.S. 1-253, *et seq*, for the purpose of obtaining from the court instruction with reference to certain questions that have arisen concerning the disposition of the estate of Lou W. Winstead, and thereunto relating, the agreed statement of case on appeal, recited the allegations of the verified complaint as follows:

"1. That Lou W. Winstead, late of the county of Person, died on the 27th day of January, 1959, leaving among her valuable papers and effects and in her handwriting a last will and testament which has been duly probated in this court in the office of the Clerk of the Superior Court in Will Book 23 at pages 227-230.

"2. That Mary Jane Walters, having qualified and being appointed by this court as executrix of the said Lou W. Winstead, letters testamentary were issued to her on the 10th day of March, 1959, and that she is now acting as such executrix.

"3. That the sole devisees and legatees of the said will of the said Lou W. Winstead are: (1) Mills Home Orphanage, Thomasville, N. C.," and others (naming them).

"4. That the said will is as follows: 'Roxboro, N. C. Person County. Apr. 30th 1948. I, Lou W. Winstead of the aforesaid County and State being of sound mind and knowing the uncertainty of life and the certainty of death, do make publish and declare this my last will and testament. 1st— I bequeath to my beloved sister Mary Jane Walters all my property, personal and real estate — my rings, bonds, bank stock— (Everything I Have). 2nd— I hereby name my beloved sister Mary Jane Walters the Executrix of this Will with the request she will not be required to give bond to execute it. I, the said Lou W. Winstead do hereby set my hand and seal. This the 30th day of April, 1948. Lou W. Winstead (Seal) Witness D. S. Brooks Witness Hazel Long— Reuben C. Bowes.' That as to the language of the said will, its purport and intent, no question arises.

"5. That among the valuable papers and effects of the said Lou W. Winstead, and in her handwriting, there was found and duly probated a codicil to the last will and testament of Lou W. Winstead, executed by the said Lou W. Winstead on the 17th day of July, 1953, said codicil being as follows:

"I, Lou W. Winstead make this as a Codicil to my will made on April 30, 1948. In that will, I willed *all* my possessions to my sister Mary Jane Walters with the wish she was to administer without bond.

If she for any reason should not be able to execute said will, I wish The Peoples Bank of Roxboro, N. C. to execute the said will and this Codicil.

"I want my diamond ring if still in the possession of my sister, Mary Jane Walters, to go to my niece Mamie Love Barnett, the family antique rocker to my niece, Mary Allison Latham, and my silver spoons. I want Louise Barnett Penry, my niece to have my silver forks and knives. My set of china with gold band to go to my nieces, the three daughters of Mrs. W. A. Duncan (deceased); Two Hundred and Fifty Dollars worth of my Peoples Bank stock to Mrs. Ruth Stephens and $250.00 worth to Roxboro Baptist Church for building fund if needed — if not to go to Missions through the church. If there are other things in the house my nieces would like to have, I would like them to be disposed of under the supervision of Mamie Love Barnett, if she will do it. The rest of my property, real estate and personal I wish sold and proceeds to go to Mills Home Orphanage at Thomasville, N. C., this being the codicil of my will written on Apr. 30. 1948. Signed—Lou W. Winstead Witness—This date, July 17, 1953.

" 'I, Lou W. Winstead realize my sister Mary Jane Walters and I might be killed in an automobile accident or for other reasons she might not be able to execute will—that is why I wrote this. I want her to do just as she wishes with every thing as long as she lives, and I realize conditions change so as to the living nieces. Signed—Lou W. Winstead. Witness: Mrs. Mary V. Millican—Reuben C. Bowes—Anne Yarborough . . .'

"That as to the entire codicil set out above, the following question arises: Does the said codicil modify the said will executed by the said Lou W. Winstead on April 30, 1948, in any respect, since it provides only for an alternative disposition of the estate of Lou W. Winstead and alternative appointment of another executor in the event of the death or incapacity of her sister, Mary Jane Walters, neither event having occurred?

"6. That in addition to said will and codicil there was found among the valuable papers and effects of the said Lou W. Winstead after her death a paper writing in her handwriting which was duly probated as a further codicil to said will as follows:

" '1957. Dear Sister — Singular to me on the exact date of Jan. 27 last year, I wrote a note like this so by accident I opened this on Jan. 27, 1957. The first of these notes I wrote in 1941 to you, but they need changes as the years go by. Right now the Wagstaff Place—(Cersel Watkins tenant) and the Semora farm—Pool tenant, would go back to J. J. Winstead's brothers and sisters heirs. All the ¼ crops on these two farms would be yours for 1957. No debt on any of

them now. If Eugene Winstead is living he can be notified and he can appoint some one to take charge of that, but you get 1957 crop. John's heirs will owe my estate the accumulated commissions, the amt. is at the courthouse to yr. 1956. That will come out of the sale of the estate of heirs. I don't want a steel casket unless you will feel better about it. I want you to administer on my estate without bond, as is stated in my will. I leave you all I have to do as you please with it. That will please my *spirit*. I have 3 insurance policys. You can find them in my box. Two are accidental policys—the other is hospital policy. I write this hoping it will make it a little easier for you. I am not sad but not well. This asthma and tightness in my chest—I am so conscious of the latter. A heart of love as I have always had for you, my twin. Sister. Jan. 27, 1957.'

"That said paper writing contains, among other sentences reaffirming the dispositive intent of said will of April 30, 1948, the following sentence: 'I leave you all I have to do as you please with it.'

"That as to the quoted sentence the following question has arisen:

"Does the sentence, 'I leave you all I have to do as you please with it,' only reaffirm the testamentary intent of the will dated April 30, 1948, or does it in itself constitute a will, bequeathing and devising the entire estate of Lou W. Winstead to her sister Mary Jane Walters?

"7. That all of the defendants are of full age and *sui juris*."

Upon these allegations "the plaintiff Mary Jane Walters, executrix of the estate of Lou W. Winstead, respectfully prays the court for a declaratory judgment and proper instruction upon the following two questions: 1. Upon the question raised by the said will and codicil, that is to say, whether Mary Jane Walters is the sole and absolute owner of the estate of Lou W. Winstead. 2. Upon such other questions, matters and things as any of the defendants by their several answers may pray the court to decide."

And in answer thereto the Baptist Children's Homes of North Carolina, Inc., admit each and every paragraph of the complaint, but as to paragraph six this qualification is added (by amendment after judgment as later shown) "in so far as it conforms to the record."

And thereupon the record shows that "the Baptist Children's Homes of North Carolina, Incorporated, prays the court: (1) That the will and codicils of the said Lou W. Winstead be construed in the manner prescribed by law, and its rights, if any, in the estate of the testatrix, be determined and appropriately decreed; and (2) For such other and further relief as it may show itself entitled to upon the whole cause." (Signed and verified)

And the record shows judgment reading as follows: "This cause coming on to be heard, and being heard before his Honor Hamilton

H. Hobgood, Resident Judge of the Ninth Judicial District, by consent of counsel, on the 21st day of August, 1959, in Chambers in the courthouse in Roxboro, North Carolina, upon the pleadings filed in this action, and it appearing to the court that no issue of fact is raised by the pleadings; that all parties having any interest in the controversy are *sui juris* and properly before the court; that this action is properly constituted under the Uniform Declaratory Judgment Act; that the judgment entered herein will terminate the uncertainty and controversy giving rise to this proceeding; and that the sole question presented to the court for decision is the question of law as to whether the last will and testament of Lou W. Winstead devises and bequeaths the entire estate of Lou W. Winstead to Mary Jane Walters in fee simple absolute, the said last will and testament of Lou W. Winstead being constituted by the three paper writings set out as follows:

"Item One: A paper writing dated the 30th day of April, 1948, to wit:" (The same as hereinabove set forth in paragraph 4 of the complaint).

"Item Two: A paper writing dated July 17, 1953, to wit:" (The same as hereinabove set forth in paragraph 5 of the complaint.)

"Item Three: The paper writing wholly in the handwriting of Lou W. Winstead dated January 27, 1956, to wit:" (The same as hereinabove set forth in paragraph 6 of the complaint.)

And the record shows that "The court having examined the pleadings, heard argument of counsel, and studied the brief submitted by counsel, reaches the following conclusions of law that the three paper writings of Lou W. Winstead referred to as items one, two and three above were duly admitted to probate in the office of the Clerk of the Superior Court of Person County and were duly proven to have been executed by Lou W. Winstead as her last will and testament.

"2. The court concludes as a matter of law that the three paper writings referred to in items one, two and three, above, taken together, constitute the last will and testament of Lou W. Winstead.

"3. The court concludes as a matter of law that by the last will and testament of Lou W. Winstead, constituted as set out above, the entire estate, real and personal, of Lou W. Winstead was devised and bequeathed to Mary Jane Walters in fee simple absolute."

"Wherefore" the court "ordered, adjudged and decreed that Mary Jane Walters take the entire estate of Lou W. Winstead in fee simple absolute, and that the costs of this action be taxed against the executrix of said estate. This first day of September, 1959. (Signed) Hamilton H. Hobgood, Resident Judge of the Ninth Judicial District."

And the agreed case on appeal contains what purports to be the

proceedings had in the probate of holograph codicil dated 27 January 1957, set forth in paragraph 6 of the complaint as follows:

"*Probate of Holograph Codicil*

"North Carolina, Person County, In The Superior Court

"A paper writing, without subscribing witnesses, purporting to be a Codicil to the last will and testament of Lou W. Winstead, deceased, is exhibited for probate in open court by Mary Jane Walters, the Executrix therein named; and it is thereupon proved by the oath and examination of Mary Jane Walters that the said will was found among the valuable papers and effects of the said Lou W. Winstead after her death.

"And it is further proved by the oath and examination of three competent and credible witnesses, to wit, J. C. Brooks, Reuben C. Bowes, and Hazel Long Harvey, that they are acquainted with the handwriting of the said Lou W. Winstead, having often seen her write, and verily believe that the name of the said Lou W. Winstead, subscribed to the said will, and the said will itself, and every part thereof, is in the handwriting of the said Lou W. Winstead.

"And it is further proved by the evidence of the three last mentioned witnesses, that the said handwriting is generally known to the acquaintances of the said Lou W. Winstead.

"Severally sworn and subscribed, this 10 day of March, 1959 before me.
Rama Williams, Ass't Clerk
Superior Court

J. C. Brooks
Reuben C. Bowes
Hazel Long Harvey

"NORTH CAROLINA PERSON COUNTY

"It is therefore considered and adjudged by the court that the said paper writing and every part thereof is a Codicil to the last will and testament of the said Lou W. Winstead and the same is ordered to be recorded and filed.

"This 10 day of March, 1959.

"Rama Williams, Ass't. Clerk of the Superior Court."

Then follows the "Codicil — 1957" and the "Words written on the envelope that contained the second codicil (Holograph) of Lou W. Winstead, deceased, dated January 27, 1957. For Mary Jane Walters— 'Sister' to read as soon as possible after my passing."

Then follows motion of Baptist Children's Home of North Carolina, Incorporated, in which it is set forth:

"1. That it is a defendant in the above entitled action and is one

of the devisees under the paper writings alleged to constitute the Last Will and Testament of Lou W. Winstead, deceased.

"2. That, through its attorney, it inquired of the plaintiffs, through their attorney of record, whether or not the documents alleged in the complaint as constituting the Last Will and Testament of Lou W. Winstead, deceased, had been probated in the office of the Clerk of the Superior Court of Person County with all statutory provisions relating to the probate complied with, and was assured by the plaintiffs, through their said attorney, that in his opinion the said documents had been probated in accordance with the terms and provisions of the statute relating to such probates; and the said Baptist Children's Homes of North Carolina, Incorporated, filed answer admitting that the said documents had been duly probated.

"3. That the Baptist Children's Homes of North Carolina, Incorporated, acted and relied upon the information furnished to it in the manner herein set forth in filing its Answer and admitted paragraph six of the Complaint, and did not discover until it through its said attorney of record, examined the records in the office of the Clerk of the Superior Court of Person County on August 21, 1959, that in his opinion the statutory requirements with respect to the second codicil, being the third item set forth in paragraph 6 of the Complaint, had not been complied with.

"4. That, as the Baptist Children's Homes of North Carolina, Incorporated, is advised, believes and so alleges, it is entitled, in the furtherance of justice, to an Order permitting it to amend paragraph 6 of its Answer so as to cause the said paragraph to read as follows:

"'(6) That paragraph 6 of the complaint is admitted insofar as it conforms to the record.'"

Upon which "the movant prays that an order be entered in the above-entitled action permitting it to amend its Answer so as to cause paragraph 6 of the said Complaint to read as follows: '(6) That paragraph 6 of the Complaint is admitted insofar as it conforms to the record.'" (Signed for, and verified by attorney for Movant).

And the record shows that at the September 14, 1959, regular Mixed Term of Person Superior Court, Judge Hobgood entered an order allowing amendment. It is there recited: " * * * it appearing that the court on the first day of September, 1959, had signed a judgment in the above captioned action after hearing said action upon pleadings which duly constituted it under the Declaratory Judgment Act; and it appearing that counsel for Baptist Children's Homes of North Carolina, Inc., one of the defendants, moved the court subsequent to the signing of said judgment on the 14th day of September, 1959, that said defendant be permitted to amend the sixth paragraph of its

answer for the purpose of bringing into the statement of said case on appeal an issue concerning the validity of the probate of one of the instruments incident to said action; and the court being of the opinion that the motion should be allowed makes the following order: 'It is Ordered, adjudged and Decreed that Baptist Children's Home of North Carolina, Inc., be permitted to amend the sixth paragraph of its Answer in the instant action to read, "That paragraph six of the complaint is admitted insofar as it conforms to the record."

" 'It is Further Ordered that this motion is allowed for the sole purpose of permitting the validity of said probate to be adjudicated as part of the record in the statement of the case on appeal.' "

Plaintiff excepted to the order and gave notice of appeal (but it now appears she did not perfect her appeal). And the record of case on appeal contains stipulation as follows: "It is stipulated between the attorneys of record for the plaintiffs in the above-entitled action and the defendant Baptist Children's Homes of North Carolina, Incorporated, that the Order entered in the above-entitled action making the Baptist Children's Homes of North Carolina, Incorporated, a party defendant, the stipulation extending the time for the said defendant to answer, the probate of the paper writing dated April 30, 1948, and set forth in paragraph 4 of the Complaint, and the probate of the paper writing dated July 17, 1953, and set forth in paragraph 5 of the Complaint, are not necessary to an understanding of the Case on Appeal in the above-captioned cause, and may not be incorporated as a part of the record on appeal to the Supreme Court."

The record also contains stipulation of attorneys for the respective parties agreeing to case on appeal.

The defendant Baptist Children's Homes of North Carolina, Incorporated, appeals to the Supreme Court and assigns error.

Jesse A. Jones for defendant, appellant.
R. B. Dawes, Charles B. Wood for plaintiff, appellee.

WINBORNE, C. J. Upon the Clerk of Superior Court the statutes of this State confer exclusive and original jurisdiction of proceedings for probate of wills. *Brissie v. Craig*, 232 N.C. 701, 62 S.E. 2d 330, citing statutes and cases. "By this" as stated by *Ervin, J.*, writing in the *Brissie* case, "it is meant that the Clerk of the Superior Court has the sole power in the first instance to determine whether a decedent died testate or intestate, and if he died testate, whether the script in dispute is his will," citing *Hutson v. Sawyer*, 104 N.C. 1, 10 S.E. 85.

And the Superior Court has no jurisdiction to determine whether a paper writing is or is not a will except upon the issue of *devisavit*

vel non duly raised by a caveat filed with the Clerk. G.S. 31-32 through G.S. 31-37. See headnote 3 in the *Brissie* case, *supra.*

Indeed the probate of a will by the Clerk of Superior Court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. *Mayo v. Jones,* 78 N.C. 402. *McClure v. Spivey,* 123 N.C. 678, 31 S.E. 857.

And until so set aside it is presumed to be the will of the testator. *In Re Will of Puett,* 229 N.C. 8, 47 S.E. 488.

Applying these principles to case in hand, the three items of paper writing, having been probated in common form by the Clerk of Superior Court of Person County, are presumed to be the will of Lou W. Winstead, deceased, and are conclusive evidence of the validity thereof until vacated on appeal or declared void by a competent tribunal in a proceeding instituted for that purpose. And they cannot be vacated in a collateral manner. Hence this Court holds *ex mero motu* that the Superior Court is without jurisdiction to permit defendant to amend pleadings in this cause for the purpose of bringing into the statement of case on appeal an issue concerning the validity of the probate of one of the instruments incident to the action. And the same is declared to be a nullity.

On the other hand, on the face of the record the three items probated in common form by the Clerk of the Superior Court as a matter of law, now constitute the last will and testament of Lou W. Winstead, deceased, a subject for construction under the declaratory judgment act, G.S. 1-253 and G.S. 1-254.

In G.S. 1-253 it is provided that "courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed * * * ." And G.S. 1-254 provides that "Any person, interested under a * * * will * * * may have determined any question of construction or validity arising under the instrument * * * and obtain a declaration of rights, status, or other legal relations thereunder."

In this respect the trial court concludes as a matter of law that by the last will and testament of Lou W. Winstead, constituted as aforesaid, the entire estate, real and personal, of Lou W. Winstead was devised and bequeathed to Mary Jane Walters in fee simple, and so ordered.

This ruling appears to be accordant with statute G.S. 31-38 and decisions of this Court. See among many others *Heefner v. Thornton,*

216 N.C. 702, 6 S.E. 2d 506; *Taylor v. Taylor*, 228 N.C. 275, 45 S.E. 2d 368.

For reasons stated, the case on appeal is

Modified and affirmed.

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

STATE v. EDWARD LEE WALLACE, JR., AND WOODROW WILSON HOLDER.

(Filed 16 December, 1959.)

1. Criminal Law § 154—

An appeal itself constitutes an exception to the judgment and raises the question of whether error of law appears upon the face of the record.

2. Criminal Law §§ 13, 139—

It is an essential of criminal jurisdiction that the warrant or indictment sufficiently charge an offense, and the Supreme Court will take notice *ex mero motu* of the insufficiency of the warrant or indictment, even in the absence of a motion in arrest of judgment.

3. Automobiles § 82—

A warrant which fails to charge that defendant was driving a motor vehicle at the time he failed to heed a police siren is fatally defective. G.S. 20-157(a).

4. Indictment and Warrant § 9—

The words "in violation of city ordinance, chapter ....., section ....." added to a warrant after the charge of an offense against the General Statutes of this State are surplusage and should be stricken.

5. Criminal Law § 121—

The arrest of judgments vacates the verdicts and judgments, but the State may thereafter proceed against defendants upon sufficient warrants or indictments.

6. Automobiles § 65—

Warrants for reckless driving which charged the offense in the language of the statute are sufficient. G.S. 20-140, (a), (b).

7. Criminal Law § 159—

Assignments of error not set out in the brief and in support of which no reason or argument is stated or authority cited are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

8. Automobiles §§ 65, 82— Evidence held sufficient to support conviction of driver and of owner of vehicle riding therein of reckless driving and failing to heed police siren.

The State's evidence tended to show that an officer driving a patrol car, saw and followed a truck being driven over 35 m.p.h. in a residential district, that after the truck had turned around and stopped the officer stopped the patrol car, turned on the red light on its top, and got out and started walking toward the truck, whereupon the driver of the truck put it in reverse, and then entered an intersecting street, that the officer got back in the patrol car and began a chase during which the truck was driven at a very high rate of speed through stop lights etc., that when the truck was finally stopped one of the defendants was driving and the other defendant, a passenger in the truck, stated that he was the owner of the truck and that he did not tell the driver to stop until he saw that the police car was overtaking them. *Held* the evidence is sufficient to overrule nonsuit as to each defendant on charges of speeding and reckless driving, it being sufficient to show that the owner of the truck had the right to control its operation, was controlling its operation, and aided and abetted the driver in the commission of the offenses.

9. Criminal Law § 9—

All who participate in the commission of misdemeanors as aiders and abettors are guilty as principals.

10. Automobiles § 65—

The fact that warrants charge defendants with reckless driving upon a named road "at" an intersecting road, with evidence that the defendants' vehicle was operated on the named road in a reckless manner but was finally stopped some 250 yards from the named intersecting road, does not justify nonsuit for variance, since word "at" when used to designate a place is less definite than "in" or "on", and often means "near to".

11. Criminal Law §§ 104, 108—

An instruction to the effect that the evidence conclusively established all the elements of the offense charged but that the jury must be satisfied beyond a reasonable doubt that defendant was the culprit must be held for error, since the court may not intimate whether a material fact has been fully or sufficiently established. G.S. 1-180.

APPEAL by defendants from *Crissman, J.*, 13 April 1959 Term, of GUILFORD (Greensboro Division) for the trial of criminal actions.

Each defendant was tried in the Superior Court, on appeals from adverse judgments in the Municipal-County Court, Criminal Division, on three warrants charging him with a violation of the motor vehicle laws of the State.

WARRANTS AGAINST EDWARD LEE WALLACE, JR.

The first warrant, as amended in the Superior Court by the Solici-

tor for the State, and without objection by defendant, charges that defendant Wallace on 18 May 1958, "at and in Guilford County, except High Point, Deep River and Jamestown Townships, did unlawfully and willfully operate a motor vehicle on a public highway upon Pinecroft Road at High Point Road, Greensboro, North Carolina, at or about 9:00 P. M., carelessly and heedlessly in a willful 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 person and property in that he did . . . . . all in violation General Statutes of North Carolina Chapter 20 Section 140."

The second warrant charges that defendant Wallace on 18 May 1958, "at and in Guilford County, except High Point, Deep River and Jamestown Townships, did unlawfully, and willfuly violate the motor vehicle laws of the State of North Carolina, to wit; did fail to heed a police siren while being in ample hearing distance of the said Police Siren, on Pinecroft Road, at High Point Road, Greensboro, North Carolina, against the statute in such case made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter , Section ."

The third warrant charges that defendant Wallace on 18 May 1958, "at and in Guilford County, except High Point, Deep River and Jamestown Townships, did unlawfully and willfuly operate a motor vehicle on a public highway at a speed in excess of 35 miles per hour in a residential district, to wit: 80 miles per hour on Pinecroft Road at High Point Road, Greensboro, North Carolina, against the statute in such case made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter , Section ."

WARRANTS AGAINST WOODROW WILSON HOLDER.

The first and third warrants are in practically the identical words as in the first and third warrants against defendant Wallace. The Solicitor in the Superior Court amended the first warrant exactly as he did the first warrant against the defendant Wallace.

The second warrant charges that defendant Holder on 18 May 1958, "at and in Guilford County, except High Point, Deep River and Jamestown Townships, did unlawfully and willfuly violate the Motor Vehicle Laws of the State of North Carolina, to wit; did fail to heed a Police Siren while same was in reasonable distance to the said defendant, on Pinecroft and High Point Roads, Greensboro, North Carolina, against the statute in such case made and provided and against the peace and dignity of the State and in violation of City Ordinance, Chapter . Section ."

Upon motion of the Solicitor for the State, and without objection by the defendants, the court ordered all six cases consolidated for trial.

Plea: Not Guilty by each defendant as to all charges against him. Verdict: Each defendant is guilty of all three charges in the warrants against him.

From sentences of imprisonment in each of the three cases against him, each defendant appealed to the Supreme Court.

Malcolm B. Seawell, Attorney General, and H. Horton Rountree, Assistant Attorney General, for the State.

Robert S. Cahoon for defendants, appellants.

PARKER, J. Defendant Wallace assigns as error that the Trial Court erred in imposing judgment of imprisonment upon him on his conviction of failing to heed a police siren while being in ample hearing distance of the police siren, as charged in the second warrant against him. Defendant Holder assigns as error that the Trial Court erred in imposing judgment of imprisonment upon him on his conviction of failing to heed a police siren while same was in reasonable distance to him, as charged in the second warrant against him.

Defendants have filed a joint brief. In their brief they contend in respect to these assignments of error that the judgments of imprisonment imposed upon them on their convictions on the second warrants should be arrested, for the reason that the second warrants utterly fail to charge any criminal offense. Defendants made no motion in arrest of judgment, according to the record. However, this Court has said in *S. v. Corl,* 250 N.C. 252, 108 S.E. 2d 613; "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."

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or an indictment. *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140; *S. v. Scott,* 237 N.C. 432, 75 S.E. 2d 154; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

A court cannot properly give judgment in a criminal action, unless it appears in the record that a criminal offense is sufficiently charged. In the absence of a motion in arrest of judgment, it is the duty of this Court to examine the whole record, and if it sees that the judgment should have been arrested, it will, *ex mero motu,* direct it to be done. *S. v. Strickland, supra; S. v. Thorne, supra; S. v. Scott, supra; S. v. Watkins,* 101 N.C. 702, 8 S.E. 346.

The State contends that the second warrant against each defendant

charges all the constituent elements of G.S. 20-157(a), which reads as follows: "Upon the approach of any police or fire department vehicle giving audible signal by bell, siren or exhaust whistle, the driver of every other vehicle shall immediately drive the same to a position as near as possibe and parallel to the right hand edge or curb, clear of any intersection of highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until the police or fire department vehicle shall have passed."

We do not agree with the contention of the State. The second warrant against each defendant does not charge that the defendant was the driver of any vehicle, and completely fails to aver the words of G.S. 20-157(a), either literally or substantially, or in equivalent words. Such being the case, the second warrant against each defendant utterly fails to charge a violation of G.S. 20-157(a).

The State makes no contention that the second warrants charge any violation of any city ordinance. It would seem that the second warrants were drawn on printed forms used in the Municipal-County Court, and the concluding words "and in violation of City Ordinance. Chapter , Section ." are mere surplusage, which should have been stricken out. See *S. v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654. In our opinion, the second warrants charge no criminal offense. This Court, *ex mero motu,* orders the judgment on the second warrant as to each defendant be arrested. The legal effect of arresting the judgments is to vacate the verdicts and judgments of imprisonment on the second warrants below, and the State, if it is so advised, may proceed against the defendants for an alleged violation of G.S. 20-157(a) upon a sufficient warrant or indictment. *S. v. Strickland, supra; S. v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81; *S. v. Scott, supra; S. v. Sherrill,* 82 N.C. 694.

Each defendant has an assignment of error to the first warrant, similar to his assignment of error to the second warrant. While they made no motions in arrest of judgments of imprisonment imposed on their convictions on the first warrants, they contend in their joint brief that the judgments of imprisonment on the first warrants should be arrested, for the reason that while the first warrants charge the offenses in practically the precise words of G.S. 20-140, they then allege "in that he did . . .," and fail to allege explicit facts showing acts by the defendants in violation of G.S. 20-140. The first warrants charge the offense practically literally in the words of G.S. 20-140, (a), (b), and are sufficient. *S. v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Wilson, supra.*

Each defendant has an assignment of error to the third warrant, similar to his assignment of error to the second warrant. These as-

signments of error are not set out in their brief, and in support of them no reason or argument is stated or authority cited. They are taken as abandoned by defendants. Rule 28, Rules of Practice in the Supreme Court. 221 N.C. 544, 563; *S. v. Clayton, ante,* 261, 111 S.E. 2d 299.

Each defendant assigns as errors the denial by the trial court of his motions for judgments of nonsuit in each case against him renewed at the close of all the evidence. G.S. 15-173.

The State's evidence tends to show the following facts: About 9:00 p. m. o'clock on 18 May 1958 two officers of the city of Greensboro Police Department were on duty, and were sitting in a patrol car parked beside the Western Cafe in the vicinity of Spring Garden Street. One of the officers saw a 1955 Ford truck traveling east on Spring Garden Street at a speed of 40 to 45 miles an hour, where the speed limit for that area was 35 miles an hour. The officer driving the patrol car drove into Spring Garden Street, as the truck made a left turn into Copeland Street. The patrol car followed the truck. The truck swung around in the Richfield Service Station at the intersection of Spring Garden and Copeland Streets, and was directly facing the patrol car. The officer drove the patrol car up facing the truck, turned on the red light on top of the patrol car, got out, and started walking to the truck. Whereupon, the driver of the truck put it in reverse, backed up, and entered Spring Garden Street traveling east at a high rate of speed. The officer jumped back in the patrol car and with the red light flashing on the patrol car and the siren sounding, pursued the truck. The truck continued east on Spring Garden Street, reaching a speed of about 75 to 80 miles an hour. The truck ran through a red light on Spring Garden Street, where it intersects Oakland Avenue. The truck turned left on to Park Terrace, proceeded down Masonic Drive, turned left into Cliffside Terrace, and came all the way back up to Spring Garden Street. The truck went a short distance west on Spring Garden Street, and turned left into Pinecroft Road, and continued south on Pinecroft Road to about 250 yards from the High Point Road, where the officer stopped the truck. The truck ran through a stop sign at the intersection of Cliffside Terrace and Oakland Avenue; it ran through another stop sign at Collier's Drive and Spring Garden Street. The truck entered Pinecroft Road at a very high rate of speed, completely on the wrong side of the center division of the intersection, and continued on the wrong side until stopped. The maximum speed limit through the area of pursuit is 35 miles an hour. Pinecroft Road along the path of pursuit is completely residential, except for two service stations. Along Pinecroft Road the truck was operated at a speed of about 75 miles an hour.

The pursuit covered a distance of around two and one-half miles, and lasted three to four minutes. During the entire time of the pursuit the red light on the patrol car was blinking, and its siren was sounding. The truck was stopped by the patrol car bumping it twice from behind, hooking bumpers with it, and stopping.

The driver of the patrol car, when the truck was stopped, got out and went to the left side of the truck. Defendant Holder was sitting under the wheel, next to him was one Doss, and next to him was defendant Wallace. Then and there defendant Wallace said he was the owner of the truck, and in reply to an officer's question why they ran, he replied, "the panic was on," saying that several times.

Officer John Barham went to the scene, and brought defendants to the Police Department. He asked defendant Holder what made him run from the police officers. Holder replied, "if he had ever gotten on the Red Road that they would never have caught him." Defendant Holder told Officer Barham he was driving the truck.

Defendant Holder told Sergeant S. N. Ford of the Greensboro Police Department that he tried to outrun the officers, and defendant Wallace did not say anything to him about stopping the truck or to stop driving in the manner he was driving, until the police car started gaining on them at Pinecroft Driving Range, which is about 300 to 350 yards from the High Point Road, where the truck stopped. Defendant Wallace told Sergeant Ford that the truck was his. Sergeant Ford asked defendant Wallace why he did not stop the truck. Defendant Wallace replied: "He did not try to stop it, and did not tell him to stop it, until the police car started gaining on him on the Pinecroft Road, and he saw they were going to catch him or hit him, and he told him to stop it, and that was when the police car hit him, and he did stop the truck."

Defendant Wallace contends that all the evidence shows he was not driving the truck, and "that the owner of a truck is not vicariously liable for the acts of the driver in a criminal action." The State's evidence tends to show that defendant Wallace told Sergeant S. N. Ford of the Greensboro Police Department "the truck was his"; it further tends to show that defendant Wallace was riding in the truck on the seat with its driver the defendant Holder during the entire time of its pursuit by the police car, and it further tends to show that defendant Wallace told Sergeant S. N. Ford, "that he (Wallace) did not try to stop it, and did not tell him to stop it, until the police car started gaining on him on the Pinecroft Road, and he saw they were going to catch him or hit him, and he told him to stop it, and that was when the police car hit him, and he did stop the truck." Such evidence on the part of the State permits the jury to draw the

fair inference that defendant Wallace, as owner, had the right to control the operation of the truck, was controlling its operation, and that he aided and abetted defendant Holder in the commission of the offenses alleged in the first and third warrants against him, and is sufficient to require the submission to the jury of the cases against defendant Wallace which are alleged in the first and third warrants, because all who participate in the commission of a misdemeanor, as aiders and abettors, are guilty as principals. *S. v. Gibbs*, 227 N.C. 677, 44 S.E. 2d 201; *Story v. U. S.*, 16 F. 2d 342, 53 A.L.R. 246, cert. denied, 274 U.S 739, 71 L. Ed. 1318. See *S. v. Trott*, 190 N.C. 674, 130 S.E. 627. We do not consider the motions for judgments of nonsuit as to the second warrants, because the second warrants charge no criminal offense.

Both defendants contend that the offenses charged against them in the first and third warrants should have been nonsuited, for the reason that the first warrants charge that the reckless driving of the Ford Truck was "upon Pinecroft Road at High Point Road, Greensboro, North Carolina," and that the third warrants charge that the driving of the Ford Truck at a speed of 80 miles an hour in a 35-miles-an-hour residential district was "on Pinecroft Road at High Point Road, Greensboro, North Carolina," and while the State's evidence shows that the Ford Truck was operated on Pinecroft Road, it further shows that it was stopped by the police on Pinecroft Road 250 yards from the High Point Road, and, therefore, there is a fatal variance between the averments of the warrants and the evidence of the State.

This Court said in *Waynesville v. Satterthwait*, 136 N.C. 226, 48 S.E. 661: "The word 'at,' when used to designate a place, may, and often must mean, 'near to.' It is less definite than 'in' or 'on'; at the house may be in or near the house. Web. Inter. Dic., 95; Cent. Dic., Vol. I." See also *Purifoy v. R. R.*, 108 N.C. 100, 12 S.E. 741; 7 C.J. S., At, Place, pp. 153-155.

The Trial Court properly overruled each defendant's motions for judgments of nonsuit in respect to the offenses charged in the first and third warrants.

The court charged the jury that the defendants are charged with three offenses: one of speeding in excess of 35 miles an hour in a 35-mile zone, two, of reckless driving, and three, of failing to heed a siren of a police car.

Immediately thereafter the Judge charged as follows, which is assigned by defendants as error: "Now, members of the jury, the Court charges you that under the evidence as to the defendant Holder, that this evidence points conclusively to the fact that the motor vehicle

on this occasion was being driven in violation of those laws, but that you must be satisfied beyond a reasonable doubt that the defendant Holder was doing the driving on this occasion."

This assignment of error is sustained. This Court said in *S. v. Owenby*, 226 N.C. 521, 39 S.E. 2d 378: "Nor is it permissible for the Judge in charging the jury or at any time during the trial, to intimate whether a material fact has been fully or sufficiently established, it being the true office and province of the jury to weigh the testimony and to decide upon its adequacy to prove any issuable fact." See also the multitude of other cases appearing in the Code Annotation to G.S. 1-180.

For error in the charge, the defendants are entitled to a new trial on the first and third warrants.

New trial on first and third warrants.

Judgment arrested on second warrant.

MRS. MINNIE PRIVETT, WIDOW; NELLIE GRAY RICHARDS AND HUSBAND, W. R. RICHARDS; MILDRED LUCILLE JONES AND HUSBAND, T. G. JONES; MARY LOUISE UPCHURCH AND HUSBAND, J. N. UPCHURCH; B. H. PRIVETT AND WIFE, RACHEL PRIVETT; RUTH HILLIARD RICHARDS; W. R. RICHARDS, JR., AND WIFE, EVELYN RICHARDS; LUCILLE CHAMBLEE AND HUSBAND, CHARLES CHAMBLEE, PETITIONERS v. LUCIUS JONES; J. E. MALONE, GUARDIAN AD LITEM OF LUCIUS JONES AND THE UNBORN CHILDREN OF MILDRED LUCILLE JONES; JUDY UPCHURCH, JIMMIE UPCHURCH AND TED UPCHURCH, AND E. C. BULLOCK, GUARDIAN AD LITEM OF JUDY UPCHURCH, JIMMIE UPCHURCH AND TED UPCHURCH AND THE UNBORN CHILDREN OF MARY LOUISE UPCHURCH; AND BILLY FAY PRIVETT AND TEDDIE RONALD PRIVETT; AND G. M. BEAM, JR., GUARDIAN AD LITEM OF BILLIE FAY PRIVETT AND TEDDIE RONALD PRIVETT AND THE UNBORN CHILDREN OF B. H. PRIVETT; AND JOHN F. MATTHEWS, GUARDIAN AD LITEM FOR THE UNBORN CHILDREN OF NELLIE GRAY RICHARDS; AND W. M. JOLLY, GUARDIAN AD LITEM OF CHARLES RONALD CHAMBLEE, MINOR, DEFENDANTS.

(Filed 16 December, 1959.)

1. **Wills § 33c— Devise of land for life with remainder to children vests the remainder in the children as of date of testator's death.**

Testator devised his lands for life to his widow then to his daughters for life with remainder in fee to their children, with further provision that if any daughter died without children her surviving her share should go to her brothers and sisters. At the time of testator's death each daughter had living children, but one daughter died prior to the death of the widow, leaving her surviving one child. *Held:* The grand-

children of testator took a vested remainder as purchasers under the will, subject to be opened up to let in any afterborn children, and therefore the son of the deceased daughter takes the fee in that part of the land in which his mother's life estate would have been allotted.

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

APPEAL by petitioners and J. E. Malone, Guardian *ad Litem* of Lucius Jones, from *Hobgood, J.*, of the Ninth Judicial District of North Carolina, in Chambers, 5 September 1959.

Special proceeding for actual partition of certain lands in Franklin County, North Carolina, of which W. H. Privett died seized and possessed,— in accordance with estates devised under his last will and testament.

The petitioners and defendants, through their respective counsel of record, stipulated and agreed, among other things not necessary to be recited, that the findings of fact as set out in the judgment and decree constitute the agreed statement of facts for the purpose of this appeal.

The cause came on for hearing, and was heard, before Hobgood, J., upon appeal from a confirmatory decree and judgment of Clerk of Superior Court of Franklin County,— all parties being represented by counsel.

The court by consent of all the parties found in pertinent part the following facts:

"1. That W. H. Privett died in Franklin County, North Carolina, on the 14th day of May, 1940, leaving a last will and testament which appears of record * * *" in pertinent part as follows:

"Item Three. I give and devise to my said wife, Minnie Privett, all the remainder of the real estate of which I shall die seized and possessed and wheresoever situate, for and during the term of natural life only.

"Item Four. At the death of my said wife, Minnie Privett, I give and devise the tract of land known as the Bryant Pearce place, containing 72 acres and being the tract of land upon which I now reside, to my son, B. H. Privett, for and during the term of his natural life only, and after his death to his children in fee simple. I also give and devise to my said son, B. H. Privett, after the death of my said wife, Minnie Privett, so much of the Josh Pearce tract of land as lies between the Bryant Pearce tract of land and the public road leading from Henry Baker's to Crudup's Mill, and containing three and one-half acres, more or less, for and during the term of his natural life, and after his death to his children in fee simple.

"Item Five. At the death of my said wife, Minnie Privett, I give

and devise to my three daughters, Nellie Gray Richards, Mildred Lucille Jones, and Mary Louise Upchurch, the tract of land known as the Josh Pearce place, containing approximately 91 acres (except the part thereof devised to my son B. H. Privett in Item Four hereof), which I bought from L. T. Pearce, and the tract of land known as the James Pearce place, containing 30 acres, which I bought from James Pearce. I give and devise these lands to my said three daughters, share and share alike, for the term of their natural lives only, and upon the death of any one of them her one-third share is to go to her children, and if any one of them shall die without children then, upon the death of such a one, her share shall go to her brother and sisters, share and share alike."

"2. That for the purpose of dividing the lands of the said W. H. Privett, deceased, according to the terms of his will, this proceeding was instituted by the said Mrs. Minnie Privett, widow of the testator, and the said Nellie Gray Richards and husband W. R. Richards, the said Mildred Lucille Jones and husband T. G. Jones, the said Mary Louise Upchurch and husband J. N. Upchurch, and the said B. H. Privett and wife Rachel Privett, together with Ruth Hilliard Richards, adult daughter of Nellie Gray Richards, and W. R. Richards, Jr., adult son of Nellie Gray Richards, and his wife Evelyn Richards, and Lucille Chamblee, adult daughter of Mildren Lucille Jones, and her husband Charles Chamblee, as petitioners, against Lucius Jones, minor son of Mildred Lucille Jones, and the unborn children of said Mildred Lucille Jones, herein represented by J. E. Malone, Guardian *ad Litem;* Judy Upchurch, Jimmie Upchurch and Ted Upchurch, minor children of Mary Louise Upchurch, and the unborn children of said Mary Louise Upchurch, herein represented by E. C. Bulluck, Guardian *ad Litem*; Billy Faye Privett and Teddie Ronald Privett, minor children of B. H. Privett, and the unborn children of the said B. H. Privett, herein represented by G. M. Beam, Jr., Guardian *ad Litem;* and the unborn children of the said Nellie Gray Richards, herein represented by John F. Matthews, Guardian *ad Litem.*

"3. That subject to the life estate of his widow, now deceased, the said testator, in Item Four of his will, devised certain lands to his son B. H. Privett 'for and during the term of his natural life only, and after his death to his children in fee simple'.

"4. That subject to the life estate of his widow, now deceased, the testator, in Item Five of his Will, devised certain other lands to his daughters Nellie Gray Richards, Mildred Lucille Jones, and Mary Louise Upchurch, 'share and share alike, for the term of their natural lives only, and upon the death of any one of them her one-third share is to go to her children, if any, and if any one of them shall

die without children then, upon the death of such a one, her share shall go to her brother and sisters, share and share alike'.

"5. That at the time of the death of the testator the said Nellie Gray Richards, Mildred Lucille Jones and Mary Louise Upchurch each had living children.

"6. That, in accordance with the prayers of the said Petition and the Answers filed by the respective Guardians *ad Litem*, as aforesaid, the court appointed three Commissioners to divide and partition the lands devised by the said W. H. Privett to his said three daughters, namely, Nellie Gray Richards, Mildred Lucille Jones, and Mary Louise Upchurch, and the Report of said Commissioners was duly filed herein on 14 November 1953 allotting shares of said lands in accordance with the Will of said W. H. Privett, deceased, as follows:

"' One share thereof to the said Mildred Lucille Jones for the term of her natural life, and upon her death to her children Lucille Chamblee and Lucius Jones, and the unborn children of the said Mildred Lucille Jones, as tenants in common, and if the said Mildred Lucille Jones shall die without children then upon her death to her brother and sisters, share and share alike.

"' One share thereof to the said Nellie Gray Richards for the term of her natural life, and upon her death to her children Ruth Hilliard Richards and W. R. Richards, Jr., and the unborn children of Nellie Gray Richards, as tenants in common, and if the said Nellie Gray Richards shall die without children then upon her death to her brother and sisters, share and share alike.

"' One share thereof to the said Mary Louise Upchurch for the term of her natural life, and upon her death to her children Judy Upchurch, Jimmie Upchurch and Ted Upchurch, and the unborn children of Mary Louise Upchurch, as tenants in common, and if the said Mary Louise Upchurch shall die without children then upon her death to her brother and sisters, share and share alike.'

"7. That after this proceeding had been instituted and while the same was pending, and before a decree was entered confirming said partition, the petitioner Lucille Chamblee, adult daughter of Mildred Lucille Jones, died on the 30th day of December, 1953, leaving surviving her husband, the petitioner Charles Chamblee, and one child, Charles Ronald Chamblee, who was and is a minor under the age of twenty-one (21) years.

"8. That after this proceeding was instituted, and while the same was pending, and before a decree was entered confirming said partition, the said Mrs. Minnie Privett died on the 5th day of December, 1954, and her life estate in said lands fell in.

"9. That after the death of the said Lucille Chamblee and the said

Mrs. Minnie Privett, the petitioners filed a Supplemental Petition, setting out the fact of the death of the said Lucille Chamblee and of the said Mrs. Minnie Privett, and praying that the said Charles Ronald Chamblee be made a party defendant herein, and that a Guardian *ad Litem* be appointed to represent him; and the petitioners thereafter filed an Amendment to said Supplemental Petition alleging that upon the death of the said Lucille Chamblee prior to the death of her mother Mildred Lucille Jones, the remainder interest owned by the said Lucille Chamblee in the tract of land allotted and assigned to the said Mildred Lucille Jones would not go to the said Charles Ronald Chamblee, but that the entire remainder interest therein would go to Lucius Jones, together with any other children not now *in esse* of the said Mildred Lucille Jones.

"10. That thereafter W. M. Jolly was duly appointed by the court as Guardian *ad Litem* for the said Charles Ronald Chamblee and filed an Answer in his behalf denying the allegations of the Amendment to the Supplemental Petition of the petitioners, and upon the matter of law or legal inference arising upon the said Amendment to the Supplemental Petition and the Answer filed by the said W. M. Jolly, Guardian *ad Litem* of Charles Ronald Chamblee, the Clerk of the Superior Court of Franklin County duly heard this cause and entered a Confirmatory Decree and Judgment, from which the petitioners and the defendant J. E. Malone, Guardian *ad Litem* of Lucius Jones, appealed to the Judge of the Superior Court in apt time.

"11. That all parties to this proceeding have had full and ample notice and knowledge of the report of the Commissioners filed herein, as aforesaid, on 14 November 1953. That no exceptions or objections have been filed to said report, except as to the remainder interest in said lands, and the time allowed by law for filing objections or exceptions to the same has fully expired.

"12. That the partition and division made and reported by said Commissioners is just and fair and should be confirmed in all respects except as modified herein with respect to the ownerhip of the remainder after the life estates of said life tenants, and as to the ownership of the remainder after the life estates of said life tenants," the Judge considered "the following question:

"Where, upon a devise of land to one for life with remainder upon the death of the life tenant to the children, if any, of such life tenant, and if the life tenant shall die without children then to the brother and sisters of such life tenant, a daughter of the life tenant predeceased the life tenant leaving a child, what interest, if any, does such child have in the land? That is, what interest, if any, does Charles Ronald Chamblee, son of Lucille Chamblee, deceased daughter of

Mildred Lucille Jones, have in the land involved in this proceeding?"

Thereupon "the court being of the opinion that it was the intention of the testator that any child or children of the life tenant should have a vested remainder interest in the land, such interest to be diminished in quantity by the birth of other children to such life tenant, and that upon any such child or children of the life tenant predeceasing such life tenant, the interest of such deceased child in such vested remainder would descend to the surviving issue of such deceased child or children, the roll to be called at the date of the death of the life tenant. It will not be presumed that the testator intended for the grandchildren of the life tenant to be excluded merely because a child of the life tenant predeceased such life tenant. Such an interterpretation would cause the enrichment of the line of descent of one of the testator's children to the impoverishment of the line of descent of another of the testator's children—an event easily possible if one life tenant should die leaving children surviving and another life tenant should die leaving grandchildren but no children surviving. A reading of the entire Will discloses the manifest intention of the testator that his four children should enjoy their respective shares of his estate during their lives, and upon their death leaving descendants capable of inheriting, the share of each life tenant should go to such descendants. The devise of the remainder after the life estate to the brother and sisters of the life tenant if the life tenant should not leave children surviving her would seem to have been motivated by the desire of the testator to keep the share of such life tenant 'in the family', rather than by any desire of the testator to prevent the life tenant's share from passing to the testator's great grandchildren. The Court is of the opinion that by the word 'children', the testator meant 'line of descendants', and intended that his great grandchild by the life tenant should have the share of land which his grandchild by the life tenant would have had if such grandchild should be living at the death of the life tenant."

In accordance therewith the Judge thereupon "Ordered, Adjudged and Decreed:

"1. That subject to the provisions hereinafter set forth as to the ownership of the remainder after the life estates of the life tenants, the Report of the Commissioners appointed to divide and partition the lands of W. H. Privett, deceased, in accordance with the terms of the will of W. H. Privett, deceased, be and the same is hereby in all respect confirmed.

"2. That subject to the life estate of Nellie Gray Richards, the children of the said Nellie Gray Richards, namely, Ruth Hilliard Richards and W. R. Richards, Jr., together with any other children

who may be born to the said Nellie Gray Richards, are the owners of a vested remainder in fee in the share of land devised to said Nellie Gray Richards by the will of W. H. Privett, deceased, the issue of any deceased child of the said Nellie Gray Richards to take the share which such deceased child would take if such deceased child should be living at the time of the death of the said Nellie Gray Richards.

"3. That subject to the life estate of Mildred Lucille Jones, the child of said Mildred Lucille Jones, namely, Lucius Jones, together with any other children who may be born to the said Mildred Lucille Jones, are the owners of a vested remainder in fee in the share of land devised to the said Nellie Gray Richards by the will of W. H. Privett, deceased, the issue of any deceased child of the said Mildred Lucille Jones to take the share which such deceased child would take if such deceased child should be living at the time of the death of the said Mildred Lucille Jones; that is, the said Charles Ronald Chamblee, being the issue of Lucille Chamblee, a deceased daughter of the said Mildred Lucille Jones, shall take the share which the said Lucille Chamblee would take if the said Lucille Chamblee should have been living at the time of the death of the said Mildred Lucille Jones.

"4. That subject to the life estate of Mary Louise Upchurch, the children of said Mary Louise Upchurch, namely Judy Upchurch, Jimmie Upchurch and Ted Upchurch, together with any other children who may be born to the said Mary Louise Upchurch, are the owners of a vested remainder in fee in the share of land devised to said Mary Louise Upchurch by the Will of W. H. Privett, deceased, the issue of any deceased child of Mary Louise Upchurch to take the share which such deceased child would take if such deceased child should be living at the time of the death of the said Mary Louise Upchurch.

"5. That the said report of the Commissioners and the plats appended thereto, together with this Judgment and Decree, be enrolled in the records of this Court, and that the same be certified to the Register of Deeds of Franklin County, North Carolina, and registered in his office.

"6. That the said report and this Judgment and Decree shall be binding among and between the parties to this proceeding, and their heirs and assigns."

To the signing of the foregoing judgment the petitioners and J. E. Malone, Guardian *ad Litem*, except and appeal to the Supreme Court, and assign error.

Yarborough, Yarborough & Paschal, W. H. Taylor for petitioners for Guardian ad Litem Malone, appellants.

Lumpkin & Lumpkin for Charles Ronald Chamblee, appellee.

Gaither M. Beam for Guardian ad Litem, appellee.

John F. Matthews for Guardian ad Litem, appellee.

WINBORNE, C. J. The sole question on this appeal is as to what interest, if any, does Charles Ronald Chamblee, son of Lucille Chamblee, deceased daughter of Mildred Lucille Jones, have in the land involved in this proceeding. The trial judge held, and properly so, that Charles Ronald Chamblee takes the interest which his mother Lucille Chamblee would have taken had she been living at the time of the death of her mother Mildred Lucille Jones, life tenant.

In this connection, where a will devises a life estate to a woman for life, with remainder to her children, and there are children in being at the death of the testator, such children take a vested remainder, "subject to open and let in any that may afterwards be born before the termination of the particular estate." *Lbr. Co. v. Herrington,* 183 N.C. 85, 110 S.E. 656, and cases cited. To like effect are: *Bell v. Gillam,* 200 N.C. 411, 157 S.E. 60; *Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641.

The same principle applies to like provisions in deeds. See *Griffin v. Springer,* 244 N.C. 95, 92 S.E. 2d 682; *Blanchard v. Ward,* 244 N. C. 142, 92 S.E. 2d 776; *Edwards v. Butler,* 244 N.C. 205, 92 S.E. 2d 922.

And the principle is recognized in these cases: *Waddell v. Cigar Stores,* 195 N.C. 434, 142 S.E. 585; *Trust Co. v. Stevenson,* 196 N.C. 29, 144 S.E. 370; *Greene v. Stadiem,* 198 N.C. 445, 152 S.E. 398; *Spencer v. McCleneghan,* 202 N.C. 662, 163 S.E. 753; *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365; *Neill v. Bach,* 231 N.C. 391, 57 S.E. 2d 385.

In the present case testator devised the land involved in this proceeding to his three daughters, share and share alike, for the term of their natural lives only, with provision that upon the death of any one of them her one-third share to go to her children, if any; and bearing in mind that each of the daughters had children living at the date of the death of the testator,—such children took a vested remainder subject to open and let in any child thereafter born to either of said daughters. The daughter Mildred Lucille, whose husband is T. G. Jones, had two children so living, a son Lucius Jones, and a daughter Lucille, who married Charles Chamblee. This son and this daughter each took a vested remainder by purchase and became "a new *stirpes* of inheritance or new stock of descent." *King v. Scoggin*

92 N.C. 99, cited and applied in *Blanchard v. Ward, supra,* and upon the death of the daughter Lucille Chamblee her estate passed directly by descent to her son, Charles Ronald Chamblee.

And in accordance therewith, the judgment from which appeal is taken is

Affirmed.

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

ALEXANDER WEBB, FOR HIMSELF AND OTHER PERSONS OWNING STOCK IN THE NORTH CAROLINA RAILROAD COMPANY v. JOHN M. MOREHEAD, PRESIDENT OF THE NORTH CAROLINA RAILROAD, EDWIN S. POU, SECRETARY OF THE NORTH CAROLINA RAILROAD, AND THE NORTH CAROLINA RAILROAD COMPANY.

(Filed 16 December, 1959.)

1. Corporations § 4—

G.S. 55-27, (Ch. 2, Public Laws of 1901), prior to the effective date of Ch. 1371, S.L. 1955, prescribed as a matter of public policy that in no case should more than a majority of the shares of stock of a corporation be required to be represented at any meeting in order to constitute a quorum, and this law rendered invalid any by-law of a corporation in conflict therewith, even though such by-law was in effect prior to the passage of the act, since what could be originally prohibited can be subsequently prohibited.

2. Same: Constitutional Law § 25—

The fact that G.S. 55-27 renders invalid the prior by-law of a corporation requiring a majority of the privately owned shares of stock to be represented in order to constitute a quorum does not result in the impairment of any contractual right, even in respect to a corporation in which the State owns a majority of the stock, since the shares held by the State have exactly the same rights and no more than any other shares. Further, such by-law being invalid at the time of the enactment of Ch. 1371, S.L. of 1955, it could not be revived by that statute.

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

APPEAL by plaintiff from *Fountain, S. J.,* March 1959 Civil Term, of WAKE.

Bailey & Bason for plaintiff, appellant.

Harley B. Gaston and Willis C. Smith for the North Carolina Railroad Company.

Attorney General Seawell and Assistant Attorney General Bruton, amicus curiae.

RODMAN, J. This action was instituted 2 March 1959, for the purpose of determining the validity of an amendment to the bylaws of defendant North Carolina Railroad Company adopted at a special meeting of the shareholders held on that date. Defendant corporation has a total of 40,000 shares of issued and outstanding stock, 30,002 shares of which are owned by the State of North Carolina, and 9,998 shares by individuals and private corporations. The complaint alleged a special meeting of the shareholders of defendant corporation had been called to consider amendments to its bylaws; that the bylaws in effect when the meeting was called required the presence of a majority of the stock privately held to constitute a quorum; a majority of the stock owned by the individuals was not present at said meeting; the attention of the presiding officer was called to that fact and protest made to the transaction of any business; the action of the majority, in the absence of a quorum, was invalid.

Based on the allegations of the complaint, a temporary restraining order issued prohibiting defendants from acting on the amended bylaw. Defendants moved for a dissolution of the restraining order. By consent the cause was heard on 6 March by Judge Fountain. Evidence was offered by plaintiff and defendants to support their respective contentions as to the validity of the challenged bylaw. No findings of fact were made by Judge Fountain. He dissolved the restraining order. In the statement of the case on appeal the parties agreed that the bylaws were amended by substituting for sec. 4 a new section reading as follows: "A majority of the outstanding stock entitled to vote, represented in person or by proxy, shall constitute a quorum for the transaction of business. If no quorum is present at any meeting, it may be adjourned from time to time until a quorum is present;" that defendant corporation was created pursuant to the provisions of c. 83, Laws of 1848-49.

Prior to the special meeting, Art. I, sec. 4, provided: "Individual stockholders represented, in person or by proxy, and holding not less than the majority of the stock owned by individuals, shall be necessary to constitute a quorum for the transaction of business. If no quorum is present at any meeting, it may be adjourned from time to time until a quorum is present."

Sec. 1 of that article provides for annual meetings on the second Thursday in July.

The court made no finding fixing the date on which the bylaws in existence prior to the special meeting were adopted. There is evidence tending to show adoption in July 1926. There is also evidence tending to show adoption prior to 1900.

The record contains what purports to be copies of minutes of

meetings of stockholders held 12 October 1893 and 12 July 1894. At these meetings it was announced that in the absence of a majority of the stock privately held, no quorum existed and no business could be transacted. The parties, in their briefs and on oral argument, presented the case on the theory that the bylaw requiring a majority of the stock privately owned for a quorum was adopted by the stockholders prior to 1900.

30,300 shares were present at the special meeting. This included the 30,002 shares owned by the State of North Carolina which was represented by proxy. The change in bylaws was approved by a vote of 30,294 shares. Six shares voted against the proposed amendment. We decide the case upon the assumption that the bylaw on which plaintiff relies was adopted prior to 1900.

North Carolina Railroad Company was incorporated pursuant to the provisions of c. LXXXII of the Laws of 1848-49. Sec. 6 of that Act provides the corporation should have power to hold and convey real and personal property, perpetual succession, the right to sue and be sued "and may have and use a common seal, which they may alter and renew at pleasure; and shall have and enjoy all other rights and immunities which other corporate bodies may, and of right do exercise; and may make all such bye-laws, rules and regulations, as are necessary for the government of the corporation, or effecting the object for which it is created, not inconsistent with the Constitution and laws of the United States and of the State of North Carolina." Sec. 9 provides that the affairs of the company shall be managed by a board "to consist of twelve directors, to be elected by the stockholders from among their number at their first and subsequent general annual meetings, as prescribed by section 8th of this Act." Sec. 8 directed the organization meeting to be held at Salisbury for the purpose of electing the directors "and to enact all such regulations and bye-laws as may be necessary for the government of the Corporation and the transaction of its business." This section further declared: "The persons elected directors at this meeting, shall serve such period, not exceeding one year, as the stockholders may direct; and at this meeting, the stockholders shall fix on the day and place or places where the subsequent election of directors shall be held; and such elections shall henceforth be annually made." Sec. 10 gives to each shareholder as many votes as he has shares and provides that directors shall be named by majority vote. Sec. 12 permits the shareholders to provide "by a by-law, as to the number of stockholders and the amount of stock to be held by them, which shall constitute a quorum for transacting business at all subsequent regular or occasional meetings of Stockholders and

Directors." Sec. 24 makes it mandatory that the directors "shall once in every year, at least, make a full report on the state of the company, and its affairs to a general meeting of the stock-holders. . ."

Before action can be taken at a meeting of the shareholders of a private corporation, a quorum must be present.

Sec. 2, c. 26, Rev. Code of 1854, provided: "All corporations may, by their by-laws, where no other provision is specially made, determine the manner of calling and conducting all meetings; the number of members that shall constitute a quorum . . ." Hence both by general statute and charter provision the company was, prior to 1901, empowered without limitation to fix the shares necessary for a quorum. A bylaw duly adopted by the shareholders was valid. 13 Am. Jur. 521.

But such a bylaw could have no validity when it came in direct conflict with the declared public policy of the State of North Carolina. That is true for the reason that in granting the privilege to organize as a corporation and to adopt bylaws, the State, by sec. 6, prohibited a bylaw in conflict with laws of the State.

In 1901 the Legislature enacted "An Act to Revise the Corporation Law of North Carolina." C. 2, P.L. 1901. This Act became effective 1 April 1901. By express language it applies to corporations then in existence as well as those thereafter created. So far as pertinent to this decision, its provisions are codified and brought forward as c. 55 of the General Statutes, 1950 edition. Hereafter, references in this opinion to the General Statutes refer to the 1950 edition. In 1955 the Legislature, by c. 1371, S.L., made major revision of our corporation laws. That Act became effective 1 July 1957 and is hereafter referred to as the 1959 Cumulative Supplement to the General Statutes.

Sec. 12 of the Act of 1901 provided: "All corporations may, by their by-laws, where no other provision is herein made, determine the manner of calling and conducting all meetings; the number of members that shall constitute a quorum: (*Provided,* in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum; if the quorum shall not be so determined by the corporation, a majority in interest of the stockholders, represented either in person, or by proxy, shall constitute a quorum.)" This provision was in substance codified as Revisal 1146, C.S. 1127, and G.S. 55-27, and remained in effect until 1 July 1957, the effective date of c. 1371, S.L. 1955.

This statutory provision was the rule of the common law. *Hill v. Ponder,* 221 N.C. 58, 19 S.E. 2d 5, where it is said: "It is a fundamental rule of parliamentary procedure, applicable as well to municipal and electing boards, that a majority of the members of a body

consisting of a definite number constitutes a quorum for the transaction of business (Citations), and it is equally well settled that a majority of the quorum has power to act. (Citation) This rule derives from the common law and is of universal application unless modified by statute or some controlling regulation or by-law in the particular instance. (Citations) 'The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, etc., where not otherwise expressly provided.'"

The statute, on 1 April 1901, became the declared public policy of the State. Certainly no corporation thereafter created could adopt a valid bylaw which conflicted with this statute.

"A bylaw providing what shall constitute a quorum is invalid if in conflict with the provisions of a statute on the subject, and yields to the statute, as, for example a bylaw providing that a majority of the entire stock is necessary to constitute a quorum, where the statute provides that the election shall be held by such of the stockholders as may attend for that purpose, without reference to the number of shares they may own." Fletcher, Cyc. Corporations, Vol. 5, p. 82, perm. ed.; *Gentry-Futch Co. v. Gentry,* 106 So. 473; *Benintendi v. Kenton Hotel,* 60 N.E. 2d 829, 159 A.L.R. 280; *Kerbs v. California Eastern Airways,* 90 A. 2d 652, 34 A.L.R. 2d 839; *Lutz v. Webster,* 94 A. 834; *Clausen v. Leary,* 166 A. 623; 18 C.J.S. 605, 13 Am. Jur. 286-7.

It is not within our province to inquire as to the reasons prompting the Legislature to declare that no corporation could adopt a bylaw requiring more than a majority of the stock to constitute a quorum. Plaintiff calls attention to the minutes of the annual meeting of 1894, set out in the record, which had to adjourn for want of a quorum under the then existing bylaw. What effect, if any, this may have had on the Legislature of 1901 does not appear. It does, however, suggest the necessity for some provision prohibiting a minority of the stock from preventing stockholders' meetings, thereby perpetuating in office directors elected for a term of one year. Inability to hold a meeting could be used to continue a policy opposed by a majority of the stock.

Unless the statute enacted in 1901 prohibiting a bylaw requiring the presence of more than a majority of the capital stock to constitute a quorum is invalid as impairing some contractual right, it is manifest that a quorum was present at the meeting held on 2 March 1959. It is, we think, manifest that the statute enacted in 1901 in no way impaired any contractual rights which private stockholders could assert. What could have been prohibited originally could, by the provisions of sec. 6 of the charter, be subsequently prohibited. Multitudinous decisions have applied the rule to many factual situations. Illustrations may be found in *Erie R. Co. v. Williams,* 233 U.S.

671, 58 L. Ed. 1149, where the State required payment of corporate employees semi-monthly rather than monthly; *Looker v. Maynard*, 179 U.S. 46, 45 L. Ed. 79, *Bridgers v. Staton*, 150 N.C. 216, 63 S.E. 892, cumulative voting by stockholders. At common law the right to vote had to be exercised by the stockholder in person. Proxies were not recognized. *Harvey v. Linville Improvement Co.*, 118 N.C. 693. The common law was abrogated by the statute authorizing stockholders to authorize such voting. Nevertheless, the Legislature in 1901 declared that no proxy should have validity for more than three years after its date. G.S. 55-110. The validity of this provision was recognized and given effect in *Bridges v. Staton, supra.* At common law private corporations were not permitted to utilize their funds for charitable or educational purposes. *A. P. Smith Manufacturing Co. v. Barlow*, 98 A. 2d 581, 39 A.L.R. 2d 1179. By-laws of mutual burial associations providing how the obligation may be discharged may be modified by legislative declaration. *Spearman v. Burial Assn.*, 225 N.C. 185, 33 S.E. 2d 895. Corporate bylaws adopted by stockholders requiring a unanimous vote for the directors, when in conflict with the statutory provision, are void. *Benintendi v. Kenton Hotel, supra.*

The 1901 statute, applicable to all corporations, was a declaration of public policy of the State. No sound reason exists why it should apply to all corporations except the defendant. The mere fact that the State happened to be a stockholder in the corporation neither diminished nor increased the State's rights as a shareholder. The shares of stock held by it have exactly the same rights, no more and no less than any other share. *Marshall v. R.R.*, 92 N.C. 322; *Curran v. The State of Arkansas et al.*, 15 Howard 302, 14 L. Ed. 705. The legislation did not seek to give to the State any right because of its stock ownership.

There was no valid bylaw prescribing a quorum on 1 July 1957 when c. 1371, S.L. 1955, became effective. Hence a majority of the stock constituted a quorum. G.S. 55-27; *Hill v. Ponder, supra.*

Stockholders of a corporation may, by authority given by the Act of 1955, G.S. 55-65 and 66 (1959 Cum. Supp.), fix more than a majority of shares or members of a corporation for a quorum. This power is denied to directors, and cannot be used to prevent the holding of annual meetings. G.S. 55-16 (1959 Cum. Supp.) The authorization so given is a new declaration of public policy. The shareholders of the defendant corporation may use this authority if they do desire. This statutory authorization cannot, however, resurrect a bylaw which was invalidated on 1 April 1901.

The only relief which plaintiff seeks is to enjoin action by the shareholders of defendant company pursuant to the provisions of the

bylaw adopted on 2 March 1959. Since a quorum was, on the conceded facts, present at the meeting, shareholders were authorized to act on such matters as were included in the notice of the meeting; and since invalidity is asserted only because of the invalid bylaw prescribing a quorum, no cause of action is stated.

Action dismissed.

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

JASON LANE, JR., BY HIS NEXT FRIEND, JASON LANE, PLAINTIFF v. DAIZEL CHATHAM AND JOYCE CHATHAM, DEFENDANTS.

(Filed 16 December, 1959.)

1. **Parent and Child § 7—**

The common law rule that the mere relation of parent and child imposes no liability on the part of the parent for the torts of the child is recognized in this State.

2. **Same—**

An air rifle is not a dangerous instrumentality *per se* and the mere fact that parents give their nine-year old son an air rifle, and permit him to use it, is insufficient to impose liability on the parents for a negligent or willful injury inflicted by the son in the use of the air rifle.

3. **Same—**

Parents may be held liable for an injury negligently or willfully inflicted by their minor son with an air rifle given the son by the parents if under the circumstances the parents could or should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof, the basis of liability being the parents' independent negligence.

4. **Same—**

Evidence tending to show that a nine-year old boy intentionally shot his playmate in the eye with an air rifle given him by his parents and that on three prior occasions the boy had intentionally inflicted injury on persons with the air rifle, with further evidence that the boy's mother had been informed or had knowledge thereof but without evidence that the boy's father had knowledge thereof, *is held* sufficient to be submitted to the jury as to the negligence of the mother but is insufficient to be submitted to the jury as to the father's negligence.

HIGGINS, J., concurring.

APPEAL by defendants from *Patton, J.*, March Term, 1959, of RUTHERFORD.

LANE *v.* CHATHAM.

Civil action for damages for personal injuries inflicted by defendants' minor son by means of an air rifle, based on alleged negligence of defendants in giving him the air rifle and in failing, after notice of prior misuse, to prohibit, restrict or supervise his further use thereof.

On November 30, 1957, the Saturday after Thanksgiving, Raymond Chatham, then nine years old, shot plaintiff with his BB gun or air rifle. The shot entered plaintiff's eye, causing total loss thereof.

Defendants filed separate demurrers to the complaint, each asserting plaintiff's failure to allege facts sufficient to constitute a cause of action. Judge Huskins overruled the demurrers and defendants excepted.

At the close of all the evidence, defendants made separate motions for judgment of nonsuit. The motions were overruled and defendants excepted. Thereupon the court submitted and the jury answered two issues, *viz.*: "1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes. 2. What damage, if any, is plaintiff entitled to recover of defendants? Answer: $1800.00."

Judgment for plaintiff, in accordance with the verdict, was entered. Defendants excepted and appealed.

Hamrick & Hamrick for plaintiff, appellee.
Harry K. Boucher and Stover P. Dunagan for defendants, appellants.

BOBBITT, J. Defendants' only assignments of error are (1) to the overruling of their demurrers, and (2) to the overruling of their motions for judgment of nonsuit.

As to the rulings on the demurrers: Suffice to say, certain unsupported *alleged facts* would strengthen plaintiff's position. Hence, defendants' contention that *the evidence* was insufficient for jury consideration poses the more serious question.

"At common law it is well established that the mere relation of parent and child imposes on the parent no liability for the torts of the child . . ." 67 C.J.S., Parent and Child § 66; 39 Am. Jur., Parent and Child § 55. Our decisions are in full accord: *Brittingham v. Stadiem,* 151 N.C. 299, 66 S.E. 128; *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096; *Taylor v. Stewart,* 172 N.C. 203, 90 S.E. 134; *Bowen v. Mewborn,* 218 N.C. 423, 11 S.E. 2d 372; *Hawes v. Haynes,* 219 N.C. 535, 14 S.E. 2d 503.

In *Brittingham v. Stadiem, supra,* this statement is quoted with approval: "Relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable.

It must be shown that he approved such acts, or that the child was his servant or agent."

In the *Brittingham* case, a pistol was involved; and recovery against the *feme* defendant (mother) was upheld on the ground that her twelve-year old son's negligent act was committed while he was acting as her servant within the scope of his employment in her pawn shop. The liability of the defendant father was based on Section 2105 of the Revisal of 1905, which provided, in part: "Every husband living with his wife shall be jointly liable with her for all damages accruing from any tort committed by her . . ." It is noted that this statutory provision was repealed in 1921 and that the present statute, G.S. 52-15, provides in part: "No husband shall be liable for damages accruing from any tort committed by his wife . . ."

In *Taylor v. Stewart, supra,* evidence that the death of plaintiff's intestate was proximately caused by the negligent operation of his father's automobile by a thirteen-year old boy, and that the father habitually permitted his said son to operate his automobiles *in violation of statute,* was held sufficient to impose liability on the father. The actionable negligence of the boy was not imputed to the father on account of their relationship. His responsibility for his son's actionable negligence was based on his own negligence.

In the Restatement of the Law of Torts, § 316, the general rule is stated as follows: "A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control."

To impose liability upon the parent for the wrongful act of his child (absent evidence of agency or of the parent's participation in the child's wrongful act), for which the child, if *sui juris,* would be liable, it must be shown that the parent was guilty of a breach of legal duty, which concurred with the wrongful act of the child in causing the injury. "A parent is liable if his negligence combines with the negligence of the child and the two contribute to injury by the child." 67 C.J.S., Parent and Child § 68.

Uncontradicted evidence tends to show:

The Lane and Chatham families lived in close proximity to the "Chatham Store." The Lanes and Chathams had been good friends, had attended the same church and the children had attended the same school. Plaintiff and Raymond often played together and were good friends. Defendants had purchased and given to Raymond a BB

gun or air rifle at Christmas of 1956. Plaintiff, also Howard Lane, plaintiff's younger brother, had been given air rifles by their father. Prior to his injury, plaintiff's air rifle was broken and thereafter he shot Raymond's air rifle "some." BB shot were sold at the "Chatham Store." On Thanksgiving Day, two days before plaintiff was injured, Joyce Chatham, Raymond's mother, had given him two boxes of BB shot.

The evidence offered by plaintiff is the only evidence as to what occurred on the occasion of plaintiff's injury. (Raymond did not testify.) It tends to show: Between 1:00 and 1:30 p.m., after eating dinner, plaintiff, then fourteen years old, was sitting on the back porch of his home. Raymond jumped from behind a nearby tree, pointed his BB gun straight at plaintiff and shot him, "the bullet" entering plaintiff's eye "straight range."

As to Raymond's alleged prior misuse of his air rifle, plaintiff's evidence tends to show:

1. On Thanksgiving Day, two days before plaintiff was injured, a married sister (Peggy Jo Lane Owens) and a younger sister (Margaret Lane) of plaintiff went to the "Chatham Store," purchased coca-colas; and as they walked out of the store "the little boy" (Raymond) jumped out from the side of the store and shot Peggy Jo with his air rifle, striking her on the hip and making a blister. Peggy Jo went right back into the store and told the *feme* defendant what Raymond had done. The *feme* defendant had nothing to say.

2. About two or three weeks before plaintiff was injured, Raymond shot Howard Lane, plaintiff's younger brother, then nine years old, with match stems that he put into the BB gun. Raymond shot "about ten or twelve times" and hit Howard "about four times" on his arms and legs and "made some marks." Howard told one Davis what Raymond had done. On the same day, Davis talked with the *feme* defendant. In their conversation, the *feme* defendant brought up the subject of said incident and "stated that she did not punish him because Raymond told her that Howard had shot him first."

3. A few weeks before plaintiff was injured, Marshall Hollifield, then eleven years old, went to the "Chatham Store." Raymond and the *feme* defendant were there. Raymond chased him around the store "a couple of times"—"with his gun"—but did not shoot at him. Marshall told the *feme* defendant, then went on home. The afternoon of November 30, 1957, *after plaintiff had been shot and taken to the doctor,* Raymond chased Marshall home from the store with his gun and shot at him, hitting him once "on the britches leg."

It is noted: The testimony tending to show notice to the *feme* defendant of Raymond's conduct on said three prior occasions was con-

tradicted by her in all particulars. Moreover, she testified that "Raymond's daddy took the air rifle away from him just as soon as the accident happened."

There was ample evidence to support a finding that plaintiff's injury was caused by Raymond's wrongful act. The crucial question is whether the evidence was sufficient to support a jury finding that defendants or either of them was guilty of a breach of legal duty that combined and concurred with Raymond's wrongful act and so contributed to plaintiff's injury.

Cases relating generally to the liability of a parent for the wrongful acts of his minor child, under diverse factual situations, are collected in Annotation, 74 Am. St. Rep. 801, and in Annotation, 155 A.L.R. 85. Cases relating to the liability of a parent for injuries inflicted by a minor child when the parent permits his minor child to have firearms or access thereto are collected in Annotation, 44 A.L.R. 1509, and in Annotation, 12 A.L.R. 812.

This Court has had no occasion to pass upon a case involving a parent's liability for injury inflicted by a minor son's wrongful use of an air rifle. Indeed, the number of decisions in other jurisdictions involving this factual situation is quite small. Recovery by plaintiff was upheld in *Gudziewski v. Stemplesky* (Mass.), 160 N.E. 334; *Kuchlik v. Feuer*, 267 N.Y.S. 256, affirmed 191 N.E. 555; *Archibald v. Jewell*, 70 Pa. Superior Ct. 247. Recovery was denied in *Martin v. Barrett* (Cal.), 261 P. 2d 551; *Highsaw v. Creech* (Tenn.), 69 S.W. 2d 249; *Fleming v. Kravitz* (Pa.), 103 A. 831; *Harris v. Cameron* (Wis.), 51 N.W. 437; *Capps v. Carpenter* (Kan.), 283 P. 655; *Norlin v. Connolly* (Mass.), 146 N.E. 2d 663.

It is universally held that an air rifle is not a dangerous instrumentality *per se*. It should be noted that we have no statute such as Section 1896 of the New York Penal Code, which provides, in part, that it is a misdemeanor to give to a person under the age of sixteen years ". . . any air-gun, spring-gun or other instrument or weapon in which the propelling force is a spring or air or any instrument or weapon commonly known as a toy pistol . . ." True, an air rifle may be so used as to inflict injury (particularly injury to an eye); but this is true of a bow and arrow set, a baseball bat, a knife, a bicycle, and many other devices with which children of Raymond's age are accustomed to play.

It is noted that there was no evidence as to the make or power of Raymond's air rifle. Nothing else appearing, we assume it was of the type and kind given to plaintiff and his younger brother and used generally by boys of comparable age in the community. Although the evidence is not specific, the implication is that the Lanes and Chath-

ams lived in a rural community or small settlement where it was customary for boys of Raymond's age to have and to use air rifles in the course of their outdoor activities.

Evidence that defendants gave Raymond an air rifle at Christmas 1956, and permitted him to use it, is insufficient, standing alone, to support a jury finding that defendants are liable for Raymond's wrongful act.

The applicable rule is this: Where parents entrust their nine-year old son with the possession and use of an air rifle and injury to another is inflicted by a shot intentionally or negligently discharged therefrom by their son, the parents are liable, *based on their own negligence,* if under the circumstances they could and should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof.

Applying this rule, the evidence is insufficient to establish liability on the part of Daizel Chatham. Prior to plaintiff's injury, Raymond had used the air rifle for more than eleven months. There is no evidence of any incident (prior to plaintiff's injury) involving Raymond's misuse thereof in his father's presence. Daizel Chatham testified: "No one had ever mentioned to me about my son Raymond shooting people with his air rifle." We find no evidence tending to contradict or in conflict with this statement. Nothing appears in the evidence to support a finding that Daizel Chatham should have reasonably foreseen that Raymond was likely to use the air rifle in such manner as to cause injury. We have found no decision in this jurisdiction or elsewhere that would support a recovery by plaintiff against Daizel Chatham under the circumstances disclosed by the evidence in this case. Hence, Daizel Chatham's motion for judgment of nonsuit should have been sustained.

As to the *feme* defendant, the situation is different. The credibility of the testimony as to prior incidents was for jury determination; and we must consider this evidence, and all inferences and intendments that may be drawn therefrom, in plaintiff's favor. When so considered, we are constrained to hold that it was sufficient to support a finding that the *feme* defendant, after learning of Raymond's misuse of his air rifle, breached her legal duty by failing to exercise reasonable care to prohibit, restrict or supervise Raymond's further use thereof, and that by the exercise of reasonable care she should have reasonably foreseen that Raymond, in his unrestricted further use thereof, was likely to use the air rifle in such manner as to inflict injury. Hence,

as to her, the motion for judgment of nonsuit was properly overruled; and, as to her, the verdict and judgment will stand.

As to defendant Daizel Chatham, reversed.

As to defendant Joyce Chatham, no error.

HIGGINS, J., concurring: I concur in the opinion. However, court decisions that air rifles are not *per se* dangerous weapons are as out of date as the horse and buggy. Marvelous advances have been made both in the precision and power of pneumatic arms. Sporting magazines on practically every newsstand carry stories and advertisements of air rifles capable of driving a lead slug through a three-quarter-inch pine board. It is time for the courts to find out what the public, or at least those interested in such matters, has known for some time —that a well manufactured air rifle is now not only a dangerous, but a deadly weapon. I am unable to approve decisions to the contrary.

THE GENERAL TIRE & RUBBER COMPANY, A CORPORATION v. DISTRIBUTORS, INC., A CORPORATION.

(Filed 16 December, 1959.)

1. Pleadings § 15—

Upon demurrer, the allegations of the pleading are to be taken as true and liberally construed with a view to substantial justice between the parties. G.S. 1-151.

2. Same—

A pleading will not be rejected upon demurrer unless it is wholly insufficient and if the pleading in any part alleges facts sufficient to constitute a maintainable action the demurrer must be overruled, nor does a demurrer present whether a particular allegation should be stricken.

3. Pleadings § 10—

In an action on contract, the defendant may, under G.S. 1-137 (1), set up as a counterclaim a cause of action arising out of the contract sued on and may, under G.S. 1-137 (2), also set up the breach of an entirely different and distinct contract existing at the commencement of the action.

4. Same: Claim and Delivery § 2—

In plaintiff's action to recover certain goods sold under consignment, with ancillary proceedings in claim and delivery, defendant may set up as a counterclaim a separate contract existing at the time under which defendant was given exclusive right to act as distributor for the goods of

plaintiff until a specified future date, and that plaintiff's seizure of the goods was in violation of the distributor agreement and was wrongful.

5. Pleadings § 18—

Where an answer setting up a counterclaim is served on plaintiff, plaintiff must reply thereto. G.S. 1-140.

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

APPEAL by defendant from *Sharp, Special J.*, May 4, 1959 Special Term, of MECKLENBURG.

Plaintiff's action is to recover specific personal property, to wit, certain cartons of Bolta-Floor Vinyl Flooring described in schedule attached to complaint as Exhibit A, in possession of defendant as plaintiff's consignee under terms of "Warehouse Agreement" dated July 30, 1956, "or so much thereof as is available," and to recover judgment for such portion thereof "as has been disposed of and is not now recoverable by this action."

Under the "Warehouse Agreement," a copy of which is attached to complaint as Exhibit B, plaintiff retained title to the merchandise consigned to defendant as "Warehouseman" until disposed of by defendant in accordance with the terms thereof. The "Warehouse Agreement" provided, *inter alia*, for the withdrawal of merchandise "(b) On order of Distributors, Inc. (defendant), in its capacity as Distributor, within the limit established by the Credit Department of the Company (plaintiff) provided said merchandise is withdrawn for Warehouseman's (defendant's) use in the ordinary course of business." It contains provisions as to reports, invoices, payments, etc., in respect of all merchandise stored in or withdrawn from "the Warehouse."

In respect of "TERMINATION," the "Warehouse Agreement" provides: "Breach of this agreement by either party will be considered just cause for immediate termination. This agreement may also be canceled by either party at any time upon three days' written notice. In either event, Warehouseman agrees to deliver immediately thereafter to location designated by Company and without expense or commission of any nature to Company, all consigned stock in his possession."

Plaintiff alleged that, notwithstanding its demand therefor, defendant refused to deliver to plaintiff the consigned merchandise, and that plaintiff was the owner and entitled to the immediate possession thereof.

The action and ancillary proceedings in claim and delivery were commenced March 24, 1958. Upon failure of defendant to retain pos-

session *pendente lite* by filing replevy bond, G.S. 1-478, plaintiff, on March 28, 1958, obtained possession of all except sixty-four cartons "not found."

Defendant answered. It admitted plaintiff's ownership of the personal property seized in claim and delivery proceedings, but denied that plaintiff was entitled to the immediate possession thereof.

Plaintiff demurred to the portion of defendant's answer entitled "FOR FURTHER ANSWER AND DEFENSE TO PLAINTIFF'S COMPLAINT, AND IN BAR OF ITS RIGHT TO RECOVER HEREUNDER, AND AS A COUNTERCLAIM." (Note: Prior to the filing of said demurrer, the court, allowing in part plaintiff's motion, had stricken all or part of twenty-three of the thirty paragraphs of defendant's said pleading. Neither party excepted to this order.)

As grounds for demurrer, plaintiff asserted: 1. In any event, defendant cannot recover from plaintiff more than the value of the merchandise obtained by plaintiff by virtue of plaintiff's undertaking in claim and delivery proceedings. 2. Defendant cannot set up by counterclaim a cause of action for alleged breach of contract occurring July 2, 1958, more than three months after this action was commenced. 3. Defendant's alleged counterclaim constitutes a misjoinder of causes of action in that the matters alleged therein "are foreign to the subject action in time and substance . . ."

This is the gist of defendant's allegations:

In July, 1956, plaintiff and defendant agreed, orally, that from July 30, 1956, defendant was to be the sole and exclusive distributor of plaintiff's products in North and South Carolina. Defendant agreed (1) to "give up" the competitive line it had been handling, and (2) to promote, in particulars stated, at defendant's expense, the sale of plaintiff's products in the Carolinas. It was agreed that, to avoid "encumbering" defendant's working capital, plaintiff would make available to defendant an adequate stock of its merchandise; and the "Warehouse Agreement" was executed as a means of implementing this part of their agreement. It was contemplated the defendant would remain the distributor of plaintiff's products "for many years in the future," but no period of duration was specified. However, on July 31, 1957, plaintiff agreed, in writing, that the "Warehouse Agreement" would continue in effect "until at least July 31, 1960."

Although defendant performed all of its obligations "right up until the time of this action," plaintiff, during the latter part of 1957, "knowingly, wilfully and wantonly, set out upon a studied plan to deprive defendant of the benefits of said Distributorship Agreement and to damage the defendant through illegally canceling the defendant's appointment as sole and exclusive distributor for plaintiff corporation

in North and South Carolina." On March 6, 1958, plaintiff, by Western Union telegram, "purported to cancel WAREHOUSE AGREEMENT, and did demand of defendant that it deliver unto plaintiff's agent all inventory being stored by defendant for its use as plaintiff's distributor." Thereafter, on March 24, 1958, plaintiff instituted this action and "thus illegally seize(d) Inventory lawfully in the possession of the defendant."

After this action was commenced, to wit, on May 1, 1958, plaintiff and defendant entered into "another agreement." Plaintiff then agreed "that credit arrangements would again be extended to defendant corporation, which the parties agreed were necessary in order for defendant to continue functioning as a Distributorship, if the defendant corporation would cause its President and Vice-President to execute personal guaranties up to the maximum amount of credit plaintiff would extend defendant, to protect plaintiff corporation from any possible loss"; and, "In consideration of plaintiff's promise to honor its distributorship agreement and to resume its warehousing arrangement with defendant, as aforesaid, defendant agreed that it would pay to the plaintiff approximately $5,500 then currently due for goods sold on open account." Thereafter, on May 26, 1958, in compliance with plaintiff's demand, defendant's President and Vice-President, and their respective wives, executed and furnished to plaintiff such good and adequate personal guaranties; and on June 4, 1958, defendant "paid plaintiff corporation $1,500 of the aforementioned Open Account fund."

Notwithstanding defendant complied with all of plaintiff's requirements under said agreement of May 1, 1958, "plaintiff, on July 2, 1958, did notify the defendant, in writing, of its refusal to extend any credit whatsoever to defendant, and of its refusal to make available to the defendant any warehouse stock," all in breach of their agreement and in "wilful, wanton and callous disregard of the defendant's rights and well being under the terms of the agreement between the parties."

On account of plaintiff's breach of contract as alleged, defendant is entitled to recover $50,000.00 as compensatory damages and $100,000.00 as punitive damages.

The court entered judgment sustaining plaintiff's said demurrer. Defendant excepted and appealed.

Orr, Osborne & Hubbard for plaintiff, appellee.
Ralph C. Clontz, Jr., for defendant, appellant.

BOBBITT, J. The demurrer does not challenge defendant's counterclaim on the ground that it fails to state facts sufficient to constitute

a cause of action against plaintiff. Nor does it challenge defendant's counterclaim on the ground that it united, but did not separately state, two causes of action. G.S. 1-123; *Heath v. Kirkman,* 240 N.C. 303, 306, 82 S.E. 2d 104. The phrase "misjoinder of causes of action," as used in the demurrer, refers to plaintiff's contention that "the matters alleged in defendant's counterclaim are foreign to the subject action in time and substance . . ."

Plaintiff's contention is that the cause of action alleged by defendant is for the alleged breach on July 2, 1958, of a contract entered into between plaintiff and defendant on May 1, 1958, all occurring subsequent to the commencement of this action; and *upon this premise,* plaintiff asserts that the counterclaim is not permissible under G.S. 1-137(2).

In determining whether the counterclaim is permissible under G.S. 1-137, we accept as true the facts alleged by defendant. *Burns v. Oil Co.,* 246 N.C. 266, 98 S.E. 2d 339. "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." G.S. 1-151.

"A pleading must be fatally and wholly defective before it will be rejected as insufficient." *Guerry v. Trust Co.,* 234 N.C. 644, 646, 68 S.E. 2d 272, and cases cited. Plaintiff's demurrer is directed to defendant's said pleading *in its entirety,* not to specific portions thereof. Whether particular allegations thereof should be stricken is not presented. Thus, if defendant's said pleading includes a permissible counterclaim, it was error to sustain plaintiff's demurrer.

Under G.S. 1-137(1), it is permissible to allege as a counterclaim "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

In addition to counterclaims permissible under G.S. 1-137(1), G.S. 1-137(2) permits a defendant to allege as a counterclaim in an action arising on contract, "any other cause of action arising also on contract, and existing at the commencement of the action." Thus, G.S. 1-137(2) is applicable "where, in an action on a contract, the breach of an entirely different and distinct contract is set up by defendant." *Smith v. French,* 141 N.C. 1, 7, 53 S.E. 435. A counterclaim permissible under G.S. 1-137(2) need not relate to the contract or transaction set forth in the complaint "as the foundation of the plaintiff's claim or (that it be) connected with the subject of the action." *Credit Corp. v. Motors,* 243 N.C. 326, 334, 90 S.E. 2d 886.

The purpose and intent of G.S. 1-137(1) "is to permit the trial in one action of all causes of action arising out of any one contract or

transaction." *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614; *Amusement Co. v. Tarkington,* 247 N.C. 444, 101 S.E. 2d 398. While it authorizes "the litigation of all questions arising out of any one transaction, or series of transactions concerning the same subject matter, in one and the same action," and so does not permit multifariousness, "it must appear that there is but one subject of controversy." *Hancammon v. Carr, supra,* and cases cited. "The cross action must have such relation to the plaintiffs' claim that the adjustment of both is necessary to a full and final determination of the controversy. *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555. This means that it must be so interwoven in plaintiffs' cause of action that a full and complete story as to the one cannot be told without relating the essential facts as to the other." *Hancammon v. Carr, supra,* where *Barnhill, J.* (later C.J.), quotes with approval definitions of the phrases "connected with" and "subject of the action." Also, see *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843.

When considered in the light most favorable to it, defendant alleged: That the "Warehouse Agreement" was an integral part of a distributorship agreement entered into between plaintiff and defendant in July, 1956, which, by agreement of July 31, 1957, was extended until July 31, 1960; that defendant had fully performed its obligations; and that plaintiff breached their agreement on March 6, 1958, by then demanding, and thereafter by seizing under claim and delivery proceedings herein, all inventory then in defendant's possession, thus depriving defendant of its distributorship. Allegations of defendant to this effect suffice to allege a breach by plaintiff of its contract with defendant that occurred prior to the commencement of this action. Thus, *the premise* upon which plaintiff bases its aforesaid contention is untenable.

True, plaintiff's action is based solely on the "Warehouse Agreement" and defendant's failure, upon demand, to deliver to plaintiff the consigned merchandise. Even so, if the facts are as alleged by defendant, plaintiff may not deprive defendant of its right to recover by counterclaim for plaintiff's breach of contract simply by treating the "Warehouse Agreement" *as if* it were the entire contract between the parties.

The subject of plaintiff's action is its alleged right to the immediate possession of the consigned merchandise. (Plaintiff seeks to recover the consigned merchandise, "or so much thereof as is available," and to recover judgment for such portion thereof "as has been disposed of and is not now recoverable by this action.") It did not have such right, notwithstanding title thereto was in plaintiff until disposed of in accordance with the provisions of the "Warehouse Agreement," if

it was agreed that the "Warehouse Agreement" and the distributorship were to continue until July 31, 1960. Hence, defendant's counterclaim relates to a controversy directly "connected with the subject of plaintiff's action." It is "so interwoven in (plaintiff's) cause of action that a full and complete story as to the one cannot be told without relating the essential facts as to the others." Indeed, if it were determined in this action that plaintiff is entitled to the immediate possession of the consigned merchandise, it would appear that such finding, and a judgment predicated thereon, would preclude defendant from thereafter asserting in an independent action the alleged contract and breach thereof now asserted as the basis of its counterclaim.

Our conclusion is that defendant has alleged a counterclaim permissible under both G.S. 1-137(1) and G.S. 1-137(2). Hence, the court erred in sustaining plaintiff's demurrer.

Since defendant has alleged a cause of action permissible as a counterclaim, it is unnecessary to consider in detail defendant's allegations as to what occurred subsequent to the commencement of this action. Suffice to say, such allegations are not inconsistent with defendant's allegations to the effect that plaintiff had breached its contract with defendant prior to the commencement of this action. Too, without determining whether these allegations should have been separately stated as a second cause of action, a question not presented by this appeal, these allegations are germane to the "one subject of controversy," namely, the contractual relations between plaintiff and defendant with reference to the "Warehouse Agreement" and the distributorship agreement and whether plaintiff or defendant breached their contractual obligations.

It appears that the answer, inclusive of the counterclaim, were served on plaintiff. Hence, plaintiff will reply thereto. G.S. 1-140.

Reversed.

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

HARRIET COTTON MILLS v. LOCAL UNION NO. 578, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); JOHNNY ROSE, CHARLIE THOMAS DUKE, CLINT ROBERSON, HILTON PARRISH, WALTER C. WATKINS, ANDREW PENDERGRASS, LEROY WILLIAMSON, WOODROW GOODING, JOHN HENDERSON, HOMER ROBERTS, JR., DOUGLAS ROSE, CARL NEAL, LEE HARRIS, HENRY HARRIS, CHARLIE HARRIS, HERBERT PARRISH, RANSOM HARGROVE, JOYCE R. MEDLIN, ESTHER C. ROBERSON, RACHEL PIRTLE, BOSHER EUBANKS ETTA AYSCUE, LEWIS WRIGHT, CLYDE WOODLIEF, GEORGE ROSE, MRS. GEORGE ROSE, EDITH J. PEOPLES, BLANCHE LEWIS, WARREN WALKER, SALLY JOE WALKER, ALBERTA ROSE, RUBY R. CURRIN, MILTON CURRIN, DORTITH THOMPSON, WILLIE JARRELL, FRED LEE COLLIER, WILLIAM CHOPLIN, DAVID SAMUEL PULLEY, DARRELL HEDGEPETH, LEWIS CLAYTON, MILO CLEATON, EARL BENNETT, THOMAS STARNES, HERBERT INSCOE, CLARENCE AYSCUE, ANDREW MEDLIN, OSCAR FAULKNER, RANDELL SMITH, LAWRENCE PEACE, CURTIS ROSE, JOHN FAUCETTE, RALPH FAUCETTE, JESSIE ROBERSON, LOU VENE B. COGHILL, VIRGINIA R. PEOPLES, SARAH D. PACE, ALVIN C. BREEDLOVE, LULU BARHAM, DORSEY EATMAN, JAMES EATMAN, WILLIAM C. VOYLES, MYRTLE JOHNSON, MYRTLE P. PEOPLES, BRANSON BLAKE, MILDRED BLAKE, HAROLD VIVERETTE, LONNIE FAISON, JOHNNY MARTIN, TOM WILLIAMS, BENNIE EDWARDS, HORACE FAULKNER, MARY M. WEAVER, LEROY NORRIS, JAMES HOLMES, MILDRED McGHEE, BASIL GREEN, JOE JARRELL, FORREST McGHEE, CHESLEY YARBOROUGH, ZOLA MAE AYSCUE, GOLDA GREY AYSCUE, DAYLON AYSCUE, BLANCHE WHITE, JAMES R. ADCOX, JR., ANNIE TURNER, RAYMOND, B. HUDSON, EUGENE HUDSON, LILLIE JONES, MATTIE A. PARRISH, RUBY C. ROSE, JOE FOWLER, ROBERT PARRISH, MAUDE JARRELL, FLORENCE ROBERSON, JOE ROBERSON, LIJAH PEOPLES, JAMES FREEMAN, OSCAR HEDGEPETH, JR., JIM STEVENSON, HOMER ROBERTS, JR., CHARLIE RANES, JOE PACE, MARVIN GRIFFIN, VOLLIE MANNING, ROY FRANCIS, ROBERT GRISSOM, ALBERTA R. McGHEE, BOBBY JONES, CHARLIE WEST, FRED LEE COGHILL, ROBERT RAINES, CLAUDIA GUPTON, ELIZABETH MARKS, JAMES TART, ANDREW RAINES, BUD DUKE, MORTON ROBERSON, THURSTON LIGGON, EDWARD F. TUCKER, WILLIAM K. HARRIS, HOMER ROBERTS, SR., AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME.

(Filed 16 December, 1959.)

1. Appeal and Error § 38—

Assignments of error not set out in defendant's brief and in support of which no reason or argument is stated or authority cited will be deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

2. Appeal and Error § 22—

An exception to the findings of fact and conclusions of law and the

judgment of the court is a broadside exception which does not present for review the sufficiency of the evidence to support the findings.

3. Contempt of Court § 6—

Findings of the court that the respondents with knowledge willfully violated the restraining order theretofore issued in the cause *held* supported by substantial competent evidence and binding on appeal.

4. Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—

In proceedings under an order to show cause why respondents should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by respondents in violation of the order will not be held for error when respondents, represented by counsel, do not object to the admission of the affidavits or indicate any desire to cross-examine any affiant on the hearing, or move to strike, or except to the order on such ground, and it is a fair inference from the record that the affiants were readily available as witnesses since respondents will be held to have waived their rights of confrontation.

HIGGINS, J., not sitting.

APPEAL by respondents Joyce Ann Clark Robinson and Juanita Raines from orders of *Mallard, J.*, 25 May 1959 Special Criminal Term, of VANCE.

This proceeding, docketed here as No. 387, was heard upon an order issued by Judge Bickett on 3 March 1959, and duly served with attached affidavits of Eva Walker Robinson, of Doza Stone, and of Sheriff E. A. Cottrell on respondents on 4 March 1959, commanding respondents to appear before Judge Bickett at 3:00 p. m. o'clock on 5 March 1959 in the Superior Court courtroom at Henderson, Vance County, North Carolina, and to show cause, if either one can, why each one should not be held in contempt of court for the alleged violation of a temporary restraining order issued by Judge Bickett on 13 February 1959. On 5 March 1959 respondents filed a joint answer to the show cause order in which they aver that they, and each one of them, have not committed any wilful or unlawful act in violation of the aforesaid temporary restraining order. On the return date of the show cause order, Judge Bickett continued the hearing of it from time to time, until on 29 April 1959, he entered an order, with the consent of counsel for plaintiff and respondents, that the hearing be held before Judge Mallard at the aforesaid term of court.

The relevant parts of Judge Bickett's temporary restraining order are set out in the case of *Harriet Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO), Johnny Rose, et al.*, docketed here as Number 385, *ante* 218, 111 S.E. 2d 457, to which reference is hereby made. It would be supererogatory to repeat those parts here.

This case, in which the show cause order was issued, was instituted on 13 February 1959, and within due time, summons was served on the defendants by delivering to them copies of the summons, of the complaint, and the temporary restraining order issued by Judge Bickett on 13 February 1959. Within apt time the defendants, and each one of them, filed a joint answer.

On 5 March 1959 Judge Bickett, on motion of plaintiff, with the attorney for defendants not resisting the motion, ordered that the temporary restraining order before issued be continued in full force and effect until the case shall be heard on its merits. This does not appear in the record in the instant case, but it does appear in the opinion of this Court in the case of *Harriet Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO), Johnny Rose, et al.*, docketed here as Number 385, *supra*, and in the record in that case. The restraining order was in full force and effect at all times relevant to this proceeding.

At the hearing before Judge Mallard, plaintiff introduced in evidence the affidavits of Eva Walker Robinson, of Doza Stone, and of Sheriff E. A. Cottrell. Joyce Ann Clark Robinson testified in her own behalf, and Dora Duke was a witness for her. Juanita Raines testified in her own behalf, and Edith Peoples and Mrs. Elizabeth Marks were witnesses for her. Both respondents are members of the Union, and are on strike. The respondents are not defendants in this case.

Judge Mallard entered separate orders as to each respondent. The essential parts of Judge Mallard's order as to Joyce Ann Clark Robinson, respondent, necessary for decision of this appeal, are as follows: Joyce Ann Clark Robinon was represented by counsel at the hearing of the show cause order, that she filed an answer to the show cause order, that plaintiff and respondent offered evidence, that the Judge after hearing counsel for plaintiff and respondent, and after considering the evidence, finds the following facts:

> "Joyce Ann Clark Robinson had actual knowledge of the Restraining Order and the contents thereof issued by Judge William Y. Bickett on February 13, 1959, by means of the said Restraining Order being conspicuously posted on bulletin boards set 75 feet on either side of the gates of the Harriet Cotton Mills, and two copies of said Order being posted on either side of the door of the Vance County Courthouse, and a copy thereof being published in the Henderson Daily Dispatch, a newspaper published in Vance County, on February 14, 1959, and the contents thereof having been publicized over the radio; that Joyce Ann Clark Robinson is and was on February 26, 1959, a member of Local Union No. 584, Textile Workers of America, which is the Union

at the Henderson Cotton Mills, and in which matter a Restraining Order similar to the Restraining Order issued herein has been issued; that Joyce Ann Clark Robinson lives in South Henderson near the Harriet Cotton Mills and served as a Picket for Local Union 578 at the Harriet Cotton Mills; that Local Union No. 578 was served with a copy of the Restraining Order issued herein February 14, 1959, and that a copy of the Restraining Order issued herein was served on Local Union No. 584 on February 14, 1959.

"And the Court further finds as a fact that Joyce Ann Clark Robinson testified under oath that she knew about the Restraining Order issued herein and its contents; that at or about 3:00 o'clock P. M. on February 26, 1959, Joyce Ann Clark Robinson threw a rock at a car driven by Doza Stone as the said Doza Stone was leaving Plaintiff's plant at the end of the 3:00 o'clock workshift; that Doza Stone was an employee of the Harriet Cotton Mills on February 26, 1959, and worked in Plaintiff's plant; that Joyce Ann Clark Robinson was a member of the picket line picketing Plaintiff's plant at or about 3:00 o'clock P. M. on February 26, 1959, at which time there were over 100 persons on said picket line.

"The Court further finds as a fact that the said Restraining Order was in full force and effect on February 26, 1959, and that Joyce Ann Clark Robinson wilfully, knowingly and intentionally violated the terms of the Restraining Order at or about 3:00 o'clock P. M. on February 26, 1959, by throwing a rock at a car driven by a person who worked in the Harriet Cotton Mills as the said worker was leaving Plaintiff's plant, thereby violating Section 1 of the Restraining Order by interfering with free egress from Plaintiff's premises, and violating Section 2 of the Restraining Order by assaulting, threatening, abusing and damaging the property of, and intimidating a person who works in Plaintiff's plant, and violating the section 4 of the Restraining Order by being on a picket line containing more than 8 persons as peaceful pickets, and participating in mass and nonpeaceful picketing, and violating Section 5 of the Restraining Order by throwing said rock at a worker's car and engaging in mass picketing thereby abusing and intimidating a person leaving plaintiff's premises and impeding a motor vehicle leaving plaintiff's premises and interfering with free egress from plaintiff's plant.

"The Court further finds that the above acts committed by the said Joyce Ann Clark Robinson were committed for the purpose of wilfully, knowingly and intentionally intimidating employees

and persons who work in or seek to work in Plaintiff's plant, and interfering with and impeding motor vehicles leaving Plaintiff's premises, and interfering with free egress from Plaintiff's plant.

"The Court further finds as a fact that Joyce Ann Clark Robinson on the 26th day of February, 1959, at or about 3:00 o'clock P. M. did wilfully, knowingly and intentionally violate the terms of the Restraining Order issued herein.

"NOW, THEREFORE, the Court does hereby find, and IT IS ORDERED AND ADJUDGED that Joyce Ann Clark Robinson is in contempt of this Court for wilfully, knowingly and intentionally violating the terms of the Restraining Order issued herein.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Joyce Ann Clark Robinson be confined to the common jail of Vance County for a period of 2 days and pay a fine of $250.00."

Judge Mallard entered a substantially identical order as to Juanita Raines, respondent, with this exception, respondent Robinson is a member of Local Union No. 584 (Henderson Cotton Mills), and respondent Raines is a member of Local Union No. 578 (Harriet Cotton Mills). The punishment imposed in each order is the same.

From the orders, respondents appeal to the Supreme Court.

Perry & Kittrell, Charles P. Green, A. W. Gholson, Jr., and Alton T. Cummings for plaintiff, appellee.

W. M. Nicholson, James B. Ledford, James J. Randleman and L. Glen Ledford for respondents, appellants.

PARKER, J. Respondents have filed a joint brief. In their brief they have brought forward and discussed only two of their four assignments of error appearing in the record.

Assignments of error Numbers Two and Four are not set out in their brief, and in support of them no reason or argument is stated or authority cited. They are taken as abandoned by respondents. Rule 28, Rules of Practice in the Supreme Court. 221 N.C. 544, 563; *S. v. Clayton, ante,* 261, 111 S.E. 2d 299.

Respondents' assignment of error Number One is: Respondents except to the findings of fact and conclusions of law of the Court finding each of them in wilful contempt of Court, and except to the judgment. This is a broadside exception, which fails to point out any particular findings of fact, and does not bring up for review the sufficiency of the evidence to support the findings of fact. *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America*

(AFL-CIO), Doug Rose, et al., docketed here as Number 392, *post*, 419, 111 S.E. 2d 526; *Weaver v. Morgan*, 232 N.C. 642, 61 S.E. 2d 916; *Hickory v. Catawba County*, 206 N.C. 165, 173 S.E. 56. However, a careful examination of the evidence in the record shows there is substantial competent evidence to support Judge Mallard's findings of fact in both orders, even though he was mistaken in finding as a fact that Joyce Ann Clark Robinson testified that she knew about the contents of the restraining order, though he was correct in finding that she testified that she knew about the restraining order. This being true, his findings of fact in both orders are conclusive and not reviewable on appeal. *Young v. Rollins*, 90 N.C. 125; *Wood Turning Co. v. Wiggins*, 247 N.C. 115, 100 S.E. 2d 218, and cases there cited; 17 C.J.S., Contempt, Sec. 124(d). Respondents' assignment of error Number One is overruled.

Respondents' assignment of error Number Three is that respondents were denied due process of law, because they were denied the right to confront Eva Walker Robinson, Doza Stone, and Sheriff E. A. Cottrell. This assignment of error made by each respondent is not based on any exception taken at the hearing. It appears from the record that the show cause orders served on the respondents were heard jointly and at the same time by Judge Mallard, though he entered separate orders. There were no objections by respondents, or either of them, to the admission in evidence of the above mentioned affidavits, no request by respondents, or either of them, that the affidavits be stricken out, and no request by respondents, or either of them, to confront Eva Walker Robinson, Doza Stone, and Sheriff E. A. Cottrell, and to cross-examine them, or either one of them. It would seem to be fair inferences from the evidence that Eva Walker Robinson, Doza Stone, and Sheriff E. A. Cottrell were readily available as witnesses, if respondents had desired to confront and to cross-examine them, or either of them, and if respondents, or either of them, had made such a request, the Judge would have granted it. Upon authority of *Harriet Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO), Johnny Rose, et al.*, docketed here as Number 385, *ante*, 218, 111 S.E. 2d 457, which decided the precise question here presented, this assignment of error is overruled.

Judge Mallard's findings of fact in both orders support his conclusions in both orders and his orders based thereon. *Erwin Mills v. Textile Workers Union*, 234 N.C. 321, 67 S.E. 2d 372; *Erwin Mills v. Textile Workers Union*, 235 N.C. 107, 68 S.E. 2d 813; *Wood Turning Co. v. Wiggins, supra; Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO), Doug Rose, et al.*, docketed here as Number 393, *ante*, 240, 111 S.E. 2d 471. Respond-

ents' assignment of error Number Three is overruled. Judge Mallard's orders are

Affirmed.

HIGGINS, J., not sitting.

HENDERSON COTTON MILLS v. LOCAL UNION NO. 584, TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); TEXTILE WORKERS UNION OF AMERICA (AFL-CIO); DOUG ROSE, NICK LANGLEY, RUFUS STRANGE, M. LUTHER JACKSON, VERNON W. BURNETTE, ANDREW C. TURNER, CARL C. MOORE, RALPH F. HARRIS, WILLARD O. FAULKNER, JAMES B. H. ROBERSON, ALBERT L. BATTON, HENRY W. STALLINGS, EDWARD J. OFTEN, JAMES E. REARDON, RICHARD F. PARROTT, CLARENCE E. HARPER, JOHN E. STALLINGS, JOE HALE, JOHN LONG, HARRY HICKS, EDWIN ELLINGTON, COY L. PEGRAM, SHERMAN FERRELL, FRANK O. TURNER, LINVEL NELSON, SIDNEY WALLACE, PHIL HARRIS, ELMORE MURPHY, MACON RENN, JOHN OWEN, CLIFTON CARTER, SANDY SAM ROBERSON, JAMES BARKER, EDWARD MOSELEY, WILLIAM TART, MELVIN BRAME, HERMAN MULCHI, R. TALMADGE HARPER, BILLY THOMPSON, JOHN G. MULCHI, JAMES M. WILKERSON, AND ALL OTHER PERSONS TO WHOM NOTICE AND KNOWLEDGE OF THIS ACTION MAY COME.

(Filed 16 December, 1959.)

1. Appeal and Error § 38—

Assignments of error not set out in defendant's brief and in support of which no reason or argument is stated or authority cited will be deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

2. Appeal and Error § 22—

An exception to the findings of fact and conclusions of law and the judgment of the court is a broadside exception which does not present for review the sufficiency of the evidence to support the findings.

3. Contempt of Court § 6—

Findings of the court that the respondents with knowledge willfully violated the restraining order theretofore issued in the cause *held* supported by substantial competent evidence and binding on appeal.

4. Constitutional Law §§ 31, 37: Contempt of Court § 6: Criminal Law § 155—

In proceedings under an order to show cause why respondents should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by respondents in violation of the order will not be held for error when respondents, represented by counsel, do not object to the admission of the affidavits or indicate any desire to cross-examine any affiant on the hearing, or move to strike, or except to the order on such ground,

and it is a fair inference from the record that the affiants were readily available as witnesses since respondents will be held to have waived their rights of confrontation.

HIGGINS, J., not sitting.

APPEAL by respondent Collis Delon Strickland from an order of *Mallard, J.*, 25 May 1959 Special Criminal Term, of VANCE.

This proceeding, docketed here as No. 392, was heard upon an order, issued by Judge Bickett on 4 March 1959 and served on respondent on 5 March 1959, commanding respondent to appear before Judge Bickett at 10:00 a. m. o'clock on 11 March 1959 in the Superior Court courtroom at Henderson, Vance County, and to show cause, if any he can, why he should not be held in contempt of court for the alleged violation of a temporary restraining order issued by Judge Bickett on 13 February 1959. On the return date of the show cause order, Judge Bickett continued the hearing until he set another date. On 29 April 1959, Judge Bickett, with the consent of counsel for petitioner and respondent, ordered the show cause order to be heard before Judge Mallard at the aforesaid Special Criminal Term of Court.

The relevant parts of Judge Bickett's temporary restraining order are set out in the case of *Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO), Doug Rose, et al.*, *ante*, 240, 111 S.E. 2d 471, docketed here as Number 393, to which reference is hereby made. It would be supererogatory to repeat them here.

This case, in which the show cause order here was issued, was instituted on 13 February 1959, and within due time, summons, copies of the complaint and of the temporary restraining order were served on the defendants. Defendants, and each one of them, filed an answer. On 5 March 1959, Judge Bickett on motion of plaintiff, the attorney for the defendants not resisting the motion, ordered that the temporary restraining order be continued in full force and effect until the case shall be heard on its merits. The restraining order was in full force and effect at all times relevant to this proceeding.

The affidavits of W. S. Etheridge, a North Carolina State Highway Patrolman, and E. A. Cottrell, Sheriff of Vance County, were attached to and made a part of the show cause order served on respondent.

At the hearing before Judge Mallard plaintiff introduced in evidence these two affidavits. The affidavit of Etheridge is to this effect: He was on duty at the Henderson Cotton Mills on 25 February 1959. About 3:05 p. m. on that day he was riding north on Williams Street in a patrol car driven by Sergeant T. E. Cook. When they approached

the intersection of Williams and Main Streets, there was a crowd of at least 75 to 100 people gathered on the west side of Williams Street. The workers' automobiles were leaving the main gate, and some of them were going down Williams Street. They saw a rock hit a car. They stopped. He got out, and circled behind the main body of the crowd. At this time he saw a man about 10 feet away throw a rock at a pickup truck, which was driven by a worker leaving the Henderson Cotton Mills: He placed him under arrest. The arrested man said he was Collis Delon Strickland. This occurred about 150 feet from the main gate of the mill, and within plain sight of a bulletin board 75 feet from the main gate on which was posted a copy of Judge Bickett's restraining order. The affidavit of Sheriff Cottrell is to this effect: On 14 February 1959 two copies of Judge Bickett's temporary restraining order were posted conspicuously on bulletin boards on either side of each gate at the Henderson Cotton Mills, two copies were posted on either side of the courthouse door in Henderson, a copy of the order has been published in Henderson, the contents of the order publicized over the radio, and the order is of general knowledge throughout the county.

Respondent testified at the hearing, as did Catherine Roberson and Myrtle Hughes, in his behalf.

Respondent Collis Delon Strickland's testimony is to this effect: He is a member of the Union, and is now on strike. He was in the crowd of people numbering about 300. He threw no rock. A rock came over his shoulder. A patrolman came through the crowd, grabbed two men, and asked if they threw the rock. They replied, "No." The patrolman grabbed him, saying "you threw that rock." He didn't open his mouth, and the patrolman arrested him. He testified on cross-examination: "I knew about the contents of the restraining order before this occurrence." His further testimony on cross-examination is to this effect: He saw several rocks hit cars, but did not see any one throwing rocks. The testimony of Catherine Roberson and Myrtle Hughes is to the effect that they were standing in the crowd near Strickland, and that Strickland threw no rock. The record shows that respondent is not a defendant in this case.

Judge Mallard's order is to this effect: Collis Delon Strickland was represented by counsel at the hearing, that he filed an answer to the show cause order, that plaintiff and he offered evidence, and that counsel for plaintiff and respondent were heard. In his order he found the following facts: The temporary restraining order issued by Judge Bickett was in full force and effect at all times relevant to this hearing. Respondent knew the contents of the restraining order before 25 February 1959. That Collis Delon Strickland wilfully, knowingly and

intentionally violated the terms of the restraining order on 25 February 1959 by throwing a rock at a pickup truck driven by a person who worked in the Henderson Cotton Mills as the worker was leaving the mills and by being one of 300 pickets engaged in non-peaceful picketing, in violation of sections one, two and four of the restraining order. Whereupon, Judge Mallard adjudged him in contempt of court, and ordered him to be confined in jail for twenty days and to pay a fine of $100.00.

From this order, respondent appeals.

Perry & Kittrell, Charles P. Green and A. W. Gholson, Jr., for plaintiff, appellee.

W. M. Nicholson, James B. Ledford, James J. Randleman and L. Glen Ledford for respondent, appellant.

PARKER, J. Respondent has brought forward and discussed in his brief two of his four assignments of error appearing in the record.

Assignments of error Numbers Two and Four are not set out in his brief, and in support of them no reason or argument is stated or authority cited. They are taken as abandoned by respondent. Rule 28, Rules of Practice in the Supreme Court. 221 N.C. 544, 563; *S. v. Clayton, ante,* 261, 111 S.E. 2d 299.

His assignment of error Number One is, he excepts to the findings of fact and conclusions of law of Judge Mallard finding him in wilful contempt of court, and he excepts to the judgment. This is a broadside exception, which fails to point out any particular finding of fact, and does not bring up for review the sufficiency of the evidence to support the findings of fact. *Kovacs v. Brewer,* 245 N.C. 630, 97 S. E. 2d 96; *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916; *Hickory v. Catawba County,* 206 N.C. 165, 173 S.E. 56. However, there is substantial competent evidence to support Judge Mallard's findings of fact, and this being true, his findings of fact are conclusive and not reviewable on appeal. *Young v. Rollins,* 90 N.C. 125; *Wood Turning Co. v. Wiggins,* 247 N.C. 115, 100 S.E. 2d 218, and cases there cited; 17 C.J.S., Contempt, Sec. 124(d). Assignment of error Number One is overruled.

Respondent's assignment of error Number Three is that respondent was denied due process of law because he was denied the right to confront Patrolman Etheridge and Sheriff Cottrell, and to cross-examine them. This assignment of error is not based on any exception taken at the hearing. Respondent at the hearing was represented by counsel. There was no objection by respondent to the admission in evidence of the affidavits of Etheridge and Cottrell, no request that they be strick-

en out, and no request to confront Etheridge and Cottrell, and to cross-examine them. It would seem to be fair inferences from the evidence that Patrolman Etheridge and Sheriff Cottrell were readily available as witnesses, if respondent had desired to confront and to cross-examine either or both, and if he had made such a request, the Judge would have granted it. Under the facts here respondent waived his constitutional right to confront Etheridge and Cottrell, and to cross-examine them. Upon authority of *Harriet Cotton Mills v. Local Union No. 578, Textile Workers Union of America (AFL-CIO), Johnny Rose, et al.*, docketed here as Number 385, *ante*, 218, 111 S.E. 2d 457, which decided the precise question here presented, this assignment of error is overruled.

Judge Mallard's findings of fact support his conclusions and his order based thereon. *Erwin Mills v. Textile Workers Union*, 234 N.C. 321, 67 S.E. 2d 372; *Erwin Mills v. Textile Workers Union*, 235 N.C. 107, 68 S.E. 2d 813; *Wood Turning Co. v. Wiggins, supra; Henderson Cotton Mills v. Local Union No. 584, Textile Workers Union of America (AFL-CIO), Doug Rose, et al.*, docketed here as Number 393, *supra*. Respondent's assignment of error Number Three is overruled. Judge Mallard's order is

Affirmed.

HIGGINS, J., not sitting.

STATE v. WILLIAM H. BRYANT.

(Filed 16 December, 1959.)

1. Criminal Law § 138—

Where judgment upon conviction of a defendant imposes a prison sentence and also directs that defendant pay a fine in a stipulated sum and the costs, but the judgment does not direct that defendant be imprisoned until the fine and costs are paid or until defendant is discharged according to law, such judgment is not in compliance with G.S. 6-46, and G.S. 6-48 is not applicable. Therefore, after defendant has served the sentence and been discharged, the Superior Court has no authority at a later term to order that the defendant be imprisoned until the fines and costs should be paid.

APPEAL by defendant from *Bone, J.*, June 1959 Assigned Criminal Term, of WAKE.

STATE *v.* BRYANT.

This is an appeal by defendant from an order of Judge Bone entered, pursuant to G.S. 6-48, committing him to the common jail of Wake County, there to be held, until two fines and the costs imposed upon him at the March Term 1949 of the Wake County Superior Court, are paid or until he is otherwise discharged according to law.

At the March Term 1949 of Wake County Superior Court defendant was tried on appeal from the city court of Raleigh on a warrant charging him with operating a lottery and with having in his possession a quantity of numbers tickets, in violation of G.S. 14-290 and G.S. 14-291.1. He pleaded not guilty, and the jury returned a verdict of guilty as charged in the warrant. On the first count in the warrant the judgment of Judge Clawson L. Williams is that the defendant W. H. Bryant pay a fine of $2,000.00 and costs, and be imprisoned for two years, a violation of G.S. 14-291.1. On the second count in the warrant the judgment is that defendant pay a fine of $1,000.00 and costs, and be imprisoned for six months, a violation of G.S. 14-290, said sentence to begin at the expiration of sentence imposed on the first count in the warrant. From the judgment, defendant appealed to the Supreme Court. This Court found no error in the trial, the opinion being filed on 9 November 1949, and is reported in 231 N.C. 106, 55 S.E. 2d 922. The opinion of this Court was certified to the Superior Court of Wake County on 5 December 1949, and became final on said date. When defendant appealed to the Supreme Court, he gave an appearance bond, but no stay of execution or *supersedeas* bond, so far as the record discloses. The defendant has served his sentences of imprisonment, but has never paid the fines and costs imposed in said sentences.

Nothing was done about the collection of these fines and costs, until the June Regular Criminal Term 1959 of Wake County Superior Court, at which term defendant was convicted by a jury of the crime of bribery. From the sentence imposed defendant appealed to the Supreme Court. This Court found no error in the trial in an opinion filed on 11 November 1959, and reported *ante* p. 217, ... S.E. 2d ..... In that opinion it is said: "The evidence before the jury disclosed the defendant paid two Raleigh police officers money for the purpose of having them 'lay off his numbers racket.'" At the bribery trial Judge Clawson L. Williams was presiding. After the conviction for bribery, Judge Williams inquired if the fines and costs imposed upon defendant at the March 1949 Term for operating a lottery and having in his possession a quantity of numbers tickets had been paid. He learned that they had not been paid. Whereupon, the Court issued an execution against the property of defendant, which was returned unsatisfied by the Sheriff of Wake County.

Then the defendant was arrested on a *capias* for the nonpayment of the two fines and costs, which is the first time he was held for nonpayment of the two fines and costs. At the June 1959 Assigned Criminal Term of Wake County Superior Court, the Solicitor for the State made a motion before Judge Bone, pursuant to G.S. 6-48, that defendant be held for the fines and costs imposed in the judgment at the March Term 1949, as above set out, until discharged according to law.

Judge Bone after hearing the evidence offered by the State and the defendant, entered the order above set forth, from which defendant appeals to the Supreme Court.

Malcolm B. Seawell, Attorney General, and Harry W. McGalliard, Assistant Attorny General for the State.

Robert L. McMillan Jr., and Thomas W. Ruffin for defendant, appellant.

PARKER, J. Each of Judge Williams' judgments entered against defendant Bryant at March Term 1949 imposed a term of imprisonment and also imposed a fine and the costs, but each judgment did not direct that defendant be imprisoned until the fine and costs were paid, or until he was discharged according to law. Judge Williams was authorized to enter such judgments by virtue of the provisions of G.S. 14-290 and G.S. 14-291.1.

In *Ex-Parte Watkins,* 7 Peters 568, 8 L. Ed. 786, Tobias Watkins was convicted upon three indictments, and judgments were pronounced by the court condemning him to certain terms of imprisonment, and also to the payment of certain fines and costs. There, as here, the judgments did not provide that Watkins be held until the fines and costs were paid. This is what the Court said as to the applicable common law: "At the common law, whenever a fine and imprisonment constitute a part of the judgment upon a conviction in a criminal case, the judgment, if the party is in court, is that he be committed to jail in execution of the sentence, and until the fine is paid. If he is not then in court, a special writ of capias pro fine issues against him; the exigency of which is that his body be taken and committed to jail until the fine is paid. Unless such a committitur be awarded he cannot be detained in jail in execution of the sentence. It is the warrant of the jailer, authorizing the detention of the prisoner. No capias ad satisfaciendum in the form appropriate to civil cases, where the exigency of the writ is to take the body of the party and him safely keep, so that the sheriff have his body before the court at the return day of the process with the writ, is ever issued or issuable. If, therefore, the present case were to be tried by the common law, the process of

capias ad satisfaciendum under which the prisoner is detained would be wholly insufficient to justify his detention."

This is said in 15 Am. Jur., Criminal Law, Section 543: "Under the common-law rules, it is the practice, when a punishment inflicted is by sentence to pay a fine, to include in the judgment an order that the prisoner be committed to jail until the fine is paid. This has been the practice in England from the earliest times until a comparatively recent date at least. . . ."

When the case tried by Judge Williams at the March Term 1949 was upheld by this Court at the Fall Term 1949, 231 N.C. 106, 55 S.E. 2d 922, the defendant was committed to prison to serve his sentences of imprisonment. Defendant served his sentences of imprisonment, but has never paid the fines and costs imposed on him by Judge Williams at the March Term 1949. Nothing was done about these fines and costs until the June Regular Term 1959. At the June 1959 Assigned Criminal Term, Judge Bone, upon motion of the Solicitor for the State made pursuant to G.S. 6-48, ordered the defendant to be committed to the common jail of Wake County, there to be held until the fines and costs imposed by Judge Williams at the March Term 1949 be paid, or until he is otherwise discharged according to law.

Defendant's sole exception is to Judge Bone's order. Defendant makes two contentions: One, Judge Bone erred in committing defendant to jail, for the reason that the judgment entered at the March Term 1949 was not rendered in compliance with G.S. 6-46. Two, the judgment entered at the March Term 1949 is barred by the ten-year Statute of Limitations, G.S. 1-47.

G.S., Chapter 6, Article 6, sets forth the liability of a defendant in criminal actions.

G.S. 6-45 reads: "COSTS AGAINST DEFENDANT CONVICTED, CONFESSING, OR SUBMITTING. .....Every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution."

G.S. 6-46 reads: "DEFENDANT IMPRISONED NOT DISCHARGED UNTIL COSTS PAID. .....If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison, after the expiration of the fixed time for his imprisonment, until the costs shall be paid, or until he shall otherwise be discharged according to law."

G.S. 6-47 reads: "JUDGMENT CONFESSED; BOND GIVEN TO SECURE FINE AND COSTS. .....In cases where a court, mayor, or a justice of the peace permits a defendant convicted of any crim-

inal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid."

G.S. 6-48 reads: "ARREST FOR NONPAYMENT OF FINE AND COSTS. .....In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the State, to order a capias to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law; and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law."

What is now G.S. 6-46 was first enacted at the 1868-69 Session of the General Assembly as Section 16 (page 450), Chapter IV, Chapter CLXXVIII, of the Laws of North Carolina. Chapter IV, under which Section 16 appears, is entitled "OF THE FINAL JURISDICTION OF JUSTICES OF THE PEACE IN CRIMINAL ACTIONS."

What are now G.S. 6-47 and G.S. 6-48 were enacted at the 1879 Session of the General Assembly as Sections 6 and 7, Chapter 264, of the Laws of North Carolina, which chapter is entitled "AN ACT TO REDUCE THE COSTS OF CRIMINAL PROSECUTIONS."

Judge Williams' judgments do not provide that the defendant shall remain in prison, after the expiration of the fixed time for his imprisonment, until the costs shall be paid, or until he shall otherwise be discharged according to law, as set forth in G.S. 6-46.

G.S. 6-48 reads: "In default of payment of *such* fine and costs, etc." (Italics ours.) It seems to us that the words "such fine and costs" refer to the fine and costs secured by bond as provided for in G.S. 6-47. That being true, G.S. 6-48 has no application here, and does not support Judge Bone's order.

G.S. 23-24 provides that "every person committed for the fine and costs of any criminal prosecution" may be discharged from imprisonment upon complying with this article and G.S. 153-194. In *S. v. Davis*, 82 N.C. 610, which is annotated under G.S. 23-24, the defendant was sentenced to pay a fine and be committed until the fine and costs are paid. In *S. v. Williams*, 97 N.C. 414, 2 S.E. 370, annotated at the same place, the defendant was sentenced to imprisonment for twelve months, and to pay the costs, and if he failed to pay the costs at the expiration of the sentence, that he remain in jail until said costs are paid. G.S. 153-194 provides in part that "all insolvents imprisoned by any court in said counties for nonpayment of costs in criminal

causes may be retained in imprisonment and worked on the public works until they repay the county to the extent of the half fees charged up against the county for each person taking the insolvent oath."

The record shows that defendant has served his sentences of imprisonment imposed by Judge Williams; that he has never paid the fines and costs imposed by Judge Williams and that nothing was done about the collection of the fines and costs until June 1959. So far as the record shows, defendant, when he was imprisoned, may have been retained in prison, after the expiration of his sentences of imprisonment, to repay Wake County to the extent of the half fees charged up against it.

Judge Williams' judgments entered at the March Term 1949 did not direct imprisonment of the defendant, until the fines were paid, or until he shall otherwise be discharged according to law. Therefore, the payment of such fines cannot be enforced by imprisonment or detention, for the reason that a commitment of a defendant in a criminal action departing in matter of substance from the judgment back of it is void. *In re Swink*, 243 N.C. 86, 89 S.E. 2d 792. The rule is well established in the Federal Courts that payment of a fine imposed by a Federal Court in a criminal prosecution may be enforced by imprisonment only where such consequence is prescribed in the imposition of the sentence. *Hill v. U. S.* 298 U.S. 460, 80 L. Ed. 1283; *Boyd v. Archer*, (C.C.A. 9th), 42 F. 2d 43, 70 A.L.R. 1507; *Wagner v. U. S.*, (C.C.A. 9th), 3 F. 2d 864.

Judge Bone's order is broader than Judge Williams' judgments. A court speaks through its judgments, and not through any other medium. Judge Bone's order that defendant be held in the common jail of Wake County for the fines imposed in Judge Williams' judgments, until the fines are paid or until he is discharged according to law, is not authorized by Judge Williams' judgments, and in that respect is void. The part of Judge Bone's order that defendant be held until the costs imposed in Judge Williams' judgments cannot be upheld for the reason that Judge Williams' judgments do not conform to G.S. 6-46, and for the further reason that so far as the record shows — the commitments of defendant to prison under Judge Williams' judgments are not in the record, nor their contents stated therein—defendant may have worked the costs out as provided in G.S. 153-194.

G.S. 15-185, which is entitled, "JUDGMENT FOR FINES DOCKETED; LIEN AND EXECUTION," provides a procedure to collect fines imposed in a criminal action from a solvent defendant.

The order below is

Reversed.

MAUDE T. LEE v. JAMES R. STEVENS AND WIFE, EVELYN K. STEVENS.

(Filed 16 December, 1959.)

1. Automobiles § 41g—

Evidence tending to show that defendant ran through a stop sign and entered an intersection in the path of plaintiff's car, which was traveling on the dominant highway, forcing plaintiff to take evasive action to avoid a collision and resulting in plaintiff's being forced off the traveled portion of the highway and down an embankment, is sufficient to take the issue of defendant's negligence to the jury.

2. Negligence § 24a—

Evidence sufficient to make out a case of actionable negligence resulting in damage in any amount precludes nonsuit.

3. Damages §§ 3, 14—

Proof of negligence and subsequent injury is insufficient alone to charge the defendant with liability for such injury, but plaintiff has the burden of introducing evidence sufficient to warrant the inference of fact that the injury was the proximate result of the negligence, and evidence which leaves the matter in mere speculation or conjecture is insufficient.

4. Same— Evidence held insufficient to show that cerebral hemorrhage after accident was the result of the accident.

Plaintiff suffered a cerebral hemorrhage some 36 days after the accident in suit. Plaintiff testified that prior to the accident she was in good health and that subsequent thereto she had headaches and nausea, but plaintiff further testified that shortly after the accident she drove her car to another city for repairs and worked continuously from the date of the accident until she had the stroke. Plaintiff's expert witness testified that he found no evidence of skull fracture but that there was a possibility that the stroke resulted from the accident. The testimony of defendant's expert witness, not in conflict with plaintiff's evidence, was to the effect that the hemorrhage was due either to a ruptured aneurism or to high blood pressure, and that in his opinion plaintiff would have had the hemorrhage had she not had the accident. *Held:* The evidence leaves in mere speculation whether the stroke was the result of the accident and is insufficient to be submitted to the jury on that question.

5. Trial § 22a—

Evidence which shows it merely possible for the fact in issue to be as alleged or which raises a mere conjecture to that effect is insufficient foundation for a verdict and should not be submitted to the jury.

APPEAL by defendants from *Clark, J.*, February, 1959 Civil Term, HARNETT Superior Court.

Civil action to recover for personal injuries the plaintiff alleged she sustained as a result of the negligent operation of the automobile

owned by the defendant James R. Stevens and operated by his wife, Evelyn K. Stevens. Issues of negligence and contributory negligence, and damages were raised by the pleadings. Both parties introduced evidence.

The evidence favorable to the plaintiff tends to show that on February 14, about one o'clock, p. m., she was driving north through the town of Garner on dominant highway No. 50 when the defendant, Evelyn K. Stevens, driving her husband's Buick, ran through a stop-sign and entered highway No. 50 from St. Mary's Street. In taking the evasive action necessary to protect herself from the collision with the Stevens' vehicle wrongfully entering highway No. 50, the plaintiff was forced off the traveled portion of the highway and down an embankment; that she received certain injuries which were proximately caused by the negligence of Mrs. Stevens in "running the stop-sign." The following is the plaintiff's testimony with respect to her injuries:

"My general physical condition prior to February 14th was perfect. I didn't have any trouble. I had been working for 18 years and had not lost any time from work. I went back to work right after I left Garner and got home and worked until they carried me to the hospital. My head hurt me all the time. It would start in here and go right on up (indicating back of head, to top of head). I had not had any headaches prior to February 14. My head started aching immediately after the wreck. It hurt right on up until they carried me to the hospital. It got worse. My nausea and vomiting got worse. I was not affected with nausea and vomiting prior to the wreck and I was not nervous before the wreck."

On cross-examination, she stated: "I did not go and see any doctor from the date the wreck happened on February 14th until March 22nd when I had the cerebral hemorrhage. I consulted no doctor whatsoever because I thought I was going to get well. . . . From the time of the wreck . . . I continued to work for Mr. Tart. I was in Fayetteville on business for Mr. Tart when I had this trouble on March 22nd."

Dr. Lilly, found to be an expert in the general practice of medicine, testified in substance he examined the plaintiff on March 22, 1957, and found she had suffered a cerebral hemorrhage or stroke. In answer to a hypothetical question whether a blow received in the accident could or might have caused her hemorrhage, he replied: "That is a possibility." Dr. Lilly further testified he found no evidence of skull fracture. "Injury or trauma contribute a very small part to cerebral hemorrhage. I would not say that trauma, particularly, and severe trauma, is the least of all common causes of cerebral hemorrhage. A cerebral hemorrhage itself is extremely infrequent in the absence of

actual skull fracture." It is true that diseases of the blood vessels in the brain account for the greatest portion of strokes or cerebral hemorrhage as age advances. "It is correct to say that her apparent stroke at this time, that is, March 22 or 23, 1957, was simply, or may have been, result of a hemorrhage that had been building up for some time." At the time of his examination, March 22 or 23, Dr. Lilly found evidences of hypertension and "vein nicking." "I know of my own knowledge that she had been hospitalized for high blood pressure or hypertension prior to March 22, 1957, and in fact prior to February 14, 1957." It is a matter of speculation or conjecture as to the cause of the hemorrhage.

Dr. Lilly called in consultation Dr. LeRoy Allen, a neurological surgeon. Later, on February 5, 1958, Dr. Allen examined the plaintiff. He was called as a witness for the defendants. After having been found to be a medical expert in the special field of neurological surgery, he testified: "As to the causes of cerebral hemorrhage, the most common causes are a rupture of a congenital aneurism of the brain, which is a defective, weak wall area in the blood vessel, which has been present since birth, and the other one is high blood pressure with the associated hardening of the arterial walls and, therefore, defective areas in the blood vessel walls associated with the high blood pressure, and arteriosclerosis, or hardening of the arteries. Yes, it is true that this disease of the blood vessels in the brain does account for the greatest number of strokes, . . . That is true in by far the greatest majority—in excess of ninety-five percent, I would say, of all cases. . . . excitement would elevate the blood pressure. . . . there is an increased possibility of that weak spot giving way. . . . There is a type of hemorrhage which can occur by coming out in such a gradual manner that the condition will not be asserted sufficiently for it to become known within a period of some five, six or eight weeks. That is what I would describe as a 'sub-dural hematoma' . . . You have asked me that if it does then assert itself . . . it is likely . . . in the form of a sudden, acute attack. My answer is that it is unlikely to do that. . . . Yes, it is also a fact that the seepage or leakage of blood from a vessel in the brain is likely to cause, . . . nausea, headaches and dizzy spells. . . . No, it is not generally accepted medical fact that the presence of nausea, dizziness and headaches are symptoms which indicate brain damage or increased pressure in the brain cavity. . . . those symptoms which you mentioned are frequently associated with brain conditions, but they are also caused by a variety of other illnesses." They are symptoms of, but do not indicate a brain condition. "My opinion is that she had a cerebral hemorrhage due either to a ruptured aneurism or to high blood pressure."

Without objection, Dr. Allen testified that based on his examination and knowledge of the plaintiff's medical history, in his opinion she would have had the stroke regardless of the accident in which she was injured on February 14, 1957.

The defendants having objected to its introduction, made a motion to strike from the record all evidence relating to cerebral hemorrhage and expenses incurred in the treatment thereof for the reason that the evidence failed to connect the hemorrhage which occurred on March 22 with the accident that occurred on February 14. The motion was denied, to which defendants took their exception No. 14.

The court overruled motions for compulsory nonsuit at the close of all the evidence and submitted the following issues to the jury:

"1. Did the plaintiff sustain a cerebral hemorrhage as a result of the negligence of the defendants, as alleged in the Complaint?

"2. Did the plaintiff sustain any injury as a result of the negligence of the defendants, as alleged in the Complaint?

"3. Did the plaintiff by her own negligence contribute to her own injury?

"4. What damages, if any, is the plaintiff entitled to recover of the defendant?"

In apt time the defendants requested the court to instruct the jury to answer the first issue, "No." To the refusal of the court to do so, the defendants entered exception No. 15.

The jury answered the first and second issues, "Yes," the third issue, "No," and the fourth issue, "$16,000." From the judgment on the verdict, the defendants appealed.

Edgar R. Bain and Wilson & Johnson, By: W. A. Johnson for plaintiff, appellee.

Broughton & Broughton, and D. K. Stewart for defendants, appellants.

HIGGINS, J. The evidence favorable to the plaintiff is sufficient to go to the jury on the issue of defendants' actionable negligence in causing the accident on February 14, 1957. It is likewise sufficient to show the plaintiff suffered injury and damage as a result of that accident. Upon a finding of actionable negligence, the showing of damage in any amount will take the case to the jury. Assignment of Error No. 13, therefore, cannot be sustained.

The defendants' assignments of error Nos. 14 and 15 are based on the court's refusal (1) to withdraw from the jury the evidence relating to the cerebral hemorrhage, and (2) to instruct the jury to answer the first issue, "No." These assignments require us to determine wheth-

er there is substantial evidence the plaintiff's cerebral hemorrhage suffered on March 22 resulted from the injury she sustained in the accident on February 14.

The plaintiff's own testimony is quoted in the statement of facts. By way of showing the lights and shadows in the picture she painted of her condition subsequent to the injury, we have the following admissions made by her: After the accident, a short rest, an aspirin, and a coca cola, she drove her automobile from Garner to Raleigh for repairs. A friend drove her to her home in Dunn. She did not call or consult a physician. She worked continuously from the day of the accident until she had the cerebral hemorrhage on March 22.

The lay testimony, including the plaintiff's own evidence, fails to show causal relationship between the accident and the stroke.

The testimony of plaintiff's expert witness, Dr. Lilly, boiled down to its essence is that a causal relationship between the accident and the stroke is a possibility. He was frank to admit the cause of the hemorrhage is a matter of speculation or conjecture. The other medical evidence in the case came from Dr. LeRoy Allen, a neurological surgeon called in consultation by Dr. Lilly, but examined as a witness by the defendants. Inasmuch as Dr. Allen was a witness for the defendants, his evidence may be considered to the extent only that it explains or fills out, but does not contradict, the plaintiff's evidence. Dr. Allen testified the cause of cerebral hemorrhage in more than 95 per cent of the cases is (1) rupture of a congenital aneurism of the brain, or weak wall area in a blood vessel present since birth; and (2) high blood pressure or hardening of the arteries and weakening of the walls in the blood vessels of the brain. "My opinion is she had a cerebral hemorrhage due either to a ruptured aneurism or to high blood pressure. . . . My opinion is she would have had the hemorrhage had she not had the accident."

The medical testimony, added to the other evidence, leaves the causal relationship between the accident and the stroke in the realm of conjecture and speculation. The authorities in this State are uniform in holding such evidence is insufficient to support a verdict and judgment. The rules taken from earlier cases were restated by *Justice Walker* in the case of *Byrd v. Express Co.*, 139 N.C. 273, 51 S.E. 851: "The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established, and the negligent act of the defendant must not only be the cause, but the proximate cause of the injury. . . . The burden was therefore upon the plaintiff to show the defendant's . . . negligence proximately caused his intestate's death, and

the proof should have been of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact. . . . 'We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury.' . . . 'Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.' "

Byrd v. Express Co., supra, was decided in 1905. It was cited with approval by this Court in *Lane v. Bryan,* decided in 1957 and reported in 246 N.C. 108, 97 S.E. 2d 411. Between the decision in *Byrd v. Express Company* and *Lane v. Bryan,* this Court has cited the *Byrd* case with approval in more than forty cases.

In commenting on the rule in the *Byrd* case, *Justice Brogden* had this to say in *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12: "This rule is both just and sound. Any other interpretation of the law would unloose the jury to wander aimlessly in the fields of speculation."

We conclude the evidence was insufficient to show causal relationship between the plaintiff's injury in the accident and the cerebral hemorrhage five weeks later. The defendants' motion to strike the evidence relating thereto should have been allowed. The first issue was improperly submitted for lack of evidentiary support.

The trial court having denied the motion to withdraw from the jury the evidence relating to the cerebral hemorrhage, the defendants were entitled to a peremptory instruction to answer the first issue, "No."

For the reasons here assigned the judgment of the Superior Court is set aside. The defendants are entitled to a

New trial.

JEWEL RAY BRINSON BY HER NEXT FRIEND, ANNIE DENNIS BRINSON v. TRAVIS DRYMAN MABRY.

(Filed 16 December, 1959.)

1. Automobiles § 34—

While a driver who sees or by the exercise of due care should see children on or near the traveled portion of the highway is under duty to use due care to control the speed of his vehicle and to keep a vigilant lookout to avoid injury, he is not required to come to a complete stop when children are standing off the hard surface and apparently attentive to traffic conditions and, he may not be held liable for injury to one of them who darts in front of his vehicle when there is nothing to give the driver notice that she might do so until too late for him to take evasive action.

2. Automobiles § 41m— Evidence held insufficient to show negligence on the part of motorist in hitting child on highway.

The evidence tended to show that two children were standing on the west side of the highway off the hard surface where there was no marked crosswalk, that defendant knew that pedestrians, including children, crossed at the place, that as defendant, traveling north, approached the children two vehicles traveling south obstructed his vision, that immediately after these vehicles passed, plaintiff, a seven-year old child, ran into the highway to pick up some object therefrom, that while she was stooping over to do so her sister shouted a warning and she straightened up and ran on across the highway where she was struck at the eastern edge thereof. The physical evidence, including the fact that defendant's vehicle was stopped before the rear wheel had reached the child, disclosed that defendant was not traveling at an excessive speed and that defendant did not depart from his proper lane of travel. *Held:* The evidence is insufficient to be submitted to the jury on the issue of defendant's negligence.

APPEAL by plaintiff from *Johnston, J.*, May 11, 1959 Civil Term, STANLY Superior Court.

Civil action for damages on account of the personal injury alleged to have resulted from the defendant's actionable negligence.

The plaintiff's evidence disclosed the following: The plaintiff sustained an injury about eight o'clock on the morning of September 21, 1957. The accident occurred on U. S. Highway No. 52 near the village of Porter in Stanly County. Number 52 is a north and south highway. The surface is concrete, approximately 20 feet wide. A well marked center line divides the surface, the east lane for north-bound and the west lane for south-bound traffic. At the site of the accident "a tar and gravel strip lay east of the cement portion of the highway, the width of which varied from nothing at each end . . . to a maximum width of about four feet. Immediately next to and ad-

joining this strip on the east was an apron driveway that led to a nearby grocery store-filling station. Shoulders flanked each side of the concrete, varying in width from approximately five feet to seven and one-half feet. . . . A church road entered the highway from the east approximately 150 feet north of the site of the collision. . . . A dirt road entered the highway from the west approximately two hundred feet north of the site of the collision." There were no highway signs on No. 52 indicating either of these intersecting roads. "A highway sign designating a roadway intersection was displayed on the east side of the highway approximately 600 feet south of the site of the collision. To the north . . . the highway was straight and practically level for several hundred yards. To the south the highway curved to the east, reaching the apex of the curve approximately 600 feet south. . . . At the moment of the collision the highway to the north was clear and free of oncoming traffic and the defendant's view in that direction was unobstructed for more than one-fourth mile, but immediately prior to the moment of the collision, the defendant had met two vehicles proceeding in the opposite direction (south) and by reason thereof, the defendant's view of the western edge of said highway was obstructed as the defendant rounded the curve in said highway. . . . At the time of the collision U. S. Highway No. 52 was a much traveled thoroughfare . . . the weather was clear and the highway was dry."

The defendant "left his home about two miles south of . . . Porter . . . driving his Ford pickup truck in a northerly direction on Highway No. 52; that when he approached the curve in the highway . . . he reduced the speed of his truck to approximately 40 miles per hour . . . that the defendant met two vehicles proceeding in the opposite direction, (south); that after meeting and passing the second of said vehicles, the defendant observed two children on the west shoulder of the highway . . ."

The quoted portions of the two preceding paragraphs appear in the defendant's answer. However, they were introduced in evidence by the plaintiff.

The plaintiff's evidence disclosed that the plaintiff, then seven, and her older sister, 10 or 11, had approached the highway from the west on a footpath, intending to cross to the church on the east. They stopped on the west shoulder of the road about two or three feet from the concrete surface. "A car came by going towards Norwood." (south) "Just before my sister was injured I looked in the direction of Norwood and Albemarle along the highway. I saw a white Ford coming from towards Albemarle and he had passed us before my sister was hit. . . . There was a piece of rubber lying in the road and

she wanted it, so she went out to get it, and she stooped over to pick it up and I hollered, 'Look out,' because his truck was coming and she took off across the road, and about the time she got to the edge of the road it hit her."

On cross-examination, she testified: "A car came by going towards Norwood. It was at the side of the road near where Jewel and I were standing. After the car came by Jewel ran out into the road to pick up a piece of rubber . . . When she stooped over to pick it up, I hollered, 'Look out,' . . . She took out across the road and just as she got to the right-hand side . . . the truck hit her. . . . The truck was over on its right-hand side of the road . . . After the car passed it would have been between me and the truck. The truck didn't run over Jewel. The wheel did but the whole truck didn't."

The medical testimony was to the effect that plaintiff, as a result of the accident, suffered a compound fracture of both bones in the lower right leg and "some abrasions over her face, forehead, and elbow. . . . The little girl had very good results. . . . She certainly seems to be all right."

At the close of plaintiff's evidence the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

D. D. Smith, Morton & Williams for plaintiff, appellant.
Richard L. Brown, Jr., for defendant, appellee.

HIGGINS, J. The only assignment of error presents for review the sufficiency of the evidence to survive the motion for nonsuit. In passing on this question we must evaluate the evidence in the light most favorable to the plaintiff. *Lake v. Express Co.*, 249 N.C. 410, 106 S.E. 2d 518; *McFalls v. Smith*, 249 N.C. 123, 105 S.E. 2d 297; *Simmons v. Rogers*, 247 N.C. 340, 100 S.E. 2d 849; *Chambers v. Edney*, 247 N.C. 165, 100 S.E. 2d 343.

We must take into account the fact that the plaintiff was a child seven years of age at the time of the accident. *Pavone v. Merion*, 242 N.C. 594, 89 S.E. 2d 108; *Sparks v. Willis*, 228 N.C. 25, 44 S.E. 2d 343. However, at the time defendant saw, or should have seen her, she was standing in a path on the west side of the highway about three feet from its surface, accompanied by an older sister, then 10 or 11. They were in a place of safety. The defendant admitted in his answer that he was acquainted with conditions on and near the scene of the accident. He knew that pedestrians, including children, on occasion crossed the highway from the west to the church and to the store and filling station on the east. The scene of the accident was in a 55-mile speed zone for vehicles of the type driven by the defendant.

The testimony fails to disclose, and the physical evidence tends to disprove speed. The sister of the plaintiff, the only eye-witness, said Jewel ran out to the center of the highway immediately behind the vehicle going south which cut off her view of the approaching pickup driven by the defendant. "You couldn't see until it got right at you." Necessarily, the passing car likewise cut off the view of the defendant until an instant before the contact. The defendant's vehicle skidded the wheels a distance the plaintiff's eye-witness measured by holding up her hands about three feet apart. One wheel only ran over the plaintiff before the vehicle stopped. At all times the defendant's vehicle was in his proper lane of traffic. The plaintiff's sister testified: "I don't know whether I heard any horn blow. I could just hear the wheels." Thus the evidence fails to show the defendant had time to sound his horn.

The evidence presents this picture: Two girls, one seven and the other 10 or 11, were standing in a path on the west side of the highway unmarked as a place for pedestrians to cross, though the defendant knew that children and grownups used it for that purpose. Assuming the defendant saw the girls, or should have seen them, they were standing by the highway in a place of safety, apparently waiting for the traffic to pass. Two cars were going south. The defendant was going north. As soon as the last vehicle passed going south, the little girl broke away from her sister, ran into the highway to pick up a mat near the center, but at the sister's warning she darted to the east or opposite side into the path of the defendant's pickup. The evidence indicates the forward movement of the vehicle stopped after one wheel only ran over her. The character of the injuries, a broken leg and abrasions of the face and elbow, though serious enough, lend support to the physical evidence the pickup was almost stopped at the time of contact. The record fails to disclose evidence of speed or departure from the proper lane of traffic, or to indicate the girls would not continue to wait until the vehicular traffic, including defendant's pickup, had passed.

True, the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury. *Washington v. Davis*, 249 N.C. 65, 105 S.E. 2d 202; *Brunson v. Gainey*, 245 N.C. 152, 95 S.E. 2d 514; *Pope v. Patterson*, 243 N.C. 425, 90 S.E. 2d 706; *Barnes v. Caulbourne*, 240 N.C. 721, 83 S.E. 2d 898; *Hawkins v. Simpson*, 237 N.C. 155, 74 S.E. 2d 331; *Hughes v. Thayer*, 229 N.C. 773, 51 S.E. 2d 488.

Nevertheless, when a child, without warning, darts from behind

another vehicle into the path of a motorist who is observing the rules of the road with respect to speed, control, and traffic lanes, and who is maintaining a proper lookout, the resulting injury is not actionable. *Butler v. Allen,* 233 N.C. 484, 64 S.E. 2d 561; *Bass v. Hocutt,* 221 N.C. 218, 19 S.E. 2d 871; *Kennedy v. Lookadoo,* 203 N.C. 650, 166 S.E. 752. In such event the cause should not be submitted to the jury. *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Fox v. Barlow,* 206 N.C. 66, 173 S.E. 43.

In this case the children were not on the traveled portion of the highway. They were apparently waiting for vehicular traffic to clear before attempting to cross. The defendant saw nothing to give notice to the contrary until the little girl darted out from behind another vehicle in front of him, leaving insufficient time to take evasive action. *Grant v. Royal,* 250 N.C. 366, 108 S.E. 2d 627; *Sparks v. Willis, supra.* Under the circumstances the defendant did all he was required to do, that is, to slow down and proceed with caution. Surely he was not required to stop completely so long as the girls remained off the hard surface and apparently attentive to traffic conditions.

Comparison of the facts in this case with those presented in *Butler v. Allen, supra,* declared by the Court to be a borderline case, will serve to illustrate wherein the facts now before us fail to make out a case for the jury.

For the reasons indicated, the judgment of compulsory nonsuit in the court below is

Affirmed.

HELEN B. MOORE v. ALLEN LANGSTON, EXECUTOR OF THE ESTATE OF GRACE B. NEAL, DECEASED; ELIZABETH NEAL FRANKLIN AND HUSBAND, WORTH H. FRANKLIN; NATALIE NEIL BLOMQUIST AND HUSBAND, GEORGE B. BLOMQUIST.

(Filed 16 December, 1959.)

1. Wills § 31—

The dominant purpose of the testatrix as gathered from the entire instrument, irrespective of the use of any particular words, is to be ascertained and given effect, and, when necessary, attendant circumstances surrounding the testatrix at the time of the execution of the instrument may be resorted to in ascertaining such intent.

2. Wills § 33—

Testatrix devised and bequeathed all of her property to her two daughters. Thereafter she executed a codicil "this is my wish to be carried out in my will" that her sister receive two hundred dollars a month for life from rentals, and stating that she wanted her two daughters to see that this was done. *Held:* The words of the codicil are not merely

precatory but constitute a testamentary disposition of the property.

3. **Wills § 36—**

A bequest will be construed as a demonstrative rather than a specific bequest unless the intent to the contrary clearly appears in the will, and the mere designation of a fund out of which a legacy is to be satisfied is not enough to make the bequest specific.

4. **Same— Bequest held to constitute a demonstrative and not a specific legacy.**

The codicil directed that testatrix's sister "receive from the rentals of my property Two Hundred Dollars" per month for life. At the time of executing the codicil testatrix was receiving approximately $2000 per month rentals from her property. Thereafter she conveyed her property to a rental corporation in exchange for a note of the corporation and shares of stock. After the conveyance to the corporation testatrix executed a codicil which, after making other unrelated bequests, reaffirmed the will. *Held:* The fact that testatrix was receiving no rentals directly at the time of her death does not adeem the legacy, since the bequest was not a specific but a demonstrative legacy to be satisfied out of the interest on the corporate note and the dividends on the corporate stock and then out of other available assets of the estate, it being apparent that testatrix was disregarding the corporate structure.

APPEAL by defendants from *Thompson, S. J.*, February, 1959 Assigned Civil Term, WAKE Superior Court.

This action was instituted by Helen B. Moore for the purpose of having the court determine and declare her rights under the will of her sister, Grace B. Neal. This will was executed January 27, 1944: "I, Grace B. Neal, declare this to be my last Will and Testament.

"I give, bequeath and devise all of my property, real, personal and mixed to my two daughters, Elizabeth Neal Franklin and Natalie Grace Neal share and share alike.

"I designate and appoint Allen Langston as executor of my will to serve without bond. /s/ Grace B. Neal."

On July 28, 1949, the testatrix executed the following codicil written in her own hand:

"This is my wish to be carried out in my will.

"That my beloved sister, Helen C. Moore, receive from the rentals of my property Two Hundred Dollars every month as long as she shall live and after her death this allowance shall stop.

"I want Natalie Neal and Elizabeth Neal Franklin to see that this is done.

"Also that grandmother's expenses be paid as it may be necessary."

On April 22, 1955, the testatrix executed a second codicil setting up a trust fund of $2,500 for Kathleen Foster to be paid at the rate of

$100 per month until her death or until the fund was exhausted. This provision is not material to the question here presented. However, the codicil further provided: "And except insofar as said will is expressly or by necessary implication changed by this codicil I do hereby ratify, republish and reaffirm my said will and each and every part thereof."

At the time the will was executed in 1944 the testatrix owned real estate consisting of her residence, the Wilmont Apartments, and the ManMur Bowling Center. At the date the first codicil was executed the testatrix was receiving approximately $2,000 per month rental from the apartments and the bowling center.

On May 20, 1954—a date subsequent to the execution of the first codicil and prior to the execution of the second—the testatrix, her daughter, Elizabeth Neal Franklin, and Allen Langston organized a corporation known as Wilmur Associates, Inc. The capital stock of the corporation consisted of 1,100 shares of Class A and 8,100 shares of Class B stock. By deed dated May 31, 1954, the testatrix conveyed the bowling center and by deed dated November 26, 1955, she conveyed Wilmont Apartments to the corporation. As payment for the bowling center she received 80 shares of Class A and 3,400 shares of Class B stock. For the Wilmont Apartments she received 1,000 shares of Class A and 3,000 shares of Class B stock, and a note for $50,000 bearing interest at five and one-half per cent.

The testatrix died on April 29, 1956. At that time she held 1,070 shares of Class A and 1,811 shares of Class B stock in the corporation and its note for $50,000 upon which $3,000 had been paid. All other outstanding shares of both classes were held by the daughters and their husbands, with the exception of 10 shares of Class A held by Mr. Langston.

The answer of the defendants discloses that on the date of the first codicil the plaintiff, sister of the testatrix, lived in the home of their mother, Mrs. Elizabeth Black. This home was purchased and substantially paid for by funds furnished by the testatrix, Grace B. Neal, and her husband, Dr. Paul N. Neal; "that Grace B. Neal supported her mother in said home by paying for her food, medicine, clothing, medical attendants, hospital bills, servants and nursing, and other necessities."

The plaintiff contends she is entitled to receive a legacy of $200 per month from the date the testatrix died and that the estate generally is impressed with a trust for its payment.

The defendants contend (1) the testatrix already having devised all her property to her two daughters in fee simple, the first codicil was intended merely as an expression of a wish or advice to the

two daughters; that the words are precatory and not mandatory, and the codicil creates no property right in the plaintiff; (2) if the court should hold the codicil constituted a bequest to the plaintiff, the legacy is specific in that it likewise provides for payment from rentals. In short, the defendants contend that payments were to be made from the receipts from rentals and from rentals only, and there being no receipts from rentals, there is no fund out of which payment can be made. Therefore, the legacy is adeemed.

The trial court "finds as a fact and as a matter of law that the portion of said will designated 'Codicil' dated July 28, 1949, is a vested demonstrative legacy; and the court further finds as a fact and as a matter of law that by the terms of the said will there is impressed upon the estate of the said Grace B. Neal, Deceased, a trust in favor of the plaintiff." The court decreed "That the plaintiff shall recover . . . first from rental income of the estate, if any, and the balance, if needed, from other assets of the estate, the sum of $200 each month from the date of the death of Grace B. Neal, April 29th, 1956, until the plaintiff's death, . . ." The payments were to be made by the executor until discharged and thereafter by Elizabeth Neal Franklin and Natalie Neal Blomquist who are declared trustees for the purposes of payment.

The defendants excepted to the judgment, and appealed.

Clem B. Holding, Harris, Poe & Cheshire, By: W. C. Harris, Jr., for plaintiff, appellee.

Allen Langston, Fletcher & Lake, By: I. Beverly Lake for defendants, appellants.

HIGGINS, J. In passing on this appeal, it becomes necessary to determine whether the first codicil was intended merely as the expression of a wish or advice to the two daughters, or whether it constituted a valid and enforceable bequest to the plaintiff.

At the date of the first codicil the testatrix was receiving from the two rental properties approximately $2,000 per month. She conveyed these properties to the corporation which she helped to organize. In payment she received stock in the corporation and its note for $50,000. The note, subject to a credit of $3,000, and a substantial block of stock in the corporation belonged to her at the time of death. It does not appear she had other rental property. At that time, the corporation was receiving approximately $2,000 per month rent from the apartments and the bowling center.

In determining the effect of the first codicil, resort must be had to all parts of the will, and, if necessary, to the attendant circumstances

surrounding the testatrix at the time she made it. *Trust Co. v. Wolfe*, 245 N.C. 535, 96 S.E. 2d 690. If the words used in a will do not of themselves make perfectly plain the maker's intent, the court may consider the circumstances and conditions surrounding the maker in order to determine the meaning. " 'The discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary construction, for the intent of the testator, as so expressed, is his will.' *Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E. 2d 578; *Heyer v. Bulluck*, 210 N.C. 321, 186 S.E. 356; 'The intent of the testator need not be declared in express terms.' *Trust Co. v. Schneider, supra; Efird v. Efird*, 234 N.C. 607, 68 S.E. 2d 279; *Trust Co. v. Miller*, 223 N.C. 1, 25 S.E. 2d 177. 'And greater regard is to be given to the dominant purpose of the testator than to the use of any particular words.' *Allen v. Cameron*, 181 N.C. 120, 106 S.E. 484"; *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298.

What interest, if any, did the testatrix bequeath to the plaintiff by the first codicil? "This is my wish to be carried out in my will. That my beloved sister, Helen C. Moore, receive from the rentals of my property $200 every month as long as she shall live and after her death this allowance shall stop. I want Natalie Neal and Elizabeth Neal Franklin to see that this is done." The codicil begins with the statement that the wish is *"to be carried out in my will."* (emphasis added) It provides that the $200 payment shall be terminated by the death of the legatee. Then follows: "I want Natalie Neal and Elizabeth Neal Franklin *to see that this is done."* (emphasis added) The bequest is of money ($200 per month) "from rentals." On the date the codicil was written the testatrix was receiving $2,000 per month from Wilmont Apartments and ManMur Bowling Center. Subsequently a corporation was formed by the testatrix, one of the daughters, and Mr. Langston, their attorney. The incorporators selected Wilmur Associates, Inc., as the corporate name. It seems apparent the name came from a combination of Wil, the first syllable from the name of the Apartments, and Mur, the last syllable from the name of the Bowling Center. Evidence in the record indicates other rental property (Lincoln Theatre) was conveyed to the corporation by the daughters, for which they received corporate stock. It may be inferred that the corporation was organized for the purpose of operating rental properties. There is no evidence it carried on any other business.

The apartments and the bowling center returned a monthly rental of $2,000, to the testatrix before the transfer—to the corporation afterwards. It is not difficult to understand why the testatrix, looking through the veil of the corporate structure at the source, should consider the dividends on her stock as income "from rentals." In this

view, even if the legacy should be classified as specific, it would not fail if within the contemplation of the testatrix her estate had income "from rentals."

However, we think the testatrix clearly intended to bequeath to the plaintiff not a specific but a demonstrative legacy. The gift is not of rentals but of "Two Hundred Dollars every month as long as she shall live." The codicil provides that the bequest shall be satisfied "from rentals of my property."

The distinction between specific and demonstrative legacies is clearly pointed out in an exhaustive opinion by *Adams, J.*, in the case of *Shepard v. Bryan,* 195 N.C. 822, 143 S.E. 835, and subsequently approved in *Bost v. Morris,* 202 N.C. 34, 161 S.E. 710; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. See also 73 A.L.R. 1250, and 64 A.L.R. 2d 778. For the reasons pointed out in *Shepard v. Bryan,* the designation of a fund out of which the legacy is to be satisfied is not enough to make the bequest specific. The tendency of the courts is to hold that a bequest is not specific unless the intent clearly appears in the will.

Under the authorities cited and many others to the same effect, we conclude the bequest to the plaintiff constituted a demonstrative legacy to be satisfied first out of income from rental properties belonging to the estate, including interest from the note and dividends on the stock of Wilmur Associates, Inc. Should these prove insufficient, the remainder of the bequest may be satisfied out of other available assets of the estate.

The judgment of the Superior Court is modified to include in the rental income the interest on the note of, and the dividends from the stock in Wilmur Associates, Inc. As thus modified, the judgment of the Superior Court is affirmed.

Modified and affirmed.

STATE v. ELLIOTT CAULDER, CHARLIE C. HARRIS, LIZA CLEATON.

(Filed 16 December, 1959.)

1. Riot § 2—

Evidence tending to show that defendants were members and leaders of a large group which gathered outside the gates of a mill during the progress of a strike, that both defendants had rocks in their hand and that rocks and missiles were thrown at cars carrying workers from the mill, etc. *is held* sufficient as to each defendant to be submitted to the jury on the charge of riot.

2. Same—

An indictment charging that defendants did unlawfully assemble on

a public street, bearing weapons, with the mutual intent to aid and assist each other against lawful authority and others who opposed them, etc., sufficiently charges an unlawful assembly constituting an essential of the offense of riot.

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

APPEAL by defendants Elliott Caulder and Charlie C. Harris from *Mallard, J.*, at May 25, 1959 Special Term, of VANCE.

Criminal prosecution upon a bill of indictment charging substantially the following: That Elliott Caulder, Charlie C. Harris and Liza Cleaton, on 12 May, 1959, with force and arms at and in Vance County, unlawfully, willfully, violently, riotously, and tumultuously, together with a large crowd numbering 30 or more persons, did assemble and gather together upon a public street in the city of Henderson, bearing weapons consisting of pocket knives, bricks and stones, making loud noises and with loud voices to the terror of the good citizens residing, and being so assembled, did then and there with the mutual intent to aid and assist each other and others assembled against lawful authority and those who opposed them, did then and there violently throw and hurl such weapons as bricks and missiles at persons and automobiles, lawfully traveling upon the public street, violently striking the same and inflicting damage thereto which continued for a period of 15 minutes or more and did thereby unlawfully engage in riot against the form of the statute in such case made and provided and against the peace and dignity of the State.

Plea: To the charge placed in the bill of indictment, the defendants, and each of them, come into open court and entered a plea of not guilty.

Upon the trial in Superior Court the State offered testimony of officers of the city of Henderson and Vance County tending to show substantially the following: On the night of 12 May, this year, a strike was on at the Harriet South Mills. And officers of the law, just a few minutes before 11 o'clock, the hour for working shift to change at the Harriet Mill were in an automobile close to the intersection of Rose Street (or avenue) and Alexander Avenue, half a block from the mill gate. They saw defendants Harris and Caulder. Caulder was behind the second house on the left of Rose Avenue (that is, east of it). He was telling the officers to turn out the spot light on the car. He said "Turn out that light; if you don't I am going to knock it out and if you want to get anybody, come on over here and get them; turn that light out of my face;" he was up in the yard of the house. He went back to the sidewalk. A few seconds after that the first workers' cars started coming by going west on Alexander Avenue; the

workers coming out from the mills. Officer H. U. Watkins testified: "The next thing that I noticed Harris and Caulder doing was running across Rose Street * * * Mr. Caulder and Mr. Harris ran up the street, and Mr. Harris said 'Come on; come on.' A crowd was following them and they were in the lead. They ran up the sidewalk that was adjacent to the street. About 25 or 30 people were behind him * * * From where I first saw them, they ran about 50 yards. Over that 50 yards Caulder and Harris were running * * * ahead of the crowd and Mr. Harris was saying 'Come on, let's get them,' and Caulder was running with him and said 'Run, run, there is no one up here.' Caulder also said, 'Let's get them, come on up here and let's get them' * * * As they went by the front of the car lights, across Rose Street, I could see that Mr. Harris had rocks in his hands and also Mr. Caulder. The workers were going up the street, and we pulled on up to the intersection and turned in the direction they were running. The workers from the east and going west on Alexander Avenue; they were coming from the mills. We got in the line of traffic with the workers and as we were heading west we had full view of Mr. Harris and Mr. Caulder on the sidewalk in our headlights. The crowd at that time was coming along about even with the car. Harris and Caulder were about 40 or 50 feet ahead of the crowd at that time. Mr. Harris got in a position to throw a rock when one car come by; he had a rock in his hand; he did not throw * * * at that time. He repeated the same thing when the next car come by. He made that motion twice before he threw the rock at the cars. I saw the rock leave his hand and I heard the rock hit, and I heard one of them say, 'Damn, I did not see which car it hit * * * I don't know what part of the car it struck.' Caulder was right behind Harris * * * Caulder and Harris were on the sidewalk on Alexander Avenue west of Rose Street when Harris threw the rock. The mob of people were heading west on the sidewalk behind them so to speak and we were riding along beside this mob. The mob was hollering and yelling 'Get them, let's get them.' The mob did not leave the sidewalk. When Harris threw the rock, Mr. Watkins stopped the car right beside of him and I left the car, rolled right out, and Mr. Harris saw me and ran * * * I chased him up the sidewalk * * * I caught him * * * and he said: 'I am not going to run any more.' I placed him under arrest."

Officer Raynor testified: "I know Lizzie Cleaton; I saw her that night. We came up Rose Street approaching the area of the mill. Officers Reaves, Bobbitt, Ellis and Alvin Byrd were with me. Officer Reaves was driving. As we approached we never did stop on Rose Street; as we were coming out of Rose Street into Alexander Avenue. Elliott Caulder came down the sidewalk. He was at the edge of the

sidewalk as if he would step over into Rose Street and he made the remark that 'Here is these damn yellow bellied scabs, if I had my gun I would kill every damn one of them.' He was looking at us. He was close enough to us that he could have touched our car at that time. Me and Officer Bobbitt got out and arrested him and put him in the police car. By that time Mrs. Cleaton and, I would say, 35 more people ganged up there at the car. Lizzie Cleaton was in the mob. As she walked up she said, 'Get them damn scab setters.' She actually called me by name. * * * When I first recognized her she came down the sidewalk up to the car with the mob of people. She was down in the front of them coming down." Later Raynor testified: "Lizzie Cleaton was hollering 'Get them, let's get them.' The hollering lasted for several minutes."

And J. B. Bobbitt, a police officer, testified: "I also saw Lizzie Cleaton there. She was up at the front of the crowd. It was at this time that Mrs. Cleaton cursed Officer Raynor and said that we were all s. o. bs. * * * The whole group was pretty excited."

On cross-examination Officer Bobbitt testified as follows: "Lizzie Cleaton wasn't arrested that night * * * When I saw her that night she was about 10 feet back of Caulder in a group of people. * * * I never heard Lizzie Cleaton say anything until we had put Caulder in the car. I didn't see any of the defendants do anything, but I heard her say, 'Get your guns and shoot them', * * * she was just urging the people to get us."

The case was submitted to the jury upon the evidence offered by the State, and that offered by the defendants, under the charge of the court.

Verdict: The jury, for their verdict, say as to each of the three defendants guilty of the crime of riot as charged in the bill of indictment.

Judgment: (1) As to defendant Elliott Caulder— Confinement in the common jail of Vance County for a period of eight (8) months, and assigned to work under the supervision of the State Prison Department.

(2) As to defendant Charlie C. Harris— Confinement in the common jail of Vance County for a period of twelve (12) months and assigned to work under the supervision of the State Prison Department.

Appeal to Supreme Court by defendant Elliott Caulder and by defendant Charlie C. Harris is noted in open court,— assigning error.

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

W. M. Nicholson, James B. Ledford, L. Glen Ledford, James J. Randleman for defendant appellants.

WINBORNE, C. J. Appellants state in their brief only one question as being involved on this appeal. That is: Did the trial court err in denying the defendants' motion for judgment as of nonsuit as to each of them at the close of the State's evidence and renewed at the close of all the evidence. Exception No. 1.

In this connection it is noted that the bills of indictment in case No. 364, *S. v. Moseley, et al, ante,* 285, and in case No. 365, *S. v. Rose, et al., ante,* 281, charge the same offense, riot, as that charged against defendants in case in hand, No. 361, *S. v. Caulder, et al,* and, hence, the same principles of law are applicable in all three cases. And applying these principles in the instant case, the evidence here offered, taken in the light most favorable to the State, is abundantly sufficient to take the case to the jury and to support the verdict of guilty rendered as to appellants.

Moreover, in this Court each of defendant appellants files a motion in arrest of judgment entered as to him in this cause, No. 361, for that the Bill of Indictment upon which the defendants were tried is fatally defective for the reason that it fails to aver that the group of persons, of which the defendants were allegedly members, unlawfully assembled, and therefore fails to allege an essential element of the crime of engaging in a riot. Like motions were filed in No. 365, *S. v. Rose, et al, ante,* 281 and there, after full consideration, the motion was denied. And, too, in No. 364, *S. v. Moseley, et al, ante,* 285, like motion was entered and, upon authority of *S. v. Rose, supra,* was denied. Now, here, it appearing that the bills of indictment in the three cases are identical in substance, the motion here is denied upon authority of the decisions there.

Therefore, in the judgment from which appeal is taken there is No error.

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

EDNA VIRGINIA JOHNSON v. MYTOLENE GRAYE.

(Filed 16 December, 1959.)

1. Contracts § 31—

A third party who, acting without justification and not in the legitimate exercise of his own rights, induces one contracting party not to enter into or renew a contract with the other contracting party, may be held liable by either of the contracting parties for the malicious interference with his contractual rights.

2. Contracts § 32: Master and Servant § 13: Libel and Slander § 1—

Allegations to the effect that defendant school principal maliciously by false charges reflecting upon plaintiff's professional efficiency and character procured plaintiff's discharge by the school board and prevented the renewal of her contract as a teacher, relate to a cause of action for malicious interference with plaintiff's contractual rights, governed by the three-year statute, G.S. 1-52(5), and not a cause of action for libel and slander, and the court should have overruled defendant's motion to dismiss on the ground that the record disclosed that the action was for libel or slander brought more than one year after the alleged defamation. G.S. 1-54, G.S. 1-55.

3. Pleadings § 15—

A demurrer which fails to distinctly specify the grounds of objection may be disregarded. G.S. 1-128.

4. Pleadings § 20½—

When a demurrer is sustained the action should be dismissed only if the allegations in the complaint affirmatively show that plaintiff has no cause of action against defendant.

5. Pleadings § 16—

A demurrer to a defective statement of a good cause of action comes too late after answer.

APPEAL by plaintiff from *Crissman, J.*, February 16, 1959 Civil Term, of GUILFORD (High Point Division).

Civil action to recover damages on account of the termination of plaintiff's contract with the High Point School Board, and on account of its failure to renew such contract, allegedly caused by defendant's wrongful conduct as set forth in the complaint.

In substance, plaintiff alleged: Plaintiff had been a teacher in the Fairview Street School in High Point, North Carolina, during the period 1944-1956, doing satisfactory work. On or about April 22, 1956, defendant, who was then principal of said school, made false charges against plaintiff, including seven specifically set forth, to the superintendent of the High Point City Schools. These false charges: (1) reflected "directly and unequivocally upon plaintiff's professional efficiency, ability, character and attitude"; (2) were made maliciously, "in a spirit of vindictiveness," for the "unjustifiable and unlawful purpose of having said plaintiff's contract with the High Point School Board terminated and for the further purpose of having said plaintiff's renewal contract denied and refused"; (3) "were material in forcing plaintiff's discharge and preventing a renewal of her contract as a teacher in said City School District."

Answering, defendant denied the alleged wrongful conduct and, by way of further answer, set up certain pleas in bar. She pleaded, *inter*

alia, in bar of plaintiff's action the six months statute of limitation applicable to actions for slander, G.S. 1-55, and the one year statute of limitation applicable to actions for libel, G.S. 1-54, asserting "That the cause of action alleged by the plaintiff, if any, is a cause of action for slander or libel."

Thereafter, defendant filed a motion to dismiss plaintiff's action on the ground that it was barred by said statutes of limitation. She based her motion to dismiss on these propositions: (1) As shown by the record, this action was commenced July 19, 1958. (2) As shown by plaintiff's admission, she was not under disability when her cause of action accrued (G.S. 1-17, G.S. 1-20), and no facts existed that would toll the running of the applicable statute of limitation. (3) As shown by the complaint, the cause of action, if any, alleged by plaintiff is for slander or libel.

The court, allowing defendant's said motion, entered judgment dismissing the action. The judgment recites, *inter alia*: "and counsel for plaintiff having admitted in open court that the plaintiff was suffering from no disability which would toll the Statute of Limitations and that there were no other extraneous facts which would toll the Statute of Limitations . . ."

Plaintiff excepted to said judgment and appealed.

J. Kenneth Lee for plaintiff, appellant.
James B. Lovelace for defendant, appellee.

BOBBITT, J. Plaintiff's action was dismissed on the ground that it appears affirmatively, upon the record, admission and complaint, that it is barred by the statutes of limitation *relating to slander and libel.*

The gravamen of the cause of action alleged by plaintiff is defendant's alleged malicious interference with plaintiff's contractual relations with the High Point School Board. Plaintiff, in her complaint, does not use the words "slander," "libel" or "defamatory." She alleges the false statements of April 22, 1956, as overt acts to induce the High Point School Board to terminate plaintiff's contract and to refuse a renewal thereof.

Whether plaintiff could have based an action for slander or libel upon the alleged false statements of April 22, 1956, is beside the point. She did not elect to do so. The gist of her action is that defendant wrongfully and maliciously caused her to lose her employment; and the alleged false statements of April 22, 1956, are alleged as the means used by defendant to accomplish her unlawful design. *Strollo v. Jersey Central Power & Light Co.*, 20 N.J. Misc. 217, 26 A. 2d 559; *Sheppard v. Coopers' Incorporated*, 156 N.Y.S. 2d 391. "If defamation is the

means employed, the action is not one for libel or slander, but for the common-law wrong of malicious interference with contractual rights. The means used do not change the nature of the cause of action." *Chilton v. Oklahoma Tire & Supply Co.* (Oklahoma), 67 P. 2d 27, and cases cited.

"A party to a contract, whether of employment or otherwise, has a right of action against a person who has procured a breach of such contract by the other party thereto otherwise than in the legitimate exercise of his own rights, and without justification." 30 Am. Jur., Interference § 21. The essential elements of this tort are set forth by *Parker, J.*, in *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176.

"It is generally held that the act of maliciously inducing a person not to enter into a contract with a third person, which he would otherwise have entered into, is actionable if damages result, although there is some authority to the contrary." 30 Am. Jur., Interference § 38. The cases cited in support of the majority rule include *Coleman v. Whisnant,* 225 N.C. 494, 35 S.E. 2d 647. Also, see *Bohannon v. Trust Co.,* 210 N.C. 679, 188 S.E. 390, and cases cited therein, and Annotation: "Liability for preventing one from making specific contract," 99 A.L.R. 12.

Defendant's motion to dismiss does not undertake to specifiy wherein the complaint fails to allege facts sufficient to constitute a cause of action for malicious interference with plaintiff's contractual relations with the High Point School Board, the basis on which plaintiff seeks to recover. Nor does the judgment of dismissal so specify. Each contains the simple assertion that plaintiff's cause of action is for slander or libel.

In this novel procedural setting, the view most favorable to defendant is that the motion to dismiss, in respect of this feature of the case, should be treated as a demurrer to the complaint for failure to state facts sufficient to constitute a cause of action for malicious interference with plaintiff's contractual relations with the High Point School Board. *Elam v. Barnes,* 110 N.C. 73, 14 S.E. 621. When so considered, the following rules are apposite.

1. "The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded." G.S. 1-128; *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555, and cases cited. The substantial reasons underlying this statutory provision are stated in *Love v. Commissioners,* 64 N.C. 706, and in *Elam v. Barnes, supra.*

2. "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." *Lumber Co. v. Pamlico County*, 250 N.C. 681, 685, 110 S.E. 2d 278, and cases cited.

3."A demurrer to a defective statement of a good cause of action comes too late after answer." *Davis v. Rhodes*, 231 N.C. 71, 74, 56 S.E. 2d 43; McIntosh, North Carolina Practice and Procedure, § 443.

The court below should have overruled (disregarded) defendant's motion to dismiss on account of defendant's failure to specify wherein she contended the complaint failed to allege facts sufficient to constitute a cause of action for malicious interference with plaintiffs contractual relations with the High Point School Board. Indeed, the brief filed by defendant in this Court does not undertake to specify any deficiency in plaintiff's allegations in respect of such cause of action.

We are not disposed to examine the complaint critically with the view of determining whether plaintiff's statement of a good cause of action is in any respect defective. Indeed, if the allegations are defective in any particular, it would be of no avail to defendant in relation to her motion to dismiss. Suffice to say, the allegations of the complaint do not affirmatively disclose that plaintiff has no cause of action against defendant for malicious interference with her contractual relations with the High Point School Board; and, as to such cause of action, the three year statute of limitation is applicable. G.S. 1-52(5).

For the reasons stated, the judgment dismissing plaintiff's action is reversed.

Reversed.

HERBERT D. BRAUFF, (DECEASED), MRS. H. D. BRAUFF, EXECUTRIX, PETITIONER v. THE COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, IN THE MATTER OF THE ASSESSMENT OF TAXES BY THE STATE OF NORTH CAROLINA FOR THE INCOME YEAR 1953.

(Filed 16 December, 1959.)

1. Taxation § 29—

Before an assessment of additional income tax by the Commissioner of Revenue can become final it is required that notice be given to the taxpayer and that he have an opportunity to be heard on the validity of the additional assessment.

2. Administrative Laws § 3—

While administrative bodies are not required to adhere strictly to procedural rules, they cannot make a ruling adversely affecting the rights of a particular person without affording such person notice and an opportunity to be heard as required by due process of law.

3. Taxation § 29—

The Commissioner of Revenue was a party to proceedings in which letters testamentary to the nonresident widow of the deceased taxpayer were revoked and an ancillary administrator c.t.a. was appointed. Thereafter notice of additional assessment of income tax for a particular year against the estate was sent to the widow as executrix. *Held:* The Commissioner of Revenue was charged with notice that the widow had no authority to act for the estate in North Carolina and, therefore, the notice to the widow is insufficient to support the additional assessment against the estate.

4. Executors and Administrators § 3—

A foreign executor or administrator has no authority to act for the estate in North Carolina, but all actions and proceedings must be brought against and can be defended only by an ancillary administrator appointed here.

APPEAL by petitioner from *Williams, J.*, April, 1959 Second Regular Term, WAKE Superior Court.

This proceeding originated before the State Department of Revenue upon the following:

"NOTICE OF TAX ASSESSMENT

DATE March 13, 1957

"To Mr. Herbert D. Brauff (Deceased)—
Mrs. H. D. Brauff, Exetrx.

"Address: Wilson, N. C.

"You are hereby notified that an assessment for income tax and interest is made against you as of this date in the amount indicated below as result of examination of your income tax return filed for the following year:

YEAR	AMOUNT
1953	$1178.09

"This assessment is made pursuant to Section 105-241.1 of the General Statutes of North Carolina, which provides in part as follows:

" 'Any taxpayer feeling aggrieved by such assessment shall be entitled to a hearing before the Commissioner of Revenue upon making application therefor in writing within thirty days after the receipt of notice of assessment. If no application for a hearing is made within thirty days after notice of assessment is given, the assessment shall be final and conclusive.'

EUGENE G. SHAW, COMMISSIONER
By: W. H. Griffin, Director
Individual Income Tax Division."

The foregoing notice was addressed to the petitioner, Wilson, North

Carolina, and was forwarded to her at her home address in Pennsylvania. She received it in due course of the mails.

To this notice the petitioner, through her attorney, made the following reply:

"Dear Sir:

"Mrs. Laura E. Brauff, Executrix of the Estate of Herbert D. Brauff in the Commonwealth of Pennsylvania, has received from you a Notice of Tax Assessment in the sum of $1,178.09, for additional Income Tax for the year 1953.

"A hearing is requested for the sole purpose of making this special appearance, expressly reserving all other rights under North Carolina General Statutes Section 105-160 pending disposition of this motion.

"The executrix above named, appearing specially through her attorney in the above entitled action for the purpose of this motion, and for no other purpose, moves that the attempted service of notice of tax assessment on this defendant be set aside, and the assessment abated, on the following grounds:

"The defendant is not the executrix of the Estate of Herbert D. Brauff in the State of North Carolina, North Carolina Letters Testamentary having been revoked on February 8, 1957, in the Superior Court of Wilson County before the Clerk, at which time Robert M. Wiley was appointed as Ancillary Administrator C. T.A. under the will of Herbert D. Brauff, deceased. At the time of revocation of the Letters Testamentary, this Notice of Assessment was not pending so as to invoke the provisions of North Carolina General Statutes, Section 28-181. Under the provisions of G.S. 28-176 the defendant executrix in the Commonwealth of Pennsylvania was not the proper party against whom the assessment should be made. (*Cannon v. Cannon,* 228 N.C. 211)."

Within the time permitted (30 days) the petitioner entered, or attempted to enter, a special appearance before the Commissioner and moved to vacate the notice and the proposed tax assessment upon the grounds she was not the proper party to receive the notice and represent the estate. She had been removed as executrix in North Carolina. Mr. Robert M. Wiley was the duly appointed and acting ancillary administrator.

The parties stipulated:

"1. An order signed by the Clerk of Superior Court of Wilson County on April 26, 1956, allowing Eugene G. Shaw, Commissioner of Revenue of the State of North Carolina 'to intervene in (the) proceeding and to file such petitions or motions . . . as he may be advised.'"

"2. An order signed by the Clerk of Superior Court in Wilson County on February 8, 1957, revoking letters testamentary to Laura S. Brauff, and appointing Robert M. Wiley an ancillary administrator c.t.a. of the estate of H. D. Brauff."

The Commissioner held the notice of assessment to Mrs. Brauff, the petitioner, was in accordance with the provisions of G.S. 105-241.1 and refused to dismiss or vacate the notice or abate the assessment. On appeal, the Tax Review Board affirmed the decision of the Commissioner. Upon petition for review, the cause was heard in the Superior Court of Wake County before Judge Williams who entered judgment dismissing the appeal at the cost of the petitioner. To this judgment she excepted and appealed.

John Webb, Frank P. Meadows, Jr., for petitioner, appellant.

Malcolm B. Seawell, Attorney General, Lucius W. Pullen, Assistant Attorney General for the State.

HIGGINS, J. The record discloses that Herbert D. Brauff died in Richmond, Virginia, on June 15, 1955. His will was executed in Wilson County on April 9, 1953. Laura Brauff, wife of the testator, a resident of Vandergrift, Pennsylvania, was named executrix. A controversy arose as to whether the testator was a resident of North Carolina or of Pennsylvania. He owned extensive property in both states. The executrix probated the will in, and received letters testamentary from the probate court in Vandergrift, Pennsylvania. On July 6, 1956, Mrs. Brauff obtained letters testamentary from the Clerk Superior Court in Wilson County and executed a bond for the faithful discharge of her duties.

At the time of appointment Mrs. Brauff did not designate a process agent in North Carolina as required by G.S. 28-186. For failure to appoint a process agent and to file an inventory in Wilson County, the Clerk Superior Court, by proper citation, directed Mrs. Brauff to appear and show cause why her letters testamentary in North Carolina should not be revoked. On April 26, 1956, Revenue Commissioner Eugene Shaw intervened and made himself a party to the removal proceeding. On February 8, 1957, the Clerk Superior Court of Wilson County entered an order revoking the letters testamentary theretofore issued to Mrs. Laura Brauff and appointed Robert M. Wiley ancillary administrator c.t.a. of the Brauff estate. The Revenue Commissioner of North Carolina, therefore, having intervened and made himself a party to the proceeding in which Mrs. Brauff was removed and Mr. Wiley was appointed administrator c.t.a., was charged with notice that Mrs. Brauff had no power to act further for the estate in

North Carolina, and that Mr. Wiley, the ancillary administrator, alone was authorized to represent the estate here. The Commissioner's assessment notice should have been sent to him.

The record recites: "Pursuant to the provisions of G.S. 105-241.1 an assessment of additional income taxes and interest was made against Herbert D. Brauff, deceased, on April 2, 1957, and on that date a notice thereof was transmitted to Robert M. Wiley, Administrator c.t.a. of the Estate of said decedent." At no time has Robert M. Wiley, Administrator c.t.a., been a party to this proceeding. We are not, therefore, called upon to determine the effect of notice, if any, to him. Mrs. Laura Brauff, executrix, and the Commissioner of Revenue are the only parties to this proceeding or to this appeal.

A tax assessment of the type here involved is a somewhat summary proceeding. However, before an assessment becomes final, notice is required to the end that the taxpayer may have opportunity to be heard on the validity of the assessment. While administrative bodies are not required to adhere strictly to procedural rules, nevertheless those whose rights are adversely affected are entitled to insist on compliance with the requirement of due process of law. *Shields v. Utah Idaho Central R.R.*, 305 U.S. 177; *Interstate Commerce Comm. v. L & N R.R.*, 227 U.S. 88. See the many cases there cited. Due process requires notice.

The Commissioner of Revenue sought to levy additional income taxes against the estate of Herbert D. Brauff, deceased. It was his duty to give the notice required to someone clothed with authority to represent the estate and to contest the validity of the proposed assessment. On March 13, 1957, the petitioner was without authority to represent the Brauff Estate in North Carolina.

G.S. 28-176 provides: "All actions and proceedings brought by or against executors, administrators or collectors upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity." In construing the statute this Court, in the case of *Cannon v. Cannon*, 228 N.C. 211, 45 S.E. 2d 34, held: "But we have no statutory authority which authorizes a foreign executor or administrator to come into our courts and prosecute or defend an action in his representative capacity. . . . Ordinarily when an estate administered in a probate court of another State . . . action . . . cannot be maintained in our courts except by . . . ancillary administrator of such estate . . ." The *Cannon* case involves "an action in court." However, the statute embraces "proceedings" upon a cause of action or "right." In such proceeding the foreign executrix, Mrs. Brauff, could not defend. Mr. Wiley, the ancillary administrator, alone could defend. In such case

the law required notice to Mr. Wiley. Under the circumstances, the notice to Mrs. Brauff, Executrix, given by the North Carolina Commissioner of Revenue by letter dated March 13, 1957, was insufficient notice to the estate upon which to predicate the assessment of income taxes for the year 1953.

In the view we take of this proceeding, it is immaterial whether the petitioner could enter a special appearance before the Commissioner, the Tax Review Board, or the Superior Court. As a foreign executrix acting under the Probate Court of Pennsylvania she had no right or authority to act for the estate in North Carolina. *Cannon v. Cannon, supra.*

The North Carolina Revenue Commissioner in the first instance, the Tax Review Board, and the Superior Court of Wake County successively, were in error in holding that notice to the petitioner was sufficient to support the assessment.

The judgment of the Superior Court of Wake County is

Reversed.

MRS. EULA CUTHBERTSON v. ROBERT BURTON, DEFENDANT, AND EXCELL R. CUTHBERTSON, ADDITIONAL DEFENDANT.

(Filed 16 December, 1959.)

1. Compromise and Settlement: Courts § 9— One Superior Court judge has no authority to review a final order of another.

Plaintiff and the original defendant reached a compromise which was approved by the court by order authorizing and directing the original defendant to pay a stipulated sum to plaintiff in full settlement of her claim but without prejudice to the rights of the original defendant to maintain his cross-action against the additional defendant for contribution, the additional defendant being represented when the order was entered. Thereafter the additional defendant was permitted to file answer alleging the compromise and release of the original defendant and asserting that such release of his joint tortfeasor released him, and later moved that the cross-action of the original defendant against him be dismissed. *Held:* The motion to dismiss was properly denied, since one Superior Court judge is without authority to review and vacate final orders entered in the cause by another Superior Court judge.

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

APPEAL by additional defendant Excell R. Cuthbertson from *Sharp, S. J.*, April 6, 1959 Special Term, of MECKLENBURG.

In February 1955 plaintiff sued Robert Burton to recover the sum of $10,000 for personal injuries resulting from a collision between an

automobile operated by her husband, Excell R. Cuthbertson, and an automobile operated by defendant Burton. She alleged she was a passenger in the car operated by her husband; and the collision was caused by the negligence of Burton.

In May 1955 Burton moved to make Excell R. Cuthbertson, an asserted joint tortfeasor, a party defendant in accord with the privilege granted by G.S. 1-240. The motion was allowed. Process issued for and was served on Excell R. Cuthbertson. Burton answered plaintiff's complaint and in his answer asserted his cross-action against Excell R. Cuthbertson, alleging that the additional defendant was negligent and, that his negligence concurred with Burton's negligence in causing the collision and resulting damages to plaintiff. The additional defendant answered on 6 June 1955. He denied negligence causing the collision, asserting that the collision resulted solely from the negligence of Burton. In addition to denying negligence, he asserted a counterclaim against Burton for damage alleged to have been caused by Burton to the additional defendant's automobile.

The cause came on for trial at the October 1956 Term of Mecklenburg. On 31 October 1956 and during the course of the trial, counsel for Burton reported to the court that he had discussed with counsel for the additional defendant settlement by Burton of plaintiff's claim without prejudice to Burton's right to continue his action against the additional defendant for contribution, that plaintiff had indicated a willingness to accept $1,800 in settlement of her claim against defendant, and that defendant Burton was prepared to pay said sum on condition that the settlement be approved by the court without prejudice to the rights of defendant Burton to pursue his claim for contribution against defendant Cuthbertson and on condition that the cause remain on the civil issue docket for that purpose.

Thereupon the court entered an order reciting: "The Court being of the opinion that such a settlement without prejudice and retention of the cause for the determination of the rights of the defendants between themselves would be in the interest of justice and offer a fair method of adjudicating the rights of the defendants and that such action should be taken under and by direction of the Court and at the discretion of the Court; IT IS THEREFORE ORDERED AND ADJUDGED; 1. The defendant Robert Burton is authorized and directed to pay to the plaintiff Mrs. Eula Cuthbertson the sum of $1800.00" which would constitute full settlement of her claim, which payment would be without prejudice to the rights of defendant Burton to maintain his action against the additional defendant and without prejudice to the rights of additional defendant to maintain his counterclaim for damages to his automobile. The additional defendant was represented

when the order referred to was entered. He excepted to the findings of fact made by the court and to those parts of the order directing that the cause remain on the civil issue docket for trial of the issues raised in the pleadings filed by defendants Burton and Cuthbertson.

On 9 November 1956 defendant Cuthbertson moved that he be permitted to file amendment to his answer so as to allege an additional defense which had arisen since the filing of his original answer. The amendment was designated as a second and further defense. It states that defendant Burton had paid to plaintiff the sum of $1,800 which had been accepted by plaintiff in full settlement and satisfaction of all claims as set out in the complaint, and pursuant to such settlement plaintiff has executed a release releasing Burton. Additional defendant averred this release executed by plaintiff to one of the alleged tortfeasors released all.

In September 1958 Judge Froneberger, presiding over the courts of Mecklenburg, permitted additional defendant to file the proposed amendment. At the March Term 1959 additional defendant moved before Judge Sharp for judgment dismissing defendant Burton's action against him for the reasons assigned in his answer as amended. Judge Sharp denied the motion and additional defendant appealed.

Kennedy, Covington, Lobdell & Hickman for additional defendant, appellant.

John H. Small for defendant, appellee.

RODMAN, J. Judge Sharp correctly refused to allow the motion of additional defendant. The amended answer asserts an affirmative defense requiring proof. Burton has not by demurrer challenged the asserted defense and thereby admitted the facts alleged. The amended answer merely pleads the asserted release and not the order or judgment pursuant to which the release was executed. Judge Huskins both *authorized* and *directed* payment of $1,800 and acceptance of a release. The scope and effect of Judge Huskins' order can only be determined when that is properly before us.

Judge Sharp was without authority to review and vacate orders or judgments, not merely interlocutory, entered in the cause by another judge of the Superior Court. *Topping v. Board of Education,* 249 N. C. 291, 106 S.E. 2d 502; *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153; *Davis v. Land Bank,* 217 N.C. 145, 7 S.E. 2d 373. The court properly refused to allow the motion of additional defendant.

Affirmed.

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

STATE v. EDWIN WENRICH AND RAMON BUJAN.

(Filed 16 December, 1959.)

1. Criminal Law § 109: Robbery § 3—

In a prosecution for robbery with firearms or other dangerous weapon it is error for the court to fail to submit to the jury the question of defendant's guilt of the lesser offenses of common law robbery, assault with a deadly weapon or simple assault when there is testimony tending to show defendant's guilt of these lesser offenses.

APPEAL by defendants from *Burgwyn, E. J.*, July 1959 Criminal Term, of MECKLENBURG.

Defendants were tried upon a bill of indictment charging them with the violation of G.S. 14-87, entitled "Robbery with firearms or other dangerous weapons." The jury returned a verdict of "Guilty of Armed Robbery" as to each defendant.

From judgment imposing prison sentences both defendants appealed and assigned errors.

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

Llewellyn & McKenzie for defendants, appellants.

PER CURIAM. In effect the trial judge instructed the jury that, as to each defendant, it should return one of two verdicts, guilty as charged in the bill of indictment or not guilty. ". . . (I)n a prosecution for robbery with firearms, (or other dangerous weapons) an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial." (Parentheses ours.) *State v. Bell*, 228 N.C. 659, 663, 46 S.E. 2d 834. But the court should not submit to the jury an included lesser crime where there is no testimony tending to show that such lesser offense was committed. But where there is evidence tending to show the commission of a lesser offense the court, of its own motion, should submit such offense to the jury for its determination. *State v. Holt*, 192 N.C. 490, 493, 135 S.E. 324.

In the instant case the evidence was such that the jury might have returned a verdict of common law robbery, assault with a deadly weapon or simple assault. There was error in the failure to so instruct the jury.

New trial.

STANDARD AMUSEMENT COMPANY, INC. (PLAINTIFF) v. R. O. TARKINGTON AND WIFE, MARY MARSH TARKINGTON (DEFENDANTS), AND WAYNE THEATRES INC., MAX ZAGER AND MAX ZAGER ENTERPRISES (ADDITIONAL DEFENDANTS).

(Filed 16 December, 1959.)

1. Appeal and Error § 34—

Where the evidence is set out in the record in question and answer form and not in narrative form as required by Rule 19 (4), Rules of Practice in the Supreme Court, the appeal will be dismissed in the absence of error appearing on the face of the record proper.

APPEAL by R. O. Tarkington and wife, Mary Marsh Tarkington, hereinafter referred to as "defendants," from *Crissman, J.*, January 19, 1959 term, of GUILFORD (Greensboro Division).

This is an action by plaintiff to recover of defendants unpaid rents under a lease of theater properties. Defendants admitted execution of the lease and default in payment of some of the monthly rentals and set up a counterclaim for damages by reason of alleged misrepresentations and fraud inducing defendants to enter into the lease agreement. Defendants admitted that the rent sued for is due and payable. At the close of the evidence the court nonsuited the counterclaim, directed a verdict on plaintiff's cause of action and entered judgment accordingly.

From judgment of involuntary nonsuit on the counterclaim defendants appealed and assigned errors.

G. C. Hampton, Jr. for plaintiffs, appellees.

T. C. Hoyle, Jr. for additional defendants Max Zager and Max Zager Enterprises, appellees.

Paul R. Ervin for Wayne Theatres, Inc., additional defendant, appellee.

Daniel R. Dixon for R. O. Tarkington and wife, appellants.

PER CURIAM. This case was here at the Fall Term, 1957. *Amusement Co. v. Tarkington*, 247 N.C. 444, 101 S.E. 2d 398. In the present appeal, plaintiff filed no exceptions to defendants' case on appeal and the case was not settled by the trial judge. Plaintiff filed motion in this Court to dismiss the appeal on the ground that the evidence in the case on appeal is not in narrative form. Rule 19 (4), Rules of Practice in the Supreme Court, 221 N.C. 544, 556. All the testimony in the case on appeal is in question and answer form. Rule 19(4) is mandatory and failure to comply therewith necessitates a dismissal of the appeal. *Laughinghouse v. Insurance Co.*, 239 N.C. 678, 679,

80 S.E. 2d 457. When this rule is not complied with this Court will consider only such errors as are presented by the record proper. *Hall v. Hall,* 235 N.C. 711, 714, 71 S.E. 2d 471. "For the reasons stated in *Anderson v. Heating Co.,* 238 N.C. 138, 76 S.E. 2d 458, the Court has not only found it necessary to adopt Rule 19 (4), but also to enforce it uniformly." It may not be waived even by agreement of counsel. *Whiteside v. Purina Co.,* 242 N.C. 591, 592, 89 S.E. 2d 159. Notwithstanding this inflexible rule, we have carefully considered the evidence in the record and we find it insufficient to make out a *prima facie* case of fraud as alleged in the counterclaim. No error appears upon the record proper.

The appeal is

Dismissed.

CHARLIE SHOFFNER v. CARL W. MANN AND MARVIN W. MANN, INDIVIDUALLY AND TRADING AND DOING BUSINESS AS MANN INSURANCE AND REAL ESTATE COMPANY.

(Filed 16 December, 1959.)

APPEAL by plaintiff from judgment of involuntary nonsuit entered by *Armstrong, J.,* at the close of plaintiff's evidence in the trial at the May 4, 1959 Civil Term, GUILFORD Superior Court, Greensboro Division.

As his cause of action, plaintiff alleged he purchased from the defendants a policy of liability insurance on one 1951 Ford four-door automobile and one 1950 Ford one-half ton truck; that the insurance was obtained by the defendants in the Virginia Mutual Insurance Company of Richmond, Virginia. The plaintiff paid the required premium on the policy which ran from January 23, 1958 to January 23, 1959; that notwithstanding the fact the premium was paid, the Virginia Mutual cancelled the policy without cause and the Motor Vehicles Division of the State Department of Revenue was notified of the cancellation and in consequence thereof plaintiff's operating permits for both vehicles were suspended. No part of the unearned premium was returned to the plaintiff. He claimed damages, including expenses incurred in obtaining other insurance and obtaining operating permits, and for the loss of the use of both vehicles during the period of suspension. Plaintiff introduced the policy which provided for cancellation and notice, and for return of the unearned premium within reasonable time. However, the plaintiff's evidence showed he obtained the benefit of the unearned premium by way of a credit on

subsequently issued policy. At the close of plaintiff's evidence, judgment of involuntary nonsuit was entered from which the plaintiff appealed.

Comer & Comer, By: Wm. E. Comer for plaintiff, appellant.
Allen & Allen, By: Louis C. Allen, Jr., for defendants, appellees.

PER CURIAM. Attention is called to the fact the suit is against the brokers who negotiated the insurance contract and not against the Virginia Mutual Insurance Company, the insurer. The right to cancel is reserved to the insurer. The right to cancel being conceded, it appears any cause of action would be limited to the recovery of the unearned premium. The plaintiff's evidence showed he had received credit on another policy for the full amount due him. The plaintiff's own evidence, therefore, put him out of court.

The judgment of nonsuit is

Affirmed.

STATE v. WAYNE BEUFORD RODDY.

(Filed 16 December, 1959.)

APPEAL by defendant from *Preyer, J.*, at April 1959 Term, of SURRY.

Criminal prosecution upon a bill of indictment charging murder in the first degree of one Bobby Jarrell.

Plea: Not guilty.

Verdict: Guilty — Manslaughter.

Judgment: Confinement in Central Prison for a period of not less than three nor more than six years.

Defendant excepts and appeals to Supreme Court, and assigns error.

Attorney General Seawell, Assistant Attorney General Harry W. McGalliard for the State.
Barber & Gardner for defendant, appellant.

PER CURIAM. While defendant presents on this appeal several assignments of error based upon exceptions to admission and to exclusion of matters of evidence, a careful consideration of them fails to reveal prejudicial error. Hence in the judgment from which appeal is taken there is

No error.

EMULSIFIED ASPHALT REFINING COMPANY v. HARRIS & HARRIS CONSTRUCTION COMPANY AND MAE E. HARRIS.

(Filed 16 December, 1959.)

APPEAL by defendant Mae E. Harris from *Carr, J.*, May Civil Term, 1959, of DURHAM.

This action was instituted by the plaintiff to recover on a bond executed on 20 December 1956 by Harris & Harris Construction Company as principal and Mae E. Harris as surety in the sum of $4,631.67.

The Emulsified Asphalt Refining Company instituted an action in Brunswick County, North Carolina, against Harris & Harris Construction Company, et al, alleging to be due to the Emulsified Asphalt Refining Company the sum of $9,631.67. After the suit was instituted, Harris & Harris Construction Company gave its check to the plaintiff in the sum of $5,000 and the above bond was given to secure any amount for which the plaintiff might secure judgment over and above the $5,000, not to exceed $4,631.67. The plaintiff secured a judgment for the difference between the amount claimed in the complaint and the $5,000 paid thereon in the sum of $4,631.67. Judgment was duly entered and docketed in the office of the Clerk of the Superior Court of Brunswick County, and also in the judgment docket in the office of the Clerk of the Superior Court of Durham County, in Judgment Book 26 at page 243.

Execution was duly issued against the defendant Harris & Harris Construction Company and returned unsatisfied. The present action was instituted in Durham County against these defendants, and during the course of the trial the defendant Harris & Harris Construction Company announced through its counsel in open court that the corporate defendant did not resist judgment on the bond.

The case was submitted to the jury against the surety only, and the jury returned a verdict in favor of the plaintiff and against Mae E. Harris in the sum of $4,631.67.

From the judgment entered on the verdict the defendant Mae E. Harris appeals, assigning error.

Eugene C. Brooks, III, E. C. Brooks, Jr., for plaintiff.
Williams & Zimmerman for defendant, appellant.

PER CURIAM. We have carefully considered the exceptions and assignments of error of appellant and no prejudicial error that would justify a new trial has been made to appear.

No error.

STATE v. WARREN WALKER, CALVIN RAY PEGRAM, ROBERT EDWARD ABBOTT, MALCOLM JARRELL, JOHNNIE MARTIN, BOYD E. PAYTON, LAWRENCE GORE AND CHARLES AUSLANDER.

(Filed 14 January, 1960)

1. Conspiracy § 6—

In a prosecution for conspiracy, evidence tending to prove the guilt of any two of the defendants as a fairly logical and legitimate deduction, and which raises more than a mere suspicion or conjecture of their guilt, precludes nonsuit as to such defendants.

2. Conspiracy § 3—

A conspiracy is an agreement between two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means, and since the agreement itself is the offense it is not necessary that the object of the agreement should be accomplished.

3. Conspiracy § 6— **Evidence of guilt of conspiracy held sufficient to overrule nonsuit.**

Evidence tending to show that strikes had been called by the local unions at two specified mills, that a staff representative of the national union originated and discussed with the State's witness a plan to bomb the boiler room of one of the mills in order to stop operations at the mill, which plan was later enlarged to cover the bombing of two other sites, that thereafter personal meetings were had by certain of defendants in formulating the plan, that three of defendants were arrested at the place agreed upon as the rendezvous prior to going to consummate the conspiracy, together with admissions made by two of them after a tape recording of one of the meetings had been played to them, with other incriminating facts and circumstances, *is held* sufficient to overrule nonsuit as to each of such defendants in a prosecution for conspiracy.

4. Same— **Evidence that one of defendants had knowledge of conspiracy and agreed to deliver message to another in furtherance of common design held sufficient as to his guilt.**

Where a conspiracy among certain of defendants to bomb certain properties to stop operations at a mill during a strike is established, the State's evidence that the State's witness phoned one of the conspirators at his hotel for explanation why certain other of the conspirators had failed to meet him as agreed, that the person who answered the phone was not the conspirator called, but that such person identified himself, that such person was a union official, the superior of one of the conspirators, whose voice was recognized by the State's witness, that such person's conversation indicated he knew of the conspiracy and the necessity of avoiding any connection of the union therewith, but promised to get in touch with the conspirator who had been called, *is held* sufficient, together with other incriminating circumstances, to be submitted to the jury as to such person's guilt as a co-conspirator.

5. Criminal Law § 67—

Evidence that a telephone conversation was made to the room of one

person, that the superior of such person answered the phone and identified himself, together with the testimony of the person making the call that he recognized the voice as that of the person who had identified himself, is sufficient to take the question of the identity of the antiphonal speaker to the jury.

6. Conspiracy §§ 3,6: Criminal Law § 7—

The mere fact that an agent of the law pretended to be acting in conjunction with several others in a criminal conspiracy does not absolve such others from criminal responsibility, since even though the agent of the law did not join in the conspiracy, the illegal agreement between any two others would constitute the offense.

7. Criminal Law § 15—

A prosecution for conspiracy is properly brought in the county in which the conspiracy was to be consummated and where several of the conspirators had come to consummate it and had been arrested.

8. Indictment and Warrant § 4—

Defendants are not entitled to examine members of the grand jury to support their contention that the finding of a true bill was based solely on incompetent evidence or that one of the two bills was not based on any evidence given in connection therewith.

9. Criminal Law § 164—

Where the sentences on each of three indictments are concurrent and identical as to each defendant, error would have to relate to all three indictments in order to be prejudicial.

10. Indictment and Warrant § 14—

Motion to quash after the introduction of the evidence is not made in apt time.

11. Criminal Law §§ 39, 84—

Where the motives and credibility of a State's witness have been attacked on cross-examination it is competent for such witness upon redirect examination to explain his motives for the purpose of repelling the attack on his credibility.

12. Criminal Law § 97—

Where it appears that persons other than defendants were present at the time referred to in the testimony of the State's witness and could have contradicted the State's witness if the facts related by him were untrue, the prosecution may argue to the jury that no one had testified in contradiction of the State's witness, and such argument will not be held improper as a comment upon defendant's failure to testify.

13. Constitutional Law § 30—

Every person charged with a crime is entitled to a fair and impartial trial.

14. Conspiracy § 5: Criminal Law § 34—

In a prosecution for conspiracy to bomb a mill and transformers pro-

viding power for the operation of the mill in order to stop operations at the mill during a strike, testimony of statements made by defendants in regard to their knowledge as to which transformer would have to be destroyed to interrupt power to the mill is competent to show their asserted skill and ability to accomplish the purpose of the conspiracy, and the fact that such testimony may tend to implicate the defendants in other offenses is not ground for its exclusion.

15. Criminal Law § 162—

Where competent evidence has been excluded there can be no prejudicial error arising from the fact that it was heard by the jury before the court instructed them not to consider it, or that after the jury had returned into the courtroom the transcript of such evidence was again read them upon the request of the solicitor.

16. Criminal Law § 67½—

Incriminating conversations between defendants recorded by a tape recorder placed in a room with the consent of the person renting and occupying the room are competent.

17. Criminal Law § 96— Action of solicitor held not to amount to the taking of unfair advantage of defendants.

Where a tape recording is material to the case as inducing confessions by certain of defendants, the act of the solicitor in offering the recordings in evidence with the statement to the effect that some of the matters therein contained might not be competent but that they were offered for corroboration of witnesses and for use by the defendants if they so desired, will not be held prejudicial on the ground that the solicitor thereby undertook to take unfair advantage of defendants when prior occurrences had indicated defendants did desire to attack the validity of the recordings and there is nothing in the record to impugn the motives of the solicitor.

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

BOBBITT, J., dissenting in part.

APPEAL by defendants from *Mallard, J.*, July 13, 1959 Special Criminal Term, of VANCE.

Defendants were charged, in three bills of indictment, with a conspiracy to injure by dynamite or other high explosives properties in Vance County. The conspiracy charged in bill 3508 was to dynamite the boiler room including the boiler and other machinery of Henderson Cotton Mills. In bill 3509 the conspiracy alleged was to dynamite the main office building of Harriet Cotton Mills, and in bill 3510 the conspiracy charged was to dynamite the substation, transformer, switches, and power lines of Carolina Power and Light Company. The cases were consolidated for trial. Verdicts of guilty were returned as to each defendant on each charge. Prison sentences were imposed, identical as to each defendant, on each charge

but varying as to the different defendants. The three sentences imposed on each defendant run concurrently. Defendants excepted to the judgments rendered and appealed.

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

W. M. Nicholson, James J. Randleman, James B. Ledford, and Hill Yarborough for defendants, appellants.

RODMAN, J., The record contains 225 assignments of error. Manifestly a seriatim discussion is not desirable. Instead we treat the basic principles which appellants urge in support of their assignments of error.

When the State rested, defendants severally moved for nonsuit which, if allowed, would have the force and effect of a judgment of not guilty. G.S. 15-173. They offered no evidence. The court overruled the motions and defendants severally excepted. The correctness of the rulings on the motions so made is the first question presented.

If the evidence offered, when viewed in the light most favorable to the State, was sufficient for a jury to fairly conclude that any two defendants were guilty, the motion as to those defendants was properly overruled. *S. v. Horner,* 248 N.C. 342, 103 S.E. 2d 694; *S. v. Block,* 245 N.C. 661, 97 S.E. 2d 243; *S. v. Simpson,* 244 N.C. 325, 93 S.E. 2d 425. If, however, the evidence amounts to no more than suspicion or conjecture, the motion to nonsuit should have been allowed. *S. v. Glenn,* 251 N.C. 156.

The bills charge that defendants "did unlawfully, willfully and feloniously combine, conspire, confederate and plan together to willfully, maliciously and wantonly injure" the property of another. A conspiracy is an agreement by two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. The heart of the conspiracy is the agreement. It is not necessary that the object sought by the agreement be accomplished. *S. v. Hedrick,* 236 N.C. 727, 72 S.E. 2d 904; *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Andrews,* 216 N.C. 574, 6 S.E. 2d 35; *S. v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594; *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643; *S. v. Whiteside,* 204 N.C. 710, 169 S.E. 711.

The refusal to nonsuit requires an examination of the evidence to ascertain if there was an agreement between defendants or any two of them to maliciously injure the property of Harriet Cotton Mills or Carolina Power & Light Company. The evidence as to

the guilt of defendants Martin, Payton, Gore and Auslander is confined to the testimony of witness Aaron. Evidence of guilt of defendants Walker, Abbott, Pegram, and Jarrell appears in the testimony of the witness Aaron and confessions related by agents of the S. B. I.

The development of the conspiracy, as related by Aaron, can best be treated chronologically. Aaron is a resident of Leaksville, N. C. He knows Auslander, who lives in a hotel in Reidsville but works in Spray. He testified: "During the month of May, 1959, I saw Auslander five or six times. He has an office in the Textile Workers Union of America Union Hall in Spray. I think he is the manager of the Local and has been, best I recall, eight, nine, ten years. . . I had an occasion to see him during the month of May, on or before about the 21st of May, in his office at the Union Hall, pursuant to some word I got from somebody. I went to the Union Hall and talked to him during the day. . . We discussed the strike situation in Henderson, and he said that the Henderson strike was affecting all of the unions in the South and said if the strike was not won in Henderson, it would be against all of the unions in the South.

"We discussed the possibility of going to Henderson to put the mill out of operation. Auslander first mentioned it. He wanted to know if I would go to Henderson and bomb the boiler room and stop operation of the mill. . . .I told him I would do it, would bomb the boiler room, nobody else was present except me and him. We discussed the substation that supplied the mill with power and I told him that I knew where it was. . . .He asked me if I could get somebody to help me. I told him I thought I could.

"I left with the understanding I would get somebody else and meet him. . . .I brought E. C. McBryde from Draper with me to talk with him about the bombing. That conversation was in his office in the daytime. (Present at that time were Auslander, Dave Harris, Auslander's assistant, McBryde, and Aaron). . .Then we talked of going through with the bombing of the boiler room and the substation that feeds the cotton mills in Henderson. That just about taken care of the conversation at that time. . . .

"I saw Auslander again at his office that afternoon and had a conversation with him. . . .

"Auslander told me to go to Henderson and look the situation over. He gave me $10.00 for expenses to go down to Henderson and look the boiler room over and the substation. That was in cash."

The witness contacted a member of the State Highway Patrol and informed the patrolman of his conversation with Auslander. The patrolman put Aaron in touch with a member of State Bureau of In-

vestigation. He related his conversation with Auslander. Pursuant to an understanding with members of the S. B. I. that he would keep them informed of what transpired, he went to Henderson. He testified: "I came to Henderson on the 2nd of June. . . .When I arrived in Henderson, I called Johnnie Martin from a service station . . . .I saw him at his home. . . .It was daytime when I saw him. . . . When I reached Martin's home, I knocked on the door and he came to the door and I told him that Auslander had sent me down there . . . .I said that I was sent to contact him and we went and got in his car and we discussed why I came to see him. . . .I told him I was sent to bomb the boiler room and the power station and that he would help me out and I told him of another name. . . .I showed him the paper I had. . . .Mr. Auslander gave me the paper in his office at the last meeting with him. . . .He said that he talked to these boys in Henderson and said that he did not think that Martin would actually do the bombing, but said that he would help me out in any other way that he could. . . .When I was talking with Martin on this occasion he asked me first why I had not come when I was supposed to. He asked me why I did not come when I was supposed to the week previous. . . .Martin said that he would be the one to go between me and Walker if we had to get in touch with each other. Then I went to Warren Walker's home and saw Walker. . . . We talked of the bombing of the boiler room, how to get into it. . . . I told Walker I was down there to bomb the boiler room and asked him would he help me. He said he would. I told him the boy I was going to bring with me could not come and I had to have somebody to help me, and I told him that I understood that they knew all about it and he said they did. . . .I told him that it had to be so that the Union would not be involved in it. If we got caught, we were on our own and they would not have anything to do with it. . . .

"After talking with Walker at length about the actual bombing and how we would do it, I sat up a meeting to meet him. I told Walker we would bomb the boiler room and the substation. . . .He said that he was going to help me bomb the boiler room, the power station, and we talked of all of the things. . .Walker did not at that time mention the office of the Harriet Cotton Mills. . . .I next talked to him at the Brookwood Motel on or about the 3rd of June. . . . Lawrence Gore was with him. It was in the nighttime. . .Gore asked me why I didn't come when I was supposed to and I explained to him why I didn't come, that I didn't trust the boy I was bringing with me and I could not bring him and I told him that I would rather come by myself. . . .

"Gore said that he thought that the main office building of the

South Henderson Mill would be of more importance than the boiler room. He said that they had records that could not be replaced. . . He said he would see some boys that were to help me do the actual bombing and he said that me and him would not meet again. . . ."

Aaron returned to Rockingham County on 5 June. He testified: "I saw Auslander when I got to Leaksville. He asked me why I had not got rid of the main office building. We were discussing dynamite and he had made a call—he told me that he was going to call South Carolina. . . .He said: 'I am going to make a call.' He said about some 'bones,' as to what kind of 'bones,' that is dynamite. He made the call on the telephone. I heard what he said when he made the call. He placed the call to Spartanburg, South Carolina. . .I heard what he said to him. He said that he needed, asked him first did he have any 'bones' hid. . . .In response to what the person on the other end of the line said, Auslander said, he had a boy in the office there that would come down and get them, get the bones."

Aaron communicated this conversation to the S. B. I. Pursuant to their request, he came to their office in Raleigh. He then went to the Brookwood Motel at Roanoke Rapids. This room had, with Aaron's consent, been wired with a tape recorder. Aaron continued: "Warren Walker came to my room alone. I talked with him. . . . he asked me what I was planning to do and I told him that I didn't know, that as far as I was concerned that the 'bones' would have to come from Henderson, because I could not get any in Leaksville. . . we talked about bombing the boiler room, the substation and the setting fire with Molotov Cocktails the main office building at the South Henderson mill.

"A Molotov Cocktail is fuel oil and gasoline mixed in a bottle and corked up with a fuse on the outside. When it bursts against something it ignites the gas. I asked him could he fix them up. He said he could."

That meeting, according to the witness Aaron, lasted about an hour. Arrangements were then made for a meeting at the motel the following night. Aaron continued: "He did meet me the following night at the Brookwood Motel, Warren Walker, Pegram, Abbott and Jarrell and myself. . . .When they first got in my presence in my room, one of them was introduced to me as Mike Jarrell and Abbott and Pegram said they were the Jones boys and said that was as much as I would ever know. . . .Walker told me that these were the boys that he had told me about previously and said that Pegram and Abbott would bomb the transformers. And Pegram asked me about the price, what he would get out of it. I told him that I didn't know, but the understanding that I had was that the pay-off would come from

Leaksville, and he said that he had discussed it with Gore and Gore and him had come to some agreement. He did not tell me what it was, and Pegram said that if they had paid the price, he could have knocked that office building out long ago, but that they would not pay the price for it. . . .I told Jarrell that Pegram was running his mouth too much and Jarrell agreed with me. . . .Walker said he could vouch for Punch referring to Pegram, and the other two boys said that he knew how they operated and said that they were good boys. . . .Walker and I said that we would bomb the boiler room if we could. . .Pegram told me, 'If you show me exactly where to put it, it will go out,' referring to the lights. By 'it' was meant dynamite. He wanted me to show him where to put the dynamite under the transformers. . . .We talked of the best time to engage in those activities, me and walker, and I asked him was the mill in operation on Saturday and Sunday and he said that — Pegram said that he thought it would be the best night to do it. . . ."

Arrangements were made to meet again at the Brookwood Motel on 12 June. Aaron testified that Walker, Abbott, and Pegram came to the motel. Pegram did not get out of the car but Walker did and came to his room. Pegram and Abbott left in their car. Walker remained with the witness. Aaron testified that it was arranged that they would meet on the night of the 13th at the Motor Freight Terminal in Henderson to consummate the conspiracy. Aaron quoted Pegram as saying: " 'I will drive my brother's car' or 'I will have my brother's car.' He said that he would have the stuff with him, talking about the dynamite. Pegram himself said that he had the 60% dynamite stuff he would use on the power plant. Walker said he would get out of the car. He did not say whose car he would drive up in but said he would get out of the car and get in with me. . ."

Special agents and members of the Highway Patrol, pursuant to the information communicated to them by Aaron, were at the Motor Freight Terminal in Henderson on the night of the 13th. About 7:50 that night an automobile drove up with three persons in it, the defendants Walker, Pegram, and Abbott. They were arrested and interrogated by members of the S. B. I. The tape recordings taken at Aaron's room in the Brookwood Motel were played to them. Witnessess for the State testified Walker and Abbott admitted the agreement to dynamite as related by Aaron but asserted they had not intended to go through with the plan. They testified Pegram admitted going to Roanoke Rapids with Walker, Abbott, and Jarrell where they talked with another person; but Pegram refused to make any further statement.

The additional evidence on which the State relies to support the verdict of guilty as to defendant Boyd Payton may be thus summarized: Auslander is a staff representative of the Textile Workers Union of America, AFL-CIO. The proposal to dynamite the mill properties and electric system originated with Auslander to prevent the failure of the strike by union members, employees of the Cotton Mill. Aaron, soon after he went to Henderson pursuant to his agreement with Auslander, was contacted by defendant Lawrence Gore, likewise a staff representative of the Textile Workers Union of America. Payton was the union agent having charge of the strike at Henderson. Gore was his subordinate. It was important that union association should not be established if the plan went awry. Gore was registered at the Vance Hotel in Henderson during the early part of June. He was there on the night of 4 June and checked out on 5 June. Gore promised the men employed to assist in dynamiting would meet Aaron at his motel room on the night of 4 June. They failed to appear. Aaron, when they failed to appear, called for Gore at his hotel room in Henderson. A person answered stating that the defendant Payton was talking. Aaron recognized Payton's voice. This sufficed to take the question of identity to the jury. *Everette v. Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288.

Supporting Aaron's testimony were telephone company records showing a long distance call for Gore at the Vance Hotel in Henderson. The call lasted two minutes 25 seconds. It was made at 8:36 p.m. Payton answered the phone in Gore's room. Aaron continued: "He said this is Boyd Payton, and I said that this is the boy from Leakesville at Roanoke Rapids. He said, I know, and I told him that I was broke and had to go home. My wife thought I was in Richmond and I had to go home that week-end. I told him I was upset because Gore had not met me that night he was supposed to, Walker was supposed to. He says, don't say too much. He says the phones are going through a switchboard. He said that Lawrence was out of town but he would contact him that night or the first thing in the morning and get him to get in touch with me and he hung up. That's all."

The brief of defendants, dealing specifically with the sufficiency of the evidence as to Payton's guilt, says with respect to the quoted conversation between Payton and Aaron: "The jury conceivably could infer from this testimony that the defendant, Payton, knew about the alleged conspiracy involving the other defendants." With this knowledge Payton promised to have Gore see Aaron.

The following morning Aaron had breakfast at a restaurant next to the bus station at Roanoke Rapids. When he returned to the

motel, Lawrence Gore and Warren Walker were waiting for him. Aaron was asked: "What was said then and there?" He testified: "The first thing was said, Mr. Gore said that Boyd had finally got in touch with Charlie. . .he said that Boyd had finally got in touch with Charlie Auslander, Boyd Payton, and said that he had got in touch with Charlie himself the night previous to the meeting we had that morning and said that Auslander wanted me to come home to discuss the situation over further. . . .Gore told me, he said, 'I thought we had an understanding that we would not get in touch with each other again,' and he did not like the idea that I called the hotel. He said he did not like it and said Boyd did not like it, me calling the Vance Hotel and talking to Payton. I told him I called the hotel to talk to him, Gore. And I said I did not ask to talk to Payton and we discussed that. I just explained to him that I did not know that I was going to talk to Payton and I did not ask for Payton, they done it on his own free will. . .He (Gore) said he was moving from Whiteville to Greensboro and he needed every penny he had and said he could give me $20.00. He gave me $20.00. He said, 'Here's $20.00,' and he says, 'When you get home tell Charlie to send it back to Boyd and Boyd can give it to me.' "

Payton carried a telephone credit card issued to "Boyd E. Payton, Textile Workers Union of America, C. I. O., 110 West 6th Street, Charlotte, N. C." A representative of the telephone company produced, pursuant to subpoena, records showing charges to the credit card. Among the charges to that card was a telephone call made at Henderson to Auslander at his residence in Reidsville. The call was made at 11:21 p.m. 4 June and lasted eight minutes. Other calls to Auslander in May and June were charged to Payton's credit card.

Aaron returned to Leaksville on the morning of 5 June. He testified: "I saw Auslander when I got to Leaksville. He was standing outside. I was waiting for him when he came up. I saw him the same day and he drove up and we walked over behind my car and we talked, Auslander and me. As to what he said then, what was the first thing, well, he got mad because I had called Payton. He told me I was wrong by calling him and getting him involved in anything, getting Payton involved. He said I should not have talked to him. I explained to him that I did not call him and he talked to me voluntarily. . ." This was the time Auslander telephoned Spartanburg to secure dynamite.

The evidence is, we think, sufficient to show Payton's participation in the proposed plan to dynamite the properties of the Cotton Mill and the Power Company, conceived for the purpose of pro-

moting Payton's job of keeping the mills from operating and is sufficient, if accepted by a jury as true, to establish the guilt of all of the defendants.

Defendants argue there can be no conviction because of Aaron's pretended participation. Their position is that the evidence establishes that Aaron never had any intent to consummate his agreement with Auslander; that agreement constitutes the basis on which the conspiracy must rest, and that since there was no consent to the conspiracy by Aaron, the agreement by the others was a nullity and constituted no crime.

In support of their position they rely on *King v. State*, 104 S 2d 730. There the defendant King and another were charged with having entered into a conspiracy with a law enforcement officer to violate the gambling laws of Florida. They were convicted; judgment was originally affirmed. Petition to rehear was filed, and by a divided Court it was held that the conviction could not be sustained where one of the parties to the conspiracy was a law enforcement officer who had no intent to violate the law. The Court said: "But Muscovitz, in the circumstances here, is not criminally liable as a co-conspirator (citations omitted); nor can it be seriously contended that a government agent can be prosecuted for a violation of a criminal statute committed in the performance of his duty as such agent. We are cognizant of the fact that a punishable conspiracy may exist whether or not the crime intended to be accomplished by it was committed. But it is equally well settled that where one of two persons who conspire to do an illegal act is an officer acting in the discharge of his duty, the other person cannot be convicted of a charge of conspiracy."

If the Supreme Court of Florida was speaking with reference to a conspiracy limited to a governmental agent and one other person, the facts differ from the facts in this case. If the Supreme Court of Florida intended to hold that a conspiracy among several, one of whom was a governmental agent, without any intent to participate but merely seeking information with respect to the proposed criminal act, we disagree with the conclusion reached. The mere fact that an agent of the law pretends to be acting in conjunction with several others in a criminal conspiracy does not absolve those indicted and relieve them of guilt. We so held in *S. v. Caldwell*, 249 N.C. 56, 105 S.E. 2d 189.

The cases cited by the Supreme Court of Florida do not, in our opinion, support the conclusion reached in the *King* case.

In *De Mayo v. United States*, 32 F. 2d 472, there was a charge of criminal conspiracy and as here a government agent was, or pre-

tended to be, a party to the conspiracy. The indictment charged several as participants in the conspiracy. The Court said: "It developed in the testimony that Kelsey, together with one Kennedy, was acting as the representative and agent of the prohibition officers of the United States; that he was in effect such an officer and did what he did for the purpose of detecting the conspirators and of bringing them to trial and conviction. It is urged, therefore, by appellant that the indictment, if not in fact invalid because of the incorporation of Kelsey as conspirator, failed of support by the evidence in that a government officer, who is not in fact a co-conspirator, but who acts simply for the purpose of detecting crime, cannot bind his codefendants; that his acts are not imputable to them because there is not community of purpose. . . .(I)t seems clear that if, in addition to the parties first named, Kelsey, though not a government officer, had been included as a defendant, and it had developed that Kelsey was not a party to the conspiracy, it could not be claimed that the conspiracy charged would fail on that account as to the others. We take it that Kelsey's incompetency to become a conspirator under the facts existing effects a result no different from that which would follow if he were otherwise found not to be a party to the unlawful agreement."

O'Brien v. United States, 51 F. 2d 674, involved a conspiracy to violate the prohibition laws. The court said: "That there was a conspiracy to violate the prohibition law, there can be no doubt. The conspiracy was conceived by the three prohibition agents, who enlisted the services of a decoy, Lyle, to more effectually accomplish their object. . . .It might be urged, perhaps, that the object of the conspiracy was to entrap certain suspected offenders. Nevertheless such entrapment was to be accomplished through the violation of the Prohibition Act. As a conspiracy may have several objects, if follows that, if one of its objects be the violation of a federal law, it falls within the condemnation of the statutes."

In *Weathered v. State,* 81 S.W. 2d 91 (Texas), the bill charged Weathered, Vick Bradley, and Edgar Hammonds with a conspiracy to break and enter a house. The court reviewed the evidence as to Bradley's intent to participate in the conspiracy and his part as an informer. Following the review of the evidence, the Court said: "From the foregoing testimony it is obvious that Vick Bradley did not intend to commit burglary or aid in the commission thereof. His participation in the alleged conspiracy was not sincere; it was simulated. Hence, there was no union or meeting of the minds on the part of Bradley with the other parties so as to constitute him a coconspirator. His acts, conduct, and presence was to deceive

and mislead his alleged coconspirators. His mind did not concur and unite with the minds of his alleged coconspirators in a criminal intent to commit the alleged offense. . . . But this would not relieve the appellant from being prosecuted and convicted of said offense provided the testimony showed that appellant and Hammonds had entered into a conspiracy to commit the offense. . ."

Applying the definition heretofore given of a conspiracy, this Court has held that one cannot be convicted unless at least two are so charged. *S. v. Wrenn,* 198 N.C. 260, 151 S.E. 261. But when, as here, several are charged and participate in the conspiracy, conviction can be had; and this is true even though some of the alleged conspirators are unknown. *Rogers v. U. S.,* 340 U.S. 367, 95 L. ed. 344, 19 A.L.R. 2d 378.

Defendants next challenge the right to put them on trial. The bills of indictment were returned at the June Term. Before pleading to the charge contained in bill 3508, they filed what they denominated a plea in abatement. By this plea they assert (1) Vance County was not the proper venue, (2) the bill was based solely on incompetent evidence, which fact they propose to establish by testimony of members of the grand jury, and (3) the bill was not based on any evidence given in connection therewith. Such testimony as was heard related to a prior bill, and they propose to establish this fact by testimony from members of the grand jury.

The evidence taken at the trial establishes contact between Martin and Walker and activities between them in Vance County. It is also fair to infer that Walker, Abbott, and Pegram came to the Motor Freight Terminal in Henderson on the night of 13 June to consummate the conspiracy by dynamiting the buildings. Trial was properly had in Vance County, *S. v. Warren,* 227 N.C. 380, 42 S.E. 2d 350; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737.

The bills show that L. E. Allen, C. D. Fentress, and W. C. Wilson testified before the grand jury. The evidence at the trial shows these witnesses are members of the S. B. I. Wilson and Fentress testified at the trial. They related confessions made by Walker, Jarrell, Pegram, and Abbott. Allen did not testify at the trial. The court refused to permit defendants to examine members of the grand jury to determine what evidence they heard to induce them to return a true bill. The court ruled correctly. *S. v. Blanton,* 227 N.C. 517, 42 S.E. 2d 663; *S. v. Levy,* 200 N.C. 586, 158 S.E. 94; *S. v. Broughton,* 29 N.C. 96; *S. v. Ernster,* 179 N.W. 640; *S. v. Lewis,* 38 La. Ann. 680; 27 Am. Jur. 720. The reason for the holding is aptly expressed by *Adams, J.,* in *S. v. Levy, supra:* "The suggested practice would hinder the trial and result in useless delay. It would often require the ex-

amination of a number of witnesses, including, perchance, members of the grand jury; it would demand of the judge that he invade the province of the grand jury or exercise the functions of a petit jury finding the facts from conflicting evidence and passing upon the credibility of witnesses; it would turn the Superior Court into a forum for an unseemly contest between members of the grand jury and those whom they may have charged with crime. Besides, such practice is unnecessary; if the evidence is incompetent it will be excluded by the trial court."

Even if the court had ruled erroneously on the motion relating to one bill of indictment, such ruling could not avail defendants on this appeal. They have been convicted and sentenced on three bills. The sentences are identical and run concurrently. Error would have to appear as to all three to be prejudicial. *S. v. Thomas*, 244 N.C. 212, 93 S.E. 2d 63; *S. v. Williamson*, 238 N.C. 652, 78 S.E. 2d 763; *S. v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871.

Motions to quash after the evidence was in and motions to nonsuit had been overruled came too late. *S. v. Williamson*, 250 N.C. 204; *S. v. Gales*, 240 N.C. 319, 82 S.E. 2d 80; *S. v. Suddreth*, 223 N.C. 610, 27 S.E. 2d 623.

Defendants next assert their rights were prejudiced by permitting the witness Aaron, on redirect examination, to explain why he had communicated with the president of the mill and law enforcement officers with respect to Auslander's proposal and the witness's subsequent trips to Henderson. He had been subjected to rigorous cross-examination. It was in evidence that he had been convicted of several criminal acts. He was out of work. At least a portion of his expense in Henderson and Roanoke Rapids was paid by the S. B. I. Enmity on Aaron's part to Auslander was claimed. These facts would support an argument that Aaron was prompted to testify because of his hate for Auslander or from mercenary motives. Either would render his testimony of dubious value. His unworthiness of belief was strongly argued before us. Manifestly it was competent in that situation for Aaron to explain his reason for communicating with the officers. The evidence was intended only to repel defendants' attack on the witness's credibility. It was competent. Stansbury, N. C. Evidence, sec. 50 and 51.

Defendants contend their rights have been prejudiced by improper argument made by one of the prosecuting attorneys. These assignments are not based on exceptions taken at the trial. Notwithstanding this failure of defendants to take exceptions, we consider the assignments. During the argument of Mr. Hooks defendants asked the court to permit the jury to retire. Their request was allowed. The

record shows: "The defendants then objected to the following statement they say was made by Mr. Hooks: 'No one has gone on the stand to testify as to Aaron's discredibility, on behalf of the defendants, except the lawyers.'

"COURT: Is that the statement you made.

"MR. HOOKS: Substantially, yes, sir. I said, 'Nobody has testified to anything except the lawyers in this case contradicting what this witness has said.'"

Defendants thereupon moved for a mistrial which was denied. Defendants assert the argument was improper and forbidden by the statute, G.S. 8-54, because the defendants had not elected to testify. They offered no evidence. Defendants' contention is not well founded. To correctly interpret and apply the statute, it should be remembered that at common law, both in England and in this country, parties were not competent witnesses and were not permitted to testify. Relaxation of this rigorous rule began in England early in the administration of Queen Victoria when so much remedial legislation was adopted. North Carolina shortly thereafter modified the law of exclusion, c. 23, Laws 1856-57, but it was not until 1881 when the privilege now accorded to a defendant in criminal actions to testify or to remain mute without creating a presumption against him was enacted. *S. v. Wilcox*, 206 N.C. 691, 175 S.E. 122.

An admission of guilt by defendant was competent evidence prior to 1881 just as it is competent today. Then as now the law applied and gave effect to the assumption that one charged with crime and wrongful conduct would not remain silent when he had an opportunity to speak. Such silence was evidence of guilt. *S. v. Crockett*, 82 N.C. 599; *S. v. Bryant*, 235 N.C. 420, 70 S.E. 2d 186.

Counsel should base their argument on the evidence and the fair inferences which may be drawn therefrom. Guilt must be ascertained from the evidence. *S. v. Roach*, 248 N.C. 63, 102 S.E. 2d 413; *S. v. Roberts*, 243 N.C. 619, 91 S.E. 2d 589; *Cuthrell v. Greene*, 229 N.C. 475, 50 S.E. 2d 525; *S. v. Little*, 228 N.C. 417, 45 S.E. 2d 542.

Since the admission of guilt by failure to deny a charge of crime is evidence of guilt, a solicitor may properly so argue. In 1881 when the barrier was removed, preventing the accused from testifying and according him a privilege, it was proper to provide that his failure to utilize the privilege so given should not be regarded as an implied admission. Hence the language used by the Legislature, G.S. 8-54, "his failure to make such request shall not create any presumption against him," was entirely proper.

But the remark to which the objection is made does not specifically point to the failure of the defendants to take the stand. It does

not argue any admission of guilt by them because of such failure. The argument must be viewed in the light of the evidence. Aaron, the principal witness for the State, had been sharply cross-examined. We may assume that the defendants in their argument to the jury had challenged his credibility. He had testified that at the inception of the conspiracy four were present: Auslander, in whose mind the crime originated, the witness Aaron, Auslander's assistant, Dave Harris, and E. C. McBryde. So far as appears, neither Harris nor McBryde took part in the conspiracy.

They were merely silent observers. If Aaron's testimony with respect to the very inception of the conspiracy was false, the whole case would fall. It was not improper for the solicitor in this situation to say that no one had testified in contradiction of Aaron. *S. v. Hooker,* 145 N.C. 581; *S. v. Weddington,* 103 N.C. 364.

At the request of defendants the court reporter took the remainder of Mr. Hooks' argument. Defendants now assign other portions of his argument as error entitling them to a new trial. No objection was made at the time. The portions assigned as error are, when tested by correct legal principles, not improper and form no basis for a mistrial. The court in its charge was careful to inform the jury that the defendants had a right to elect whether they would or would not testify and that their failure to do so should not be considered by the jury against them or to their prejudice as they were exercising a right given by law.

By assignments of error 35, 36, 133, 116, 96, 97, 98, 37, 51, 152, and 121-132 defendants assert that they have not had a fair and impartial trial which the law guarantees to every defendant.

It would seem needless to say that every person charged with crime is, when placed on trial in the courts of North Carolina, entitled to a fair and impartial trial. We have repeatedly so declared. *S. v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387; *S. v. Phillips,* 240 N.C. 516, 82 S.E. 2d 562, and numerous cases there cited. If, as defendants contend, they have not had a fair and impartial trial, the judgment directing their imprisonment ought to and would be vacated and a new trial ordered.

We have already dealt at length with most of defendants' contentions. Perhaps the opinion is already unduly protracted, but the mere assertion that a defendant has been deprived of a fair trial requires discussion. For that purpose we pick the assignments which seem to typify the basis for the assertion. The contention is that the prosecutor sought to introduce in the trial evidence of other crimes for the purpose of influencing the jury. It is quite true, as defendants argue, that evidence of crime committed by a defendant

totally unrelated to the crime with which he is charged is immaterial and hence should not be offered. In applying this general rule the court excluded evidence and directed the jury not to consider evidence which seems to us to have been competent. The rulings by the court were not prejudicial but favorable to defendants. Of course the State had no right to except to these rulings which we think unnecessarily limited the evidence on which the State was entitled to rely. We pick as typical of the assignments relied upon numbers 35, 36, and 51.

The S. B. I. agent, Wilson, testified as to the statements made by Walker and the other defendants on the night of their arrest. The witness was relating the statement of Walker when he was asked: "What else did he tell you?

"I asked Walker what he told the man at Roanoke Rapids about him furnishing all of the dynamite in the violence of Henderson—

"Objection. . .

"WITNESS (continuing): Walker said he told the man that he had supplied all of the dynamite . . .

"Motion to strike the answer on the ground it attempts to connect Walker with other crimes with which he is not here charged.

"SUSTAINED. You will not consider his answer, gentlemen. Dismiss it from your minds."

Thereupon a motion for mistrial was made. The jury was permitted to retire. When the jury returned, "The Court Reporter, at the request of Mr. Hooks, repeats the last statement of the witness Wilson. Defendants move for a mistrial on the ground of repetition of that highly prejudicial statement.

"COURT: You will not consider anything about that question or the answer thereto, gentlemen. Dismiss it.

"Q What else was said by Walker?

"A And that he fixed the bombs and carried them to the person who used them . . .

"Objection — Sustained.

"COURT: You will not consider the answer to the question. Dismiss it from your minds.

"DEFENDANTS MOVE FOR A MISTRIAL. DENIED.

"Walker said that although he told the man this, that this was not true, that he was only bragging to him." The foregoing portion of the record constitutes assignments 35 and 36.

Aaron testified that at the conference at the motel in Roanoke Rapids with Pegram, Walker, and others, there was discussion as to how to effectively destroy the transformers and electric lines furnishing power to Harriet Cotton Mills. It may be assumed from the testimony that the Power Company had several transformers at its

substation. It was necessary to ascertain which transformer should be destroyed to prevent the transmission of power. Aaron testified: "Pegram said that he did not think that if we knocked that transformer out that it would knock out the lights at both mills and I told him we were not interested in the North Henderson mill and then there was a lot of discussion about where the power came from feeding the South Henderson mill.

"Q What was said about that?

"A Pegram said it come from Greystone. He said, 'The reason I know, you remember when I throwed the cap . . .'

"Objection by the defendants.

"COURT: Objection overruled.

EXCEPTION BY DEFENDANTS EXCEPTION #45.

"WITNESS (continuing): He said the reason he knew it come from Greystone, he said that when he threw the cowchain across the high-tension wires and he looked at Robert and he says, 'Don't you know, Robert, when we knocked the lights out at the North Henderson plant?' And he says, 'The South Henderson plant did not go out.

"Objection (by the defendants) and motion to strike.

"COURT: Motion allowed. You will not consider his answer, gentlemen; dismiss it from your minds."

The testimony objected to relates to crimes distinct from the criminal charge then being heard, but it must be remembered that the State did not offer to prove the truth of the statements made by Walker and Pegram. The competency of the evidence rests upon their assertion that their experience and knowledge made them ideally fitted to confederate and become conspirators and follow the leadership of Aaron. It was immaterial whether the lights had gone out at two Henderson mills because of wrongful conduct by someone with the transformers. It was material that Pegram claimed to know which transformers had been destroyed. The State did not seek to show that Walker had in fact furnished the dynamite for other violence in Henderson. It sought to show, and it was competent for it to show that Walker, professing his skill and ability to accomplish the purpose of the conspiracy, should boastfully make such a claim. Since the evidence was competent even though excluded, it necessarily follows that no prejudice arose by the insistence of the prosecutor in presenting it to the jury. *S. v. McClain*, 240 N.C. 171, 81 S.E. 2d 364, and authorities there cited.

As previously noted, a tape recorder was placed in Aaron's motel room with his consent and was so placed for the purpose of recording conversations among the conspirators. Evidence so obtained was, as to those engaged in the conversations, not incompetent. *Irvine v. Cal-*

ifornia, 347 U.S. 128, 98 L. Ed. 561. The solicitor had the S. B. I. agent who installed it show how the machine operated. This testimony was objected to and forms the basis of assignments 121-132. Since the evidence there obtained was competent as to the participants, it was competent to demonstrate or explain how the machine operated. Perhaps some of the jurors had never seen such a machine in operation.

After the witness had explained its operation, the solicitor offered the recordings in evidence. When he offered the recordings he frankly said to the court: "I have heard those recordings. In my opinion they contain matters that are not entirely competent in the evidence in this case because of their relation to other matters. We offer here the tapes and the recordings. We offer them for use by the defendants, if they desire, and we offer them in evidence in corroboration of the witnesses in this case who have testified about those matters."

Defendants objected to the use of the tapes and moved for a mistrial, "on the grounds of the Solicitor's statements in the presence of the Jury to his Honor and on the grounds the Solicitor has tried to take unfair advantage of the defendants by putting the defendants on a spot." The court sustained the objection. Defendants moved for a mistrial. This motion was denied.

Defendants argue the offering of these tape recordings was so unfair as to demonstrate a deliberate intent on the part of the prosecutor to prejudice them and prevent a fair trial. This contention must be weighed in the light of the testimony and the rulings which the court had made. When the recording was played to defendant Pegram, he recognized his voice, but is quoted as saying the recording "sounded like a bunch of drunks playing poker." Manifestly, defendants intended to challenge the accuracy of the recording which, according to the State, caused Walker, Abbott, and Jarrell to confess their participation and Pegram to refuse to deny the charge of conspiracy.

The court, on objection by defendants, had excluded declarations made by some of the defendants for the purpose of showing their fitness for their part in the conspiracy. As previously stated, this evidence was competent against the speaker even though it related to other crimes. This was apparently the view which the solicitor took when he offered the evidence. Unlike defendants, an exception to an erroneous ruling would not avail him.

The tape recording played an important part in the trial of the case. If the solicitor had not offered it, defendants could charge unfairness in withholding evidence. He could not well answer that he did not offer it because it contained statements which he thought the court would deem incompetent. In the situation confronting him

he did the proper thing. He offered it in evidence and told the court that he thought the court would hold parts of it incompetent. He made it available to the defendants. We find nothing in this record to impugn his motives.

It is the duty of the trial judge to supervise the trial of cases and to control counsel so that the parties may be assured of a fair and impartial trial. Here the trial court manifestly concluded that the accusation made by defendants found no support in fact. The record indicates that counsel for defendants, as well as counsel for the State, diligently sought to perform their respective duties. It may be that at times each was over zealous. It is true that the court on occasion had to admonish counsel, but we find nothing from our examination of the record which leaves the impression that the defendants were not afforded a fair and impartial trial.

We have carefully examined each exception and each assignment of error. We find nothing which in our opinion would justify another trial as to any defendant.

No error.

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

BOBBITT, J., dissenting as to defendant Payton. In my opinion, the evidence, when considered in the light most favorable to the State, is insufficient to show that defendant Payton was a party *to the conspiracies charged in the bills of indictment.*

"The existence of a conspiracy may not be established by the *ex parte* declaration of an alleged conspirator made in the absence of his alleged coconspirator. Only evidence of the acts committed and declarations made by one of the coconspirators after the conspiracy is formed is competent against all, and then only when the declarations are made or the acts are committed in furtherance of the conspiracy." *S. v. Benson,* 234 N.C. 263, 66 S.E. 2d 893, and cases cited.

Upon this legal principle, Aaron's testimony as to what Gore and Auslander *said* (in Payton's absence) Payton *had said* was not competent to establish that Payton was a party to the alleged conspiracies. Hence, I do not discuss the dubious probative significance of this portion of Aaron's testimony.

The competent evidence is sufficient to establish these findings: (1) Aaron, endeavoring to contact Gore, had a telephone conversation with Payton, and Payton gave Gore Aaron's message; (2) after his telephone conversation with Aaron, Payton telephoned Auslander, with whom Payton was in contact from time to time; and (3) Payton knew Auslander had sent Aaron to the Henderson area *for some purpose* incident to the strike.

The crucial question is whether the circumstantial evidence is such that logical and legitimate inferences may be drawn therefrom to support the factual conclusion that Payton was a party to the alleged conspiracies. See *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. In my opinion, the correct answer is, "No." However strong the suspicion, it seems to me that supposition and conjecture must be invoked to reach such factual conclusion.

Of course, if we could assume that Payton then knew the facts disclosed by the evidence now before us, there would be no doubt as to the sufficiency of the evidence as to him. But there is *no evidence* that he had such knowledge at the time of his telephone conversations with Aaron and with Auslander.

Activities incident to the strike were many and varied. Conceding the sufficiency of the evidence to support a finding that Payton knew Aaron had been sent by Auslander to the Henderson area *for some purpose* incident to the strike, Payton's guilt or innocence depends upon whether he had knowledge of and was a party *to the (particular) conspiracies alleged in the bills of indictment.* In my view, *the evidence,* as to Payton, is insufficient to support the verdict.

VIRGINIA LAMM HAYES AND HUSBAND, J. F. HAYES, BESSIE H. LAMM, ZELMA LAMM POYTHRESS AND HUSBAND, T. M. POYTHRESS, TEMPIE ANN HAYES AND JACK THOMAS HAYES, INFANTS APPEARING HEREIN BY THEIR NEXT FRIEND, J. W. HARRISON, v. EUNICE WILLIAMSON DECKER RICARD AND FREE WILL BAPTIST ORPHANAGE, INC., AND H. G. CONNOR AND CHARLES B. McLEAN, TRUSTEE.

(Filed 14 January, 1960.)

1. Trial § 4—

The granting or denying of a motion for a continuance rests in the sound discretion of the presiding judge, and his decision will not be disturbed except for abuse of discretion.

2. Judgments § 38: Pleadings § 7½—

Ordinarily it is within the discretion of the trial court to determine whether in the circumstances of a particular case a plea in bar is to be disposed of prior to trial on the merits.

3. Pleadings § 38: Trial § 5½—

Where the record discloses that at the pretrial hearing motion for continuance was denied, and that motion that defendants' plea in bar be heard prior to trial on the merits was granted and the hearing thereon set for a term of court, and that the plea in bar was heard in open

court at such term, the record discloses that the plea in bar was determined at a regular term of court and not in a pretrial conference.

4. Trial § 5½—

Where the record contains a statement of the trial court that the authenticity of the records offered in evidence by both parties was admitted by both parties, a party may not thereafter object that the records were admitted without proof of authenticity.

5. Judgments § 29—

A judgment operates as a bar to a subsequent action only as to the parties to the prior action and those in privity.

6. Judgments § 33—

A judgment as of nonsuit is a bar to a subsequent action only when it is made to appear that the former adjudication was on the merits and it is found by the trial court that the second action is between the same parties and those in privity with them, is based upon substantially identical allegations and substantially identical evidence, and that the merits of the second action are identical with those of the first.

7. Judgments § 5—

A judgment is on the merits when it is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form.

8. Judgments § 38—

A plea in bar cannot ordinarily be determined from the pleadings alone.

9. Same—

The findings of fact of the court in regard to the identity of the action will not be reviewed on appeal, if the findings are supported by the evidence.

10. Judgments § 29—

A grandchild born after judgment of nonsuit in a prior action is represented by an older grandchild who was a party and represented the class in the prior action, and is in privity with him.

11. Same—

Purchasers with notice from a party in the prior action are in privity with such party in a subsequent action involving the title to land.

12. Judgments § 30—

A judgment on the merits is conclusive not only as to matters actually litigated and determined but also as to all matters properly within the scope of the pleadings which could and should have been brought forward, since a party will not be allowed to split up his claim or divide the grounds of recovery.

13. Judgments § 33— Judgment of nonsuit on merits held to bar subsequent action upon substantially identical evidence.

Where, in an action to determine the title to land between parties

claiming from a common source, judgment of nonsuit is entered on the merits on the ground that all of plaintiffs' evidence was insufficient to establish better title from the common source, such judgment is properly held to bar a subsequent action upon the court's findings, supported by the pleadings and transcript of the evidence in the former trial introduced in evidence, together with testimony of witnesses, that the second action sought the same relief as the first, that the parties were the same or in privity, and that the issue in the second had been directly tried and determined in the first, and if matters embraced within the pleadings in the former action and which might have been litigated therein were not brought forward in the prior action, plaintiffs are nevertheless concluded thereby and may not assert them in the second.

14. Judgments § 38—

Where, upon the plea of the bar of a prior action of nonsuit on the merits, the proof admits of only one conclusion, the plea in bar is properly heard and determined by the court without a jury.

RODMAN, J., concurring in the result.

BOBBITT, J., dissenting.

APPEAL by plaintiffs from *Frizzelle, J.*, June 1959 Civil Term, of WILSON.

This is an action in the nature of ejectment to determine title to a tract of land, and to recover rents and profits from said land, heard on pleas in bar.

A former action of a similar nature to determine title to a tract of land, and to recover rents and profits from such land, which same tract of land is the subject matter of the instant case, has been before this Court twice. The decisions on the two former appeals of the first action are reported in 244 N.C. 313, 93 S.E. 2d 540, and in 245 N.C. 687, 97 S.E. 2d 105. The decision on the second appeal affirmed a judgment of involuntary nonsuit.

Following the decision of the second appeal, plaintiffs commenced this action within one year, pursuant to the provisions of G.S. 1-25.

From a judgment sustaining defendants' pleas in bar of *res judicata* and estoppel by judgment, and dismissing the action, plaintiffs appeal.

Lamb, Lamb & Daughtridge by Vernon F. Daughtridge and Cooley and May by Hubert E. May for plaintiffs, appellants.

Gardner, Connor and Lee for defendants Eunice W. Ricard, H. G. Connor and Charles B. McLean, Trustee, appellees.

PARKER, J. On 5 September 1958 the defendants Ricard, Connor, and McLean, Trustee, requested the Clerk of the Superior Court of Wilson County to place this action on the pre-trial docket. On 7 January 1959, Judge Frizzelle ordered that this case be set for trial per-

emptorily as the first case for trial at the June 1959 Civil Term of the Superior Court of Wilson County.

At the June 1959 Term, Judge Frizzelle entered what is designated as a "Pre-Trial Order," which is in substance: Plaintiffs moved for a continuance. Judge Frizzelle denied the motion, and plaintiffs excepted. Defendant Ricard moved that her pleas in bar be heard and determined prior to the trial on the merits. Judge Frizzelle, in his discretion, granted defendant Ricard's motion, and set the hearing of the pleas in bar for 22 June 1959. Plaintiffs excepted to the order.

Judge Frizzelle, without a jury, heard the pleas in bar of defendant Ricard. Defendant Ricard offered in evidence her answer containing her pleas in bar of estoppel by judgment and *res judicata*. At this point plaintiffs' counsel read to Judge Frizzelle their reply to defendant Ricard's pleas in bar and counterclaim. Then defendant Ricard in support of her pleas in bar offered in evidence the following: the pleadings in the first action on the second appeal to this Court, with the two deeds attached as exhibits to the amended complaint; the judgment of Judge George M. Fountain, entered at the September 1956 Civil Term, nonsuiting plaintiffs' first action; the appeal entries on the second appeal; the summons in the first action with the Sheriff's return; the proceedings making additional parties in the first action; the opinion of this Court on the second appeal, which is reported in 245 N.C. 687, 97 S.E. 2d 105; a transcript of the record in the trial of the first action, which resulted in the second appeal to this Court, containing the testimony of Mrs. Annie Parker Phillips, of Mrs. Nana Louvinia Parker, of George A. Barfoot, of Mrs. Bessie Lamm, of R. H. Jackson, and B. F. Varnell, all witnesses for plaintiffs, in the form of questions and answers; and also containing copies of the deed from Nana Louvinia Parker and others to R. A. Stamper and wife, of the deed from R. A. Stamper and wife to Grover T. Lamm, of the deed from R. A. Stamper and wife to defendant Ricard, who was then Eunice Williamson Decker, and stipulations and comments of counsel. Defendant Ricard also introduced some immaterial pleadings, e. g., her answer to the original complaint, when the first action was tried twice in the Superior Court resulting in two appeals to this Court on an amended complaint, and the original complaint is not in either of the records of those two appeals.

Plaintiffs offered in evidence before Judge Frizzelle the following: The testimony of W. A. Lucas, in the form of questions and answers, given at a former trial of the first action before Judge Carr in November 1954. Incorporated in W. A. Lucas' testimony is a copy of the Will of Grover T. Lamm. Plaintiffs also offered in evidence a copy of a will and copies of deeds in reference to the land which is the

subject matter of this present action. Plaintiffs also offered in evidence a transcript of the testimony of defendant Ricard given in the first trial of the hearing before Judge Carr, largely in the form of questions and answers. Judge Frizzelle excluded this testimony as irrelevant, but permitted counsel to read it into the record.

Judge Frizzelle entered a judgment in substance: Plaintiffs' complaint in the case fixes their alleged cause of action as one in the nature of ejectment, and fixes their claim of title to the land described in their complaint as being derived from R. A. Stamper and wife. That a prior action upon the same alleged cause of action, and seeking the same relief, was instituted in the Superior Court of Wilson County by summons issued 24 December 1952. The parties plaintiff in the prior action were the same as the parties plaintiff in this action. The parties defendant in the prior action were the same as the parties defendant in this action, with the exception of H. G. Connor and Charles B. McLean, Trustee, both of whom aver they have acquired interests in the land, the subject matter of this action, from the defendant Ricard. Plaintiffs' first action was tried at the September 1956 Civil Term of the Superior Court of Wilson County. At said trial plaintiffs sought to establish their alleged cause of action by showing that they and the defendant Ricard claimed title to the *locus in quo* from a common source, to wit, R. A. Stamper and wife. At said trial plaintiffs introduced evidence to support their alleged title from the common source, and introduced further evidence to support defendant Ricard's claim of title from the common source. Plaintiffs offered nothing by way of attack upon the title of defendant Ricard. After plaintiffs had closed their evidence, defendant Ricard moved for judgment of nonsuit. Thus, squarely presented, was the question for legal determination: Which claim of title from the common source was the better? The trial judge entered judgment of nonsuit, and dismissed plaintiffs' action. Upon appeal to the Supreme Court, the judgment was affirmed, and the Supreme Court held that plaintiffs proved themselves out of court by showing a superior title in defendant Ricard from the common source. Plaintiffs' claim to the *locus in quo* rests solely upon it being determined in this action that they hold the better title than defendant Ricard from R. A. Stamper and wife. That question was judicially determined adverse to plaintiffs in a prior action. Thus, a fact essential to plaintiffs' action, that defendant Ricard holds the better title from R. A. Stamper and wife, has been directly tried and decided. This essential fact cannot be contested again between the same parties, or their privies, in the same or any other court. Plaintiffs are estopped to deny the aforestated particular fact, which is essential to the cause of action alleged in

their complaint. At the former trial the way was open to plaintiffs to attack defendant Ricard's claim of title, that they had offered in evidence, upon any and all existing grounds, both legal and equitable. It was incumbent upon them to bring forward, and assert their whole case. Plaintiffs have had their day in court, and have had the opportunity to disprove defendant Ricard's claim of title that they, the plaintiffs, offered in evidence. They have waived their right to assert and prove their attack alleged in the complaint in this case on defendant Ricard's claim of title. Whereupon, Judge Frizzelle adjudged and decreed that the pleas in bar of the defendants Ricard, Connor and Charles B. McLean, Trustee, be allowed, and dismissed plaintiffs' action. Plaintiffs are estopped to relitigate the question as to whether they or defendant Ricard hold the better title to the land described in the complaint from R. A. Stamper and wife, a common source; and the judicial determination of the former action, which was affirmed in the Supreme Court, operates as an estoppel, and as *res judicata* against plaintiffs to maintain this action.

Plaintiffs assign as error the refusal of the court to grant them a continuance to a subsequent term. The granting or denying of a motion for a continuance rests in the sound discretion of the presiding judge, and his decision will not be disturbed on appeal, except for abuse of discretion. No abuse of discretion has been shown. This assignment of error is overruled. *Furniture Co. v. Baron,* 243 N.C. 502, 91 S.E. 2d 236.

Plaintiffs assign as error the court's hearing defendant Ricard's pleas in bar prior to the trial of the action on its merits. The pleas in bar of defendants Ricard, Connor, and McLean, Trustee, deny plaintiffs' right to maintain the action, and if established, will destroy their action. "Ordinarily, it is for the trial judge, in the exercise of his discretion, to determine whether in the circumstances of a particular case a plea in bar is to be disposed of prior to trial on the merits of plaintiff's alleged cause of action." *Gillikin v. Gillikin,* 248 N.C. 710, 104 S.E. 2d 861. This assignment of error is overruled.

Plaintiffs contend in their brief that the pleas in bar were heard, and determined at a pre-trial conference. It is manifest from a study of the record that the pleas in bar were not heard, and determined at a pre-trial conference, but were heard, and determined at a regular term of court, in open court, according to the practice of the Superior Courts of the State.

Plaintiffs in their brief contend that the evidence offered in defense of the pleas in bar was admitted without proof of authenticity, "and that counsel for said defendant proceeded to offer such evidence without a stipulation as to its authenticity." On page 63

of the record, we find this: "The authenticity of the records offered by both parties admitted by both parties. J. P. F., Judge." There seems to be no merit to this contention.

The general rule is well settled that the doctrine of *res judicata,* whereby a judgment bars a subsequent action on the same cause of action, and renders the judgment conclusive on the issues adjudicated, applies only to the parties to the action in which the judgment was rendered, and the privies of such parties. *Bennett v. Holmes,* 18 N.C. 486; *Meacham v. Larus & Bros. Co.,* 212 N.C. 646, 194 S.E. 99; *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321; *Corporation Commission v. Bank,* 220 N.C. 48, 16 S.E. 2d 473; *Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240; 30A Am. Jur., Judgments, Sec. 396; 50 C.J.S., Judgments, Sec. 762.

In *U. S. v. California Bridge & C. Co.,* 245 U.S. 337, 62 L. Ed. 332, the Court said: "The doctrine of estoppel by judgment, or *res judicata,* as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in *personam* in a former suit."

A former judgment of nonsuit is *res judicata* as to a second action, only when it is made to appear that the former adjudication has been on the merits of the action, and it appears to the trial court, and is found by such court as a fact, that the second action is between the same parties in the same capacity or quality, and their privies, and is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second action are identically the same. *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809; *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Hampton v. Spinning Co.,* 198 N.C. 235, 151 S.E. 266; 17 Am. Jur., Dismissal, Etc., p. 162; 27 C.J.S., Dismissal and Nonsuit, p. 404; 30A Am. Jur., Judgments, Section 398.

"A judgment on the merits is said to be one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form, or is a judgment that determines, on an issue either of law or fact, which party is right." 30A Am. Jur., Judgments, Sec. 348.

The pleas in bar "cannot be determined from the pleadings alone." *Craver v. Spaugh, supra,* and cases there cited.

This Court said in *Kelly v. Kelly, supra:* "Ordinarily, if the evidence on which the plea of *res judicata* is sustained tends to show

the facts to be as found by the trial court, its findings will not be reviewed by this Court."

The parties plaintiff in the former action and in the instant action are the same, with this exception: In the instant case a new plaintiff appears, Jack Thomas Hayes, an infant son of Virginia Lamm Hayes and husband, J. F. Hayes, and a brother of the infant plaintiff Tempie Ann Hayes. In the former action, Tempie Ann Hayes appeared by her next friend, J. W. Harrison: in the present case both infants appear by their next friend, J. W. Harrison. It would seem that Jack Thomas Hayes was born subsequent to our decision on the second appeal of the first action. The Will of Grover T. Lamm devises certain interests in his realty to his daughter, Virginia Lamm Hayes, for her life, after the termination of a life estate devised to his wife, and at Virginia Lamm Hayes' death, to her children. His will refers to no grandchildren by name, except Betty Frances Lamm, daughter of his late son, Oliver Lamm. It appears from the record that Jack Thomas Hayes is so identified in interest with Tempie Ann Hayes that he was in privity with her who was a party to the prior adjudication, and represented the same legal right. 30A Am. Jur., Judgments, p. 451. "'Privity' is the mutual or successive relationship to the same right of property, or such an identification in interest of one person with another as to represent the same legal right." 72 C.J.S., Privity; Privies; Privy, pp. 954-5.

The parties defendant in the former action and in the instant case are identical, with this exception: In the instant case two new defendants appear, H. G. Connor and Charles B. McLean, Trustee. The decision on the second appeal of the first action was filed 27 March 1957. On 1 May 1957, defendant Ricard conveyed to H. G. Connor by deed duly recorded a portion of the land that is the subject matter of the former action and the present action. On the same date defendant Ricard executed and delivered to Charles B. McLean, Trustee, a deed of trust duly recorded, securing an indebtedness of $2,000.00 due H. G. Connor, and conveying to the Trustee all of this same land, except the portion conveyed to H. G. Connor. H. G. Connor and Charles B. McLean, Trustee, are privies in estate with defendant Ricard, due to their relationship of grantor and grantees. 72 C.J.S., Privity; Privies; Privy, Privity in Estate, pp. 960-961.

Judge Frizzelle found that the parties plaintiff in the prior action were the same as the parties plaintiff in the instant action. By inadvertence he did not refer to the infant Jack Thomas Hayes, who is in privity with his infant sister, Tempie Ann Hayes. Judge Frizzelle's findings show the privity of estate between defendant Ricard and defendants Connor and McLean, Trustee. However, considering Judge

Frizzelle's judgment in its entirety, we are of opinion that his findings of fact are sufficient that there is an identity of parties in the first action and the present action, within the doctrine of *res judicata*, and that the evidence supports such findings.

The pleadings on the two appeals to this Court of the former action are identical. The complaint in the instant case is identical with the amended complaint on the two appeals to this Court of the former action — only the amended complaint appears in the records on the two former appeals —, with these exceptions: One. An allegation in the instant action that Jack Thomas Hayes is an infant son of Virginia Lamm Hayes and husband, J. F. Hayes, and appears herein by his next friend. Two. The addition in the present complaint of a new sub-paragraph to paragraph XII of the amended complaint in the former action. Paragraph XII begins: "Said claim of defendant Ricard is valid neither in law nor in fact for that": The new sub-paragraph reads: "E. In the year 1946, said Grover T. Lamm placed defendant Ricard and her family in possession of said lands as his tenants, and continuously thereafter until his death and at the time thereof they were in possession of said lands as such tenants, and since his death said defendant has been wrongfully holding over and withholding the possession of said lands from the plaintiffs." Three. The amended complaint in the former action requests, *inter alia*, the appointment of a receiver to take possession of the subject matter of the action: this is omitted in the complaint in the present action. Four. The amended complaint in the former action alleges defendant Ricard is a resident of North Carolina: the complaint in the present case alleges she is a resident of South Dakota.

After plaintiffs filed their complaint in the instant case, they had H. G. Connor and Charles B. McLean, Trustee, made parties defendant, and filed an amendment to their complaint to this effect: That defendant Ricard's deed to Connor and deed of trust to McLean, Trustee, are void, and conveyed nothing to them, because plaintiffs filed a *lis pendens* as to the tract of land on 24 December 1952, when they instituted their first action, that Connor was of counsel for defendant Ricard in the first action, and that Connor and McLean, Trustee, knew defendant Ricard did not own the land she purported to convey to Connor and McLean, Trustee.

In the former action plaintiffs filed a reply to defendant Ricard's supplemental answer, in which in paragraph A they allege: "Defendant Ricard is estopped to deny the fee simple title of Grover T. Lamm and the title of plaintiffs to said land for that": and then follows an allegation of practically the identical words contained in

Paragraph XII, sub-paragraph E, of their complaint in the instant case, above set forth.

This Court said in *King v. Neese*, 233 N.C. 132, 63 S.E. 2d 123: "Where a second action or proceeding is between the same parties as a first action or proceeding, the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding." To the same effect see 30A Am. Jur., Judgments, Sec. 372, where numerous cases are cited from many jurisdictions.

This Court said in *Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822: "A judgment rendered in an action estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward. Citing cases. The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can neither split up his claim nor divide the grounds of recovery."

For an analysis of the pleadings in the former action see 244 N.C. 313, 93 S.E. 2d 540. That decision also contains a summary of the evidence in that trial. See also 245 N.C. 687, 97 S.E. 2d 105, for the second appeal of the former action.

A judgment of nonsuit on the merits and after a full hearing, stands upon a different basis from those judgments of nonsuit upon other causes and upon other grounds, where a plaintiff can bring a new action under G.S. 1-25, and "mend his licks," if he can. *Hampton v. Spinning Co., supra.*

The judgment of involuntary nonsuit entered in the former action, and affirmed by this Court, 245 N.C. 687, 97 S.E. 2d 105, was an adjudication upon the merits of the action, for that plaintiffs' evidence showed affirmatively that defendant Ricard had a better title to the land from a common source, and that they are not entitled to recover, which was her defense.

Plaintiffs contend that in the instant case other issues are presented, which were not presented when the former action was tried and nonsuited, to wit: Whether defendant Ricard was a tenant of Grover T. Lamm; whether the deed to defendant Ricard was without consideration; whether the deed to defendant Ricard was a deed of gift and not registered within two years from the date of delivery, etc. All these matters were alleged by plaintiffs in their pleadings in the former action, and might have been litigated in that action. If plaintiffs did not see fit to present evidence on their whole case, as alleged

in their pleadings, when the former action was tried and nonsuited, that was their choosing, and they must abide the consequences. *King v. Neese, supra; Bruton v. Light Co., supra; Gibbs v. Higgins,* 215 N.C. 201, 1 S.E. 2d 554; *Cropsey v. Markham,* 171 N.C. 43, 87 S.E. 950; *Coltrane v. Laughlin,* 157 N.C. 282, 72 S.E. 961.

In studying the evidence we have considered plaintiffs' evidence excluded by Judge Frizzelle, as if he had admitted it. The evidence introduced in the hearing before Judge Frizzelle supports his findings of fact, and such findings support his conclusions, and his judgment based thereon. The merits of the two actions are the same.

The conveyances by defendant Ricard to Connor and McLean, Trustee, do not prevent the application here of the principles of *res judicata* and estoppel by judgment, and the sustaining of such pleas in bar destroys plaintiffs' action.

Upon the record before us, the pleas in bar were properly heard and determined by Judge Frizzelle without a jury, for the reason that the proof admits of only one conclusion. 50 C.J.S., Judgments, Sections 845-6.

What was said in *Ingle v. Cassady,* 211 N.C. 287, 189 S.E. 776, with a change of names, is in point here: "This is the 'same candle blown out in the original action,' *Hayes v. Ricard,* 245 N.C. 687, 97 S.E. 2d 340, 'and lighted again in the present action.' "

All plaintiffs' assignments of error are overruled. The judgment below is

Affirmed.

RODMAN, J., concurring in result: This cause has been considered on two prior appeals. In the appeal from the judgment of nonsuit (245 N.C. 687), it was decided that the prior recordation of the deed to defendant made a *prima facie* case of ownership and in the absence of evidence which would invalidate the deed to defendant, plaintiffs were not entitled to recover.

I understand the decision on the first appeal (244 N.C. 313) to hold that all of the evidence given by the witnesses offered by plaintiff for the purpose of invalidating the deed to defendant is competent and, when so considered, the evidence is not as a matter of law sufficient to defeat the title vested in defendant by prior registration of the deed from the common source.

Plaintiffs, at the hearing before Judge Frizzelle, offered for the purpose of establishing their superior title the identical testimony considered by this Court when the case was here in 1956 (244 N.C. 313). No other evidence was offered. The evidence is not subject to differing inferences which a jury might draw therefrom. The effect

to be given to that testimony is a matter of law. We held in effect that it was not, when all was considered, sufficient to establish plaintiffs' superior title. Since the evidence on which plaintiffs now rely has in effect been adjudged insufficient to establish plaintiffs' superior title, it follows, I think, that the conclusion reached by Judge Frizzelle is correct. Hence I vote to affirm.

BOBBITT, J., dissenting. In *Hayes v. Ricard*, 245 N.C. 687, 97 S.E. 2d 105, this Court affirmed a judgment of involuntary nonsuit entered at the close of plaintiffs' evidence. Thereafter, plaintiffs, under G.S. 1-25, commenced the present action.

The former and present actions are essentially the same. There is substantial identity as to the respective parties and the pleadings raise the same issues. Indeed, to invoke G.S. 1-25, there must be such identity.

"The time is extended because the new action is considered as a continuation of the former action, and they must be substantially the same, involving the same parties, the same cause of action, and the same right; and this must appear from the record in the case, and cannot be shown by oral testimony." McIntosh, N. C. Practice & Procedure, § 126; *Goodson v. Lehmon*, 225 N.C. 514, 518, 35 S.E. 2d 623, and cases cited.

A motion for judgment of involuntary nonsuit under G.S. 1-183 challenges the sufficiency of the evidence. *Lewis v. Shaver*, 236 N.C. 510, 512, 73 S.E. 2d 320; *Gantt v. Hobson*, 240 N.C. 426, 431, 82 S.E. 2d 384. The sole adjudication made by a judgment of involuntary nonsuit is that the evidence then before the court is insufficient to sustain plaintiff's alleged cause of action. The purpose of G.S. 1-25 is to afford the plaintiff an opportunity, upon a new trial, to offer evidence in addition to that offered in the first trial and thereby cure the deficiency on account of which the judgment of involuntary nonsuit was entered.

"It seems to be settled in this jurisdiction that a judgment of nonsuit is not *res judicata* as to a second action unless it is made to appear that the second action is between the same parties, on the same cause of action, and upon substantially the same evidence." *Pemberton v. Lewis*, 243 N.C. 188, 90 S.E. 2d 245, and cases cited. As stated by *Denny, J.*, in the *Pemberton* case: ". . . the evidence to be considered on such motion (to dismiss on the ground that a judgment of nonsuit in a former action was *res judicata*) may not be limited to the evidence that was adduced in the former trial, but contemplates a consideration of all the evidence adduced in support of the allegations of the respective complaints. It is only by a consideration of all such

evidence that the court may determine whether or not the evidence in both trials was substantially the same." Hence, in the *Pemberton* case, it was held that the motion to dismiss, if made prior to the hearing of the evidence at the trial of the second action, was premature.

As stated by *Higgins, J.*, in opinion on said prior appeal: "After introducing the Ricard deed, 'for the purpose of attack' the plaintiffs offer nothing by way of attack. They contend the deed on its face, regardless of the time of registration, is insufficient to defeat the plaintiffs' title." Absent evidence to support plaintiffs' allegations that the Ricard deed was without consideration and was never delivered, this Court held plaintiffs' evidence insufficient. The primary question now is whether plaintiffs are entitled to attack the Ricard deed by offering evidence to support their allegations that it was in fact without consideration and was never delivered.

The judgment of Judge Frizzelle is based solely on his finding or ruling that the prior judgment of involuntary nonsuit estopped plaintiffs from offering evidence upon trial of the present action to attack the Ricard deed. The ground assigned for this finding or ruling is that plaintiffs had opportunity to offer such evidence upon trial of the former action but did not do so. This, in my opinion, is a misapprehension of the applicable law. The judgment should be vacated and the cause remanded for trial. *S. v. Grundler,* 249 N.C. 399, 402, 106 S.E. 2d 488, and cases cited.

We are not concerned with the procedure where a judgment which, in terms, adjudicates the respective rights and liabilities of the parties, is pleaded as *res judicata.* A judgment of involuntary nonsuit, as indicated above, does not so adjudicate. Where a judgment of involtary nonsuit is pleaded as *res judicata,* the approved practice is to proceed to trial. When the evidence has been introduced, then, but not until then, the court determines whether *the evidence* offered by plaintiff is substantially the same as that offered at the trial in which the judgment of involuntary nonsuit was entered. *Pemberton v. Lewis, supra,* and cases cited.

MARGIE WILLIAMSON v. DOROTHY BENNETT.

(Filed 14 January, 1960.)

1. Trial § 22a—

On motion to nonsuit the evidence should be taken in the light most favorable to plaintiff and she is entitled to the benefit of every intendment upon the evidence and every reasonable inference of fact to be drawn therefrom.

2. Damages § 8—

Where ordinary negligence produces some actual physical impact or genuine physical injury, damages may be recovered for mental or emotional disturbance naturally and proximately resulting therefrom.

3. Same: Negligence § 1—

Mere fright caused by ordinary negligence is not ground for an action or the recovery of damages.

4. Same—

Fright resulting from ordinary negligence may be ground for an action and the recovery of damages if actual physical injury immediately, naturally and proximately results from the fright, as when fright causes plaintiff to faint and fall to his injury.

5. Same—

Neurasthenia resulting from fear or anxiety for the life, safety or well being of a person other than plaintiff himself is not ordinarily ground for the recovery of damages.

6. Damages § 8— Damages for neurasthenia which is not the natural and direct result of the negligent act may not be recovered.

Plaintiff's evidence disclosed that there was an actual impact between her car and the car of defendant, accompanied by a grinding noise, that plaintiff received no direct bodily impact and no immediate physical injury from the collision, that plaintiff was more than ordinarily predisposed to neurosis, that previously a child on a bicycle had run into a car driven by her brother-in-law, which accident resulted in the child's death, that plaintiff had theretofore been involved in another accident from which she had completely recovered, that at the time of the accident in suit plaintiff did not see what had struck her car but was seized with fear and anxiety that she had hit a child on a bicycle, and that thereafter plaintiff developed a neurasthenia and experienced a conversion reaction resulting in pseudo-paralysis. *Held*: Plaintiff's emotional disturbance was not the natural and proximate result of the accident, and further, was not based on anxiety for her own safety but upon a supposed injury to a non-existent child on an imaginary bicycle, and therefore plaintiff is not entitled to recover of defendant damages for the mental distress and nervous disorder.

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

WILLIAMSON *v.* BENNETT.

APPEAL by defendant from *Frizzelle, J.*, May 1959 Civil Term, of NASH.

This action was instituted by plaintiff to recover damages for injuries to her person and property because of the alleged actionable negligence of defendant.

The complaint alleges that there was a collision between automobiles driven by plaintiff and defendant; that defendant was negligent in that she failed to maintain a reasonable lookout, failed to keep her vehicle under proper control and failed to yield the right of way; that defendant's negligence was the proximate cause of the collision; that as a result of the collision plaintiff's automobile was damaged and "the plaintiff has suffered from an extreme nervous condition, resulting in a conversion reaction causing facial paralysis, weakening of the left side of her body, extreme anxiety, inability to sleep and a nervous breakdown."

Defendant answered and denied that she was negligent, averred that the collision was caused by plaintiff's negligence in failing to keep a reasonable lookout and in violating other alleged duties, and alleged that plaintiff's negligence contributed to her injuries.

The evidence adduced at the trial tends to show:

Hill Street in the city of Rocky Mount is a two-lane one-way street accommodating west-bound traffic. At its intersection with Raleigh Street traffic is controlled by lights. A school is located near the northwest corner of this intersection. On Hill Street in the block east of the intersection the speed limit is 20 miles per hour. On 9 May 1958, about 8:30 A. M., plaintiff was driving her Buick automobile westwardly on Hill Street approaching the traffic light at the Raleigh Street intersection. Her speed was about 20 miles per hour. Her two daughters were in the car with her; she was taking the older daughter to school, but not to the school referred to above. She was travelling in the north or right-hand lane. She overtook and passed another vehicle, turned back into the north lane, and observed that the traffic light was red and that there was a line of cars in the south lane waiting for the light to change, but none in the north lane. She proceeded toward the intersection, passing the line of cars on her left.

The defendant resides on the south side of Hill Street near the intersection; she was attempting to leave her private driveway in a Triumph sportscar — a small car. The line of traffic in the south lane barred her way. A motorist stopped immediately east of her driveway and waved her through the line. She passed through the gap in the line and attempted to enter the north lane and collided with the Buick driven by plaintiff. The impact turned defendant's car back into the south lane.

The only injury to defendant's car was a "slight dent" on the right front fender. Plaintiff's car was "lightly dented" on the left door and door post. Part of the damage on plaintiff's car had been caused by another accident. The new "scrape" started "about the center of the left front door . . . went across the center post and stopped approximately the middle of the left rear door." The "scrape" was "approximately ¼th inch deep and 2 or 3 inches wide. The middle was dented in and the paint scraped off."

Plaintiff did not see what had made contact with her car. There was a "grinding sound on the left side" of her car. "It did not sound like a car." About a month before this, a little girl riding a bicycle had run into the side of plaintiff's brother-in-law's car and was killed. When plaintiff heard the "grinding" sound all she could think of was that she had killed a child. She thought, "Oh, God, not a child on a bike." She drove on through the intersection and parked the Buick and then saw for the first time that she had struck a car and was glad it was a car and not a child on a bicycle. She testified at the trial: "I was so relieved it was the car, I was perfectly all right." Both drivers said they were not hurt and were sorry the accident had occurred. Plaintiff did not seem upset. There were no skid marks on the street; there was no debris or broken glass.

Later in the day plaintiff became nervous and upset. She had no physical injuries. Her nervous condition grew worse. She was 29 years old, had been married ten years and had two children. Before the accident she was a good and dutiful mother and wife, was neat in appearance, kept a neat and attractive home, helped her husband in his business, liked to be with people, was a lively conversationalist and a good neighbor. She had been injured in an automobile accident in 1955 and her injuries required surgery, but she had fully recovered and was in good health in 1958. After the accident on 9 May 1958, she was nervous and anxious, had frequent crying spells, was irritable, constantly scolded the children, was abusive to her husband, claimed that nobody loved her and that her husband's people hated her, insisted that she didn't have a friend in the world, avoided people and wanted to be alone, and neglected the children, her house work and her husband's business. In the course of time she began to complain that the corner of her mouth was drawn, her tongue swollen, and her left side numb. She complained of shortness of breath, difficulty in swallowing, and that she could not sleep.

She went to Dr. Bell, her family physician, on 22 May 1958 and he saw her often thereafter until September. He considered that she had a nervous disorder, "something on the order of a nervous breakdown." He prescribed a tranquilizer, and tried several kinds.

In September 1958 she was seen by Dr. Somers, a psychiatrist of Memorial Hospital, Chapel Hill, N. C. He made a diagnosis and treated her. He saw her eleven times from September to December. He performed a "psychological talking treatment" — psychotherapy. In his opinion plaintiff prior to the accident had a more than ordinary proneness to neurosis, and this proneness is explainable by certain of her childhood experiences. In psychiatry, neurosis is "a functional nervous disorder, without demonstrable physical lesion." (Webster's New International Dictionary, 2nd Edition). Dr. Somers diagnosed her condition as a conversion reaction. He explained that "a conversion reaction is a reaction where emotional and psychological upset, nervousness, (or) anxiety . . . is so intent and reaches the point that the mind and body then convert this into a physical symptom and then this relieves partially this anxiety." Dr. Somers testified further as follows: A conversion reaction may be described as a post-traumatic neurosis. Trauma in this sense need not be a physical injury, it may be a forceful psychological effect — it was in this instance. The physical symptoms plaintiff felt had a psychological basis and involved no anatomical change. Plaintiff's numbness and paralysis were not physical but ony pseudo-paralysis. However, her symptoms were classical symptoms of conversion reaction. She was not malingering. In the doctor's opinion, plaintiff's "fright at having collided with the defendant's little sports car produced the physical symptoms, the physical and emotional impairment." The precipitating cause of a conversion reaction "does not need to be a physical injury . . . the accident triggered off her reaction." The bicycle incident in her family "made her more susceptible." Without the accident she would not have had the illness.

Dr. Ewing, psychiatrist, who collaborated with Dr. Somers, testified: "Noise like metal, like the noise of a bicycle, against the side of the car . . . this was really a very important factor in the accident and her reaction to it."

Dr. Somers testified further that plaintiff "got over the conversion reaction." It was arrested. She may need further treatment for the upset caused by the trial, 3 or 4 visits.

Defendant did not offer evidence and at the close of plaintiff's evidence moved for judgment of nonsuit "only with respect to . . . claim for personal injuries." The motion was overruled and defendant tendered two issues (excluding consideration by jury of any personal injury.) These issues were refused, and issues were submitted to the jury and answered as follows:

"1. Was the plaintiff injured and her automobile damaged by the negligence of the defendant? Answer: Yes.

"2. What amount is plaintiff entitled to recover of the defendant by reason of injuries to her person? Answer: $4,000.00.

"3. What amount is the plaintiff entitled to recover of the defendant by reason of the damage to her automobile? Answer: $200.00."

Upon the coming in of the verdict defendant tendered a judgment allowing recovery for property damage but denying recovery for personal injuries as a matter of law and notwithstanding the verdict. The court declined to sign this judgment. Defendant excepted in apt time to each adverse ruling of the court.

From judgment in conformity with the verdict defendant appealed and assigned error.

Thorp, Spruill, Thorp & Trotter for plaintiff, appellee.
Battle, Winslow, Merrell, Scott & Wiley for defendant, appellant.

MOORE, J. The question for decision on this appeal is whether or not the court erred in overruling defendant's motion for nonsuit of plaintiff's personal injury action.

For the purposes of this appeal defendant concedes that she was negligent, that her negligence was the proximate cause of the collission and that she is liable for the "slight" damage to plaintiff's automobile. But she denies that she is responsible for plaintiff's neurosis and "converion reaction."

On a motion for nonsuit the evidence is to be taken in the light most favorable to the plaintiff and she is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference of fact to be drawn therefrom. *Manufacturing Co. v. Gable*, 246 N.C. 1, 14, 97 S.E. 2d 672.

When the evidence in the instant case is considered in accordance with this rule, the following salient facts emerge: Plaintiff experienced no direct bodily impact and received no immediate physical injury from the collision. Plaintiff did not see what had struck her car until she had driven about half a block beyond the point of collision and parked her vehicle; she heard "a grinding sound on the left side" of her automobile. She was more than ordinarily predisposed to neurosis. The collision occurred near a school building while children were going to school. About a month earlier her brother-in-law, while driving an automobile, had collided with a child on a bicycle and the child had been killed. When plaintiff heard the "grinding noise" she was seized with fear and anxiety that she had hit a child on a bicycle and was somewhat relieved to discover later that she had not. From this experience she developed a neurosis which resulted in a conversion reaction or pseudo-paralysis. In the opinion of the psychia-

trists who attended her, the collision and grinding noise "triggered" her neurosis.

Upon this evidence plaintiff insists that she has made out a *prima facie* case for recovery of damages for personal injury resulting from defendant's negligence.

This case falls within a relatively "open space" of the law. Our Court has decided cases somewhat analagous but none directly in point. With respect to some of the material aspects of the case there is considerable conflict and lack of significant direction in the decisions of other jurisdictions. This cause involves mental distress and invasion of emotional tranquility. It concerns itself with fear and resultant neurasthenia allegedly caused by *ordinary negligence.* In so far as possible we shall avoid consideration of those situations wherein fright, mental suffering and nervous disorder result from intentional, wilful, wanton or malicious conduct.

The phase of the law with which we are here concerned is fully discussed, with ample citations and annotations, in the following authorities: 52 Am. Jur., Torts, sections 45-72, pp. 388-419; 25 C.J.S., Damages, sections 62-70, pp. 548-560; 64 A.L.R. 2d 95-151; 98 A.L.R. 394-406; 76 A.L.R. 676-686; 56 A.L.R. 655-660; 44 A.L.R. 425-430; 40 A.L.R. 970-987; 23 A.L.R. 358-392; 11 A.L.R. 1115-1144. We have carefully considered these and other authorities. We have, of course, examined North Carolina decisions with great care. From the foregoing we glean the following general principles and conclusions.

It is almost the universal opinion that recovery may be had for mental or emotional disturbance in ordinary negligence cases where, coincident in time and place with the occurrence producing the mental stress, some actual physical impact or genuine physical injury also resulted directly from defendant's negligence. Thus, where plaintiff was electrically burned by defendant's negligence, it was held that she was entitled to recover for resulting shock and traumatic neurosis. *Traction & Terminal Co. v. Roman* (Ky. 1929), 23 S.W. 2d 272. See also *Israel v. Ulrich* (Conn. 1932), 159 A. 634, where injury was slight. North Carolina decisions are in accord. *Ford v. Blythe Brothers Co.*, 242 N.C. 347, 87 S.E. 2d 879; *Lane v. R. R.*, 192 N.C. 287, 134 S.E. 855; *Kistler v. R. R.*, 171 N.C. 577, 88 S.E. 864. But the emotional disturbance and nervous disorder must be the natural and proximate result of the injury as it affects plaintiff himself. *Ferebee v. R. R.*, 163 N.C. 351, 79 S.E. 685. In this case plaintiff was not allowed to recover for mental suffering occasioned by worry that his physical injuries would prevent him from supporting his family and educating his child.

All courts agree that mere fright caused by ordinary negligence

does not give a cause of action and may not be considered an element of damages. *R. R. v. Hayter,* (Tex. 1900), 54 S.W. 944, 945; *Chiuchiolo v. Wholesale Tailors* (N.H. 1930), 150 A. 540, 545. Our Court has so declared in negligence cases and in cases involving wilful conduct. *Kirby v. Stores Corp.,* 210 N.C. 808, 812, 188 S.E. 625; *Arthur v. Henry,* 157 N.C. 438, 440, 73 S.E. 211; *Kimberly v. Howland,* 143 N.C. 398, 403, 55 S.E. 778.

Where actual physical injury immediately, naturally and proximately results from fright caused by defendant's negligence, recovery is allowed. It was decided that "one negligently colliding with another's automobile may properly be held liable for injury sustained by an occupant who, though uninjured by the collision, fainted from fright on leaving the car and, falling, fractured her skull." *Comstock v. Wilson* (N.Y. 1931), 177 N.E. 431, 76 A.L.R. 676. See also *Colla v. Mandella* (Wis. 1957), 85 N.W. 2d 345, 64 A.L.R. 2d 95.

In some jurisdictions neurotic reactions, accompanied by severe headaches, dizziness, crying spells, irritability, back pains and similar manifestations, resulting from fright caused by defendant's negligence, are held to justify recovery on the ground that they amount to and should be regarded as "physical" injuries. *Bowman v. Williams* (Md. 1933), 165 A. 182; *Motor Co. v. Crysel* (Tex. 1956), 289 S.W. 2d 631. In a decision of this Court, *Kimberly v. Howland, supra,* it is said: "The nerves are as much a part of the physical system as the limbs, . . . We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."

Most of the courts have displayed considerable reluctance to extend recovery for mental distress and nervous disorders resulting from shock and fright to situations involving ordinary negligence. Various reasons are assigned for denial of recovery in such cases. It has been said that there can be no recovery for the consequences of fright where there can be no recovery for fright itself. *R. R. v. Bragg* (Ark. 1901), 64 S.W. 226; *Mitchell v. R. R.* (N.Y. 1896), 45 N.E. 354. There are decisions to the effect that nervous disorder resulting from fright is too remote in the chain of causation and is not the natural and probable consequence of the wrong done. *Justesen v. R. R.* (N.J. 1919), 106 A. 137. It was held that a miscarriage as a result of fright is not actionable since it was the result of an accidental and unusual combination of circumstances which could not have been reasonably anticipated and over which the defendant had no control. *Mitchell v. R. R., supra.* Some courts have denied recovery on the ground that

emotional disturbances are subjective states of mind, difficult of proper evaluation and of such nature that plaintiff's proof is too easy and defendant's burden too difficult. It is suggested that recovery on such grounds will open the door to fraud. *Huston v. Freemansburg* (Pa. 1905), 61 A. 1022. It is contended that it would result in a flood of litigation. *Mitchell v. R. R., supra. Spade v. R. R.* (Mass. 1897), 47 N.E. 88, rested its decision in part on the ground that in practice it is impossible for the courts to properly administer a rule allowing such recovery. These and many other reasons have been assigned for denying recovery for neurosis resulting from fright.

The courts of many jurisdictions allow recovery for emotional disturbances, mental suffering and neurosis resulting from shock and fright in cases of ordinary negligence if they proximately flow from defendant's wrongful act and may be reasonably foreseen. *Bowman v. Williams, supra; Chiuchiolo v. Wholesale Tailors, supra.* It has been declared that mental and nervous disorders are no more difficult to evaluate under these circumstances than as an element of damages following a physical injury. *Orlo v. Connecticut Co.* (Conn. 1941), 21 A. 2d 402, 405. Likewise it has been asserted that the question of causation lends itself to medical proof and is no more difficult of determination in this class of cases than in instances where there is contemporaneous personal injury. *Dulieu v. White & Sons* (Eng. 1901), 2 K.B. 669.

Recovery is usually denied where the fear or anxiety resulting in neurosis is for the life, safety or well being of a person other than plaintiff himself. *Waube v. Warrington* (Wis. 1935), 258 N.W. 497; 98 A.L.R. 394; *R. R. v. Stewart* (Ind. 1900), 56 N.E. 917. Our Court has adopted this view. *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307; *May v. Telegraph Co.*, 157 N.C. 416, 423, 72 S.E. 1059; *Ferebee v. R. R., supra.* But there are contrary holdings. *Bowman v. Williams, supra.*

If it appears that plaintiff suffered physical consequences from emotional stress only because of his own special susceptibility, courts generally deny recovery on the ground that defendant is under a duty only to avoid conduct which can injure ordinarily susceptible persons. *Spade v. R. R., supra.* Some courts permit the matter to turn upon the question as to whether or not defendant had knowledge of plaintiff's abnormal susceptibility. *Oehler v. Bamberger & Co.* (N.J. 1926), 135 A. 71 (Affd. 103 N. J. L. 703, 137 A. 425). It has been held that where the abnormal susceptibility arose because of prior experiences, the injurious results cannot be regarded as having been proximately caused by defendant's conduct. *Legac v. Vietmeyer Bros.* (N.J. 1929), 147 A. 110. Some courts have refused to apply the sus-

ceptibility doctrine and have allowed recovery notwithstanding abnormalcy. *Purcell v. R. R.* (*Minn.* 1892), 50 N.W. 1034, 1035; *Kenney v. Wong Len* (N.H. 1925), 128 A. 343, 347.

The foregoing resume demonstrates the lack of harmony in the decisions of the courts in this area of the law. It appears that cases have usually been decided strictly upon the factual situations presented. Indeed, it is a field of the law in which there is great difficulty in adhering to any fixed set of principles. It is clear that our Court has decided cases in this category strictly upon the facts as presented without adopting inflexible rules.

There has been only one case in this Court in which a conversion reaction, as such, has been directly involved. *Mintz v. R. R.*, 233 N.C. 607, 609, 65 S.E. 2d 120. The decision in that case did not deal with the nervous disorder and it furnishes no guidance here.

The case of *Kimberly v. Howland, supra,* is the nearest approach in our reports to the case at bar. In this case defendant was blasting with dynamite on the outskirts of the city of Asheville, 175 yards from plaintiff's home. A large rock fell through the roof. Defendant's foreman was not an expert blaster and the charge was improperly fired off. Plaintiff was pregnant. She was in bed when the rock came through the roof. The rock did not strike her but she was frightened and upset, almost had a miscarriage and was ill for some time. The Court held that her shocked nervous system was a physical injury and recovery therefor was allowed. The Court said: "It is true defendant did not know at the time he fired the blast that the feme plaintiff was lying in bed in her home in a pregnant condition, but he or his agents knew it was a dwelling house and that in well-regulated families such conditions occasionally exist. While defendant could not foresee the exact consequence of his act, he ought in the exercise of ordinary care to have known that he was subjecting plaintiff and his family to danger, and to have taken proper precautions to guard against it." The charge of the trial court was approved and the following is an excerpt therefrom: ". . . if this fright and nervousness is the natural and direct result of the negligent act of the defendant, and if this fright and nervousness naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an injury . . . and this injury must be the natural and direct result of the negligent act of the defendant and one which should have been foreseen by the defendant in the exercise of ordinary care." There are several differences between this case and the one at bar — at this point it is noted that the act in the manner it was performed

by the defendant was of a dangerous, violent and frightening nature.

The case at bar is factually unique even in its own category — cases of fright, anxiety and other emotional stress, unaccompanied by actual physical injury. Here defendant does not challenge recovery by plaintiff for property damage. In other words, defendant tacitly admits, for the purposes of this appeal, that plaintiff sustained damage to her automobile, defendant was negligent, and defendant's negligence was the proximate cause of such damage. But defendant insists there was no causal connection between defendant's negligent conduct and the fright, neurosis and conversion reaction experienced by plaintiff. We agree that defendant's negligence was not that cause which "in natural and continuous sequence, unbroken by any new and independent cause," produced the personal injury plaintiff complains of.

Plaintiff did not testify and does not now contend that she was frightened by the collision between her automobile and defendant's sportscar. Neither does she assert that her anxiety was occasioned by the grinding sound along the left side of her car. She said that all she could think of was that she had killed a child — a child on a bicycle. She had a more than ordinary predisposition to neurosis. The experience of her brother-in-law, about a month before, in colliding with a child on a bicycle, resulting in the child's death, had deeply affected her in her state of proneness to emotional disturbance. When the collision occurred she envisioned the possibility that she had collided with a non-existent child on an imaginary bicycle. In short, she was not frightened by what actually happened but by what might have happened. It was not the collision that caused her anxiety, it was something that did not exist at all, a phantom child on a non-existent bicycle.

The defendant was under no duty to anticipate or to take precautions against a mere possibility that plaintiff or other persons might imagine a state of facts that did not exist. The thing that plaintiff feared might have happened on this occasion is entirely remote from what actually did happen. And it was the imaginary thing, not the real occurrence, that caused the fright, neurosis and conversion reaction. Defendant is responsible only for the proximate result of her conduct, that is, for the damage caused by what actually did happen.

Furthermore, plaintiff did not see the vehicle that collided with the car. According to the evidence, defendant's right front fender made contact about the middle of the left front door of plaintiff's car. Plaintiff was sitting just inside that door. One slight glance

would have disclosed that she had collided with an automobile. The injury to the cars was slight; neither was going fast. It is true that if plaintiff had looked she could not have avoided the collision. But, if she had looked she would have seen that the object which struck her car was not a child on a bicycle. If she had merely looked she would not have been frightened by the occurrence and would have had no occasion for anxiety concerning that which did not happen — a possible collision with a phantom child on a bicycle. Plaintiff had the duty to keep a reasonable lookout. The conclusion is inescapable that her failure to look is a contributing cause of her fright, a cause without which the anxiety would not have arisen. Also, it is indisputable that plaintiff's fright and anxiety was for the safety of the imaginary non-existent child and not because of any apprehension for her own safety or well-being. The record does not disclose any evidence that plaintiff feared that she would suffer any harm of any kind from the collision. She thought of herself as one who might have injured another. And this was only momentary. She learned immediately that her fears were ungrounded. As already indicated, this Court has held that there can be no recovery for fright and anxiety, and resultant neurosis, which arises for the safety and well-being of another. In *Hinnant v. Power Co., supra,* at page 129, it is said, in a quotation from 8 R. C. L., 515, sec. 73: "In the law, mental anguish is restricted as a rule, to such mental pain or suffering as arises from an injury or wrong to the person himself, as distinguished from that form of mental suffering which is the accompaniment of sympathy or sorrow for another's suffering, or which arises from a contemplation of wrongs committed on the person of another."

In Restatement of the Law (1948 Supplement), Torts, section 435(2), it is said: "The actor's conduct is not a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

As to plaintiff's action for damages for personal injury, the judgment below is reversed; as to the action for property damage, it is affirmed. This cause is remanded that the judgment may be modified in accordance with this opinion.

Modified and affirmed.

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

STEADMAN *v.* PINETOPS.

EDNA M. STEADMAN, WILLIAM C. STEADMAN AND WIFE, FRANCES F. STEADMAN, BRUCE A. STEADMAN AND WIFE, NORMA B. STEADMAN, JOSEPH P. STEADMAN AND WIFE, LELLIA D. STEADMAN, AND DOROTHY S. POWELL AND HUSBAND, CHARLES C. POWELL, v. THE TOWN OF PINETOPS, AN INCORPORATED MUNICIPALITY.

(Filed 14 January, 1960.)

1. Appeal and Error § 49—

Where the evidence is not in the record it will be presumed that the findings of fact of the trial court are supported by competent evidence, and are binding on appeal.

2. Dedication § 1—

While the registration of map showing a subdivision of land within a municipality into streets and lots constitutes a dedication of such streets to the municipality as far as the general public is concerned, regardless of whether the streets are actually opened or not, the municipality has the right to accept or reject such offer of dedication, and when such streets are not opened or used by the public for fifteen years thereafter such offer of dedication is revocable under G.S. 136-96.

3. Dedication § 2—

Where a municipality opens, maintains and improves a street dedicated to the public by the registration of a map showing such street, there is an acceptance of the street by the municipality.

4. Dedication § 3—

Where a municipality has accepted the dedication of a street to the public by opening and maintaining the street, the right to revoke the dedication is gone except with the consent of the municipality and those owning lots purchased with reference to the map who thus have vested rights in the dedication.

5. Corporations § 1—

Where the term of a corporation is limited in its charter, such corporation ceases to exist at the expiration of such term in the absence of a due extension of its charter.

6. Dedication § 3—

Where a corporation, which had dedicated streets to the public by the registration of a map showing such streets, ceases to exist, the right to revoke such dedication is vested in the owner of the land abutting the streets, and such right is not affected by the fact that a receivership of the corporation is still extant. G.S. 136-96.

7. Adverse Possession § 14: Dedication § 2—

After a municipality has accepted the dedication of a street by opening such street for public use, such dedication is not affected by subsequent non-user, and title to such street cannot be thereafter obtained against the municipality by adverse possession.

8. Adverse Possession § 14—

Where the owner of land permits the municipality without objection

to remove fences which the owner had erected across streets which had been dedicated to the public, such owner cannot claim title to the streets by adverse possession.

9. Dedication § 8—

Where only a portion of a street is described in the instrument withdrawing such street from a previous dedication to the public, such revocation of the dedication cannot affect the street outside the portion thus described.

10. Same—

Where streets have been dedicated to the public by registration of a map showing such streets, that portion of the streets necessary to afford convenient ingress and egress to lots sold with reference to such map are not subject to revocation of the dedication except by agreement.

11. Same— Revocation of dedication is effective as to streets not accepted for use in fifteen years and which are not necessary for access to lots purchased by others.

Streets on land within a municipality were dedicated to the public by the registration of a map showing such streets. More than fifteen years thereafter the owner of the land abutting such streets filed a revocation of dedication. *Held* the revocation was effective as to all streets which had not been accepted by the municipality up to the date of revocation and which were not necessary to afford convenient ingress and egress to lots sold with reference to the map, but as to a street necessary for convenient ingress and egress to a lot, and as to a street which had been opened up by the municipality, the revocation was ineffective, even though the street which had been opened up was used only for a period of two or three years and such use thereafter abandoned.

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

APPEAL by plaintiffs from *Fountain, Special Judge,* March-April Term, 1959, of EDGECOMBE.

This action was instituted 11 June 1958 for the purpose of obtaining a permanent restraining order enjoining the defendant Town of Pinetops, an incorporated municipality, from opening certain streets shown on the plat or "Map of Pinetops, N. C., Edgecombe County made for the Macclesfield Company, September 1917."

When this cause came on to be heard, the parties, through counsel in open court, waived a trial by jury and agreed that the judge presiding might hear the evidence and find the facts, make his conclusions of law and render judgment thereon. Plaintiffs and defendant having offered evidence as to the issues raised by the pleadings, the court found the facts and made its conclusions of law as follows:

"1. The property involved in this controversy is an area shown on Map of the Town of Pinetops dated September 1917, re-checked

and corrected for the Town of Pinetops, North Carolina, by R. A. Stamper, Surveyor, in March 1919, and recorded in Map Book 1, Page 105, of the Edgecombe County Registry, and particularly described in an instrument executed and designated by plaintiffs as 'Withdrawal of Dedication' dated February 1, 1958, and recorded February 7, 1958 in Book 597, Page 267, Edgecombe Registry, and designated as that part of 6th St., 8th St., Sater St., Lashley Street, Burnett Street, Dunn Street, Irwin Street and Reasons Street, in the corporate limits of the Town of Pinetops, and enclosed by a fence, and referred to as Steadman's Dairy.

"2. That B. A. Steadman, in 1935 and 1936, acquired by deeds from Leon T. Lentz and wife, recorded in Book 342, Page 294, and Book 354, Page 54, Edgecombe Registry, those certain city blocks and lots designated and shown on Map of Town of Pinetops, recorded in Map Book 1, Page 105, and described in said deeds by reference to said map as follows, to wit: Blocks numbered 55, 56, 57, 66, 67, 68, 69, 70, 34, 35, 36, 37, 59, 60, 61, 43, 44; Lots A, B, C, D, E, G, H, I, J in Block 54; Lots C, D, E, F, G, H, I, J, K, L in Block 45; Lots D, F, H, I, J in Block 46; Lots G, H, I, J, K, L in Block 47; Lots G, H, I, J in Block 48; Lots K, L in Block 49.

"3. That B. A. Steadman died intestate in 1953, and the plaintiffs are his widow and children, and only heirs at law, and that since 1935, B. A. Steadman up to the date of his death, then plaintiffs herein, have used the blocks described in said deeds, together with the streets referred to, as a pasture.

"4. That said pasture lies on both sides of Hamlet Street, which is also designated as N. C. Highway No. 42 and N. C. Highway No. 43.

"5. That the Town of Pinetops has heretofore as needed opened and maintained for public use a large number of the streets as shown on the Map of the Town of Pinetops referred to, including: 4th Street and 10th Street; 6th Street between Hamlet Street and Reasons Street; Reasons Street West from 6th Street; Irwin Street West from 6th Street; Dunn Street West from 6th Street; Hamlet Street; Burnett Street West of 6th Street and East of 10th Street; Lashley Street West of 4th Street and East of 10th Street; Sater Street West of 6th Street and East of 10th Street.

"6. That Burnett Street was opened by the Town of Pinetops between 6th and 10th Streets about 1936, and was used by the public, principally for walking for a period of two or three years. That the other streets referred to in plaintiffs' attempted 'Withdrawal

of Dedication' have not been opened and maintained for pedestrian or vehicular traffic.

"7. That in 1955 the Town of Pinetops by order of the Board of Commissioners caused a survey to be made by L. E. Wooten & Company, Engineers, for a water and sewerage system in the Town, showing grade and elevation on all streets of proposed system, including the identical streets claimed therein by plaintiffs, approved the proposed plan, applied for grant for Federal Funds, and the same has been approved by the Federal authorities.

"8. That at the 6th of August 1957 meeting of the Town Commissioners the Board adopted a resolution to re-open Burnett Street between 6th and 10th Streets, and notified plaintiffs. Negotiations between plaintiffs and defendant, pertaining to constructing an underpass on Burnett Street for plaintiff's cattle to pass and repass, were continued from time to time until June 9, 1958, plaintiff (defendant) having begun work on re-opening Burnett Street between 6th and 10th Streets on May 23, 1958.

"9. That plaintiffs did not give actual notice to defendant that they were claiming any right or title to Burnett Street, between 6th and 10th Streets, until June 9, 1958, at which meeting between parties, defendant was advised of the attempted Withdrawal of Dedication dated February 1, 1958.

"10. That The Macclesfield Company, a corporation, dedicated to public and private use, in the year 1917, the date of the Map of Town of Pinetops, all the streets as shown on said map recorded in Map Book 1, Page 105, Edgecombe Registry, both by said map and by deeds conveying lots and blocks by reference to said map over a period of many years up to the appointment of a Receiver in 1934, and also by conveyances by the Receiver of The Macclesfield Company subsequent thereto.

"11. That the Charter of The Macclesfield Company was granted by the Secretary of State of North Carolina for a period of thirty years from June 21, 1899. That the Superior Court of Edgecombe County in a proceeding entitled 'Gurney P. Hood, Commissioner of Banks, *ex rel N. C. Bank & Trust Company v. The Macclesfield Company,*' appointed a Receiver of said The Macclesfield Company at the June Term 1934, on the grounds of insolvency, that said Receivership is still pending in the Superior Court of Edgecombe County; that on March 15, 1958 E. D. Foxhall was removed as Receiver on account of incapacitating illness, and M. L. Cromartie, Jr. was on said date appointed Receiver of The Macclesfield Company, in place of E. D. Foxhall, and was authorized and empowered to sell certain lots in the Town of Pinetops, described by reference to

said map recorded in Map Book 1, page 105. That M. L. Cromartie, Jr. is the duly appointed, qualified and acting Receiver of said Company.

"12. That under date of March 1, 1938 the Secretary of State of North Carolina suspended the Charter of The Macclesfield Company for failure to file annual franchise tax report. This suspension was recorded in the office of Clerk Superior Court of Edgecombe County on March 25, 1959.

"13. That subsequent to 1936 the Town of Pinetops opened and thereafter maintained certain of the streets, or part of the streets, as shown on said Map of the Town of Pinetops, which at that time were enclosed by the pasture fence of Steadman's Dairy, removed the pasture fence from the streets thus opened, being as follows: 4th Street from Burnett Street to Cobb Street in about 1947; 6th Street from Dunn Street to Pitt Street about 1952; 10th Street from Hamlet Street to Burnett Street * * *; 10th Street from Burnett Street to Sater Street about 1950.

"14. That under date of February 1, 1958 the plaintiffs executed an instrument designated 'Withdrawal of Dedication,' reciting that The Macclesfield Company was non-existent, that more than fifteen years had elapsed subsequent to the dedication of the streets referred to, that said streets had never been opened, that plaintiffs owned the land abutting said streets, and that the dedication of the streets described in the complaint herein were withdrawn from public and private use. * * *

"15. That on 11 June 1958, plaintiffs applied to Superior Court of Edgecombe County for temporary restraining order to prohibit defendant from re-opening Burnett Street between 6th and 10th Streets, and from trespassing on the other streets alleged to have been withdrawn from dedication.

"16. That many purchasers of lots under mesne conveyances from The Macclesfield Company own lots and reside in the vicinity of and adjacent to Burnett Street, West of 6th Street and East of 10th Street, that the George W. Carver School located on Blocks 72 and 73 is just East of 10th Street and on Burnett Street, that over 100 children travel to and from said school over Hamlet Street each day from the section of Pinetops West of 6th Street, that the opening of Burnett Street is necessary to afford convenient ingress and egress to said school, and to persons owning lots East of 10th Street and West of 6th Street as shown on Map of the Town of Pinetops.

"17. That B. A. Steadman was a member of the Board of Commissioners of the Town of Pinetops in 1936 and for some years there-

after, and was also a member of said Board at the time of his death in 1953, and some years prior thereto.

"18. That between the years 1935 and 1953 B. A. Steadman and wife executed and delivered warranty deeds to 34 grantees of lots described by reference to Map of Pinetops recorded in Map Book 1, Page 105, and to 82 grantees of lots described by reference to Map of Carver Heights recorded in Map Book 6, Page 71, which Map refers to the map recorded in Map Book 1, Page 105.

"Upon the foregoing findings of fact, the court concludes that the Town of Pinetops had accepted the dedication of the streets as shown on the map of the Town of Pinetops recorded in Map Book 1, Page 105, Edgecombe Registry, by having the map re-checked, corrected and recorded in 1919, by its conduct in opening and maintaining the streets as shown on said map from time to time over the years as required for public use, by causing a survey of all streets shown on said map by grade and elevation, for a water and sewerage system for the town, and as to Burnett Street between 6th and 10th Streets, by specific resolution of the Town Board on 6th August 1957; that the Receiver is vested with title to all property and rights of The Macclesfield Company, that plaintiffs are not authorized by G.S. 136-96 to withdraw said streets from dedication to public use, that plaintiffs have not acquired title to said streets by twenty years adverse possession, and that plaintiffs are not entitled to relief prayed for herein.

"It is therefore, upon motion of * * * attorneys for defendant, ordered, adjudged and decreed that plaintiffs are not the owners of the streets referred to in the complaint, and are not entitled to the permanent injunction prayed for in their complaint, that the defendant go hence without day, that this action be dismissed, and the plaintiffs pay the cost herein to be taxed by the Clerk."

The plaintiffs excepted to the foregoing judgment and appealed to this Court, assigning error.

Fountain, Fountain, Bridgers & Horton for plaintiffs D. C. Sessoms, Joel K. Bourne, Henry C. Bourne, for defendant.

DENNY, J. None of the evidence offered and admitted in the hearing below is brought forward and made a part of the record on this appeal.

Evidence adduced in a hearing below and not included in the case on appeal, or if included and there is no exception to the admission of such evidence or to the findings of fact based thereon, such findings are presumed to be supported by competent evidence and are

binding on appeal. *Salisbury v. Barnhardt,* 249 N.C. 549, 107 S.E. 2d 297; *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870; *Goldsboro v. Railroad,* 246 N.C. 101, 97 S.E. 2d 486; *James v. Pretlow,* 242 N. C. 102, 86 S.E. 2d 759; *Beaver v. Paint Co.,* 240 N.C. 328, 82 S.E. 2d 113.

The appellants contend that the facts found by the court below as set out hereinabove in paragraphs 2, 3, 6, 10, 11, 12, 14 and 16, do not support the conclusion that the receiver is vested with title to all property rights of The Macclesfield Company and, therefore, the plaintiffs are not authorized under the provisions of G.S. 136-96 to withdraw the streets in question from dedication to public use, and they assign this conclusion of law as error.

The general rule in this jurisdiction with respect to the dedication of streets and alleys shown on a map or plat of a subdivision was clearly stated in *Hughes v. Clark,* 134 N.C. 457, 47 S.E. 462, as follows: "* * * where lots are sold and conveyed by reference to a map or plat which represent a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted by the governing boards of towns or cities if they lie within municipal corporations. There is a dedication, and if they are not actually opened at the time of the sale they must be at all times free to be opened as occasion may require." *Gaither v. Hospital,* 235 N.C. 431, 70 S.E. 2d 680; *Rowe v. Durham,* 235 N.C. 158, 69 S.E. 2d 171; *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664; *Broocks v. Muirhead,* 223 N.C. 227, 25 S.E. 2d 889; *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13; *Wheeler v. Construction Co.,* 170 N.C. 427, 87 S.E. 221; *Conrad v. Land Co.,* 126 N.C. 776, 36 S.E. 282.

It should be kept in mind, however, that the dedication referred to in the rule above stated, insofar as the general public is concerned, without reference to any claim or equity of the purchasers of lots in a subdivision, is but a revocable offer and is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them. *Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368; *Wittson v. Dowling,* 179 N.C. 542, 103 S.E. 18. Likewise, a town has the right to determine where its streets shall be located as well as the right to accept or reject any offer of dedication. *Sugg v. Greenville,* 169 N.C. 606, 86 S.E. 695; *Lee v. Walker, supra.*

However, where a municipality opens, improves and maintains a street dedicated to the public by the registration of a map or plat

showing such street, there is an acceptance of the dedication of the street by the municipality. Moreover, where the dedication of a street has become complete by the acceptance thereof by a municipality, and the street is opened and maintained by the municipality and used by the public, the right to revoke the dedication is gone, except with the consent of the municipality acting in behalf of the public and the consent of those persons, firms or corporations having vested rights in the dedication. *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898. See also *Salisbury v. Barnhardt, supra.* But where streets are dedicated to the public by the registration of a plat showing streets and alleys thereon, and such streets or alleys are not opened or used by the public for a period of fifteen years from and after the registration of such map or plat, the dedication of such streets and alleys become subject to withdrawal under the provisions of G.S. 136-96, and this is so even though such unopened streets or alleys lie within the limits of a municipality.

It is provided in Chapter 174 of the Public Laws of 1921, as amended, and now codified as G.S. 136-96, that, "Every strip, piece or parcel of land which shall have been at any time dedicated to public use as a road, highway, street, avenue, or for any other purpose whatsoever, by a deed, grant, map, plat, or other means, which shall not have been actually opened and used by the public within fifteen (15) years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned by the public for the purposes for which same shall have been dedicated, and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein * * *; provided, that no abandonment of any such public or private right or easement shall be presumed until the dedicator or some one or more of those claiming under him shall file and cause to be recorded in the register's office of the county where such land lies a declaration withdrawing such strip, piece or parcel of land from the public or private use to which it shall have theretofore been dedicated in the manner aforesaid * * *; that where any corporation has dedicated any strip, piece or parcel of land in the manner herein set out, and said dedicating corporation is not now in existence, it shall be conclusively presumed that the said corporation has no further right, title or interest in said strip, piece or parcel of land, regardless of the provisions of conveyances from said corporation, or those holding under said corporation, retaining title and interest in said strip, piece or parcel of land so dedicated; the right, title and interest in said strip, piece or parcel of land shall be conclusively presumed to be vested in those persons, firms or corp-

orations owning lots or parcels of land adjacent thereto, subject to the provisions set out hereinbefore in this section.

"The provisions of this section shall have no application in any case where the continued use of any strip of land dedicated for street or highway purposes shall be necessary to afford convenient ingress or egress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway. * * *"

In our opinion, the charter of The Macclesfield Company expired by its own limitation on 21 June 1929, and the corporation ceased to exist at that time within the meaning of the provisions of G.S. 136-96.

In the case of *Asheville Division v. Aston,* 92 N.C. 578, this Court said: "It is unquestionably true that a corporation, whose term of existence is fixed and limited in the act which creates it, cannot endure beyond the prescribed time, unless prolonged by the same authority or continued for the purpose of adjusting and closing its business, and no judicial proceedings are required to terminate it. The expiration of the time ends the life given to the artificial body, as death terminates the life of the natural person." The Court further said: "The operation and effect of this legislation (the appointment of trustees or a receiver) in securing a just and proper administration of the effects and estate of a defunct corporation through an agency appointed by the court, and whose functions are analogous to those of an administrator upon the estate of a natural person deceased, have been so fully discussed in *VonGlahn v. DeRosset,* 81 N.C. 467, that we forbear to pursue this branch of the subject further."

It was declared in *VonGlahn v. DeRosset,* cited above, that the existence of the corporation involved, "as a corporate body expired by the limitation contained in the charter and amendment on 31 December, 1871."

In light of the provisions of G.S. 136-96 with respect to the dedication of streets made by a corporation which is not now in existence, the appointment of a receiver to wind up the affairs of such corporation after its corporate existence has expired, militates in no way against these plaintiffs with respect to their right to withdraw the dedication of the unopened streets described in their certificate of Withdrawal of Dedication and duly registered as required by law.

The withdrawal statute expressly provides, " * * * that where any corporation has dedicated any strip, piece or parcel of land in the manner herein set out, and said dedicating corporation is not now in existence, it shall be conclusively presumed that the said corporation has no further right, title or interest in said strip, piece or parcel of land, regardless of the provisions of conveyances from said corpora-

tion, or those holding under said corporation, retaining title and interest in said strip, piece or parcel of land so dedicated; the right, title and interest in said strip, piece or parcel of land shall be conclusively presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent thereto, subject to the provisions set out hereinbefore in this section."

It will be noted that the court below found as a fact in paragraph 6 set out herein that Burnett Street was opened by the Town of Pinetops between 6th and 10th Streets about 1936 and was used by the public, principally for walking for a period of two or three years; that the other streets referred to in plaintiffs' Withdrawal of Dedication have not been opened and maintained for pedestrian or vehicular traffic. Consequently, we hold that the plaintiffs had the right under the express provisions of G.S. 136-96 to withdraw from dedication all the streets described in their certificate of Withdrawal of Dedication, except Burnett Street. Such streets, except Burnett Street, not having been "actually opened and used by the public within fifteen (15) years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned * * *." G.S. 136-96.

It must be conceded that the streets shown on the map of the subdivision of The Macclesfield Company when such map was recorded and lots were sold by reference thereto, insofar as the grantor was concerned became dedicated for public use, and the purchaser of a lot or lots therein had the right to have all and each of the streets kept open. There was a dedication by The Macclesfield Company of the streets shown on the map of the subdivision which the Town of Pinetops had the right to accept at any future time, it matters not how long, unless in the meantime title thereto became vested in a third party by adverse possession or until the dedication was withdrawn in accordance with the provisions of G.S. 136-96. *Roberts v. Cameron,* 245 N.C. 373, 95 S.E. 2d 899.

This assignment of error is upheld except as to Burnett Street.

In view of the conclusion we have reached with respect to the streets that have never been opened for any purpose, it is not necessary to determine whether or not the Town of Pinetops did or did not accept the dedication thereof. However, when Burnett Street was opened by the defendant Town in 1936, the opening of the street and its use for a period of two or three years constituted an acceptance of the dedication of said street. Hence, no statute of limitations thereafter ran against the Town of Pinetops with respect to said street.

In *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104, this Court said: "When there is a dedication and acceptance by the municipality or other governing body of public ways or squares and

commons in this jurisdiction the statute of limitations does not now run against the municipality or governing body. Public Laws 1891, ch. 224, C.S. 435 (now G.S. 1-45) * * *."

We further hold that, since the plaintiffs and their predecessor in title, B. A. Steadman, have always without objection permitted the removal of the pasture fence erected by B. A. Steadman and allowed the Town of Pinetops at any time to open and extend streets into and through the property of these plaintiffs, as shown on the recorded map of the subdivision, whenever the Town needed to open any street or streets therein, until after the certificate of Withdrawal of Dedication was executed and filed of record on 7 February 1958, the claim of title to said streets by adverse possession is without merit.

From 1935 until 1953, while the plaintiffs' predecessor in title owned the blocks and lots described by block and lot number as set out in finding of fact in paragraph 2 hereinabove, the Town of Pinetops opened numerous blocks and streets as shown on the map of Pinetops; 8 or 9 blocks of these streets have been opened by the Town of Pinetops since 1947, through the property of these plaintiffs, without any objection on their part or of their predecessor in title.

Moreover, under the facts found in paragraph 16 set out hereinabove, to which there is no exception, we think the Town of Pinetops has the right to reopen Burnett Street from a point 150 feet East of 4th Street to 10th Street, a distance of only 2½ blocks, and we so hold. The withdrawal certificate purports only to withdraw from dedication Burnett Street from a point 150 feet East of 4th Street to 10th Street. The court below found, " * * * that the opening of Burnett Street is necessary to afford convenient ingress and egress * * * to persons owning lots (to lots owned by persons) East of 10th Street and West of 6th Street as shown on Map of the Town of Pinetops."

In the case of *Evans v. Horne*, 226 N.C. 581, 39 S.E. 2d 612, a subdivision was laid out and a plat thereof filed in the office of the Register of Deeds in Pitt County, North Carolina, in 1917. Albemarle Avenue, running generally North and South as shown on said map, was opened and maintained in front of a tier of lots that lay between that street and the right of way of the Atlantic Coast Line Railroad. Carolina Street, running in a generally East and West direction as shown on the map, was opened up from Albemarle Avenue West. Carolina Street, as shown on the map, continued East of Albemarle Avenue a distance of about 132 feet to the railroad right of way. The plaintiffs owned two lots North of this unopened portion of Carolina Street, one of which was adjacent thereto on the North. The defendants owned a tier of lots to the South of this unopened portion of

Carolina Street, one of which was adjacent thereto on the South. All these lots fronted on Albemarle Avenue.

In 1944, the widow of the original grantor who laid out the subdivision, together with several other persons as heirs at law of the original grantor, acting under the provisions of G.S. 136-96, filed in the office of the Register of Deeds in Pitt County a declaration of withdrawal of that portion of Carolina Street which had never been opened. When the case came on for trial, the jury found on the first issue that the portion of Carolina Street which the defendants sought to withdraw from dedication had never been opened, but on the second issue, to wit: "Is the continued use of said strip of land necessary to afford convenient ingress, egress and regress to the lot or parcel of land now owned by the plaintiffs as alleged?" the jury answered the issue "Yes." Judgment was entered accordingly.

On appeal, this Court, speaking through *Winborne, J.*, now C.J., said " * * * the jury having found that the continued use of the strip of land in question is 'necessary to afford convenient ingress, egress and regress to the lot or parcel of land now owned by the plaintiffs as alleged' the provisions of the statute G.S. § 136-96 have no application, and the challenge to the ruling on the motions for judgment as of nonsuit on this ground may not be sustained.

"Moreover, in light of the holdings of this Court in the cases of *Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach*, 216 N.C. 778, 7 S.E. 2d 13, and *Broocks v. Muirhead*, 223 N.C. 227, 25 S.E. 2d 889, on the uncontroverted facts, plaintiffs would seem to be entitled to the relief demanded as a matter of law."

In light of the conclusions we have reached, it is unnecessary to discuss the remaining assignments of error.

The judgment entered below is modified to the extent set out herein, and affirmed with respect to the right of the Town of Pinetops to reopen Burnett Street.

Modified and affirmed.

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

HENRY A. RHYNE v. THE TOWN OF MOUNT HOLLY, A MUNICIPAL CORPORATION.

(Filed 14 January, 1960.)

1. Appeal and Error § 1—

An appeal follows the theory of trial in the lower court, and where there are no objections to the issues submitted, the appeal will be determined without reference to a cause of action or a defense not embraced in the issues nor presented by the parties at the trial.

2. Municipal Corporations § 32—

An ordinance giving the municipality authority to cut weeds, grass or other noxious growth on vacant lots does not justify the municipality, in clearing a vacant lot, to cut down oak saplings 12 to 15 feet high. Oak trees of such size are not "weeds, grass or other noxious growth."

3. Same: Municipal Corporations § 10—

Where a municipal corporation, in the exercise of its governmental power to abate nuisances, enters upon a lot which had been permitted by the owner to grow up in weeds but upon which were a number of oak saplings 12 to 15 feet high, and cuts not only the weeds but also the young oaks, the municipality may be held liable in damages for the difference in the market value of the lot immediately before and after the cutting on the theory of a "taking" of private property, unless the cutting of the trees was in fact necessary to remove or abate the nuisance.

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

APPEAL by defendant from *Fountain, Special Judge,* April 6, 1959 Term, of GASTON.

Civil action to recover damages to plaintiff's described real property, located in the Town of Mount Holly, Gaston County.

Plaintiff alleged, stated separately, two causes of action, each based on essentially the same factual allegations but different as to the theory on which he sought to recover damages of $2,000.00 and costs.

Plaintiff's factual allegations, summarized, are these: In November, 1957, defendant, without notice to or permission of plaintiff, caused its employees and agents to go upon plaintiff's property with a bulldozer and other earth-moving equipment. Defendant's employees and agents "bulldozed or scraped away substantially all living trees, plants and plant matter theretofore growing" on plaintiff's property, "including over 100 water oak or pin oak trees," and a portion of the topsoil, and deposited same in an unsightly pile about 165 feet long, 15-21 feet wide, averaging about 6 feet in height. Prior to defendant's said conduct, the fair market value of plain-

tiff's property was $2,400.00; but, by reason thereof, its fair market value was reduced to $400.00.

On these facts, plaintiff alleged, in his first cause of action, that defendant's said conduct constituted an unlawful, intentional and tortious trespass on his property, depriving plaintiff of his property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and of Article I, Section 17, of the North Carolina Constitution; and, in his second cause of action, plaintiff alleged, in addition, that defendant's said conduct caused and created both a public and private nuisance in that defendant (1) did not remove "said unsightly pile" from his property, (2) that the cost of removal "would be tremendous and excessive," and (3) that "the unsightly pile" could not be burned because it contained "the large amount of the plaintiff's earth and soil. . ."

Defendant, a municipal corporation, answering, admitted plaintiff's ownership of the described property and that, in November, 1957, "it authorized a clean-up of all vacant lots in a radius of three blocks of the center of Town that had grown up and become unsightly . . ." Except as stated, defendant denied the essential allegations of the complaint.

For a further answer and defense, defendant alleged that it authorized said clean-up "pursuant to ordinances duly enacted and particularly that certain ordinance designated as Section No. 3 of Article III of the Code of the Town of Mount Holly," to wit:

> "WEEDS: TIME FOR CUTTING. The owner, or any person in possession of any vacant lot shall cut or shrub down within four inches of the ground all weeds, grass or other noxious growth from said lot at least twice each year; the first time not later than June 15 and the second time not later than August 15 of each and every year. Each day after said dates, respectively, shall be and constitute a separate offense. Said delinquent shall, upon conviction, pay a fine of one dollar for each day any said weeds or other noxious growth are not cut down upon said lot or lots on or before the fifteenth day of June and August, as aforesaid, the Board may cause the same to be cut down and the cost of cutting may be charged against each of said lots from which the said weeds or other noxious growth are removed and against the owners thereof, and charged to them and collected as other taxes."

Defendant's further allegations, summarized, are these: Plaintiff had no valuable "timbers" growing on his lot. Plaintiff's lot is located about one and one-half blocks from the center of Mount Holly, on a main traveled street which is part of North Carolina

Highway #27, and that "plaintiff had allowed said lot to become overgrown with weeds, vines, brush, grass, kudzu, and other noxious growths to such an extent that it had become an eyesore and a menace to the general health of the people of the Town of Mount Holly." Plaintiff made no effort whatever to clean or clear his said lot. After plaintiff's lot was cleaned and beautified, defendant "always stood ready to remove said debris of vines, kudzu, brush, weeds, grass and other noxious growths," but plaintiff "refused to allow the defendant or any of its employees to go upon the plaintiff's lot and remove said debris." The removal of the "kudzu, weeds, brush, vines, grass and other noxious growths" substantially improved plaintiff's property in appearance and substantially increased its value. ". . . any action taken by the defendant in cleaning plaintiff's lot was taken in good faith and with no intention other than to improve plaintiff's property in appearance and to add to the general good appearance of the Town of Mount Holly and to protect the health of its citizens and was a valid, constitutional exercise of the police powers and other constitutional authority vested in the Town of Mount Holly."

". . . the action of the employees of the defendant Town of Mount Holly, in removing said weeds, vines, brush, grass, kudzu and other noxious growths from the property of the plaintiff, was done as the valid exercise of a governmental function of the Town of Mount Holly."

The issues submitted, and the jury's answers, were as follows:

"1. Did the defendant trespass upon the lands of the plaintiff, as alleged in the Complaint? ANSWER: Yes. 2. What amount of damages, if any, is the plaintiff entitled to recover? ANSWER: $400.00."

From judgment for plaintiff, in accordance with the verdict, defendant appealed.

Fairley & Hamrick and Jack T. Hamilton for plaintiff, appellee.
Childers & Fowler for defendant, appellant.

BOBBITT, J. Apparently, plaintiff abandoned his alleged second cause of action. In any event, plaintiff's evidence as to damages did not relate to defendant's alleged failure *to remove* "said unsightly pile" from plaintiff's lot.

There was no exception to the issues as submitted, nor does it appear that either party tendered any other issue(s).

It is well established that an appeal follows the theory of the trial. *Pegg v. Gray*, 240 N.C. 548, 555, 82 S.E. 2d 757; Strong, North Carolina Index, Vol. 1, Appeal and Error § 1, and cases cited.

While other elements of damages are referred to in plaintiff's allegations, plaintiff's evidence as to the alleged impairment of the reasonable market value of his property relates solely to defendant's destruction of the trees thereon; and the case was submitted to the jury on this theory.

With reference to the first issue, the court instructed the jury, in substance, as follows: That the ordinance gave defendant the right to go upon plaintiff's vacant lot and cut or shrub down within four inches of the ground all weeds, grass or other noxious growth, and if defendant did no more than this, the jury's answer to the first issue would be, "No"; that oak trees the size of a person's wrist, twelve to fifteen feet high, are not weeds, grass or other noxious growth, and if the jury found, by the greater weight of the evidence, that defendant, after going upon plaintiff's vacant lot, cut such oak trees, such conduct would constitute a trespass upon plaintiff's property and the jury's answer to the first issue would be, "Yes."

Defendant does not deny its entry and acts upon plaintiff's property, nor does it assert that those who performed the work acted otherwise than in accordance with its instructions. Rather, it asserts what was actually done was justified by its (pleaded) ordinance.

The charter of the Town of Mount Holly is not in the record. Absent a special charter provision, presumably defendant relies upon G.S. 160-55, which authorizes a municipal corporation to enact ordinances "for abating or preventing nuisances of any kind, and for preserving the health of the citizens." The court, in accordance with defendant's contention, conducted the trial on the theory that the ordinance is valid; and we approve the instruction to the effect that oak trees of the size specified are not "weeds, grass or other noxious growth," within the meaning of the ordinance, and that the ordinance did not justify defendant's destruction thereof.

The verdict establishes that defendant, having lawfully entered, damaged plaintiff's property by acts in excess of the authority conferred by the provisions of the ordinance. In this connection, it is noted that defendant's evidence tended to show that the market value of plaintiff's lot was enhanced, not impaired, by its entry and acts thereon. If so, plaintiff was not entitled to recover more than nominal damages, *e.g.*, a penny. The court so instructed the jury.

Even so, defendant contends it was engaged in the performance of a governmental function, namely, in the exercise of its police powers to protect the health of its citizens and under such circumstances is not liable for the *tortious* acts of its officials and agents, and that the court should have granted its motion for judgment of involuntary nonsuit on this ground.

It is first noted that the basis of plaintiff's recovery is *the fact* that defendant cut and destroyed the oak trees on its land. The court disregarded all other *alleged* elements of damage.

Defendant alleged that plaintiff's lot was in such condition as to constitute "a menace to the general health of the people of the Town of Mount Holly." While the greater part of defendant's evidence relates to the "unsightly" appearance of plaintiff's lot prior to defendant's entry and acts thereon, there is some evidence tending to support defendant's said allegation. Defendant contends it was engaged in the abatement of such nuisance and hence was performing a governmental function.

While not referred to in the pleadings, the judge's charge, or in the briefs, G.S. 160-234 and G.S. 160-200(6), (26), (28) confer upon municipal corporations the power to abate nuisances, "whether on public or private property," (G.S. 160-200(26)) that are detrimental to public health. G.S. 160-234 provides: "The governing body, or officer or officers (of a municipal corporation) who may be designated for this purpose by the governing body, shall have power summarily to remove, abate, or remedy, or cause to be removed, abated, or remedied, everything in the city limits, or within a mile of such limits, which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person in default, and, if not paid, shall be a lien upon the land or premises where the trouble arose, and shall be collected as unpaid taxes."

In *Harrington v. Greenville,* 159 N.C. 632, 75 S.E. 849, *Hoke, J.* (later C. J.), states: "The general power to abate nuisances conferred on municipalities by section 2929 and other sections of the Revisal, and the power to regulate, inspect, and condemn buildings, contained in sections 2981 *et seq.* are clearly governmental in character, and for negligent default on the part of the city and its officers and agents no action lies, none having been given by the law." Section 2929 of the Revival is now codified as G.S. 160-55.

We reach this crucial question: Where defendant, acting under its power to abate a nuisance constituting a menace to health, goes upon plaintiff's lot, without plaintiff's permission or consent, for the purpose of eradicating what defendant deems to be such nuisance, and in so doing destroys trees thereon that do not in fact constitute a nuisance, is plaintiff's right to recover compensation for the impairment in value of his property caused by the destruction of the trees defeated because defendant was then engaged in the performance of a governmental function?

The legal principle on which defendant relies was stated by *Hoke, J.* (later C. J.), as follows: "It is well recognized with us that unless

a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for 'neglect to perform or negligence in performing duties which are governmental in their nature,' and including generally all duties existent or imposed upon them by law solely for the public benefit." *Harrington v. Greenville, supra.*

Upon this legal principle, recovery has been denied in many cases, based upon a variety of complaints against municipal corporations, *e.g.,* temporary suspension (by ordinance) of an ordinance prohibiting firing of fireworks, *Hill v. Charlotte,* 72 N.C. 55; failure to enforce an ordinance regulating maintenance of "hog-pens and privies," causing plaintiff's illness, *Hull v. Roxboro,* 142 N.C. 453, 55 S.E. 351; failure to prohibit boys from playing baseball on public streets, *Goodwin v. Reidsville,* 160 N.C. 411, 76 S.E. 232; failure to provide an attendant at jail to protect prisoners against fire, *Nichols v. Fountain,* 165 N.C. 166, 80 S.E. 1059; *Dixon v. Wake Forest,* 224 N.C. 624, 31 S.E. 2d 853; *Gentry v. Hot Springs,* 227 N.C. 665, 44 S.E. 2d 85; negligence of jailers in locking vicious prisoner in cell with plaintiff without searching prisoner for matches, *Parks v. Princeton,* 217 N.C. 361, 8 S.E. 2d 217; neglect of jailers to maintain a warm jail during cold night, *Moffitt v. Asheville,* 103 N.C. 237, 9 S.E. 695; negligent construction and operation of an incinerator, causing injury to city employee, *Scales v. Winston-Salem,* 189 N.C. 469, 127 S.E. 543; negligently permitting children to play near a burning trash pile, *Snider v. High Point,* 168 N.C. 608, 85 S.E. 15; failure to provide adequate water under sufficient pressure to extinguish fire, *Howland v. Asheville,* 174 N.C. 749, 94 S.E. 524; negligent operation of trash collection vehicle, *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423; *Broome v. Charlotte,* 208 N.C. 729, 182 S.E. 325; *Stephenson v. Raleigh,* 232 N.C. 42, 59 S.E. 2d 195; negligent operation of truck used to repair traffic signals, *Hodges v. Charlotte,* 214 N.C. 737, 200 S.E. 889; negligent operation of truck used in maintenance of street lighting system, *Beach v. Tarboro,* 225 N.C. 26, 33 S.E. 2d 64; neglect to observe sanitary precautions in discharging sewage from free public sewerage system into stream running near decedent's house, causing illness resulting in death, *Metz v. Asheville,* 150 N.C. 748, 64 S.E. 881; negligently permitting culvert to become choked and out of repair, causing illness, *Williams v. Greenville,* 130 N.C. 93, 40 S.E. 977; dumping garbage in hole near plaintiff's house, causing illness, *Hines v. Rocky Mount,* 162 N.C. 409, 78 S.E. 510; alleged negligent failure to condemn and remove buildings which were "fire traps," *Harrington v. Greenville, supra;* negligent failure to furnish suitable fire-fighting equipment, resulting in personal injury to fireman, *Peterson v. Wilmington,* 130 N.C. 76, 40 S.E. 853; arrest made in brutal

manner by policeman known by city officials to be cruel in making arrests, *McIlhenney v. Wilmington,* 127 N.C. 146, 37 S.E. 187; negligence in connection with installation, maintenance and timing of traffic signals, *Hamilton v. Hamlet,* 238 N.C. 741, 78 S.E. 2d 770; and negligence in continuing franchise to public utility furnishing gas to residents of municipality, resulting in gas explosion causing decedent's death, *Denning v. Gas Co.,* 246 N.C. 541, 98 S.E. 2d 910.

No North Carolina decision, except *Prichard v. Commissioners,* 126 N.C. 908, 36 S.E. 353, discussed below, has come to our attention, in which recovery has been denied when the municipality, by affirmative action for the purpose of abating a nuisance thereon, has damaged private property.

In *Scales v. Winston-Salem, supra,* it was held that the municipality was not liable for the construction and method of operation of its incinerator. But this Court has held that a municipality must pay just compensation if the operation of its incinerator damages private property, the basis of liability being that there has been a partial taking of private property for a public use or purpose. *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827; *Ivester v. Winston-Salem,* 215 N.C. 1, 1 S.E. 2d 88. The test of liability is whether, notwithstanding its acts are governmental in nature and for a lawful public purpose, the municipality's acts amount to a partial taking of private property. If so, just compensation must be paid. Where, as here, the acts complained of consist of the physical destruction of trees on plaintiff's property, there can be no doubt but that a partial taking of plaintiff's property then occurred.

It is fundamental law that when private property is taken for a public use or purpose, just compensation must be paid. *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144, and cases cited. "A constitutional prohibition against taking or damaging private property for public use without 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, 617, 89 S.E. 2d 290. ". . . the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor." *Cannon v. Wilmington,* 242 N.C. 711, 89 S.E. 2d 595; *Eller v. Board of Education, supra; Sale v. Highway Commission, supra.*

Upon this fundamental principle, where the negligence of a municipality in the operation of its sewer system caused damage to private property and injury to the health of the occupants, this Court held that the landowner was entitled to recover for the damage to his property but not for personal injuries resulting from the condition

created by defendant's negligence. *Williams v. Greenville, supra; Metz v. Asheville, supra.* In the *Williams* case, *Furches, C. J.*, states: "The reason for this distinction, that it is liable for damage, seems to lie in the fact of ownership—vested rights, which no one has the right to invade, not even the Government, unless it be for public purposes, and then only by paying the owner for it. This right to take property does not fall under the doctrine of police power, and the doctrine of *respondeat superior* applies." Also, see *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258.

While not cited by defendant, we have not overlooked *Prichard v. Commissioners, supra,* in which the plaintiffs alleged, as to the Town of Morganton, that, pursuant to an order of its Board of Commissioners, plaintiffs' residence was burned and destroyed on the unfounded pretense that there was smallpox in the family or that the family had been exposed to it. The Town of Morganton demurred on these grounds: 1. The complaint failed to allege that the tortious acts complained of were, and it appears on the face thereof that they were not, within the scope of the charter powers of said corporation. 2. If the acts complained of were done under the express direction of the town commissioners, the conduct of the commissioners would be *ultra vires.* This Court, two Justices dissenting, held the complaint demurrable as to the Town of Morganton for failure to state facts sufficient to constitute a cause of action against it.

In the present case the Town of Mount Holy neither alleges nor contends that its entry and acts on plaintiff's property were *ultra vires.* It asserts only two defenses: 1. It was fully authorized by its ordinance to do what was done. 2. In any event, it was performing a governmental function.

In *Prichard v. Commissioners, supra,* this Court did not consider the question as to whether plaintiff was entitled to recover just compensation on the ground that private property had been taken or damaged by the Town of Morganton for a public use or purpose. This is also true in *Greenwood v. City of Lincoln,* 156 Neb. 142, 55 N.W. 2d 343, 34 A.L.R. 2d 1203, cited by appellant, a case relating to the destruction of raspberry bushes on plaintiff's property.

We reach this conclusion: Where a municipal corporation, in the exercise of its governmental power to abate nuisances, enters upon and damages private property by the destruction of trees, buildings, *etc.*, thereon, it is liable for the payment of just compensation unless its acts were *in fact* necessary to remove or abate a nuisance.

In McQuillan, Municipal Corporations, Vol. 6 (3rd Ed. 1949) § 24.87, the applicable rule is stated as follows: "An owner of property is not entitled to compensation for property rightfully destroy-

ed or damaged by a city in abating a nuisance; the reason for this is that the destruction or damage is for public safety or health and is not a taking of private property for public use without compensation or due process in the constitutional sense. But a municipality is liable for impairing, removing or destroying property, ostensibly in the abatement of a nuisance, where the thing or condition in question is not a nuisance *per se,* under statute or in fact, or where the thing or condition has not been declared to be a nuisance. If a party cannot get a hearing or remedy in advance of the destruction or seizure of his property he has a right to it afterwards by an action for its value. Indeed, no one, not even the municipal corporation in which an alleged nuisance is located, is protected against suit for damages for voluntarily removing that which is not a nuisance. . . .

". . . A difference in market value before and after wrongful abatement has been ruled a proper measure of damages. The burden of proving justification has been placed on the city or its contractor. But issues of fact, of course, are for the jury or a court sitting without a jury." Also, see 39 Am. Jur., Nuisances § 185; 63 C.J.S., Municipal Corporations § 771.

The foregoing statement from McQuillan is well supported by these decisions: *North American Cold Storage Co. v. Chicago,* 211 U.S. 306, 53 L. Ed. 195, 29 S. Ct. 101; *Sings v. City of Joliet* (Ill.), 86 N.E. 663; *City of Forney v. Mounger (Tex.),* 210 S.W. 240; *City of Texarkana v. Reagan (Tex.),* 247 S.W. 816; *Moll Co. v. Holstner (Ky.),* 67 S.W. 2d 1; *Oglesby v. Town of Winnfield (La.),* 27 So. 2d 137; *McMahon v. City of Telluride (Colo.),* 244 P. 1017, 46 A.L.R. 358; *Echave v. City of Grand Junction (Colo.),* 193 P. 2d 277; *Albert v. City of Mountain Home (Idaho),* 337 P. 2d 377.

In *McMahon v. City of Telluride, supra,* it is stated:

"Abatement of nuisances is a governmental function. 28 Cyc. 1291. No liability can arise against a municipality for the destruction of property which is a nuisance, but it must be a nuisance in fact. 28 Cyc. 1292.

"Where the property is not in fact a nuisance, if the city is not liable in tort, because of the rule above mentioned and relied on by the city in the instant case, the municipality is nevertheless liable upon the theory that it must grant compensation for private property that it takes for public use. If certain property is in fact a nuisance, its destruction as such may not give rise to any right to compensation; but if property is destroyed under a mistaken belief that it is a nuisance, when in fact it is not a nuisance, it is taken for a 'public use' within the

meaning of the constitutional provision, and the loss to the owner should be made good. . . ."

While it may be that a complete clearance of plaintiff's lot by defendant could be made more conveniently and possibly at less expense by use of the bulldozer, there is ample evidence to support the view that the conditions on plaintiff's lot that might be considered detrimental to public health could have been corrected without destroying the trees thereon.

Our conclusion is that the court properly overruled defendant's motion for judgment of involuntary nonsuit.

Conceding that defendant, upon sufficient allegations, would have been entitled to have issues submitted as to whether plaintiff's lot was in fact in such condition as to constitute a menace to public health, and as to whether its acts were in fact necessary to remove and abate such nuisance, defendant did not present its defense on that theory. It cannot now complain because the court did not conduct the trial on issues neither tendered by defendant nor raised by its pleading.

Consideration of the evidence leaves the impression that the real fight at the trial was whether the market value of plaintiff's lot was impaired or enhanced by defendant's entry and acts thereon. The jury resolved this vital issue in favor of plaintiff.

Since defendant's contention that the court erred in overruling its motion for judgment of involuntary nonsuit involves a matter of major importance, we have deemed it appropriate to give full consideration to that question. However, we have not overlooked defendant's numerous assignments of error relating to the court's rulings on evidence and to certain portions of the court's instructions to the jury. Suffice to say, consideration thereof discloses no error deemed sufficiently prejudicial to justify a new trial.

No error.

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

TOWN OF MORGANTON v. HUTTON & BOURBONNAIS COMPANY, INC., G. NORMAN HUTTON AND WIFE, OPAL B. HUTTON, RALPH W. HUTTON AND WIFE, CHARLOTTE W. HUTTON, MRS. DORIS COUNCILL, A WIDOW, A. B. HUTTON, JR. AND WIFE, MARIE HUTTON, AND DONALD HUTTON AND WIFE, EVE BALLARD HUTTON.

(Filed 14 January, 1960.)

1. Eminent Domain § 1—

The power to take private property for a public purpose by eminent domain is limited only by the requirement that fair compensation be paid, Constitution of N. C., Article I, sec. 17, and in the exercise of its power the sovereign determines the nature and extent of the property required, whether an easement or a fee, whether for a limited period of time or in perpetuity.

2. Constitutional Law § 7: Eminent Domain § 4—

The General Assembly has the right to determine what portion of its sovereign power of eminent domain it will delegate to public or private corporations to be used for the public benefit.

3. Municipal Corporations § 4—

A municipal corporation has such sovereign power as has been delegated to it by its charter or by general statute.

4. Eminent Domain § 4—

The power of a municipal corporation to condemn land for its water shed in order to protect from contamination its water supply is not limited to an easement, but it has been given power to condemn the fee for that purpose, G.S. 130-162, G.S. 160-205, and the reference in G.S. 40-19 to an easement relates to procedure and is not a limitation upon the power of the municipality.

5. Eminent Domain § 12—

Where a municipality in its petition in condemnation seeks to acquire "lands" embraced in its water shed to protect its water from contamination, and the answer alleges that the "property" was of great value and requests "all elements of damage" to be considered, and it is apparent from the commissioner's report and the proceedings after exception and appeal from the report that the value of the timber and mineral interest was included in ascertaining the amount of compensation, and the judgment provides that it should operate as a conveyance of the "lands", the condemnation is of the fee and not a mere easement.

6. Same—

Everything connected with the proceedings which will throw light on the intent of the condemnor is relevant in determining whether the condemnor obtained the fee or a mere easement, and while averments in a subsequent action by the condemnor and the condemnee against a stranger, which averments describe the estate of the condemnor as an easement, may be considered upon the question of intent, such circumstance is not conclusive, and where the entire condemnation proceedings disclose that the intent was to condemn the fee and that the value of

the entire land, including timber and minerals was included in the conpensation paid, the condemnor will be held to have acquired the fee.

7. Same—

The intent of the condemnor, and whether the compensation paid is ascertained on the basis of the value of the entire land or merely an easement therein, is determinative of whether the condemnor acquired the fee or a mere easement, and when such intent is manifest and the language is broad enough to include the fee simple title to the lands the condemnor acquires the fee even though the exact technical words describing the fee simple are not used.

8. Judgments § 30—

Judgment for plaintiffs in an action by condemnor and condemnee against a third person for trespass does not involve title of the condemnor and condemnee as between themselves, and therefore such title not being in issue the judgment does not estop condemnor from thereafter asserting the ownership of the fee as against the condemnee, notwithstanding averments in the action in trespass that the condemnor owned a mere easement.

9. Estoppel § 4—

Conduct of a party cannot constitute the basis for an estoppel in *pais* when such conduct does not cause the other party to change his position or in any manner prejudice his rights.

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

APPEAL by defendants from *Campbell, J.*, March 1959 Term, of BURKE.

This action was begun in 1956 to obtain a judicial determination of the rights acquired by plaintiff by the payment of compensation fixed in a decree of condemnation rendered at the April 1928 Special Term of Burke Superior Court in an action against defendant Hutton & Bourbonnais Company and others. The adjudication is sought to determine the ownership of and right to market timber growing on the land condemned.

The action was originally instituted against the corporate defendant. A hearing was had in March 1957 at which time others whose ancestors were parties to the condemnation proceeding asserted an interest adverse to plaintiff's claim. They were not parties to this action. Judgment was then rendered in favor of plaintiff and defendant appealed. We remanded without determining the merits to permit all adverse claimants to be made parties. 247 N.C. 666, 101 S.E. 2d 679.

The additional claimants were made parties defendant. All defendants now make an identical defense against the claim asserted by plaintiff.

A jury trial was waived. The court made findings of fact and drew

conclusions of law and, based on the findings and conclusions, adjudged that plaintiff acquired full fee simple estate in the lands described in the condemnation proceeding.

Womble, Carlyle, Sandridge & Rice, H. L. Riddle, Jr., Sam J. Ervin, III, Livingston Vernon, and John H. McMurray for plaintiff, appellee.

Patrick, Harper & Dixon for defendant appellants Hutton & Bourbonnais Company, Inc., G. Norman Hutton and wife, Opal B. Hutton, and Ralph W. Hutton and wife, Charlotte W. Hutton.

Marshall V. Yount for defendant appellants Mrs. Doris Councill, A. B. Hutton, Jr. and wife, Marie Hutton.

RODMAN, J. The first question presented by the assignments of error is: What estate did plaintiff acquire by the condemnation proceeding? Was it, as plaintiff contends, an unqualified estate in fee simple, or was it, as defendants contend, an easement leaving the fee in defendants in the condemnation proceeding with the right to harvest the timber grown thereon?

The answer is to be found by determining the extent of the power which plaintiff had to take and the extent to which such power was exercised.

The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty. Our Constitution, Art. I, sec. 17, requires payment of fair compensation for the property so taken. This is the only limitation imposed on sovereignty with respect to taking.

The taking must, of course, be for a public purpose, but the sovereign determines the nature and extent of the property required for that purpose. It may take for a limited period of time or in perpetuity. It may take an easement, a mere limited use, leaving the owner with the right to use in any manner he may desire so long as such use does not interfere with the use by the sovereign for the purpose for which it takes, or it may take an absolute, unqualified fee, terminating all of defendant's property rights in the land taken. *R. R. v. Davis,* 19 N.C. 451; *Torrence v. Charlotte,* 163 N.C. 562, 80 S.E. 53; *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563; *Brooklyn Park Commissioners v. Armstrong,* 6 Am. Rep. 70 (N.Y.); *Sanitary Dist. of Chicago v. Manasse,* 42 N.E. 2d 543 (Ill.); *City of Newton v. Perry,* 39 N.E. 1032; *Chesapeake & Ohio Canal Co. v. Great Falls Power Co.,* 129 S.E. 731 (Va.); *Newton v. City of Newton,* 74 N.E. 346 (Mass.); *Wright v. Walcott,* 131 N.E. 291 (Mass.), 18 A.L.R. 1242; *Carroll v. City of Newark,* 158 A459 (N.J.); *Greenwood Coun-*

ty v. Watkins, 12 S.E. 2d 545 (S.C.); *Eldridge v. City of Binghamton,* 24 N.E. 462 (N.Y.); *Ramsey v. Leeper,* 31 P 2d 853 (Okla.); *McConihay v. Wright,* 121 U.S. 201, 30 L. Ed. 932; 18 Am. Jur. 740.

The Legislature has the right to determine what portion of this sovereign power it will delegate to public or private corporations to be used for public benefit. *R. R. v. R. R.,* 165 N.C. 425, 81 S.E. 617; *Clifton v. Highway Comm.,* 183 N.C. 211, 111 S.E. 176.

Plaintiff, a municipal corporation, is invested with such sovereign power as has been delegated to it by its charter, c. 104, Private Laws 1913, or by general statute applicable to all municipalities. Sec. 3 of art. 10 of plaintiff's charter authorizes it to acquire and hold "rights of way, water rights, sewerage outlets, and other property" for the purpose of maintaining and furnishing a pure and adequate water supply.

Apparently no statute of general application authorizing the condemnation of land for the storing of water existed prior to 1903. By c. 159, P.L. 1903, the Legislature authorized water companies to "acquire by condemnation such *lands* and *rights in land* and water as are necessary for the successful operation and protection of their plants." This Act was codified as Rev. 3060. The Act was amended by c. 62, P.L. 1911, to include municipalities and as amended was codified as C.S. 7119. It is now G.S. 130-162.

The Municipal Corporation Act of 1917 expressly authorized any municipality to own and operate a water system. G.S. 160-255. To accomplish that and other authorized purposes it granted authority to municipalities to purchase "*any land,* right of way, water right, privilege, or *easement,* either within or outside the city" as the municipality deemed necessary. G.S. 160-204. It further provided that if the municipality was unable to agree with the owners "for the purchase of such *land,* right of way, privilege or *easement,*" it might acquire by condemnation. G.S. 160-205.

The Legislature, in each of the statutes authorizing the town to acquire by purchase or condemnation, granted it the right to take and hold either the land or rights in land or easement, as it might deem necessary for the development of the project. Clearly, as here used, the words do not have the identical meaning. The word "land" manifestly had a larger significance than the words "easement" or "interest therein." Each word used is presumably used for a purpose, and in ascertaining the meaning of the statutes we are properly required to give significance to each word which the Legislature has used.

Appellants urge in support of their assertion that only an easement could be acquired because the condemnation statute which prescribes the procedure, C.S. 1723 (now G.S. 40-19) so declares. That

section dealing with procedure provides in part, upon payment of the compensation fixed "all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the corporation aforesaid." This phrase first appeared in the Revisal of 1905. The manner of acquiring by eminent domain was placed by the codifiers of the Revisal in the chapter on railroads. This Court had, prior to 1905, repeatedly held that railroads acquired not a fee but a mere easement since that was all that was needed for that purpose. *Hodges v. Telegraph Co.*, 133 N.C. 225, 45 S.E. 572; *Shields v. R. R.*, 129 N.C. 1; *R. R. v. Sturgeon*, 120 N.C. 225; *R. R. v. Bunting*, 168 N.C. 579, 84 S.E. 1009.

The Legislature did not, we think, intend, by referring to the procedure to be used in acquiring by condemnation, to restrict the power of acquiring in fee when necessary for the enumerated purposes. The reference was merely for procedural purposes. *Greenwood County v. Watkins, supra; Sanitary Dist. of Chicago v. Manasse, supra.*

Concluding as we do that the town had the power to acquire all of the estate and interest of defendants by condemnation, we must ascertain what estate and interest plaintiff sought and was granted. Notwithstanding its power to take all, it was not required to do so.

The proceeding to condemn was begun in August 1922 against the corporate defendant. The petition alleged the town was operating a water system for the benefit of its inhabitants, that its source of supply was not sufficient for its needs, and that it was necessary to acquire an additional supply, "and to that end to acquire the *lands* of the defendant hereinafter mentioned and described in order to protect from contamination the water which your petitioner is preparing to bring from the Upper South Fork River in the South Mountains to the Town. . ." Section 3 of the petition alleges "That the *lands* of defendant which your petitioner desires to acquire contain 2131.59 acres, and are described as follows:" Then follows a detailed description of the land. Section 5 alleges petitioner had sought "to purchase the lands of defendant hereinbefore described," "that the defendant has refused to sell said land to plaintiff for a reasonable price, and has refused to name a price for said lands. . ." Everywhere in the petition the property to be taken is referred to as land, not an easement or an interest in the land. The defendant answered and asserted that it was not necessary "to take defendants' land or so large a portion of it for such supply. . ." The answer repeatedly refers to "the land sought to be condemned." It denies that "all of said boundary of land sought to be condemned is 'unfit for agricultural purposes.' " It avers that the land possesses "very great value" and asks

"if its *property* is to be taken for the use of the petitioner that it be paid a reasonable and fair value for the same, *all elements of damage considered.*" The individuals who were cotenants with the corporation were made parties defendant and adopted the company's answer. The town took possession in 1922; the defendants sought to remove to the Federal courts; the right to remove was denied and this denial was affirmed by this Court at the Spring Term 1924. *Morganton v. Hutton,* 187 N.C. 736, 122 S.E. 842.

Commissioners were appointed by the clerk to appraise. The land sought to be condemned was part of a larger tract owned by defendants. The Commissioners reported: "we visited the premises and land in controversy, and after taking into full consideration the quality and quantity of the land aforesaid, the *timber and mineral interests* on said land and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of $25,800.00." (Emphasis added here and above.)

The report followed the form prescribed by the statute, C.S. 1722 (G.S. 40-18) but carried the superadded declaration that the sum to be paid included the timber and minerals on the land. Defendants in due time filed exceptions to the report. The exceptions are based on the assertion that the amount awarded was inadequate. There is no suggestion that the decree of confirmation would not vest title to the timber and minerals in petitioner or that it would take anything less than an absolute estate in fee.

The clerk overruled the exceptions and confirmed the report. Defendants excepted and appealed. Pending hearing on the appeal, defendants moved the court for an order permitting them to enter and inspect the lands in order to ascertain the value thereof "by reason of minerals such as feldspar, mica, iron, and other minerals." The court, in January 1926, allowed defendants' motion subject to restrictions necessary to assure no action which could in any wise affect the purity of the water plaintiff was taking. The case was heard on defendants' appeal at the April Special Term 1928. A jury trial was waived. The court found petitioner was entitled to condemn "the lands" of defendant for the uses and purposes set out in the petition, that defendants were entitled to recover of plaintiff the sum of $45,000 with interest from 12 August 1922, the date petitioner took possession, as compensation for said lands. It thereupon adjudged: "that this judgment and the satisfaction thereof shall operate as a deed of conveyance and shall transfer, convey to and vest in the petitioner, the Town of Morganton, its successors and assigns, during its corporate existence, the lands of the defendants sought to be condemned herein for the uses and purposes mentioned and set forth in the petition."

Nowhere in the condemnation proceeding is there a suggestion that the parties intended to take less than the full estate authorized by law. It was recognized that the petitioner would require complete and exclusive control of the entire area for the purpose for which it was taking. It was anticipated that such exclusive use and control would be perpetual. It was proper, therefore, for petitioner to pay the owner for all of its rights in the property including the timber and minerals as reported by the Commissioners.

Having been fully compensated for the timber as a part of the land taken, no sound reason is suggested why defendants should enrich themselves at public expense. The language of *Folger, J.*, in *Brooklyn Park Commissioners v. Armstrong, supra,* is, we think, pertinent. He said: "Language may be broad enough to vest an absolute title to lands, without being technical in its terms. If the expressions are such as that the whole force of them is not applied, unless a fee simple is created, that estate will be taken, though the exact words be not used . . . So in *Dingley v. The City of Boston,* 100 Mass. 544, an authority to 'purchase or otherwise take lands,' and the declaration that 'the title to all lands so taken should vest in the city,' was held to vest a title in fee simple in the defendants . . . Doubtless, in most cases, when land is condemned for a special purpose, on the score of its public utility, the sequestration is limited to that particular use. But this is where the property is not taken, but the use only. Then, the right of the public being limited to the use, when the use ceases the right ceases. Where the property is taken, the owner paid its true value, and the title vested in the public, it owns the whole property, and not merely the use; and, though the particular use may be abandoned, the right to the property remains. The property is still held in trust for the public by the authorities. By legislative sanction it may be sold, be changed in its character from realty to personalty, and the avails be devoted to general or special public purposes."

The Supreme Court of Oklahoma said in *Ramsey v. Leeper, supra*: "When land is condemned for the purpose of providing a water supply, such as in the construction of a reservoir, or for incidental use in connection therewith as in the instant case, jurors and appraisors do not make any deduction in the price paid the owner of the land on the theory that it might revert to him. Such condemnation is made in contemplation of a future continued use. In other words, cities and other municipal and *quasi* municipal corporations in the exercise of the right of eminent domain must, do, and should, pay the full value of the land condemned." *Torrence v. Charlotte, supra; Binder v. County Board of Education,* 5 S.W. 2d 903; *Sanitary Dist. of Chicago*

v. Manasse, supra; Valentine v. Lamont, 96 A 2d 417 (N.J.); *City of Waukegan v. Stanczak,* 129 N.E. 2d 751 (Ill.).

Manifestly condemnor only acquires what it pays for. The estate taken must be determined by an examination of the condemnation proceeding. Everything connected therewith which will throw light on the intent of the condemnor in seeking to acquire and the order of the court which permits acquisition is relevant in ascertaining the estate taken. Whether condemnor in a particular instance acquired a fee or lesser estate is well illustrated by two decisions of the Supreme Court of Oklahoma. c.f. *Ramsey v. Leeper, supra;* and *Cushing v. Gillespie,* 256 P 2d 418, 36 A.L.R. 2d 1420. In our opinion Judge Campbell correctly interpreted the decree of condemnation by holding that payment of the amount fixed deprived the then owners of all interest in the land described.

The answer avers plaintiff is estopped to claim the timber or land in fee. The basis for this plea is an action instituted 12 July 1934 by the defendants against Caroline Hudson to recover damages for trespass and to enjoin further trespass on the land here in controversy.

The complaint in that action alleged: "That to secure the watershed, plaintiff, Town of Morganton, was forced to condemn and did condemn the necessary drainage area to protect the source of said water, and by reason of such condemnation, is the owner of an easement and right in and to the said land and premises constituting its said water shed, which is here bounded and described as follows: (Here follows a description of the 2131.59 acre tract of land in question.)

"That the plaintiff, Hutton & Bourbonnais Company, subject to the easement acquired by the said Town of Morganton as hereinbefore alleged, is the owner of the fee of said lands and premises, constituting said water shed."

Defendant Hudson demurred to the complaint on the ground of misjoinder. The demurrer was sustained, and plaintiff appealed. This Court reversed, 207 N.C. 360, 177 S.E. 169.

On remand a jury trial was waived. The court found as a fact that plaintiffs were the owners of the land described in the complaint, that defendant had trespassed thereon to plaintiffs' damage in the sum of 3c, and further found that defendant was not the owner of the land claimed by her. It was thereupon adjudged that plaintiffs recover the damage assessed, that defendant was not the owner of any land within the boundaries described in the complaint, and defendant was enjoined from further trespass. There was no adjudication of plaintiffs' title *inter se.*

The plea of *res judicata* cannot be sustained. A judgment estops

a party as to those matters determined or properly incident to a determination of the questions at issue in the action in which the judgment was rendered. There can be no estoppel with respect to matters which the court was not called upon to consider. Hutton & Bourbonnais and its cotenants were the source of the town's title. So far as defendant Hudson was concerned, it was immaterial whether Morganton owned the fee or a lesser interest therein. The question at issue was: Did the plaintiffs, or either of them, own the land or did defendant own it? There was no question raised as to the respective interest of the plaintiffs and the court did not undertake to determine that interest. It merely accepted without investigation the allegations of the complaint. This is not sufficient to estop. *Jenkins v. Jenkins,* 225 N.C. 681, 36 S.E. 2d 233; *Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240; *Stancil v. Wilder,* 222 N.C. 706, 24 S.E. 2d 527; *Hardison v. Everett,* 192 N.C. 371, 135 S.E. 288; *Nash v. Shute,* 182 N.C. 528, 109 S.E. 353.

The mere fact that plaintiff and present defendants joined to prevent a trespass is not such conduct as amounts to estoppel in *pais.* Plaintiff has done nothing to cause defendants to change their position or which in any manner prejudices their rights. The public's right to the property for which it paid cannot be defeated in this manner. *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745; *Trust Co. v. Casualty Co.,* 237 N.C. 591, 75 S.E. 651.

The allegations in the trespass action against Caroline Hudson, if they have any pertinency, merit consideration only as an aid in interpreting the decree of condemnation. They of course cannot diminish the estate which the town acquired in 1928. We have given due consideration to the allegations for that purpose and conclude that the allegation with respect to ownership was a mere misinterpretation of the effect of the decree of confirmation.

The court correctly concluded from the findings, to which there are no exceptions and no request for additional findings, that plaintiff acquired full fee simple title to the lands described in the condemnation proceeding. The judgment is

Affirmed.

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

F. R. FRIDAY, ADMINISTRATOR OF THE ESTATE OF JACK ARMSTRONG, DECEASED, V. ALONZO ADAMS, NEWTON BLAIR DULIN, JR., AND NEWTON BLAIR DULIN, SR.

(Filed 14 January, 1960.)

1. Appeal and Error § 38—

Exceptions not brought forward in the brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

2. Pleadings § 15—

A demurrer admits for its purpose the truth of the allegations of fact set forth in the complaint and relevant inferences of fact necessarily deducible therefrom, but it does not admit conclusions or inferences of law.

3. Same—

Upon demurrer the complaint will be liberally construed with a view to substantial justice between the parties and every reasonable intendment must be in favor of the pleader, and the pleading must be fatally defective before it will be rejected as insufficient. G.S. 1-151.

4. Automobiles § 35— Complaint held sufficient to allege concurrent negligence of defendants resulting in death of intestate.

In this action by passenger in a car the allegations of the complaint are held sufficient to charge concurrent negligence of defendants, the one in driving the car at excessive speed under the circumstances and driving without glasses when his driver's license required him to wear them, so that he hit the rear of a truck while blinded by the lights of an oncoming car, resulting in his losing control of his car which ran into a ditch, resulting in the death of intestate, and negligence on the part of the other in parking the truck on the highway at nighttime without flares or other warning devices, and the demurrer of the owner and driver of the truck on the ground that allegations of the complaint disclose that the negligence of the driver of the car was the sole proximate cause of intestate's death, was properly overruled.

5. Trial § 22a—

On motion to nonsuit the evidence is to be taken in the light most favorable to plaintiff giving him the benefit of all reasonable inferences of fact.

6. Automobiles § 43— Evidence of concurring negligence of defendants held sufficient to be submitted to the jury.

Evidence tending to show that intestate was a passenger in an automobile, that the driver of the car was driving without glasses when his driver's license required him to wear glasses and that, upon passing the crest of the hill he saw a red light ahead of him in his lane of travel but thought it was on a vehicle rounding a curve some distance away, that he was blinded by the lights of an oncoming car which the driver refused to dim, did not see a truck parked on the hard surface until he was too close to it to avoid striking it, that the right front of his car struck the left rear of the truck as he swerved his car to the left to avoid the truck, that the car went into a ditch causing the death of

his passenger, and that the driver of the truck had left it parked on the highway without flares and that the rear light of the truck failed to meet the requirements of statute, *is held* sufficient to be submitted to the jury on the issue of concurrent negligence of defendants.

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

APPEAL by defendants Newton Blair Dulin, Jr., and Newton Blair Dulin, Sr., from *McLean, J.*, at February 1959 Civil Term, of GASTON.

Civil action to recover for alleged wrongful death of Jack Armstrong, intestate of plaintiff.

It is not controverted that on Friday, 10 August 1956, at 9:30 P. M., Jack Armstrong, the intestate of plaintiff, was riding as a passenger in 1946 Chevrolet sedan owned and operated by defendant Alonzo Adams in a southerly direction on Forbes Road, south of the city of Gastonia, when it, the said automobile, ran into and collided with the left rear portion of the 1951 GMC truck owned by defendant Newton Blair Dulin, Sr., being driven by his agent and employee Newton Blair Dulin, Jr., within the scope of his employment, as a result of which said intestate sustained fatal injuries.

Plaintiff alleges in his complaint substantially the following: That the said truck had been parked and unattended on the main paved portion of said highway, headed in a southerly direction without lights, reflectors or other warning devices to warn the defendant Alonzo Adams and others using the said highway; and that as said Adams was proceeding on his own or right side of said road in a southerly direction at a speed of sixty miles per hour, an excessive rate of speed, in violation of law, his automobile collided with the left rear portion of said truck, and, in an effort to avoid striking said unlighted truck and an oncoming northbound automobile, he swerved to his automobile's left across said highway and into a ditch, violently crushing and killing said Jack Armstrong; that at the time of said collision the defendants were successively, jointly and concurrently negligent in proximately causing the injuries (to) and death of Jack Armstrong in the following manner:

(1) That the defendant, Alonzo Adams (a) was driving his said 1946 Chevrolet sedan at a careless, reckless and unlawful rate of speed in violation of the laws of the State of North Carolina, in such cases made and provided; (b) * * * without due caution and circumspection and in such a manner as to endanger the lives of persons riding in said automobile and (c) was driving said automobile without glasses when his driver's license required that he wear glasses at all times while operating a motor vehicle, in violation of the general

statutes of the State of North Carolina; and (d) was negligent in other aspects not herein fully set forth in detail.

(2) (a) That the defendant, Newton Blair Dulin, Jr., while in the course of his employment as agent of Newton Blair, Sr., had parked the truck of the defendant, Newton Blair Dulin, Sr., on the main paved traveled portion of said highway in the night time in violation of the laws of the State of North Carolina.

(b) That said 1951 GMC truck parked upon said main traveled portion of said highway was * * * without lights, flares or other warning devices in violation of the laws of the State of North Carolina, in such cases made and provided.

(3) (a) That the gross negligence of defendants Dulin set in sequence a chain of events which concurrently with the negligence of defendant Adams resulted in the collision of the automobile of Adams and the truck of the defendants Dulin, and as a result of the concurrent negligence of the defendants, plaintiff's intestate was seriously and fatally injured as aforesaid, and (b) that the proximate cause of the fatal injuries and death of said Jack Armstrong was the concurrent negligence of the defendants herein named as herein set forth and constitute the efficient cause of the injuries and death of plaintiff's intestate.

Defendants Dulin answering the complaint of plaintiff, deny in material aspects the allegations of the complaint and (1) for further answer and defense aver, upon information and belief, among other things, that intestate of plaintiff and defendant were on a joint enterprise or mission for the common benefit or pleasure of all riding in the Adams automobile, and would be barred by the negligence of the driver; (2) and that plaintiff's intestate was guilty of contributory negligence in that he knowingly and willingly consented to ride and voluntarily rode with a negligent and incompetent driver without protest— all of which is pleaded in bar of any recovery herein.

And for a further answer, defense and counterclaim to plaintiff's complaint the defendants Dulin aver that if the death of plaintiff's intestate was caused by any negligence of these defendants, as alleged in the complaint, they aver (1) that the negligence of Alonzo Adams was a proximate cause of such death in manner set forth in detail; and (2) that any negligence of these answering defendants was insulated by the negligence of Alonzo Adams * * * in manner set forth.

Upon the trial in Superior Court plaintiff offered testimony of several witnesses.

Webb Armstrong testified in pertinent part: "* * * the deceased,

Jack Armstrong, was near 14 years * * * on August 10, 1956, the date of his death * * *"

Elizabeth Barnett Glenn testified: "I am 21 years of age. On the night of August 10, 1956, I was riding in the automobile of Alonzo Adams, and I was sitting on the front seat between Alonzo Adams, who was driving, and Jack Armstrong, who was sitting on the outside. Henry Floyd, Elizabeth Patton and Leonard Patton were in the back seat of this automobile. We were involved in an automobile accident that night. We all left home, and we came around * * * the road coming towards over on York Highway, and before we got there, it was a truck parked in the highway, and * * * it wasn't any lights on the back of it. It was a little after nine o'clock, and the night was dark. I do not know the exact speed we were making immediately before we hit the truck, but the last time I could remember and I looked at the speedometer Alonzo Adams was driving about forty miles per hour * * *." And in answer to question as to how fast he was going just immediately before the accident happened, she replied "My opinion would be still going the same speed—forty miles an hour * * * I was looking straight ahead down the road prior to the accident. I did not see any light on this side of the road immediately in front of the automobile of Alonzo Adams, except the headlights of an oncoming car. I did not see any tail lights or obstructions in the road immediately in front of the car I was riding in. We were almost on the truck when I first saw it, and I said, 'Look out, it's a truck,' * * * Alonzo Adams pulled out to his left to go around the truck. The rear left side of the truck hit the right front side of the car in which I was riding; but it struck farther from me. I don't remember what happened after we hit the truck as I was knocked unconscious * * * The road we were traveling on was a straight road with just a tiny rise in it * * * The truck was squarely in the middle of our lane when I first saw it, and it was moving. However, it wasn't moving fast * * * it looked like it was moving to me * * *."

And on cross-examination the witness continued: " * * * We were going to Filbert, South Carolina, to visit some friends on that night. Alonzo Adams was not wearing his glasses on the night in question. I did not know he could not drive except with glasses * * * prior to the accident I asked him how fast he was driving, and I looked at the speedometer and said to Alonzo 'Don't drive any faster' and he said 'All right' * * * When I first saw the truck it was moving. I never saw it parked in the road as it was moving, but not fast. It was quite a large truck. To my knowledge, it was nothing wrong with the lights on the car of Alonzo Adams. You could see ahead clearly, see a hundred yards ahead * * * . It was a big * * * truck * * * mov-

ing slowly on its right-hand side of the road * * * but I didn't see the truck until I was right on it as it was dark * * * real dark, and didn't have any lights * * * There was no reason why I couldn't have seen the truck * * *."

The witness indicated the distance as 16 feet she was from the truck when she first saw it. " * * * I did holler at him (Alonzo) when I first observed the truck, to watch out, and at that time he turned to the left. Prior to the time that I hollered * * * Alonzo Adams was driving straight down the road on the same side that the truck was driving * * * ."

Then on re-direct examination the witness continued: "Immediately before the accident we met the headlights of another car coming. The oncoming headlights were very bright, and they blinded me myself—the glare." And to the question "And is that the reason you didn't see the truck?" she replied: "Yes, I mean that's the reason I hollered at him right then, because the car was coming, and I assumed that he, you know, had already seen the truck." And continuing the witness testified: "It was a good distance from the top of the rise in the road to where the truck was * * * ." (agreed that the distance would be) "about 150 to 200 feet." Then on re-cross-examination, the witness continued: "We wasn't on the truck when we saw the lights of the vehicle coming in the opposite direction. We were, I would say, about five feet from it * * * When I observed the real bright lights of the car coming * * * I hadn't noticed the bright lights of the car as I wasn't paying direct attention to it." And on re-direct examination the witness concluded her testimony by saying: "The car we were meeting to my knowledge did not pass by us before we hit the truck. It was coming toward us, and the lights were * * * real bright, and a man pulled off the road."

The witness Leonard Patton testified: "* * * On August 10, 1956, * * * I was riding in the car with Alonzo Adams and these other folks * * * In my opinion the car * * * was being driven at about 40 to 45 miles per hour. It was a clear night and fair. The lights on Alonzo Adams' car were all right * * * The road at the point of the collision is a kind of grade in the road * * * a rise in the road back towards Gastonia. When I seen the truck, we was right up on it. I didn't see any lights on the rear of the truck. It was standing still when I seen it * * * we were meeting another coming towards Gastonia before the wreck. It passed us before the collision. We was right up on the truck when the car going north passed us * * * the car in which I was riding * * * stopped on down below the truck a piece * * * From the point of impact to the telephone pole across the road is about fifty feet * * * the truck * * * one of the stake body trucks * * * one that

you can take the side planks off and put them back on. You can make a flat out of it * * * I did not see any lights on the truck."

Then on cross-examination the witness testified: "On the night of the accident * * * he was making around 40 to 45 miles * * *. I would say you could see ahead about 75 yards * * * When I first saw the truck, we were about 30 feet or something from the truck. When I seen it, it was sitting still, not even moving * * * I didn't see anybody in the truck until after the wreck. The highway is straight * * * . Well, I think what made Alonzo Adams run into the truck, I mean it was another car coming too. We was right up on the truck when we saw the other car coming * * * When we were about 25 feet from the truck." Then on re-direct examination the witness continued: "From the point of impact to the crest of the hill * * * I believe it would be about 28 steps * * * ."

The witness M. J. Preslar testified: "I am with the State Highway Patrol * * * On the night of August 10, 1956, I investigated an automobile accident involving the truck of Blair Dulin, Sr., driven by Blair Dulin, Jr., and a vehicle operated by Alonzo Adams on the Forbes Road. I arrived there about 15 minutes till ten o'clock * * * I found certain dirt and debris on the highway * * * I always put that road as running east and west * * * a secondary road * * * but maintained by the State * * * ." Witness identified a photograph indicating the roadway where the accident occurred— which shows the high bank which goes up from the road to the yard of the house across the road, and says: "In my opinion the bank is 12 or 15 feet high above the paved portion of the highway * * * When I arrived at the scene of the accident, Dulin, Jr., and Alonzo Adams were there * * * I talked to Mr. Dulin, Jr., at the scene. He told me that he had left his sister-in-law's residence, which is the one you have got down there on the photograph on the shoulder of the highway. This is the residence across the road from where the accident occurred. He said he had been there to the house with his truck and come out of the driveway, which is a little east of the highway, and he was traveling west on Forbes Road. It is not a straight driveway. * * * he had left the residence. * * * On the back of the truck was a signal light— about a four-inch light on the chassis of the truck. The truck was a regular width truck, 96 inches wide * * * and the light was * * * approximately four feet from the end of the bed * * * under the bed of the chassis * * * The light was burning when I got there." Then over objection and exceptions by defendant these questions were asked, and answer is indicated:

"Q. What did he state then as to how the accident occurred?

"A. He said that he had parked the truck in the highway in front

of this residence of his sister-in-law and was up in the yard talking to them, and he saw the headlights of a car coming, the beam of the lights coming over the hill crest, and he went for his truck, and the collision happened.

"Q. Did he say he ran for his truck?

"A. That's what he said in the City Court. Now, this didn't come out at the scene of the accident that night.

"Q. Now, did he say whether or not he had reached his truck by the time the collision occurred?

"A. He said he had reached his truck, yes sir; he was in his truck.

"Q. Did he say whether or not he was moving or not at that time?

"A. He said that he saw the headlights of the truck * * * of a car coming over the hill crest, and he made a run for his truck and got in his truck, but the truck had never got to move."

And the witness continued: "I talked to Alonzo Adams at the scene of the wreck. He said he was traveling west on Forbes Road going to what is known on South * * * 321 South, as Ralph's barn, and he saw this one light on this truck. He said he saw the light, and a car was meeting him. He said * * * when the car met him, he struck the truck trying to miss both of them * * * I measured a little over 300 feet from the top of the hill to the point of impact. I found the car of Alonzo Adams at the foot of the hill, some 390 feet from the truck. The only indication I saw of any black marks or brakes being applied is when the car swerved to the left and swerved back to the right, in a circular motion to the right, and there was a skid mark there. Where it went off the left shoulder and it came back up on the highway, there was a black mark there, but no brake marks. I could not see any brake marks at all; it looked like a skid mark. Alonzo Adams said he wasn't even under the steering wheel. He said * * * he didn't apply any brakes at all; that his car went down there by itself. He said the impact throwed him around there, and he didn't know exactly what happened * * * The truck was not where the driveway was, but was considerably south or west of the driveway. I found the truck in a ditch, and traveling west it would have been in the righthand ditch. The rear light was burning when I came up to the accident, and I believe that the front lights were still left on too. * * * The road is straight where the accident happened * * * ."

Plaintiff also introduced as a witness the defendant Alonzo Adams, who testified substantially as follows: "* * * On the night of August 10, 1956, I was driving my automobile on the Forbes Road * * * When we topped that hill prior to the wreck, I seen a light * * * on the truck, but I thought it was going around the curve, which * * * is about 600 feet on down below back down to your right. There was a

car meeting me, and the car wouldn't dim its lights. At the time the car passed that's when I hit the truck. When I first saw the truck I was hitting it then, and the truck was standing still. I was about 600 to 700 feet from the truck when I first saw the small light * * * I was going between 25 and 30 miles an hour immediately prior to the accident."

And in response to question as to what he heard defendant Dulin, Jr., say at City Court, the witness stated: "Well, I heard him say he was standing in the yard and he heard a car coming and he ran to the truck and he said he wasn't for sure whether he pulled off or not."

Then on cross-examination the witness Alonzo Adams continued:

" * * * I have not filed any answer denying the allegations of the complaint * * * When I first saw the light on the back of the truck * * * when I topped the hill. I did not see the light all the time while I was traveling toward the truck. I took my eyes off the light as the car just killed that little red light * * * I was blinded by the lights of the approaching car when it got close enough to me * * * I noticed at the time the car passed I was on the truck. I was blinded before I was on the truck because I kept trying to get the man to dim his lights. I did not decrease my speed, although I had seen the light of the truck some 600 to 700 feet away. When I saw the light on the truck the car was coming then * * * I was first blinded just close as the car come to me. His lights were hitting my eyes. I don't know how far I traveled while I was blinded. I traveled approximately 35 to 40 feet while blinded, in my opinion. I was something like 40 or 50 feet from the truck when I was first blinded * * * I knew there was a vehicle out in the road. At least I thought it was. The curve that I am talking about is about a mile down the hill from where the truck actually was on that night. It is probably not that far. * * * There were conditions placed on my license restricting me to drive with glasses on. On that night I was driving without glasses * * * ."

And the witness continued: " * * * The lights on the car were in good shape that night * * * I saw the truck about 600 or 700 feet away * * * I did not apply my brakes and did not have time to attempt to apply them. * * * I recall making a statement to State Highway Patrolman Preslar about the accident * * * I told him I saw the light of the truck * * * I could see a good distance with my headlights on that night— probably 800 to 900 feet straight ahead. I could see that far clearly. Visibility was good that night."

Then in response to this question "How do you account for the fact then with what you told me that you didn't see that truck until you were within thirty feet from it?", the witness replied: "I said I didn't know whether it was a car or truck, but I saw the light."

Then defendants Dulin, reserving exception to the denial of their motion for judgment as of nonsuit, offered testimony of several witnesses including Newton Blair Dulin, Jr., who testified in pertinent part as follows: " * * * I left my truck parked in the road with motor running and lights on it * * * When I went back to the truck I knew there was something coming for I could see the gleam of the headlights shining on the sky * * * I got in the truck, let the brake off, and started on. I had a rear view mirror on my truck and I could see the car coming up on me in the mirror. After I got started just a little ways, I met a car * * * and just as the car got by me the car of Alonzo Adams hit me in the rear. At the time of the accident I had * * * one big red light on the back * * * burning * * * my left rear corner and the right side of the car were involved in the accident. I was in motion at the time.

"Where I stopped my vehicle there were only very small shoulders. I say a couple of feet. I maybe had one tire off on the shoulder."

And the witness, in response to this question, "I will ask you now if you had the lights required by the State of North Carolina on the truck?", responded: "I don't think I did. The patrolman said I didn't. I took his word for it * * * ."

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

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant, Alonzo Adams, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff's intestate injured and killed by the negligence of Newton Blair Dulin, Jr., and Newton Blair Dulin, Sr., as alleged in the complaint? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover? Answer: $10,000.00."

And from judgment in accordance therewith against defendants jointly and severally, defendants Dulin except and appeal to Supreme Court and assign error.

Oscar F. Mason, Jr., Verne E. Shive for plaintiff, appellee.
Garland & Garland for defendants Dulin, appellants.

WINBORNE, C. J. Of the twenty-seven assignments of error shown in the record on this appeal, defendants Dulin, appellants, bring forward in their brief fourteen,— the others, in accordance with provisions of Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 544 at page 562, are taken as abandoned by appellants.

The first assignment of error presented by appellants is based upon

exception to the action of the trial judge in declining to sustain their demurrer *ore tenus.*

The record shows the ground assigned for the demurrer is that the complaint does not state a cause of action against them, the defendants Dulin, in that it appears from the face of the complaint that the sole, proximate cause of the motor vehicle collision in question was the negligence of the driver of the automobile in which plaintiff's intestate was riding, and that even if defendants Dulin were guilty of any act of negligence, the same was insulated and rendered inoperative by the negligence of the defendant Alonzo Adams, driver of the car in which plaintiff's intestate was riding.

In this connection, "The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of the facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted."

But the principle does not extend to admission of conclusions or inferences of law. *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. See also *Buchanan v. Smawley,* 246 N.C. 592, 99 S.E. 2d 787, and cases cited.

Indeed it is provided by statute, G.S. 1-151, that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." And the decision of this Court interpreting and applying the provisions of this statute require that every reasonable intendment must be in favor of the pleader. The pleading must be fatally defective before it will be rejected as insufficient. See *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369, and cases there cited; also *Lewis v. Lee,* 246 N.C. 68, 97 S.E. 2d 469, and *Buchanan v. Smawley, supra.*

Applying these principles to the facts alleged in the complaint, admitted for the purpose, to be true, it may not be held that the allegations are so fatally defective as not to allege concurring negligence. Compare *Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894. Hence the ruling of the trial court in this respect was proper. Decisions cited and relied upon by defendants Dulin have been duly considered and found readily distinguishable in factual situations.

Appellants also assign as error the denial of their motions for judgment as of nonsuit at the close of all the evidence. In this respect the evidence offered is to be taken in the light most favorable to plaintiff, giving to him the benefit of reasonable inferences of fact. When so taken the evidence offered upon the trial in Superior Court is of sufficient probative value to take the case to the jury and to support

the verdict rendered on which judgment from which appeal is taken is based.

Other assignments of error, properly presented, have been given due consideration, and error for which a new trial should be granted is not made to appear.

No error.

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

STATE v. FLOYD GRAVES AND DEFOREST SNIPES.

(Filed 14 January, 1960.)

1. Criminal Law § 173—

The Post Conviction Hearing Act may not be used as a substitute for appeal but its purpose is to provide procedure under which a petitioner may initiate an inquiry as to whether there was a substantial denial of his constitutional rights in the original criminal action in which he was convicted and whether a different result would likely ensue had he not been denied such rights, the burden of showing the affirmative of both these propositions being upon petitioner.

2. Same—

The findings of fact of the trial court in a post conviction hearing are binding upon petitioner if they are supported by evidence.

3. Same—

Upon review by *certiorari* of the judgment entered preceedings upon the Post Conviction Hearing Act, the Supreme Court is not limited to the facts found by the trial judge but may consider as well undisputed facts disclosed by the evidence.

4. Constitutional Law § 31—

A defendant's right of confrontation includes the right to a fair opportunity to confront the accusers and witnesses with other testimony, which embraces the right to an opportunity to have his witnesses in court, to examine them in his behalf, and to prepare and present his defense, which right of confrontation must be afforded not only in form but in substance. Constitution of N. C., Art. I, sec. 11.

5. Indictment and Warrant § 1: Criminal Law § 173—

While a preliminary hearing is not an essential prerequisite to a finding of an indictment and while the failure to observe the provisions of G.S. 15-46 and G.S. 15-47 in regard to preliminary hearings, allowance of bail, informing the person arrested of the exact charge against him and permitting him to communicate with counsel and friends, may not under all circumstances result in a denial of constitutional rights, the failure to follow the provisions of the statutes must be given great weight in a hearing under the Post Conviction Hearing Act.

6. Constitutional Law § 31: Criminal Law § 173— Findings and uncontroverted facts held to disclose a deprivation of petitioners' constitutional right of confrontation.

Findings and the uncontroverted evidence in a hearing under the Post Conviction Hearing Act disclosing that petitioners were arrested on a Sunday, that they were taken into custody for investigation, that no warrants were issued, no preliminary hearing held and no bail fixed, that the wife of one of them was refused the right to see him on Monday and was told to return at visiting hours on Wednesday, that petitioners had requested opportunity to use the telephone but no such opportunity had been afforded, that they were not informed of the exact nature of the crime against them or as to the time of trial until they were brought into court on the following Tuesday and the indictment read to them, and that the circumstances were such that petitioners and their families were justified in thinking up to that time that the matter was under preliminary investigation, *is held* to disclose a denial of petitioners' constitutional right of confrontation and a fair opportunity to prepare and present their defenses, since up until the time of trial petitioners and their families might well have thought that there was no urgency in obtaining witnesses in their behalf and employing counsel, and order dismissing the petition in the post conviction hearing must be reversed and the judgments in the original trial vacated.

CERTIORARI to review order of *McKinnon, J.*, June 1959 Criminal Term, of ALAMANCE.

Petitioners, DeForest Snipes and Floyd Graves, were jointly indicted and tried on charge of robbery with firearms (G.S. 14-87) at the December 1958 term of Alamance County, Hobgood, J., presiding. They entered pleas of not guilty. The prosecuting witness, R. A. McCauley, was the only witness for the State. The accused were not represented by counsel and offered no evidence. They were convicted and sentenced by the court, each of them, to "be confined to State Prison for not less than 15 years, nor more than 25 years." There was no appeal.

In May 1959 Snipes and Graves filed petitions for hearing under the North Carolina Post Conviction Hearing Act, G.S. 15-217, *et seq.*, for review of the constitutionality of their criminal trial.

The petitions alleged in substance the following: Petitioners were arrested and imprisoned without being afforded the right and opportunity to advise with and be represented by counsel. They were placed in separate cells, could not confer with each other and were not permitted to communicate with friends and relatives. No warrants were issued, petitioners were not given a preliminary hearing, no bail was set and no opportunity given to make bail. When petitioners were taken to the courthouse for trial they had no notice they were to be tried at that time and supposed they were to be given preliminary

hearing. They were not advised of the charges against them until the trial began. There were witnesses who would have given evidence establishing an alibi for both of them, but no opportunity was afforded for summonsing them. The trial was held in great haste. Petitioners were arrested Sunday night, indicted the following Tuesday morning, tried Tuesday afternoon and sentenced Wednesday morning. The court was advised by them that they had not been given opportunity to communicate with relatives and friends or employ counsel, but the trial proceeded notwithstanding. Petitioners are innocent and were at their respective homes when the alleged crime was committed and they request a new trial.

The Solicitor filed answer and denied the material allegations of the petition.

The hearing upon the petitions was had before McKinnon, J., at the June 1959 term. Graves was represented by counsel of his own choice and at his own expense. Prior to the hearing the court appointed counsel for Snipes. Evidence was offered by petitioners and the State. The Judge found facts and made his conclusions of law.

The findings of fact are paraphrased as follows: (1) Petitioners were arrested at 8:00 o'clock p.m. Sunday, 30 November 1958, taken to the home of prosecuting witness, identified by him as the persons who robbed him at 6:00 o'clock p. m. on the same day, and placed immediately thereafter in jail. (2) Petitioners, both before and after being placed in jail, were informed by the arresting officer of the charge against them but no warrants were issued; when they asked concerning bail they were told by the arresting officer that it would probably be set at $5000.00 and they thereafter made no request to be allowed bail. (3) Petitioners were placed in separate cells, about 18 feet apart, and could not confer privately but made no request to be permitted to do so; at 11:00 o'clock a. m. on Tuesday, 2 December 1958, they were placed in the same cell for the purpose of taking baths and remained together until taken to trial that afternoon. (4) They were not deliberately separated to prevent them from conferring but because of lack of accommodations at that time. (5) There is no evidence that they had a common defense or reason to confer with each other. (6) Petitioners were arrested in the presence of their families and relatives who knew the charges against them; Graves was permitted to make a telephone call Tuesday afternoon. (7) Petitioners did not request the arresting officer, jailer or any other officer for permission to communicate by telephone or otherwise with relatives, friends or attorneys, though they had opportunity to make such request; they did make such requests of a "trusty" or "run boy" who worked in the jail but no permission was granted (8) Neither peti-

tioner asked that witnesses be subpoenaed or contacted. (9) No officer inquired of petitioners if they desired to use the telephone or have witnesses subpoenaed. (10) There was no deliberate denial of the right to communicate with friends and relatives or have witnesses subpoenaed. (11) The grand jury returned the bill of indictment on the first or second of December; the trial was held on the afternoon of December 2d and charges were then read to petitioners and each entered a plea of not guilty; they did not request counsel, continuance, or witnesses; they did not testify; the trial was concluded December 3rd. (12) Snipes and Graves are 25 and 35 years of age respectively; each of them reached the seventh grade in school; each of them had been in jail a number of times before and Snipes had previously been charged with felonies; both of them "were familiar with procedures of arrest and jail and of the courts." (13) "That petitioners deny their guilt of the offenses charged and allege that they have witnesses whose testimony would tend to show their innocence; that Floyd Graves is now represented by counsel employed by his relatives and alleges that he could have employed counsel at the time of trial; that DeForest Snipes is not now able to employ counsel and counsel for the purpose of his petition has been appointed by the Court."

The court made the following conclusions of law:

"1. That neither petitioner has shown a substantial denial of any rights under the Constitution of the United States or of the State of North Carolina in the proceeding resulting in his conviction.

"2. That each petitioner is lawfully confined to the State's prison pursuant to the final judgment of the Superior Court for Alamance County rendered at December 1958 Criminal Term."

The court dismissed the petition and remanded petitioners to custody.

Petitioners applied to this Court for writ of *certiorari* and the writ was duly issued.

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

W. G. Pearson, II, and George L. Bumpass for Petitioner Floyd Graves.

Spencer B. Ennis for Petitioner DeForest Snipes.

MOORE, J. Petitioners maintain that in their arrest, imprisonment and trial at the December 1958 term of Alamance County they were denied certain fundamental rights secured to them by Article I, sections 11 and 17 of the Constitution of North Carolina and as a con-

sequence they have been deprived of their liberties without due process of law.

Petitioners invoked the North Carolina Post Conviction Hearing Act, Chapter 15, Article 22, General Statutes of North Carolina, sections 15-217 *et seq.* This Act is not a substitute for appeal. Accused had unqualified right to appeal. G.S. 15-180. The Act affords an opportunity to inquire into the constitutional integrity of a petitioner's conviction. *State v. Cruse,* 238 N.C. 53, 58, 76 S.E. 2d 320. The inquiry is whether there was a *substantial denial* of the constitutional rights of petitioners in the original criminal action in which they were convicted and whether a different result would likely have ensued had petitioners not been denied such rights. *State v. Hackney,* 240 N.C. 230, 237, 81 S.E. 2d 778; *Miller v. State,* 237 N.C. 29, 51, 74 S.E. 2d 513. The petitioners have the burden of showing the affirmative of these propositions. *State v. Hackney, supra,* at page 237.

The findings of fact of the Judge in a Post Conviction hearing are binding upon the petitioner if they are supported by evidence. *Miller v. State, supra,* at page 43. In the instant case the facts as found by the Judge are supported by evidence. But there are certain significant undisputed facts, not included in the Judge's findings, which we take to be true and consider in connection with the facts found. *State v. Hackney, supra,* at page 234.

The arresting officer testified that he informed Snipes' family at the time of the arrest that he was investigating a robbery and told Graves' wife, "I am taking him off and if he wasn't charged with anything I would bring him back." The officer also testified that as soon as petitioners were identified by the prosecuting witness they were placed in jail, no warrant was issued and bail was not fixed, that petitioners inquired about bail and he told them it would be about $5000.00 and thereafter neither of them asked that bail be fixed. He testified further that he advised petitioners of the charges against them and booked them for "robbery and assault." On Monday he interrogated Graves with the purpose of implicating a third party. He also stated that prosecuting witness, at his request, came to the jail Tuesday morning and looked at petitioners in a line-up.

R. A. McCauley, the prosecuting witness, testified that he went to the jail Tuesday morning about 10:00 o'clock and saw petitioners in a line-up. He stated: "I just wanted to see them again. I asked when the trial would be and they said they didn't know. . . . I didn't know when the trial would be." He further stated that petitioners were in separate cells when he went to the jail and that he testified

before the grand jury about 11:00 or 11:30 after he had been to the jail.

Lou Pearl Graves, wife of petitioner Graves, testified that after her husband did not return home Sunday night she went to the jail Monday morning and inquired of him and asked to be permitted to see him, that she talked to Mr. Hensley, the jailer, that Mr. Hensley told her that Graves was charged with "attempted highway robbery and assault with a deadly weapon" and that his bond would probably be $10,000.00, that Wednesday was visiting day and she could see him on that day between 2:00 and 4:00 p. m. She stated that she phoned the jail on Tuesday and Wednesday and on Wednesday was told that her husband had already been tried. She testified she could have arranged bond if it had been fixed and could have employed an attorney but did not employ a lawyer immediately for she thought "they would sooner or later give him bond." Mr. Hensley, when asked about her visit to the jail, stated: "I don't recall it." He was then asked: "But you don't deny it?" He answered: "No." He stated that the visiting hours at that time were from 2:00 to 4:00 o'clock on Sundays and Wednesdays, but persons having business with prisoners could see them on other days.

Graves' sister-in-law worked for Sheriff Cole. The Sheriff testified that he did not tell her Graves was in jail until Tuesday when she made inquiry, stating she had heard that he was in jail the night before.

Both petitioners testified that when they were taken from the jail Tuesday afternoon and carried to the courtroom they thought they were to be given a preliminary hearing until the Solicitor read the bill of indictment and asked them to plead. There is no evidence that anyone told the petitioners or any members of their families before the trial when the trial was to be or that there would be a trial at the term then in progress. There is nothing to indicate that the officers or the prosecuting witness knew when the trial was to be.

While the jailer was testifying the following exchange took place between him and the Solicitor:

"Q. I will ask you if it isn't customary every term of court to try every person who is in jail if possible?

"A. Yes.

"Q. And you are worrying me from Monday morning until Friday to get these people out of jail and that is what I do?

"A. Yes.

"Q. That has been the practice ever since you have been here and I have been here?

"A. Yes, that has been the practice, and it has been appreciated."

Snipes testified: "I told the Judge I didn't know what I was being tried for, no warrant was read to me, and he said they didn't have to serve no warrant, that they were trying me under a bill of indictment." At the hearing before Judge McKinnon each of the petitioners named witnesses who would have testified in their behalf and given evidence tending to prove alibis. Snipes testified that he had wanted to call his boss to get bail for him. Graves testified that he told the officer he was at home when the alleged crime was committed. He also stated that at the trial "I told them I did not have a chance to notify, either get an attorney or notify my people, or nothing."

Neither of the petitioners was represented by counsel at the trial, none of their relatives were present and they had no witnesses.

A careful consideration of the foregoing undisputed facts in connection with the facts found by the court leads to several inescapable conclusions. The families and relatives of petitioners at the time of the arrests were fully justified in concluding that petitioners had been taken into custody for investigation. And it certainly is not unusual for an investigation to last two days. When Graves' wife was refused the right to see him on Monday and was told to return at visiting hours on Wednesday, she had every reason to believe he would be there at that time and to delay action in his behalf until she had opportunity to talk to him. There was every reason for petitioners to suppose up to the moment of their trial that the investigation had not been completed. Graves was interrogated on Monday with reference to the participation of a third party in the alleged offense. He and Snipes were placed in a line-up on Tuesday morning to be again viewed by the prosecuting witness. The prosecuting witness himself, even then, about three and one-half hours before the trial, did not know when the trial would be. No one ever advised the petitioners they were to be tried Tuesday afternoon. No warrants had been issued, no preliminary hearing had been held, no bail fixed. They had requested opportunity to use the telephone, but no such opportunity had been afforded. They may well have supposed that they would not be permitted to communicate with friends and relatives until the investigation had been completed. Graves knew, from his interrogation by the arresting officer, that the officer was attempting to involve others. That petitioners were taken unawares when hastily placed upon trial Tuesday afternoon cannot be doubted. Had they been notified of the impending trial they, at least, would have known the urgency of securing attendance of witnesses and employing counsel. But in view of the circumstances, their failure to act in this respect cannot be considered against them.

They had every reason to suppose there was ample time to prepare for trial.

It is the law in this State that "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law." G.S. 15-46. And G.S. 15-47 provides that "Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied. Provided that in no event shall the prisoner be kept in custody for a longer period than twelve hours without a warrant. Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court."

While there are circumstances under which a failure to observe the foregoing provisions may not affect constitutional rights, yet where an offense as serious as robbery with firearms is charged, such failure must be given great weight in a hearing under the Post Conviction Hearing Act. It is true that a preliminary hearing is not an essential prerequisite to the finding of an indictment and our Constitution does not require it. But "in all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront accusers and witnesses with other testimony . . ." North Carolina Constitution, Article I, section 11. Of this right of confrontation he cannot lawfully be deprived, and this includes the right of a fair opportunity to confront the accusers and witnesses with other testimony. "The word *confront* secures to the accused the right to have his witnesses in court, and to examine them in his behalf. . . . It further secures to the accused a fair opportunity to prepare and present his defense, which right must be afforded him not only in form but in substance." *State v. Hackey, supra,* at page 235. "Denial of an opportunity to exercise a right is a denial of the right . . . Due process of law implies the right and opportunity to be heard and to prepare

for the hearing." Failure to complain at the time of arraignment in court is not a waiver of these rights. *State v. Wheeler,* 249 N.C. 187, 193, 105 S.E. 2d 615.

Under the circumstances in the instant case we hold that petitioners were denied their constitutional right of confrontation, the fair opportunity to prepare and present their defense. It is observed that these petitioners were tried on the second day of the term. It could have inconvenienced the court very little to have inquired as to their readiness for trial at the time of arraignment and set the case for a time later in the term. There is considerable doubt that petitioners were properly advised of the charges against them prior to the trial. There is considerable difference between "robbery and assault" or "attempted highway robbery and assault with a deadly weapon" and robbery with firearms. The failure of petitioners to testify at the trial is understandable. Each of them had criminal records. They undoubtedly thought it best to remain off the witness stand and thereby avoid the effect of having their records considered against them by the jury. This emphasizes all the more the importance to them of having the benefit of the testimony of their witnesses.

We do not suggest that an accused may be less than diligent in his own behalf in preparing for trial. He may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. But the officers and court have a duty to see that he has opportunity for so doing. Where, as here, defendants have no notice that trial is imminent and all the circumstances indicate that the case has not progressed beyond the investigation stage and they and their families, relatives and friends have been given no oportunity to communicate and confer, and defendants have had no opportunity to confer privately with each other as to what each may be able to contribute to the defense, until a short time before the unexpected trial, and available witnesses have not been subpoenaed, trial under these circumstances is a deprivation of due process of law.

There has been no suggestion that the law enforcement officers, the court or court officials have acted in bad faith or have at any time had intent to deprive petitioners of their constitutional rights. Indeed, the distinguished and able Judge and Solicitor who officiated at the trial are well known for their zeal for justice and fair administration of the law and they are to be commended for strict attention to duty and prompt disposition of pending causes. But a deprivation of fundamental constitutional rights is none the less

serious that it occurred through inadvertence rather than wrongful purpose.

There is no rule of law that an accused may not be tried at the same term the bill of indictment is found. Capital cases are, under certain circumstances, an exception. G.S. 15-4.1. *State v. Hackey, supra,* at page 235. But the more speedily a case is brought to trial, after the offense is committed or arrest is made, the greater the duty of the courts to determine whether or not the accused has had a fair opportunity to prepare for trial.

There may well be a different result upon a retrial.

The order in the Post Conviction hearing is reversed, the judgments in the original trial are vacated and a new trial is ordered.

New trial.

ALBERT BULLOCK AND GEORGE BULLOCK; AND CHARLES WILLIAM BULLOCK, GEORGIA ANN BULLOCK AND LINDA MARIE BULLOCK, MINORS, BY THEIR NEXT FRIEND, DELPHIA B. BULLOCK v. LILA FAYE BULLOCK AND MARTHA JOY BULLOCK.

(Filed 14 January, 1960.)

1. Wills § 34b—

As a general rule, in the absence of language showing an intent to the contrary, a child adopted to the knowledge of the testator in ample time for testator to have changed his will so as to exclude such child if he had so desired, will be included in the word "children" when used to designate a class which is to take under the will.

2. Same—

Where the language of the will expresses the intent of the testator that his land should go to his named children for life and then to testator's grandchildren "from my said sons," the adopted children of a child of testator does not take in the absence of an expression of intent to the contrary, since an adopted child of a child of testator is not a grandchild of testator. Further, in this case, it did not appear that testator knew of the adoptions, or if he did have knowledge thereof that his mental and physical capacities were such that he could have changed his will after the adoptions, had he so desired.

3. Wills § 31—

The intent of testator is ordinarily to be ascertained from an examination of his will from its four corners but, when necessary in order to ascertain such intent, the court may consider the will in the light of testator's knowledge of certain facts and circumstances existing at the time of or after execution of the will.

BULLOCK *v.* BULLOCK.

APPEAL by plaintiffs from *Hobgood, J.*, May Civil Term, 1959, of ROBESON.

This is an action instituted pursuant to the provisions of our Declaratory Judgment Act (G.S. 1-253 through 1-267) for the purpose of obtaining from the court a construction of certain provisions of the last will and testament of W. B. Bullock, deceased.

The facts necessary to an understanding of the questions presented for determination are as follows:

1. The testator executed his will on 24 October 1936. He died on 25 February 1957, at the age of 93, leaving said last will and testament which has been duly probated and recorded in the office of the Clerk of the Superior Court of Robeson County.

2. Letters testamentary were duly issued to the executrix and the administration of said estate has been duly made and final accounting filed; that the personal property belonging to said estate was sufficient to pay all debts and charges of the administration.

3. Item 3 of said will, which is to be construed, provides as follows: "I give, devise and bequeath to my four sons, namely: Albert Bullock, Clifford Bullock, Ray Bullock and George Bullock, during the term of their natural lives to be equally divided among them all of my land and farm in Fairmont Township, adjoining the lands of Braswell Estate, Spurgeon Floyd, C. A. Inman and others, containing 106 acres, more or less. To have and to hold, the same unto them, during the term of their natural lives and after their death to their children in fee simple, but in case either of my sons should die without leaving children capable of inheriting said lands, then and in that event the part of said land that would go to such an (sic) one, or more of them, shall be and belong to the children of the one or those who remain; it being my desire and intention to so convey this property that my said sons shall have the full benefit of their own several use during their natural lifetime, and, after their death, that my grandchildren shall have the use of same during their life, that is, my grandchildren from my said sons. I am making this provision in this item of my will, not that I have any suspicion of either one of my said sons not being able to look after his interest, but the property being mine, I desire that it shall go and be used according to my will and pleasure."

4. Lila Bullock was duly appointed guardian *ad litem* for Lila Faye Bullock and Martha Joy Bullock, minors, and filed an answer to the complaint on their behalf.

5. That said testator left surviving him at least eight children, including the four sons named in Item 3 of the will; also one other son not mentioned in said will. That several months following the death

of testator, Ray Bullock died without leaving any children; several months later Clifford Bullock died without leaving any natural children; that the said Clifford Bullock left two adopted children, namely, Lila Faye Bullock, now age 12, and Martha Joy Bullock, now age 10. That the adoption proceeding for Lila Faye Bullock was instituted on 14 July 1948 and final order of adoption was duly entered on 3 December 1949; that the adoption proceeding for Martha Joy Bullock was instituted on 18 August 1949 and final order of adoption was entered on 3 October 1950.

6. That plaintiff Albert Bullock does not have any children. That plaintiff George Bullock is the father of three children, namely, Charles William Bullock, Georgia Ann Bullock, and Linda Marie Bullock.

Upon the foregoing, the court adjudged and decreed:

"(a) That defendants Lila Faye Bullock and Martha Joy Bullock, as adopted children of Clifford Bullock, deceased, inherit under the last will and testament of W. B. Bullock to the same extent as if they were natural children of the said Clifford Bullock.

"(b) That under Item 3 of said last will and testament, Albert Bullock, Clifford Bullock, Ray Bullock and George Bullock each became the owner of a life estate of a one-fourth undivided interest in that part of the 106 acres referred to in said item of said last will and testament and still owned by W. B. Bullock at the time of his death.

"(c) That upon the death of Ray Bullock, Lila Faye Bullock, Martha Joy Bullock, Charles William Bullock, Georgia Ann Bullock and Linda Mae Bullock became fee simple owners as tenants in common, share and share alike, in a one-fourth undivided interest in said lands.

"(d) That upon the death of Clifford Bullock, Lila Faye Bullock and Martha Joy Bullock became the fee simple owners of a one-fourth undivided interest in said lands.

"(e) That Charles William Bullock, Georgia Ann Bullock, and Linda Marie Bullock, as children of George Bullock, are the fee simple owners of a one-fourth undivided interest in said lands, subject to the life estate of the said George Bullock and subject to further children being born to the said George Bullock.

"(f) That the ownership of the fee in remainder in the one-fourth undivided interest in which plaintiff Albert Bullock owns a life estate must be determined as of the date of his death."

From the conclusions of law set forth in paragraphs (a), (c) and (d), and included in the judgment entered below, the plaintiffs appealed and assigned such conclusions as error.

Britt, Campbell & Britt for plaintiffs.
F. L. Adams and Hackett & Weinstein for defendants.

DENNY, J. The primary question to be determined on this appeal is whether or not it was the intent of the testator to include any child or children who might be adopted by any one or more of his sons named in Item 3 of his last will and testament, as ultimate taker or takers of a fee simple estate thereunder.

If the testator had devised his 106-acre farm to his four sons named in Item 3 of his last will and testament, during the term of their natural lives, to be equally divided among them, and after their death to their children in fee simple, and if any one or more of them died without children then to the children of the other sons named in his will, there would be no question about these adopted children taking under such provisions. *Smyth v. McKissick*, 222 N.C. 644, 24 S.E. 2d 621; *Bradford v. Johnson*, 237 N.C. 572, 75 S.E. 2d 632.

However, the testator went further, and in a sense interpreted what he meant by the children of his sons. He devised the 106-acre farm to his four sons named in Item 3 of his will "during the term of their natural lives, to be equally divided among them." Then he continued by adding, "To have and to hold, the same unto them, during the term of their natural lives and after their death to their children in fee simple, but in case either of my sons should die without leaving children capable of inheriting said lands, then in that event the part of said land that would go to such a one, or more than one, shall be and belong to the children of the one or those who remain"; the testator further revealed his intent by saying, "it being my desire and intention to so convey (devise) this property that my said sons shall have the full benefit of their own several use during their natural lifetime, and, after their death, that *my* grandchildren shall have the use of same during their life, that is, *my* grandchildren from *my* said sons." (Emphasis added.)

We think by the use of the phrase, "but in case either of my sons should die without leaving children capable of inheriting said lands," the testator intended to restrict the fee simple takers under Item 3 of his will to the legitimate issue of his said four sons; and an adopted child is not the issue of its adoptive parents. *Bradford v. Johnson, supra.*

It seems to be the general rule that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child, if he so desired, such adopted child

will be included in the word "children" when used to designate a class which is to take under the will. *Trust Co. v. Green,* 239 N.C. 612, 80 S.E. 2d 771; *Bradford v. Johnson, supra;* and cited cases.

It seems to be equally true that when a testator makes a devise to the children of his children in fee simple, subject to the life estates of his children, and then states it to be his desire and intention that after the death of his children, the life tenants, his grandchildren are to take the property, an adopted child or children of a child who was devised a life estate will not be construed to be included as a grandchild or grandchildren. In other words, the grandchildren of a testator, nothing else appearing, does not include an adopted child of a son or daughter of the testator. *Fidelity Union Trust Co. v. Hall,* 125 N.J. Eq. 419, 6 A 2d 124; *Dulfon v. Keasbey,* 111 N.J. Eq. 223, 162 A 102; *In re Olmsted's Will,* 277 App. Div. 1092, 101 N.Y. Supp. 2d 152; *In re Loghry's Will* (*Surr.* 1952), 113 N.Y. Supp. 2d 301; *In re Conant's Estate,* 144 Misc. 743, 259 N.Y. Supp. 885; *Comer v. Comer,* 195 Ga. 79, 23 S.E. 2d 420; 95 C.J.S., Wills, § 663, page 973. Cf. *Barton v. Campbell,* 245 N.C. 395, 95 S.E. 2d 914.

It is said in *Fidelity Union Trust Co. v. Hall, supra,* "The will * * * was executed prior to the adoption, and by a stranger to the adoption. Under these circumstances, an adopted child of a child of the testator * * * does not take under a gift to 'grandchildren' of the testator * * * unless there be other evidence in the instrument or the surrounding circumstances sufficient to show an intent by the testator that he should take."

In *Dulfon v. Keasbey, supra,* where the testator had devised property to his "grandchildren," the Court said: " * * * he meant his sons' children begot, as in Genesis; those of his loins, the stock of which he was the ancestor; and not children artificially created by law."

In *In re Conant's Estate, supra,* the New York Court said: "There is no such person as a grandchild by adoption."

In the case of *Comer v. Comer, supra,* the child involved was adopted after the death of the testator by a daughter of the testator. The plaintiff in the case was the adopted child; by his guardian he was seeking to secure a share in the testator's estate under a devise to the "grandchildren" of the testator. The Court said: " * * * no act of the testator's daughter in adopting a child, whether before or after his death, could have created any relationship between such child and the testator, so as to make that child his own grandchild, upon whom he might naturally desire to bestow a bounty * * * "

The intent of a testator is ordinarily to be ascertained from an examination of his will from its four corners. Even so, it is permissible,

when necessary in order to ascertain such intent, for the court to consider the will in the light of the testator's knowledge of certain facts and circumstances existing at the time of or after the execution of the will. *Bradford v. Johnson, supra; Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151; *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12; *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; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

The testator herein executed his will in 1936, and the defendants, the adopted children of Clifford Bullock, were not adopted until some six or eight years prior to the death of the testator on 25 February 1957. Moreover, there is nothing in the record to indicate whether or not the testator knew of these adoptions, or whether or not his mental and physical capacities were such that he would have been capable of changing his will after these defendants were adopted, if he had so desired.

In our opinion, the defendants herein took nothing under the terms and provisions of Item 3 of the last will and testament of W. B. Bullock, deceased, and we so hold. Therefore, (1) upon the death of Ray Bullock, Charles William Bullock, Georgia Ann Bullock and Linda Marie Bullock became fee simple owners, as tenants in common, share and share alike, in a one-fourth undivided interest in the lands devised in Item 3 of said will. (2) That upon the death of Clifford Bullock, Charles William Bullock, Georgia Ann Bullock and Linda Marie Bullock became the fee simple owners, as tenants in common, share and share alike, in an additional one-fourth undivided interest in the aforesaid lands. (3) That Charles William Bullock, Georgia Ann Bullock and Linda Marie Bullock, as children of George Bullock, are the fee simple owners of a one-fourth undivided interest in said lands, subject to the life estate of their father, George Bullock, and subject to further children being born to said George Bullock.

The judgment entered below is hereby modified to the extent pointed out herein, otherwise it is affirmed.

Modified and affirmed.

C. ROBERT ADAMS v. THE GREAT ATLANTIC & PACIFIC TEA CO.

(Filed 14 January, 1960.)

1. Food § 2—

A retail merchant who sells food in a sealed package to a customer impliedly warrants that the food is fit for human consumption.

2. Same—

Even though there is no direct evidence of the composition of the cereal purchased by plaintiff, which he alleged breached the seller's implied warranty of fitness for human consumption, plaintiff's introduction in evidence of the container designating the product as corn flakes and his testimony that he and his family had eaten corn flakes from this package, is sufficient to show that the product was manufactured from corn.

3. Same—

In an action for breach of implied warranty by the retailer that the corn flakes sold in a sealed container were fit for human consumption, nonsuit is properly entered upon plaintiff's evidence disclosing that he was injured while eating the cereal by breaking a tooth when he bit down on a part of a grain of corn which had crystalized into a state as hard as quartz, since such particle is not a foreign substance but is a natural part of the original food not removed in processing, and its presence might have been anticipated by the consumer, there being no evidence that the corn flakes themselves were decayed or spoiled or unwholesome.

APPEAL by plaintiff from *Sharp, S. J.*, 31 August 1959 Civil Term, of GUILFORD (Greensboro Division).

Action for damages for the loss of a tooth allegedly caused by the breach of an implied warranty that a box of Kellogg's Corn Flakes in the original sealed container sold by defendant to plaintiff was wholesome and fit for human consumption.

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

Rollins and Rollins for plaintiff, appellant.

McLendon, Brim, Holderness & Brooks by L. P. McLendon, Jr., and C. T. Leonard, Jr., for defendant, appellee.

PARKER, J. On 10 November 1958, plaintiff bought from one of defendant's stores a box of Kellogg's Corn Flakes in a sealed package. On the morning of 14 November 1958, while eating in his home a bowl of corn flakes taken from this package, he bit down on something very hard, breaking off part of an eyetooth. The breaking of the tooth exposed a nerve, causing him considerable pain. The same morning he had the rest of the tooth extracted.

When he bit on this object, he spit it out, examined it, and found

that it was a little brown, hard, crystal-like object. A chemical analysis of this object showed that it was part of a grain of corn that had partially been crystalized. It had been reduced from its normal state of a grain of corn to a state as hard as a piece of quartz. He had never seen any particle of this size in corn flakes before.

Plaintiff testified on cross-examination: "The balance of the box of corn flakes remained in my home after the accident and it was consumed by my family. . . My sole contention is that this particle of corn is a deleterious or unwholesome substance that was contained in the corn flakes. . . . I and my family eat hamburger meat, fish and chicken, things of that nature. I have on occasion bitten into a cherry pit or seed pit in eating cherry preserves, or something of that sort."

We held in *Rabb v. Covington,* 215 N.C. 572, 2 S.E. 2d 705, that when a retail merchant sells food in a sealed package to a customer there is an implied warranty of fitness for human consumption. In this case the "wieners" or sausages sold were in a casing, which plaintiff conceded constituted a sealed container, and had in them pieces of metal. Upon authority of *Rabb v. Covington,* a nonsuit was held improper in *Williams v. Elson,* 218 N.C. 157, 10 S.E. 2d 668, where defendant sold plaintiff for consumption a barbecued beef sandwich containing glass. In *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822. plaintiff sued Radford, a retail druggist, for breach of an implied warranty of wholesomeness in the sale to his intestate of an article for human consumption known as "Westsal," a salt substitute, which he alleged contained poisonous ingredients. In this case the Court recognized as applicable the doctrine of implied warranty.

Defendant in its brief states: "Defendant does not question the existence of an implied warranty that the corn flakes sold were fit for human consumption but urges that 'the warranty must be reasonably construed in the light of common knowledge in reference to the nature of the article sold.' *Cavanagh v. Woolworth Co.,* 308 Mass. 423, 32 N.E. 2d 256."

In the *Cavanagh* case the article sold was a rubber stopper to be used in bottles containing gas charged or carbonated beverages. The Court held that the seller did not, by virtue of statutory implied warranty of fitness for intended use, become an insurer that the stopper could be used with absolute safety, and stopper was not required to be perfectly adapted for its intended use but only reasonably fit therefor.

Plaintiff's case is based upon the presence in the corn flakes he was eating of part of a grain of corn that had partially been crystalized, and thereby reduced from its normal state of a grain of corn to a state as hard as quartz, that is the presence of a substance na-

tural to the corn flakes, and not removed therefrom in the process of its preparation for human consumption, and he contends that this constituted a breach of defendant's implied warranty of reasonable fitness of the corn flakes for human consumption. His is not a case of a foreign object, like glass, a piece of metal, etc., in the corn flakes, or of the corn flakes being decayed, diseased, or in a spoiled and poisonous condition.

Defendant contends that its implied warranty only extends to cases where foreign matter is contained in the food, or where the food is diseased, decayed, or otherwise in a spoiled or poisonous condition, and does not extend to the facts here.

Plaintiff states in his brief "there was no evidence presented on the composition of the cereal." However, plaintiff introduced in evidence the package bearing the label "Kellogg's Corn Flakes," which he bought from defendant. Webster's New International Dictionary, 2nd Ed., gives this definition of cereal: "2. A prepared foodstuff of grain, as oatmeal or flaked corn, used especially with milk or cream as a breakfast food." In our opinion, plaintiff's evidence shows these corn flakes were made from corn.

36 C.J.S., pp. 1247-8, defines foreign substance: "A substance occurring in any part of the body or organism where it is not normally found, usually introduced from without." A sliver of bone in a pork chop was held not a foreign substance to a pork chop in *Brown v. Nebiker,* 229 Iowa 1223, 296 N.W. 366.

In *Mix v. Ingersoll Candy Co.,* 6 Cal. 2d 674, 59 P. 2d 144, plaintiff was injured by swallowing a fragment of chicken bone, while eating a chicken pie at a restaurant. The Supreme Court sitting in bank, while agreeing that there was an implied warranty of fitness on such a sale by a restaurateur by virtue of their Uniform Sales Act, held that such a warranty was not breached by the presence of the bone in the chicken pie. The Court said: "Bearing in mind the exact wording of section 1735 of the Civil Code whereby the implied warranty is imposed upon a restaurant keeper, is there an obligation imposed by the statute upon a restaurant keeper to furnish perfect food to his patrons at all hazards; that is to say, is his obligation that of an absolute insurer of his food? The answer, in our opinion, must be in the negative. The words of the Code section are that the food furnished by the restaurant keeper shall be 'reasonably' fit for such purpose—human consumption. It may well happen in many cases that the slightest deviation from perfection may result in the failure of the food to be reasonably fit for human consumption. On the other hand, we are of the opinion, that in certain instances a deviation from perfection, particularly if it is of such a nature as in common knowledge could

be reasonably anticipated and guarded against by the consumer, may not be such a defect as to result in the food being not reasonably fit for human consumption. The facts presented in the instant case we think present such a situation. We have examined a great many cases dealing with the question of the liability of restaurant keepers which arose out of the serving of food which was held to be unfit for human consumption, and we have failed to find a single case in which the facts are similar to the instant case, or in which a court has extended the liability based upon an implied warranty of a restaurant keeper to cover the presence in food of bones which are natural to the type of meat served. All of the cases are instances in which the food was found not to be reasonably fit for human consumption, either by reason of the presence of a foreign substance, or an impure and noxious condition of the food itself, such as for example, glass, stones, wires or nails in the food served, or tainted, decayed, diseased, or infected meats or vegetables. Although it may frequently be a question for a jury as the trier of facts to determine whether or not the particular defect alleged rendered the food not reasonably fit for human consumption, yet certain cases present facts from which the court itself may say as a matter of law that the alleged defect does not fall within the terms of the statute. It is insisted that the court may so determine herein only if it is empowered to take judicial notice of the alleged fact that chicken pies usually contain chicken bones. It is not necessary to go so far as to hold that chicken pies usually contain chicken bones. It is sufficient if it may be said that as a matter of common knowledge chicken pies occasionally contain chicken bones. We have no hesitancy in so holding, and we are of the opinion that despite the fact that a chicken bone may occasionally be encountered in a chicken pie, such chicken pie, in the absence of some further defect, is reasonably fit for human consumption. Bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones. At least he cannot hold the restaurant keeper whose representation implied by law is that the meat dish is reasonably fit for human consumption, liable for any injury occurring as a result of the presence of a chicken bone in such chicken pie. In the case of *Goetten v. Owl Drug Company*, 59 P. (2d) 142, this day decided, we held that the application of the rule of implied warranty might impose a heavy burden upon the keeper of restaurants and lunch counters, but that considerations of public policy and public health and safety are of such importance as to demand that such obligation be imposed. This is true, but we do not believe that the onerous rule should be carried to absurd limits. Cer-

tainly no liability would attach to a restaurant keeper for the serving of a T-bone steak, or a beef stew, which contained a bone natural to the type of meat served, or if a fish dish should contain a fish bone, of if a cherry pie should contain a cherry stone—although it be admitted that an ideal cherry pie would be stoneless. The case of a chicken bone in a chicken pie is, in our opinion, analogous to the cited examples, and the facts set forth in the first count of the complaint do not state a cause of action."

The holding of the Supreme Court in the *Mix* case was held controlling in *Silva v. F. W. Woolworth Co.*, 28 Cal. App. 2d 649, 83 P. 2d 76, where the keeper of a restaurant was held not liable on the theory either of implied warranty or of negligence for injuries alleged to have been sustained by a customer from choking on a fragment of turkey bone in a serving of roast turkey with dressing. The Court said: "The criterion upon which liability is determined in such cases is whether the object causing the injury is 'foreign' to the dish served."

The holding in the *Mix* case was held controlling in *Lamb v. Hill*, 112 Cal. App. 2d 41, 245 P. 2d 316, where the Court held that a cafe owner was not liable on grounds of negligence, for injuries sustained by a customer as a result of swallowing a fragment of chicken bone contained in a chicken pie, purchased by customer, since the facts do not establish a lack of due care on the defendant's part and customer was not entitled to expect an entirely boneless chicken pie in every instance.

Shapiro v. Hotel Statler Corporation, (U. S. District Court S. D. California, Central Division, 1955), 132 F. Supp. 891, was an action against a restaurant keeper for damages by a customer, who, while eating a dish of Hot Barquette of Seafood Mornay, made of several different kinds of fish, swallowed a fish bone, which lodged in his throat. The Court held that bones which are natural to type of fish served are not a "foreign substance," and a customer who eats such food ought to anticipate and guard against the presence of such bones, and following the *Mix* case, *supra*, the restaurant keeper was not, under the implied warranty imposed by California law, liable for damages resulting from presence of the fish bone.

Goodwin v. Country Club of Peoria, 323 Ill. App. 1, 54 N.E. 2d 612, was an action for wrongful death caused by swallowing a bone which lodged in plaintiff's intestate's throat, while eating creamed chicken. The Court held that the presence in creamed chicken, prepared from diced turkey, of a bone which lodged in diner's esophagus, and caused death was not a breach of implied warranty that food served was wholesome and fit for human consumption. The Court in a scholarly

opinion discusses the *Mix* case, *supra*, the *Silva* case, *supra*, and *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366.

In *Brown v. Nebiker*, plaintiff's intestate, while eating a pork chop at a restaurant, swallowed a sliver of bone contained in the meat, which punctured his esophagus and caused his death. Plaintiff's substituted petition had two counts: one, based upon negligence under the rule of *res ipsa loquitur*, and the other, based on implied warranty that the food contained nothing injurious to health and life. The trial court directed a verdict for the defendant. The action was affirmed by the Supreme Court, on the ground that there was no evidence that the pork chop contained any "foreign substance," since a sliver of bone natural to the meat being served was not a "foreign substance" to the pork chop. The Court discussed, and quoted at length from the *Mix* case. The Court said: "One who eats pork chops, or the favorite dish of spareribs and sauerkraut, or the type of meat that bones are natural to, ought to anticipate and be on his guard against the presence of bones, which he knows will be there. The lower court was right in directing the verdict, and it necessarily follows that this case must be and it is affirmed."

In *Courter v. Dilbert Bros., Inc.*, 186 N.Y.S. 2d 334, plaintiff purchased a jar of prune butter containing a small piece of broken prune pit, and was injured by this piece of prune pit. A dissenting opinion says she fractured a tooth, and injured her gum. Plaintiff claimed the piece of prune pit was a "foreign substance," and that defendants breached the warranty in that the prune butter with a "foreign substance" therein was not fit for human consumption. The Court said: "The alleged injurious substance is in fact not a foreign substance and, consequently, cannot be the basis of an action for injuries by reason of the presence of the foreign substance." The second headnote reads: "Piece of prune pit allegedly contained in jar of prune butter was not a 'foreign substance,' and consequently could not be basis for action for damage resulting from foreign substance, but even if it were, in absence of privity between retailer and producer of jar of prune butter containing piece of pit, retailer, which was held liable to consumer who was allegedly injured by pit, could not recover from producer, either for negligence or for breach of warranty." The Court discusses and quotes from *Brown v. Nibiker, supra*, the *Mix* case, *supra*, *Silva v. F. W. Woolworth, supra*.

Plaintiff relies on *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A. 2d 913, 143 A.L.R. 1417, which he contends is a case in point. The facts are: Plaintiff, a housewife, ordered a sealed can of oysters from defendant, a grocer, for delivery the next day. When she received the oysters, she emptied the can into a can of milk in

order to prepare a stew. Thereafter in tasting the stew for seasoning, she swallowed a sharp oyster shell about the size of a quarter. The shell lodged in her esophagus, necessitating an operation for its removal. She and her husband brought this action in *assumsit*, averring breach of warranty, under Section 15 of the Sales Act. A majority of the Court held that under Section 15(1) of the Sales Act there was an implied warranty that the oysters were reasonably fit for human consumption. The Court then said: "We cannot say as a matter of law that the product furnished the plaintiffs was reasonably fit for human consumption." In the trial court there was a directed verdict for defendant. The Court reversed the judgment and ordered a *venire facias de novo*. Two judges dissented. The dissenting opinion states, in part: "No authority has been cited by the majority for extending the liability upon an implied warranty to a case like the present, nor have I been able to find any; and I cannot believe the Act contemplates it should be so extended." The dissenting opinion then cites the *Mix* case, *supra*, and the *Silva* case, *supra*, and quotes extensively from the *Mix* case.

The Temple University Law Quarterly, Volume XVII (1942-1943) p. 204, has this to say as to the *Bonenberger* case: "Here the injury was caused not by a foreign substance, but by an inherent part of the oyster—its shell. A reasonable consumer should expect such shells in oysters. The line of cases the court should have followed is pointed out in the dissenting opinion. They were cases where: a chicken bone was found in a chicken pie, a turkey bone in a serving of roast turkey. The majority opinion realized that it makes a difference whether the article causing harm is an inherent part of the article or not, but claimed that it was for the jury to decide whether the oysters were reasonably fit for human consumption. It is submitted that the court should have followed what seems to be the more practical rule laid down in the *Ingersoll* case *(Mix v. Ingersoll Candy Co., supra,)*: Although the question of fitness is usually for the jury, it may sometimes be that, 'The court itself may say as a matter of law that the alleged defect does not fall within the terms of the statute. It is sufficient if it may be said that as a matter of common knowledge chicken pies occasionally contain chicken bones.' Isn't it just as common for a can of oysters to contain a shell? No case has been found, in Pennsylvania or elsewhere, holding that because an article has retained a portion of itself that was intended to be extracted (as the oyster shell here), the product has thereby been rendered unwholesome and unfit for human consumption. Only when the courts have found extraneous, foreign matter to be present have they held defendant liable for breach of warranty, in either tort or trespass. Of course, it is different in

cases of rancid or spoiled food. For instance, liability was imposed for: wire in a hot dog, metal in sausage, broken glass in jelly, ground glass in Coca-Cola, a rat in an ice cream cone, a centipede in soup, a rat in tea, a screw in coffee. It is suggested that the court has, in this case, extended the protection of the warranty further than was intended by the Sales Act. This may be due to the absence of a clear and succinct definition of 'unwholesome' and 'fit for human consumption.' Be that as it may, it is submitted that liability under an implied warranty should be limited to those cases where a foreign substance — a substance the presence of which is not foreseeable — causes the harm."

Following the report of the *Bonenberger* case in 143 A.L.R., there is, beginning on p. 1421, an interesting annotation entitled "Implied warranty of reasonable fitness of food for human consumption as breached by substance natural to the original product and not removed in processing." Other annotations of interest will be found in 4 A.L.R. 1560; 35 A.L.R. 921; 47 A.L.R. 150; 104 A.L.R. 1033; 105 A.L.R. 1042; 168 A.L.R. 1056-7; 171 A.L.R. 1209; 7 A.L.R. 2d 1027, particularly 1053-4.

After a study of the *Bonenberger* case, we are of opinion it is not, so far as a diligent search on our part has shown, in line with the better reasoned cases on the subject of all other Courts, who have decided the exact question and have a contrary view. The Court in *Goodwin v. Country Club of Peoria, supra,* after stating that the appellee relies upon the case of *Bonenberger v. Pittsburgh Mercantile Co., supra,* said: "After a study of that case, we do not consider it persuasive in the case at bar."

Plaintiff cites and relies on *Paolinelli v. Dainty Foods Manufacturers,* 322 Ill. App. 586, 54 N.E. 2d 759. This case is clearly distinguishable. The suit was based on the alleged negligence of the defendant in the manufacture, preparation and inspection of its product, and the jury so found.

Plaintiff cites and relies on *Gimenez v. Great Atlantic & Pacific Tea Co.,* 264 N.Y. 390, 191 N.E. 27. This case is clearly distinguishable, for it appears that the crab meat itself was deleterious, that is harmful or destructive.

Our case of *Davis v. Radford, supra,* is of no help to plaintiff, for there it is alleged the "Westsal" sold contained poisonous ingredients.

The instant case is one where the substance causing the injury is natural to the corn flakes, and not a foreign substance, and where a consumer of the product might be expected to anticipate the presence of the substance in the food. We consider Judge Sharp's judgment of

involuntary nonsuit is in line with the better reasoned cases on the subject, and with what appears to be the overwhelming majority view. The judgment below is

Affirmed.

MARGARET FULLER PORTER v. THE CITIZENS BANK OF WARRENTON, INCORPORATED; MRS. ALICE SOUTHERLAND, TRADING AS THE STYLE SHOP; E. E. GILLAM, TRADING AS GILLAM AUTO COMPANY, AND J. B. MARTIN.

(Filed 14 January, 1960.)

1. **Judgments § 41—**

A judgment in favor of one spouse against the other cannot constitute a lien on property held by them as tenants by the entireties.

2. **Husband and Wife § 15—**

During coverture the husband has the right to the full control of the property held by the entireties and to the income therefrom, to the exclusion of the wife.

3. **Judgments § 41: Divorce and Alimony § 21—**

The court may not order the sale of land held by the husband and wife as tenants by the entireties to procure funds to pay alimony and counsel fees allowed the wife under G.S. 50-16, but the rents and profits therefrom may be charged with the support of the wife, and the court may issue writ of possession under G.S. 50-17 giving the wife possession of the property in order that she may apply the rents and profits as they accrue and become personalty to the payment of alimony and counsel fees as fixed by the court.

4. **Same—**

Neither an order making an allowance of alimony *pendente lite*, nor a subsequent order directing that in the event of a foreclosure of a deed of trust on lands held by the husband and wife by the entireties, the husband's share in the surplus should be secured for the payment of alimony, has the effect, without more, of creating a lien on the surplus realized upon the later foreclosure of the deed of trust on the property, since the husband's share in the surplus funds does not become personalty and subject to attachment or to the payment of alimony *pendente lite* until the sale under the foreclosure.

5. **Divorce and Alimony § 21—**

Where the husband abandons his wife and leaves the State and the wife obtains a decree for alimony without divorce, realty and personalty owned by the husband may be attached and a valid judgment in *rem* entered against the property, or the court may appoint a receiver for the property and direct the receiver to sell unproductive real estate and to invest the proceeds in order to obtain sufficient income to en-

able the receiver to pay the expenses of the receivership and the alimony awarded.

6. Same: Attachment § 6— Lien of attachment held superior to orders for alimony as to surplus realized in later sale under foreclosure of land held by entireties.

Order for alimony and counsel fees *pendente lite* was entered in favor of the wife in her action against her husband for alimony without divorce, in which action the husband was personally served. Thereafter an order was entered in the cause to the effect that if a deed of trust on property held by the husband and wife by the entireties were foreclosed the husband's share of the surplus should be secured for the payment of the alimony awarded. The deed of trust was foreclosed and the trustee voluntarily paid in the office of the clerk, pursuant to G.S. 45-21.31, the surplus realized in the sale. In an action on account instituted by a creditor of the husband prior to the sale, a warrant of attachment was issued and the husband's share in the surplus attached on the date it was put in the hands of the clerk. *Held*: There having been no attachment of the funds in the divorce action, nor the surplus placed in *custodia legis* in that action, and the orders issued therein not constituting a lien in *futuro* upon such funds, the lien of the attaching creditor is superior to the rights of the wife therein.

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

APPEAL by respondent J. B. Martin from *Bickett, J.*, January Civil Term, 1959, of WARREN.

This is a special proceeding instituted 2 October 1957 pursuant to the provisions of G.S. 45-21.32, to determine the ownership of a fund of $9,382.34 deposited on 20 July 1957 with the Clerk of the Superior Court of Warren County by Frank Banzet, Trustee, pursuant to the provisions of G.S. 45-21.31.

This case was here at the Fall Term 1958 of this Court and the judgment theretofore entered was vacated and the cause remanded for a hearing *de novo* in the Superior Court. The opinion is reported in 249 N.C. 173, 105 S.E. 2d 669, where the facts are set out in detail. Even so, the facts deemed essential to the disposition of the present appeal will be stated herein.

1. At all times in question in this proceeding the petitioner and one George S. Comer were and are now husband and wife, although the petitioner has had her surname changed to Porter pursuant to an order entered on 7 June 1957 by the Clerk of the Superior Court of Warren County.

2. In 1956 an action for alimony without divorce was instituted in the Superior Court of Warren County by Margaret F. Comer against the said George S. Comer, in which summons was personally served on George S. Comer and in which action he appeared and was repre-

sented by counsel. An order for alimony *pendente lite* and counsel fees was rendered in favor of the petitioner by his Honor, Hamilton Hobgood, Resident Judge of the Ninth Judicial District.

3. George S. Comer abandoned his wife, Margaret F. Comer (now Porter) in February 1957 and departed the State of North Carolina and his whereabouts are unknown.

4. At the time George S. Comer departed the State of North Carolina and at all times thereafter until 12 July 1957, George S. Comer and his wife, the petitioner herein, owned as tenants by the entirety a home in the Town of Warrenton, North Carolina, which was acquired prior to 1956. This is the real estate from which the surplus funds now in controversy were derived.

5. On 4 June 1957, on motion of Margaret F. Comer, in her action for alimony without divorce, an order was entered by his Honor, C. W. Hall, Judge holding the courts of the Ninth Judicial District, as follows:

"The interests, estate and equity of the defendant George S. Comer in and to the real property described in paragraph 6 of plaintiff's motion, together with surplus of the sale thereof to which the defendant George S. Comer would otherwise be entitled, is secured to the plaintiff Margaret Fuller Comer for the satisfaction of the award of alimony heretofore entered by the Honorable Hamilton H. Hobgood, and any person, firm or corporation having custody or control over the same shall pay to the plaintiff the sum of $837.00 and shall pay to the firm of Banzet & Banzet, attorneys, the sum of $450.00 and thereafter to pay to the plaintiff the sum of $354.00 on the 29th day of each month hereafter, commencing on the 29th day of June 1957, to be reduced by $75.00 per month so long as the plaintiff shall occupy the premises described in paragraph 6 of the plaintiff's motion.

"The Clerk of the Superior Court of Warren County is directed to file, index and cross-index in the Judgment Docket of Warren County the substance of this order insofar as the same pertains to surplus of any sale under foreclosure of the real estate described in paragraph 6 of plaintiff's motion to the end that all persons dealing with said surplus shall be bound by the terms of this order."

6. The foregoing order was entered in anticipation of the foreclosure sale of the aforesaid house and lot by Frank Banzet, Trustee, in a deed of trust thereon, to secure certain indebtedness to the Citizens Bank of Warrenton, which indebtedness was past due at the time the above order was entered.

7. On 12 July 1957, Frank Banzet, Trustee, under the aforesaid deed of trust, executed a deed to said house and lot, pursuant to the

power of sale contained in said deed of trust, for $17,795.00, and collected said sum in cash.

8. From the proceeds of the sale, the said Frank Banzet, Trustee, paid to petitioner $837.00 in payment of alimony in arrears on the date of Judge Hall's order, and paid the firm of Banzet & Banzet, as attorneys for petitioner, the sum of $450.00, both of which sums were charged against George S. Comer's one-half interest of the net proceeds of the sale. Certain additional small liens not in controversy here were paid, and on 20 July 1957 the Trustee paid the balance of the proceeds from said sale to the Clerk of the Superior Court of Warren County, pursuant to the provisions of G.S. 45-21.31, in the sum of $9,382.34.

9. On 10 July 1957, an action on an account was filed in the Recorder's Court of Warren County by J. B. Martin, a respondent herein, against George S. Comer, and on said date a warrant of attachment was issued by said court against the property of said defendant. Pursuant to said warrant of attachment, the Sheriff of Warren County, on 20 July 1957, attached the interest of the defendant, George S. Comer, in the surplus proceeds from the foreclosure sale referred to herein in the amount of $9,382.34, which on said date had been paid to the Clerk of the Superior Court of Warren County. On 26 September 1957, the plaintiff, J. B. Martin, in said action procured a judgment against George S. Comer in the sum of $605.82, with interest on $583.85 from 1 June 1953, and interest on $21.96 from the date of judgment, and for costs in the sum of $22.20. Said judgment was declared a specific lien on the proceeds in the hands of the Clerk of the Superior Court which had been attached by the Sheriff pursuant to the warrant of attachment. Said judgment was duly docketed on the same date in the office of the Clerk of the Superior Court of Warren County and recorded in Judgment Docket 11, at page 39. No amount has been paid on this judgment. The court below found that the action and judgment rendered therein were in all respects regular.

On these facts the court concluded as a matter of law that the order of Judge Hall securing to petitioner the estate and equity of George S. Comer in said surplus funds constituted a lien in favor of the petitioner superior to the attachment and judgment of the respondent J. B. Martin. Judgment was entered accordingly.

The respondent J. B. Martin appeals, assigning error.

Banzet & Banzet for petitioner.

William W. Taylor, Jr., and Charles T. Johnson, Jr., for respondent.

DENNY, J. The questions for determination on this appeal are as follows:

1. Does an order of a Superior Court Judge, in a pending action under G.S. 50-16, declaring that an order for alimony *pendente lite* previously entered in said cause should constitute a lien in *futuro* on the share to be derived by the defendant husband in the surplus proceeds from a foreclosure sale under a deed of trust on real property owned by husband and wife by the entireties, of itself and without further action by or on behalf of the wife, create a lien on the husband's share therein, the foreclosure sale being consummated after the entry of such order?

2. If so, does such lien have priority over the lien acquired by a creditor of the husband who attached the husband's interest in the surplus proceeds of sale at the time they were paid to the Clerk of the Superior Court by the Trustee, who foreclosed the deed of trust, pursuant to G.S. 45-21.31?

A judgment cannot be rendered in the Superior Court in favor of one spouse against the other that will constitute a lien on property held by them as tenants by the entireties. *Keel v. Bailey*, 214 N.C. 159, 198 S.E. 654. Even so, during coverture the husband has the right to the full control of such property and the income therefrom, to the exclusion of the wife. *Holton v. Holton*, 186 N.C. 355, 119 S.E. 751; *Dorsey v. Kirkland*, 177 N.C. 520, 99 S.E. 407; *West v. R. R.*, 140 N.C. 620, 53 S.E. 477, 6 Ann. Cas. 360. Therefore, where husband and wife own land by the entireties, the rents and profits therefrom, which belong to the husband, may be charged with the support of his wife. To enforce an order allowing alimony and counsel fees pursuant to the provisions of G.S. 50-16, the court may issue a writ of possession pursuant to the provisions of G.S. 50-17, giving the wife possession of property held by her and her husband as tenants by the entireties, in order that she may apply the rents and profits therefrom as they shall accrue and become personalty to the payment of alimony and counsel fees as fixed by the court. *Wright v. Wright*, 216 N.C. 693, 6 S.E. 2d 555. However, the court does not have the power to order the sale of land held as tenants by the entireties, to procure funds to pay alimony to the wife or to pay her counsel fees. *Holton v. Holton, supra.*

It follows, therefore, under our decisions, that neither the order of Judge Hobgood, making the allowance of alimony *pendente lite*, nor the order entered by Judge Hall on 4 June 1957, constituted a lien on the house and lot held by the petitioner herein and her husband, George S. Comer, as tenants by the entireties. The interest of George S. Comer in the surplus funds from the foreclosure

sale did not become subject to attachment until 12 July 1957 by his creditors or for payment of alimony *pendente lite* pursuant to the orders made in the action instituted by Margaret Comer (now Porter) against her husband, George S. Comer.

Real estate owned by a husband may be attached and sold for the payment of alimony; and where the husband abandons his wife, leaves the State and his whereabouts are unknown, his real estate or personal property may be attached at the commencement of an action for alimony and a valid judgment obtained against the absent defendant, not in *personam* but as a charge to be satisfied out of the property seized. *Walton v. Walton,* 178 N.C. 73, 100 S.E. 176; *White v. White,* 179 N.C. 592, 103 S.E. 216; *Pennington v. Bank,* 243 U.S. 269, 61 L.Ed. 713.

Moreover, when a husband abandons his wife and leaves the State and the wife obtains a decree for alimony without divorce, the court may appoint a receiver to take possession of the husband's property, both real and personal, and the court may direct the receiver to sell unproductive real estate and to invest the proceeds in order to obtain sufficient income to enable the receiver to pay the expenses of the receivership and the alimony awarded. *Lambeth v. Lambeth,* 249 N.C. 315, 106 S.E. 2d 491.

In the instant case, the petitioner obtained her allotment of alimony *pendente lite* in an action in which the defendant husband was personally served with summons and in which he personally appeared at the trial and was represented by counsel. However, he departed the State prior to the entry of Judge Hall's order. While Judge Hall's order purported to set aside the interest, estate and equity of George S. Comer in said real estate, as we have heretofore pointed out, it did not constitute a lien on said right, title and interest. The order further purported to secure to the plaintiff, Margaret F. Comer (now Porter), the surplus of the proceeds from the sale of said real estate owned by the parties as tenants by the entireties, but such funds were not directed to be paid by the Trustee, who conducted the foreclosure, into the hands of a trustee or to the Clerk of the Superior Court, to be held in trust for the payment of alimony *pendente lite* as such payments fell due. Neither was a receiver appointed to handle such funds pursuant to the orders of the court, as was done in *Lambeth v. Lambeth, supra.*

In *Walton v. Walton, supra,* the Court said: "The question presented is the right of the plaintiff to a warrant of attachment as an ancillary remedy to her cause of action. Chapter 24, Laws 1919, prescribes that the wife abandoned by her husband is entitled 'to have

a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband.'

"This gives the wife who has been abandoned a remedy both in *personam* and in *rem*. The attachment is to secure the property so that it may be held to satisfy the judgment when rendered and also as a basis for publication of the summons. The wife has always had the remedy of garnisheeing the salary or wages of her husband in such cases, and she is entitled to an attachment of the property for the same reason. Otherwise the defendant, pending litigation, can sell or convey his property, or creditors may attach it for debt or obtain prior liens by judgment." *White v. White, supra; Bernhardt v. Brown,* 118 N.C. 700, 24 S.E. 527, 36 L.R.A. 402.

In the case of *Hardware Co. v. Jones,* 222 N.C. 530, 23 S.E. 2d 883, there were numerous judgments against the defendant which had been duly docketed and which constituted liens on the real estate of the defendant. All the judgment liens attached at the same time, when the defendant inherited the real property from his father's estate. The plaintiff, holding a judgment docketed 22 May 1923, brought action thereupon and caused an attachment to be levied upon the defendant's distributive share of the personal estate of his father. The lower court held the plaintiff had a superior lien to the other judgment creditors who were relying upon their duly docketed liens. This Court said: "Since, under C.S. 614 (now G.S. 1-234), no lien attaches to personalty by reason of the docketing of the judgment, although such a lien may be acquired by levy, the order * * * sustaining the prior lien of attachment as to the personal property * * * is correct."

It is likewise said in 7 C.J.S., section 272, page 450, "Where a judgment has become a lien on property of defendant, before the levy of an attachment on the same property, the judgment creditor will prevail over the attaching creditor; * * *. A judgment creditor who attached the personalty of his debtor is entitled to priority over a judgment creditor who did not attach such property," citing *Deeds v. Gilmer,* 162 Va. 157, 174 S.E. 37.

As was said in *Walton v. Walton, supra,* the statute G.S. 50-16 prescribes that a wife abandoned by her husband is entitled "to have a reasonable subsistence *allotted and paid* or *secured* to her from the estate or earnings of her husband." (Emphasis added)

In *Anderson v. Anderson,* 183 N.C. 139, 110 S.E. 863, the decree allowed subsistence, expenses and counsel fees, and declared that it should be a lien on defendant's real and personal property. However, in order to secure the allowance authorized under C.S. 1667 (now G.S. 50-16), the court required the defendant to execute a deed

of trust conveying all his interest in real estate in Nash and Edgecombe counties to a trustee for plaintiff to secure the performance of the decree. In the event of failure to execute the said deed of trust within ten days from 30 November 1921, it was provided that the decree would operate as a conveyance to the said trustee with power of sale in default of any payment or part payment thereon, as required by the order. This Court affirmed the judgment. See *Sanders v. Sanders,* 167 N.C. 317, 83 S.E. 489; *Green v. Green,* 143 N.C. 406, 55 S.E. 818; *Bailey v. Bailey,* 127 N.C. 474, 37 S.E. 502; *Wood v. Wood,* 61 N.C. 538.

In *Perkins v. Perkins,* 232 N.C. 91, 59 S.E. 2d 356, suit was for alimony without divorce under G.S. 50-16, and for allowance for subsistence and counsel fees *pendente lite. Devin, J.,* later C.J., said: "By adequate statutes and the decisions of this Court it has been established in this jurisdiction that in an action for alimony without divorce, upon issuance of summons and the filing of a verified complaint setting forth facts sufficient to entitle the complainant to the relief sought, the Judge of the Superior Court has power to require the payment by the husband of a reasonable amount for the wife's subsistence and counsel fees *pendente lite,* and the court *may enforce its order by attachment* against the property of a nonresident or absconding husband without notice (G.S. 50-16), and in such case may also appoint a receiver to collect the income from the husband's property. *Bailey v. Bailey,* 127 N.C. 474, 37 S.E. 502; *White v. White,* 179 N.C. 592, 103 S.E. 216; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436; *Peele v. Peele,* 216 N.C. 298, 4 S.E. 2d 616; *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555; *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833." (Emphasis added)

In light of the foregoing authorities, in our opinion, the mere statement in Judge Hall's order, to the effect that the surplus in the sale of the real estate held as tenants by the entireties, which would otherwise belong to George S. Comer, is secured to the plaintiff, without further providing for such proceeds to be impounded and brought into *custodia legis,* did not give a lien on such funds for payment of alimony, superior to an attachment by a creditor of George S. Comer.

Moreover, the court below found as a fact that the action instituted by the respondent Martin and the judgment rendered therein were in all respects regular. Therefore, we hold that, since the petitioner did not attach these funds, and the court below took no steps to sequester and impound said funds so as to make them immune from attachment, the attachment of the respondent Martin is superior to the order of Judge Hall, with respect to the funds now held

in the office of the Clerk of the Superior Court of Warren County in an amount sufficient to satisfy the respondent's judgment.

It will be noted that these funds are not held by the Clerk of the Superior Court pursuant to any order of the court, but were voluntarily paid into his office pursuant to the provisions of G.S. 45-21.31.

The judgment of the court below is

Reversed.

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

LILLIAN A. DEAN, ADMINISTRATRIX OF JAMES HYLTON v. WILSON CONSTRUCTION COMPANY, A CORPORATION.

(Filed 14 January 1960)

1. Negligence § 39—

A fourteen-year old boy who enters upon a road construction site and opens a sliding door to the cab of a large crane used in excavation work, and undertakes to operate the crane, is a trespasser, certainly when he had theretofore been warned by a neighbor to keep off the machinery.

2. Same—

The duty owed by the owner or occupant of land to trespassers is not to wilfully or wantonly injure them.

3. Negligence § 36—

In order to invoke the doctrine of attractive nuisance plaintiff must introduce evidence to support the finding that the defendant knew, or in the exercise of reasonable care should have foreseen, that children were likely to play upon the dangerous instrumentality.

4. Same—

The doctrine of attractive nuisance is usually applied to very young children, who because of their youth, do not realize the risk involved. The doctrine does not apply to a fourteen-year old boy of more than average intelligence who enters upon a construction site and deliberately opens the sliding door to a large crane, starts the motor and undertakes to operate the boom.

5. Same—

Evidence that a fourteen-year old boy entered upon a construction site, opened the sliding door to the cab of a large crane, started the motor, and, in undertaking to operate the crane, caused the boom to come in contact with high-tension wires resulting in his death, together with testimony of an experienced workman that in ten years he had never known a person other than a trained operator to attempt the operation of a crane, *is held* insufficient to be submitted to the jury on the issue of the negligence of the construction company in leaving the machinery unlocked and unattended after working hours.

6. Same—

The act of a fourteen-year old boy, of more than average intelligence, in entering upon a construction site and opening the sliding door to the cab of a crane, starting the motor of the crane, and undertaking to operate the same, *is held* to disclose contributory negligence on his part barring recovery for his death when the boom of the crane operated by him struck a high-tension wire.

APPEAL by plaintiff from *Fountain, Special J.*, (first) June Assigned Term, 1959, of WAKE.

Civil action to recover damages for the death of James Hylton, plaintiff's intestate, allegedly caused by the negligence of defendant.

James Hylton, aged fourteen on May 8, 1957, died about 6:00 p.m. on August 1, 1957. After the workmen had left the job, he went into a construction area and got into and operated defendant's crane. The boom struck high-tension transmission lines, electrifying the boom and the crane; and, in attempting to get from the cab of the crane, part of his body came in contact with the metal of the crane, causing instant death by electrocution.

The crane was mounted on caterpillar tracks. It had a steel cab; and a steel boom, about 35 feet long, extended directly to the front of the cab. The cab and boom pivoted simultaneously when material picked up in one place in the bucket or scoop was moved around for deposit elsewhere. Inside the cab, "there were a number of levers, gears and foot pedals which were used to operate the crane, including the raising and lowering of its boom, the use of the large steel bucket attached to the boom, and the movement of the crane."

Plaintiff alleged: "15. That said crane and its operating mechanisms were attractive to children and particularly to young boys between the ages of 11 and 14 years, and for several days prior to August 1, 1957, it had been the practice of young boys residing in the neighborhood where said work was in progress to play on and about said crane and other machinery and equipment which defendant was employing on said construction job both during and after working hours; and that these facts were well known to the defendant and its various employees who were engaged in the work on said job."

Plaintiff alleged that defendant was negligent in these respects: (1) It "failed and neglected to secure the ignition system on the crane engine." (2) It "failed and neglected to lock the cab door." (3) It "failed and neglected to place any warning signs in and about said equipment to warn of its inherently dangerous nature." (4) It "failed and neglected to warn plaintiff's intestate and other children playing in the neighborhood and to forbid them from playing on said equipment." (5) It knew, or in the exercise of reasonable care should

have foreseen, that children playing in and about defendant's said machinery and equipment would likely suffer death or serious bodily harm. Such negligence on the part of defendant, plaintiff alleged, proximately caused her intestate's death.

To support her allegations, plaintiff (the intestate's mother) offered evidence tending to show the facts narrated below.

Incident to the widening and paving of Dixie Trail, a public street, defendant, pursuant to its contract with the City of Raleigh, was engaged in the construction of a culvert at Beaver Dam Creek. Dixie Trail runs (generally) north and south. It had been closed (by barricades) for defendant's operations. The crane was in Dixie Trail, just south of the "very large size culvert ditch."

Grant Avenue, an east-west street, dead-ends at Dixie Trail. A barricade on Grant Avenue faced westbound traffic thereon. The barricade marking the south boundary of defendant's operations ran across Dixie Trail "just about at the point where Grant Avenue entered Dixie Trail." It was approximately 125 feet from (north) this barricade to the creek.

Wade Avenue is the next east-west street south of Grant Avenue. The portion of Dixie Trail between Wade Avenue and the area of defendant's operations had been "blocked off" for grading work. Heavy machines, including at least one bulldozer, were in this area.

Residences were along Grant Avenue. Going north on Dixie Trail from Wade Avenue to Beaver Dam Creek, the (left) west side of Dixie Trail was an undeveloped wooded area. There were residences on the (right) east side of Dixie Trail. James Hylton lived (with his mother, Mrs. Donald M. Dean, and her husband) at the southeast corner of Dixie Trail and Grant Avenue. The Roberts residence, facing on Grant Avenue, was at the northeast corner of Dixie Trail and Grant Avenue. The Roberts property extended north to Beaver Dam Creek. The area of defendant's operations extended along the side of the Roberts property. The barricades were across the respective streets.

Between Grant Avenue and Beaver Dam Creek, high-tension power lines ran approximately parallel to, and some fifteen feet east of, the east edge of the pavement on Dixie Trail. On both sides, "the ground was considerably lower than the roadbed of Dixie Trail."

There were no signs warning persons to keep away from the equipment. Defendant's foreman, upon adverse examination, recalled no occasion when children or others were warned to get farther away from the equipment or to leave.

Defendant's construction operations had been in progress for a week or more. Paul M. Yount, defendant's foreman, was in charge of con-

struction. He gave orders to T. J. Medlin, defendant's crane operator, as to the work to be done by the crane. Only a regular crane operator was permitted to operate the crane.

Shortly after 3:00 p.m. on the afternoon of August 1, 1957, Medlin completed his work for the day and left the job. Defendant's other employees, including Yount, left "around 5:30 p.m." Thereafter, "no employees of defendant remained on the job site in charge of said crane or any other equipment."

There was a sliding door on the right front side of the cab of the crane. When Medlin (who died prior to the trial) quit work on August 1, 1957, he closed the door by sliding it forward but did not lock it. There was a latch at the front, available for attaching a lock, but there was no lock on this latch. The boom was pointed in a general westerly direction, that is, away from the power lines, and was some feet above the ground. The bucket was lying on the ground. Behind the crane, within defendant's area of operations, were piles of dirt which had been brought out of the creek, one probably as high as twelve feet.

Shortly after defendant's employees had left the job, plaintiff's witnesses Phillip Strobel and George Boder, both aged fourteen, and James Hylton, who had been playing badminton in Boder's backyard, quit their game, at Hylton's suggestion, and went to the construction area. Strobel testified: ". . . James said he would like to go down and look at the machinery." Boder testified: ". . . James stated to me that he wanted to play on the bulldozers."

Upon reaching Dixie Trail, they went first to a bulldozer that was in front of Mrs. Perry's house, "about three houses south of the Dean house." Hylton got up on the bulldozer and started it. Just then Mrs. Perry came out of her house, told the boys to leave and warned them to stay off of the equipment. Hylton then suggested that they go north, into the area of defendant's operations, that "he wanted to look at the crane." The crane was about 200 feet from (north) the bulldozer in front of Mrs. Perry's house. The boom and cab of the crane then faced west. The bucket was on the ground, some 10-15 feet from the crane. The boom was up in the air, at an angle of approximately 55 degrees.

Strobel and Boder, passing the crane, went to and crossed the creek. They were throwing dirt clods into the water when other boys chased them back to the south side of the creek. Meanwhile, Hylton had gone to the crane. Boder, who returned first to the side of the crane, saw Hylton slide open and enter the door to the cab. Hylton then got the engine started but cut it off and got out of the cab. Upon Strobel's return to the site of the crane, Hylton told him what he

had done. Hylton told Boder that "he wanted to take the boom around so he could drop the bucket in that ditch on the east side of Dixie Trail."

Hylton then got back into the cab and sat in the operator's seat on the right side of the cab. Strobel also got into the cab and stood "on the little ledge next to the driver's seat." Boder walked around and sat on a little ledge on the back of the crane but left and got on a mound of dirt some two or three feet back (south) of the crane when Hylton started the engine.

Hylton again started the engine, by pushing a button. Strobel's testimony as to what then occurred (substantially in accord with the testimony of Boder) was as follows:

"While I was standing there in the edge of the crane, I saw James operate it, that is, work the crane back and forth for several minutes. He first swung the crane from side to side, sort of testing out which lever worked which part of the crane. He didn't also work the boom up and down. I could see him lift the bucket up off the ground. When I first came there, the steel bucket was sitting on the ground. When I first came there the boom of this crane was pointed west across Dixie Trail. At the time the boom of the crane ended up in these high-tension wires it was then pointed just about east. In other words, at that time it had swung all the way around and almost a 90-degree angle. I remember hearing James say something about he was going to swing that boom around and drop the bucket in the ditch on the east side of Dixie Trail. After he said that, I saw him work the levers and the crane began to turn, that is the cab of the crane began to turn to its right, that is toward the east of Dixie Trail. The crane was moving at a sort of even slow pace. Then as the crane swung almost all the way around to my right, that is to the east, the top of it suddenly hit into these electric wires on the east side of Dixie Trail. I don't remember exactly if at that time the bucket of the boom was almost over that ditch on the east side of the road to which James wanted to put the bucket into. I think it had just about gotten over there."

When the boom hit the wires there was a big "bang." The sparks began to fly at the points of contact; and there were sparks and a small amount of flame coming from the caterpillar tracks where the crane was grounded. Strobel jumped from the cab, clearing the metal of the crane, hit the ground and ran. Neither Strobel nor Boder was injured.

A police officer, in response to a report that children were playing on the construction equipment, was en route to the scene; but the

tragedy had occurred before he arrived. Upon arrival, he called the Power Company and the Fire Department. Soon the power was cut off. A crane operator came and removed the boom from the power lines. When the officer could safely go to the crane, he found Hylton's dead body, his legs near one of the tracks of the crane.

No witness had seen Hylton attempt to get from the cab. When Strobel, fleeing from the crane, last saw him, Hylton "was sitting there . . . trying to move the crane from the wires or something."

Reference will be made in the opinion to other facts disclosed by the evidence.

At the close of plaintiff's evidence, the court entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Dupree & Weaver and David R. Cockman for plaintiff, appellant.
Smith, Leach, Anderson & Dorsett for defendant, appellee.

BOBBITT, J. The evidence does not support the allegations in plaintiff's paragraph 15, quoted in the statement of facts. The evidence relating to these allegations tends to show: At times, when the work was in progress, onlookers, including small children, stood at the barricades and watched the operation of the machinery. At times, older boys watched from closer positions. Hylton, Strobel and Boder had watched from a bank on the Roberts property. Boder testified they "went off the bank and went around right where they were working." Strobel testified that at such time he got "within about 30 feet of it . . ." Mrs Dean testified that, "after working hours every afternoon," she had observed small children and persons of all ages "at or about this equipment." *There was no evidence that any person either during or after working hours had undertaken to get upon and to intermeddle in any way with any equipment in the construction area.*

It was "still daylight" when the fatal accident occurred. The three fourteen-year old neighborhood boys could observe and were fully aware of the existing physical conditions, including the location of the power lines.

We are not concerned directly with Hylton's conduct in climbing upon and starting the bulldozer in the area south of the area of defendant's operations. However, if he was not already fully aware of his status as a trespasser and of the danger involved in his attempted operation of the bulldozer, Mrs. Perry's warning was sufficient to bring these facts to his attention. Disregarding Mrs. Perry's warning, he proceeded to the crane.

In opening the door and entering the cab of the crane, in his first

operation thereof, and in his later operation thereof for a specific purpose, all of Hylton's efforts were intentional and deliberate. They reflect a steady nerve, daring, alertness, intelligence and skill. In getting into and operating defendant's crane, Hylton was a trespasser and was well aware of that fact.

"As affecting liability for injury resulting from the condition of premises in private ownership or occupancy, one who enters without permission or other right is a trespasser." *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154. "The duty owed to trespassers is that they must not be wilfully or wantonly injured." *Jessup v. R. R.*, 244 N.C. 242, 93 S.E. 2d 84; 65 C.J.S., Negligence § 24; 38 Am. Jur., Negligence § 110.

There being no evidence that Hylton's death was caused by the wilful or wanton negligence of defendant, plaintiff frankly bases her alleged right to recover on the so-called attractive nuisance doctrine, citing *Ford v. Blythe Brothers Co.*, 242 N.C. 347, 87 S.E. 2d 879, where *Denny, J.*, quotes (with approval) from *Judge Connor's* opinion in *Briscoe v. Lighting and Power Co.*, 148 N.C. 396, 62 S.E. 600, 19 L.R.A. (N.S.) 1116. See 1 N.C.L.R. 162, "Limitations of the Attractive Nuisance Doctrine," where the *Briscoe* case is discussed in detail, and *Campbell v. Laundry*, 190 N.C. 649, 130 S.E. 638, where *Varser, J.*, citing the *Briscoe* case, stated that this Court was not disposed to extend the so-called attractive nuisance doctrine.

In the *Briscoe* case, where demurrer was sustained, the plaintiff was a thirteen-year old boy. In the *Ford* and *Campbell* cases, recovery was allowed. In *Ford*, a three-year old girl stepped into a latent bed of hot ashes. In *Campbell*, a four-year old boy climbed upon an electric delivery truck, improperly parked, and pushed a lever and thereby set it in motion. The present case does not involve a deceptive condition or latent danger, nor does it involve an accidental setting in motion of machinery.

Full discussions of the origin of the so-called attractive nuisance doctrine and of the divergent decisions relating thereto are set forth in 65 C.J.S., Negligence § 29, and in 38 Am. Jur., Negligence § 142 *et seq.* North Carolina decisions relating thereto are cited and discussed in 13 N.C.L.R. 340 and in 26 N.C.L.R. 227.

There is a growing tendency to discard the phrase "attractive nuisance doctrine" as denoting an inflexible rule of law of precise meaning. Thus, in the Restatement of the Law of Torts, § 339, under the caption, "Artificial Conditions Highly Dangerous to Trespassing Children," the conditions under which "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains

upon the land," are set forth. The legal principles there stated have received widespread approval. Prosser on Torts, Second Edition, § 76, p. 440 *et seq.;* 65 C.J.S., Negligence § 28, p. 454.

Under our decisions, to invoke the attractive nuisance doctrine, it is essential that "the facts are such as to impose the duty of anticipation or prevision." *Briscoe v. Lighting and Power Co., supra.* In our view, the evidence is insufficient to support a finding that defendant knew, or in the exercise of reasonable care should have foreseen, that children or persons of any age were likely to open the door of the cab, climb into the operator's seat and undertake to operate the crane. Indeed, it would seem that Hylton's venturesome conduct far exceeded the limits of reasonable prevision.

Yount, during ten years experience, had never known a person other than a trained operator to attempt the operation of a crane. Mrs. Dean testified: "I had never known him (Hylton) to get on cranes or heavy machinery such as this before this day." Again: "I had not specifically warned him to stay off any of this equipment; I saw no necessity for doing that."

Moreover, the attractive nuisance doctrine is designed to protect "small children" or "children of tender age." 38 Am. Jur., Negligence § 157. It applies to children who, "because of their youth do not discover the condition or realize the risk involved in intermeddling in it or coming within the area made dangerous by it." Restatement of the Law of Torts, § 339(c). "It does not extend to those conditions the existence of which is obvious even to children and the risk of which is fully realized by them." Restatement of the Law of Torts, § 339, comment, p. 922.

"The attractive nuisance doctrine applies only in favor of children of tender years who are too young to understand and appreciate danger, and excludes those who have reached years of discretion and are able to understand and appreciate the danger or who, knowing the hazard, assume the risk of doing that which will imperil their lives or limbs, even though the owner has notice that children are accustomed to come about the place of danger.

"While there is no definite age fixed at which a child ceases to be entitled to the protection of the attractive nuisance doctrine, the great majority of cases in which it has been applied have involved children of less than ten years of age, and it has been considered that it cannot be applied to a child of the age of fourteen or over, at least in the absence of some showing of a lack of the mental development which is ordinarily found in children of that age or of a very exceptional state of facts." 65 C.J.S., Negligence § 29(11).

In *Briscoe v. Lighting and Power Co., supra, Connor, J.,* states:

"Again, in the numerous cases which we have examined we do not find any in which a boy of thirteen years, 'with the usual intelligence of boys of that age,' has been permitted to rely upon the attractive allurements of machinery to children."

James Hylton was a well-developed and healthy fourteen-year old boy. Mrs. Dean testified: "I felt that he did have quite a good mind. He had successfully completed the seventh grade at Josephus Daniels High School . . ." He was interested in outdoor sports, particularly baseball and fishing. Mrs. Dean testified: "And he was crazy about the Marines. He was interested in his church, Sunday school and scouting." Indeed, all the evidence leaves the impression that he possessed as much as or more than "the usual intelligence of boys of that age."

Much as we may admire James Hylton, and much as we may deplore his untimely death, the fact remains that the evidence shows unmistakably that (1) he knew he was a trespasser, (2) he was conscious of the danger, and (3) he deliberately risked the consequences of his wrongful conduct. Under these circumstances, we are of opinion, and so hold, that plaintiff may not, under the attractive nuisance doctrine or otherwise, recover from defendant for James Hylton's death.

If instead of causing his own death, Hylton, in operating the crane had caused injury or death to an innocent bystander, unquestionably such injury or death would have resulted from Hylton's actionable negligence. The evidence, taken in the light most favorable to plaintiff, discloses that her intestate's negligence was either the proximate cause, or in any event a contributing proximate cause, of his own death. *Tart v. R. R.*, 202 N.C. 52, 161 S.E. 720; *Van Dyke v. Atlantic Greyhound Corp.*, 218 N.C. 283, 10 S.E. 2d 727; *Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412.

For the reasons stated, the judgment of involuntary nonsuit is affirmed.

Affirmed.

GAR LEE PACK v. ROBERT CIROW McCOY AND QUEEN CITY COACH COMPANY.

(Filed 14 January, 1960.)

1. Pleadings § 31—

For the purposes of a motion to strike, the allegations of the pleading must be taken as true.

2. Judgments § 28—

The plea of *res judicata* must be founded upon an adjudication on the merits.

3. Judgments § 34—

A consent judgment, as well as a judgment upon a verdict of a jury, is a bar to a subsequent action between the parties or their privies as to all questions and facts in issue therein.

4. Same—

A minor instituted action by her next friend against the drivers of the two vehicles involved in a collision, alleging that plaintiff was injured by the joint and concurrent negligence of defendants, and defendants filed joint answer denying liability. Consent judgment was entered that plaintiff recover of the defendants a stipulated sum. *Held:* The issues of the joint and concurrent negligence were raised by the pleadings and the consent judgment constitutes an adjudication thereof so that in a subsequent action by one of the drivers against the other the consent judgment may be properly pleaded as a bar.

BOBBITT, J., dissenting.

PARKER, J., joins in the dissent.

On CERTIORARI to review an order entered in the cause by *Huskins, J.*, at the September Term, 1959, MADISON Superior Court.

The plaintiff alleged he sustained personal injuries and property damage in a collision between his motorcycle and a Queen City Coach Company bus operated by Robert Cirow McCoy; that the accident and his injury and damage were proximately caused by the actionable negligence of the defendants.

The defendants, by answer, denied negligence and interposed the further defense that all issues of negligence between the present parties were adjudicated and settled by final judgment of the General County Court of Buncombe County in the case of *Sara Lou Gibbs, b.n.f., v. Gar Lee Pack,* (present plaintiff) *Queen City Coach Company and Robert Cirow McCoy* (present defendants). Copies of the pleadings and judgment were made a part of the further defense. These records disclose that in the prior action Miss Gibbs alleged she suffered injuries and damage as a result of a collision between a motorcycle operated by Gar Lee Pack and a Queen City Coach Company bus operated by Robert Cirow McCoy; that the collision and her injuries

and damage were proximately caused by the joint and concurrent negligence of Pack, the Coach Company, and McCoy.

The three defendants in the Gibbs action filed a joint answer denying all allegations of negligence. After the issues were thus joined, the General County Court rendered judgment "that the plaintiff recover of the defendants the sum of $1,050 in full and final settlement of all matters involved in this action." The plaintiff, her father as next friend, her attorney, and "attorneys for the defendants" appear to have signed the judgment signifying consent.

When the present action came on for hearing, Judge Huskins, on plaintiff's motion, entered an order striking the defendants' further defense. The defendants applied for and obtained this Court's writ to review the order.

Mashburn & Huff, By: Joseph B. Huff for defendants, appellants.
Bruce J. Brown for plaintiff, appellee.

HIGGINS, J. The plaintiff contends the plea of *res judicata* shows on its face that it is not a defense to the matters and things alleged in his complaint for that it fails to aver that he was served with summons, participated in the action, appeared or authorized any attorney to appear for him, had knowledge of the prior suit, or authorized anyone to consent to the judgment.

At this stage of the cause we are concerned with allegations only—not with proof. For the purposes of the motion to strike, we must accept as true the allegations of the further defense. *Trust Co. v. Currin,* 244, N.C. 102, 92 S.E. 2d 658. If the plaintiff's objections are well founded he will have opportunity to present them when the defendants offer evidence to support their plea. Or if, as he suggests, the record in the general county court does not speak the truth as to him, his remedy is pointed out in *Stone v. Coach Co.,* 238 N.C. 662, 78 S.E. 2d 605.

The plaintiff also contends the order striking the further defense should be sustained on the authority of *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554, and *Penn Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410. In the *Penn Dixie Lines* case the defendant interposed the further defense that the plaintiff had participated with the defendant in an extrajudicial settlement of the claims by third parties growing out of the same accident. This Court said: "The allegations relating to extrajudicial settlements of the plaintiff and the defendant . . . have no proper place in the answer . . . Logic would ignore the facts of life if it accepted the plaintiff's participation in the extra-

judicial settlement . . . as an implied admission of legal culpability on its part . . ."

In the *Mercer* case the defendant interposed the further defense that a Mrs. Strickland had instituted an action against both Mercer and Hilliard, alleging she had suffered property damage in the collision which resulted from the negligence of both. The cause was settled by payment of $165 to Mrs. Strickland. No pleadings were ever filed on behalf of either defendant. The superior court, on Mrs. Strickland's application, entered judgment of nonsuit, taxing her with the costs. In passing on the order to strike the further defense in the *Mercer* case, this Court said: "The facts alleged by defendants do not constitute either an adjudication or an acknowledgment that negligence on the part of Mrs. Mercer proximately caused the collision between the Mercer and the Hilliard cars." In *Penn Dixie Lines*, a court action was never instituted. In *Mercer*, action was instituted but judgment of nonsuit was taken by the plaintiff. In neither case was there an adjudication on the issues of negligence.

The Latin phrase, *res judicata*, comes to us from the civil law. It means the thing has been adjudicated; it has been determined by judgment; it has been settled by the court, etc. There may be an estoppel by conduct, but the plea of *res judicata* must necessarily be founded on an adjudication — a judgment on the merits. See *Hayes v. Ricard*, decided this day.

The further defense in the case now before us is bottomed on these allegations: The plaintiff, Miss Gibbs, was injured by the joint and concurrent negligence of all the defendants, including the present plaintiff. A joint answer was filed by all defendants, denying negligence. By consent the court adjudged that the defendants pay to the plaintiff $1,050 "in full and final settlement of all matters involved in this action." The defendants in the instant action have pleaded that judgment as a bar to the right of the plaintiff to recover. In a similar factual situation, this Court said: "Unquestionably the judgment pleaded, as between the parties, would constitute *res judicata* and be regarded as conclusive as to all rights, questions and facts in issue in that action. . . . This would be true whether the judgment was by consent of the parties or based on the findings and verdict of a jury. . . . 'There is no doubt that a final judgment or decree necessarily affirming the existence of a fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them . . . in the same or any other court.' " *Lumberton Coach Co. v. Stone*, 235 N.C. 619, 70 S.E. 2d 673; *Hayes v. Ricard, supra; Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E. 2d 688.

The holding in the *Lumberton Coach Company* case is founded on

the premise that a judgment for the plaintiff against two or more defendants charged with joint and concurrent negligence establishes their negligence and may be pleaded in bar by one defendant against the other in a subsequent action between them based on the negligent acts at issue in the first cause. See also, *Stone v. Carolina Coach Co.*, 238 N.C. 662, 78 S.E. 2d 605. The decisions in *Penn Dixie Lines v. Grannick, supra,* and *Mercer v. Hilliard, supra,* are not in conflict for the reason that in neither case was there an adjudication on issues of negligence.

The case of *Stanley v. Parker,* 207 N.C. 159, 176 S.E. 279, is readily distinguishable. In that case the Court said: "A judgment against several defendants does not as a rule determine their rights among themselves, unless their rights have been drawn in issue and determined in the action in which the judgment was rendered." That action was in contract. It involved an accounting between the parties as to the amount each should pay on a judgment entered against both in a prior action.

In holding the plea in bar good in a tort case, however, our Court has proceeded on the theory that a judgment against all defendants who are jointly charged with actionable negligence necessarily establishes the negligence of all. Consequently neither can recover from the other in a subsequent action involving the same negligent acts. When both parties are at fault, neither can recover from the other.

It must be conceded, however, there is authority in conflict with the rule as stated in *Lumberton Coach Co. v. Stone, supra,* etc. The conflicting authorities hold that a judgment for the plaintiff in an action against two or more defendants is not *res judicata* as to the defendants' rights and liabilities among themselves, unless those rights and liabilities have been expressly put in issue in the prior action by cross or adversary pleadings. 101 A.L.R. 104; 142 A.L.R. 727; 152 A.L.R. 1066; 38A Am. Jur., "Judgments," § 41.

However, adhering to our rule, we conclude the trial court committed error in striking the further defense. It should be restored to the defendants' answer.

Reversed.

BOBBITT, J., dissenting. *Coach Co. v. Stone,* 235 N.C. 619, 70 S.E. 2d 673, which supports the present decision, is contrary to the weight of authority. 30A Am. Jur., Judgments § 411; 50 C.J.S., Judgments § 819; Annotations: 101 A.L.R. 104; 142 A.L.R. 727; 152 A.L.R. 1066; *Byrum v. Ames & Webb, Inc.* (Va. 1955), 85 S.E. 2d 364; *Clark's Adm'x v. Rucker* (Ky. 1953), 258 S.W. 2d 9; *Casey v. Balunas* (Conn. 1955), 113 A. 2d 867; *Kimmel v. Yankee Lines* (C.A. 3rd 1955), 224 F. 2d 644.

In the cited *Virginia* case, the opinion states: "The case of *Lumberton Coach Co. v. Stone,* 235 N.C. 619, 70 S.E. 2d 673, appears to be at odds with the general rule, . . ." In my opinion, our decision in *Coach Co. v. Stone, supra,* is erroneous and should be overruled.

The rule supported by the weight of authority is illustrated in the Restatement of the Law of Judgments, § 82, as follows: "A and B are driving automobiles, which collide. C, a passenger in B's car, sues A and B. Whether the judgment is in favor of or against C as to either or both A and B, the issues as to negligence or other element of the cause of action are not *res judicata* in a subsequent action by A against B for damage to his car."

In the cited *Kentucky* case, the opinion, citing authorities, states: "The rules of *res judicata* are based upon an adversary system of procedure designed for the purpose of giving persons an opportunity to litigate claims against each other. As a consequence, persons who have not had an opportunity of litigating between themselves the correctness of a determination which is the basis of a judgment for or against them are not concluded by such a determinaton in a subsequent action between them. Unless they were adversaries in the action in which the judgment was entered, the judgment merely adjudicates the rights of the plaintiff against each defendant, leaving unadjudicated the rights of the defendants between themselves."

Where two defendants are sued as alleged joint tort-feasors, they have no legal right to prosecute their respective claims *inter se* in the plaintiff's action. *Bell v. Lacey,* 248 N.C. 703, 104 S.E. 2d 833, and cases cited. The consent judgment, now pleaded as *res judicata,* is a compromise settlement, with court approval, of a minor's alleged claim. It was entered in an action in which the alleged joint tort-feasors filed a joint answer, consisting of a general denial of the plaintiff's allegations, raising issues between the plaintiff and the defendants. No issues were raised as between the defendants. They did not attempt to prosecute in said action their respective claims *inter se.*

Tarkington v. Printing Co., 230 N.C. 354, 53 S.E. 2d 269; *Herring v. Coach Co.,* 234 N.C. 51, 65 S.E. 2d 505, and *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805, cited in *Coach Co. v. Stone, supra,* involved essentially different factual situations. In these cases, there had been a settlement or adjudication, to pursue the above illustration, of issues raised as between A and B.

In *Stone v. Coach Co.,* 238 N.C. 662, 78 S.E. 2d 605, defendant's bus driver (Parker) had sued Stone. Stone pleaded the contributory negligence of Parker. A consent judgment was entered under which Stone paid Parker a compromise consideration. Since plaintiff's right to recover from the Coach Company was grounded solely on the al-

leged negligence of Parker, it was held that the judgment, determinative as between Parker and Stone, precluded Stone's recovery from defendant, Parker's employer, on principles stated in *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570.

Here, if the plaintiff in the prior action had been *sui juris,* and the defendants, jointly or singly, had compromised her claim and obtained a release, *without court action,* such settlement with plaintiff would not be a bar to subsequent litigation to determine the rights of the defendants *inter se. Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410; *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554.

Under the present decision, the result is this: An automobile collision occurs in which a passenger is injured. The two drivers, both or either, may compromise the claim of the injured passenger, *pay* the compromise consideration and obtain a full release without impairing their respective rights *inter se.* However, if the passenger happens to be a minor, and no valid compromise may be effected without the approval of the court, the drivers may not compromise the alleged claim of the injured passenger without sacrificing their rights to have determined in subsequent litigation their respective rights and liabilities *inter se.*

Our law encourages "out of court" compromise settlements. *Dixie Lines v. Grannick, supra; Mercer v. Hilliard, supra.* For like reasons, "in court" compromise settlements should be encouraged.

Whether a judgment in accordance with a verdict establishing that the passenger was injured by the negligence of the operators of both vehicles involved in a collision should be held determinative of the rights and liabilities of the defendants *inter se,* while the subject of the authorities cited above, is not presented by this appeal. Here, there was no adjudication of the issues raised as between the plaintiff and the defendants. The defendants did not acknowledge, but denied, liability to the plaintiff. The defendants simply offered to pay a stipulated amount *by way of compromise* of plaintiff's alleged cause of action. In my opinion, the essential nature of a compromise settlement is not affected by the circumstance that it is made (necessarily so when plaintiff is a minor) with the sanction of the court.

As I see it, a fallacy in *Coach Co. v. Stone, supra,* lies in this statement: "The fact of its negligence was judicially determined." This is a misapprehension of the nature of a consent judgment.

"A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court. (Citation) It is not a judicial determination of the rights of the parties and *does not purport to represent the judgment of the court,* but merely records the pre-existing agreement of the parties." (Our italics) *McRary v.*

McRary, 228 N.C. 714, 47 S.E. 2d 27; *Owens v. Voncannon*, 251 N. C. 351, 111 S.E. 2d 700.

I vote to overrule *Coach Co. v. Stone, supra*, and to affirm Judge Huskins' order.

PARKER, J., joins in this dissent.

MARGARET S. POWELL v. DEIFELLS, INCORPORATED.

(Filed 14 January, 1960.)

1. Negligence § 37b—

Store owners are not insurers of the safety of customers on their premises.

2. Negligence § 37f—

The doctrine of *res ipsa loquitur* does not apply to a fall of a customer in the aisle of a store.

3. Negligence § 37b—

The proprietor of a store is under duty to exercise ordinary care to keep the aisles and passageways intended for use by customers in a reasonably safe condition so as not unnecessarily to expose a customer to danger, and to give warning of unsafe conditions, of which the proprietor knows or in the exercise of reasonable supervision and inspection, should know.

4. Same—

Where an unsafe condition is created by third parties or an independent agency, it must be shown that such condition had existed for such a length of time that the proprietor knew, or by the exercise of reasonable care should have known, of its existence in time to have removed the danger or to have given proper warning of its presence in order for the proprietor to be liable to a customer injured by such condition.

5. Negligence § 37f— Evidence of negligence of store proprietor resulting in fall of customer on aisle held sufficient for jury.

Evidence tending to show that the floor of defendant's store was of asphalt tile, impervious to water and slippery when wet, that on the day in question rain mixed with snow had been falling, that an unusually large number of customers was present, that water had been tracked into the store and along the aisles, that defendant proprietor usually mopped the floor and put out mats at the door on rainy days, and that plaintiff customer, entering the store some hours after it had opened, slipped and fell to her injury in an aisle at a place where there was water, the aisle being wet all the way to the door some twenty feet away, *is held* sufficient to be submitted to the jury on the issue of negligence.

6. Trial § 22a—

On motion to nonsuit the evidence must be taken in the light most favorable to plaintiff and he is entitled to every reasonable inference to be drawn therefrom.

7. Appeal and Error § 51—

On appeal from judgment of nonsuit, evidence erroneously excluded is to be considered with other evidence offered by plaintiff

8. Evidence § 16—

When it is material to the issue whether the aisle of a store was wet or dry at the time of the accident, testimony of a witness as to the condition of the floor some fifteen to twenty minutes after the accident is competent in the absence of a showing of change of condition during the interval.

9. Evidence § 36—

Testimony of a witness to the effect that the condition of the floor of a store was wet is competent when it is obvious that the response was instantaneous and a shorthand statement of fact.

10. Negligence §§ 26, 37g—

Where reasonable minds might arrive at conflicting conclusions as to whether plaintiff was guilty of contributory negligence under the circumstances adduced by the evidence nonsuit for contributory negligence is properly denied.

APPEAL by plaintiff from *Crissman, J.*, January 19, 1959 Civil Term, of GUILFORD, Greensboro Division.

This action was instituted 4 September 1957 to recover for personal injuries allegedly caused by negligence of defendant.

Plaintiff complains that she was injured when she slipped and fell in defendant's store while making purchases and her injuries were proximately caused by negligence of defendant in that the store was dimly lighted, water had been allowed to accumulate on the aisle floors from the shoes, clothing and paraphernalia of customers on account of the rainy condition of the weather, the floors were of tile asphalt and slippery when wet, customary precautions had not been taken to make the floors safe and no warning of the dangerous condition was given.

Defendant denies all allegations of negligence and pleads contributory negligence.

Following is a summary of plaintiff's evidence:

On Friday morning, 9 December 1955 about 10:30 A. M. plaintiff, a married woman 56 years of age, drove from her home in Greensboro to Summit Shopping Center, where defendant's retail department store was located, purchased merchandise at another store, did some window shopping and entered defendant's store about 11:15.

It had been raining all the morning and at times the rain was mixed

with snow. At the time plaintiff entered defendant's store it was raining and there were flurries of snow. Plaintiff had no umbrella, was wearing a hat and winter suit but no raincoat or outer coat.

The sidewalk in front of the store is ten feet wide and covered with a canopy. There are two entrances to the store and they had no storm doors. The entrances are on the same level with the sidewalk.

Plaintiff entered the right-hand door and proceeded down the main aisle on the right side of the store, inspecting merchandise, until she came to the point where a cross aisle intersects the main aisle. She waited until the clerk had finished with another customer and then made a purchase. She spied some goods across the main aisle she desired to purchase.

Plaintiff's version of what next occurred is as follows: "I turned and started to walk across to the other counter and when I did my feet just slid completely out from under me and I fell . . . hit on my right side . . . As I fell I heard my hip break . . . there was water all around where I was, and under me, as well as far as I could see toward the door down the entrance aisle. . . . I was about 20 to 25 feet from the entrance door when I fell. There was water on the floor where my foot had slid through it. As to the condition of my suit where I fell, my suit was wet about the shoulder and sleeve and that part of my jacket that came down over my hips and my skirt all the way to the hem especially on my right side. Both of my shoes were wet, but the right shoe was wetter because I had gone more on my right than on the other side . . . the right shoe was slick and shined and the heel was pulled out of line. My shoe was not in this condition when I fell." As to the amount of water she noticed after she had fallen, she said: "Well, just like the water would be when anybody came in out of the rain or snow and walked . . . water tracks." Plaintiff was not warned that the floor was wet and slippery.

Plaintiff's shoes were suede with 1¼ to 1½ inch cuban heels. There were leather taps 1 square inch in surface on the heels. They were not slick.

Juanita Collins, a clerk who had come to work at 9:00 and had seen the accident, testified: "There had been several customers in the store that morning . . . it was raining out, and as customers came there would be some water on their feet." She stated it was the custom on rainy days to mop the floor, but the floors had not been mopped on this day. She also stated: "there would have had to been a wet condition." Upon objection, the court excluded the last statement.

Plaintiff testified that the ambulance came within 15 to 20 minutes after her fall. Ralph Hutton, who was in charge of the ambulance, testified he arrived about 11:45 A. M., 5 or 6 minutes after he re-

ceived the call. In speaking of the aisle in which plaintiff fell, he stated: "The floor was very badly tracked and there was water on the floor. I saw tracks on the floor." Upon objection, the court excluded all of Hutton's testimony relating to the condition of the floor.

Plaintiff had never shopped in this store before. It was decorated for Christmas. The lights were not bright, but were sufficient to see how to walk. Plaintiff was not looking at the floor but was looking at merchandise.

There were other customers in the store at the time. Friday was one of the busiest days of the week and business was about double during the Christmas shopping season.

One of the clerks and the store manager, on adverse examination, testified that the floor was slippery when wet and that defendant customarily put mats at the door on rainy days and mopped with a dry mop if any water accumulated on the floors, but on the day in question the mats were not placed at the door and the floor was not mopped.

The floors were of 9-inch squares of asphalt tile. The color was marbleized gray. Asphalt tile is standard flooring for stores but is slippery when wet. It is impervious to water.

When plaintiff closed defendant demurred to the evidence. The court sustained the demurrer.

From judgment of involuntary nonsuit plaintiff appealed and assigned error.

McLendon, Brim, Holderness & Brooks and Hubert Humphrey for plaintiff, appellant.

Jordan, Wright, Henson & Nichols and William D. Caffrey for defendant, appellee.

MOORE, J. The decisive question on this appeal is whether or not the court erred in granting the motion for nonsuit.

Store owners are not insurers of the safety of customers on their premises. *Copeland v. Phthisic,* 245 N.C. 580, 582, 96 S.E. 2d 697. And where a customer slips and falls in the aisle of a store the doctrine of *res ipsa loquitur* has no application. *Pratt v. Tea Co.,* 218 N.C. 732, 733, 12 S.E. 2d 242. But "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 . . . unsafe conditions of which the proprietor knows or in the exer-

cise of reasonable supervision and inspection should know." *Lee v. Green & Co.*, 236 N.C. 83, 85, 72 S.E. 2d 33. But when an unsafe condition is created by third parties or an independent agency it must be shown that it had existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or given proper warning of its presence. *Hughes v. Enterprises*, 245 N.C. 131, 134, 95 S.E. 2d 577; *Brown v. Montgomery Ward & Co.*, 217 N.C. 368, 371, 8 S. E. 2d 199.

It is our opinion, and we so hold, in the instant case that plaintiff's evidence makes out a *prima facie* case of actionable negligence. The floor was of asphalt tile, a substance impervious to water and slippery when wet. The manager of the store knew this. Because the floor was slippery when wet it was customary to put mats at the entrances and mop the floor with dry mops on rainy days. On the day plaintiff fell, it had rained all the morning and at times the rain was mixed with snow, facts of which defendant is in no position to deny knowledge. But on this day defendant neglected to mop the floor. The store had been open from two to three hours when plaintiff arrived. Customers had tracked in water. The floor was in a wet condition. When plaintiff fell there was water all around her and it extended back to the entrance. This condition was observed by the man in charge of the ambulance when he arrived. There is a reasonable inference that the water had begun to accumulate on the floor from the time the store opened for business. Indeed, this is borne out by the testimony of the clerk, Miss Collins. Defendant gave plaintiff no warning of the danger and took no steps to remove it. As to whether defendant's conduct under the circumstances constituted actionable negligence is a question for the twelve.

Flora v. Tea Co. (Pa. 1938), 198 A. 663, is quite similar. Plaintiff slipped and fell on a smooth linoleum floor where water and slush had been brought in on the shoes of customers. At two-hour intervals the floor was mopped and sawdust placed thereon. Plaintiff slipped at a place from which the sawdust had been swept about 55 minutes earlier but had not been replaced. In discussing the situation there presented the Court said: ". . . (W)e hold that it is not placing an unreasonable burden upon the owner of a store to take greater safeguards than were taken in this case to protect customers against falls . . . The floor of the store was covered with smooth linoleum which had, as one witness described it, 'a slippery disposition.' . . . It was shown that it was defendant's practice in bad weather to strew either an anti-slip compound or sawdust on the floor, to prevent slipping. This indicates that defendant was aware of a floor condition which might cause

injury to its customers. That this condition could have been obviated by comparatively inexpensive attention is too clear to require argument. . . . Slipping on wet linoleum is of such frequent occurrence that those who have linoleum on the floors of their stores, and who permit it to become and remain wet, cannot successfully plead that such a fall as the minor plaintiff sustained was not foreseeable."

Another case in point is *Lyle v. Megerle* (Ky. 1937), 109 S.W. 2d 599. Plaintiff slipped on melted snow and slush which had accumulated on the tile floor of a butcher shop. The court sustained defendant's motion for a peremptory instruction. In reversing the ruling below, the appellate Court said: "The snow had been melting throughout the day and many people were on the streets. The store had been open since 7:30 o'clock in the morning and the slush had been tracked in by customers. It was muddy and sooty. The accumulation on the tile floor was very slick. . . . The case is different from that line of cases where some object causing an injury to a customer had fallen or been placed upon the floor by a third person and had remained there momentarily or for so brief a time that the proprietor was not required to take notice of its presence, or he had had no opportunity to remove or guard against it. It is distinguishable also from the cases relied upon by the appellee where persons were injured through slipping on ice or slush on outside steps, or in entrance ways outside the storeroom, . . . The smooth surface and impervious quality of tile makes the accumulation of such substance as described in this case a situation from which such an accident should well have been anticipated. It would be an extreme view to take that reasonable men could not have foreseen the possibility of a customer slipping on slushy snow on a smooth tile floor."

The holding in *Flora* and *Lyle, supra,* is the majority view. Cases factually and legally comparable are: *Taylor v. Power Co.* (Minn. 1935), 264 N.W. 139; *Laskey v. Stores, Inc.* (Mass. 1945), 59 N.E. 2d 259; *Yeager v. Chapman* (Minn. 1951), 45 N.W. 2d 776, 22 A.L.R. 2d 1260; *Clark v. Lansburgh & Bro.* (DC D of C. 1941), 38 F. Supp. 729; *Tea Co. v. McLravy* (CC6C 1934), 71 F. 2d 396. For full discussion, annotations and exhaustive citations of authority see 62 A. L.R. 2d 6-124.

The case of *Robinson v. S. H. Kress & Co.* (EDNC 1956), 137 F. Supp. 19, is distinguishable. This is a North Carolina case. Plaintiff slipped and fell on a wet terrazzo floor under circumstances somewhat similar to the case *sub judice.* The court held that there was insufficient evidence of notice to the defendant. But the court was acting both as judge and jury and conceded that there was probably a jury question involved.

As has been often declared by this Court, on a motion to nonsuit the evidence is to be taken in the light most favorable to the plaintiff and he is entitled to every reasonable inference to be drawn therefrom. *Williamson v. Bennett,* 251 N.C. 498, 112 S.E. 2d 48; *Manufacturing Co. v. Gable,* 246 N.C. 1, 4, 97 S.E. 2d 672. And on such motion evidence erroneously excluded is to be considered with other evidence offered by plaintiff. *Pinnix v. Griffin,* 219 N.C. 35, 38, 12 S.E. 2d 667.

The testimony of the witness Hutton relative to the condition of the floor 15 to 20 minutes after the accident was competent and should not have been excluded. It was corroborative of plaintiff's testimony and in light of the circumstances was admissible as substantive evidence. The weight was for the jury. It had been raining all morning, customers had been coming in and going out, the floor had not been mopped, only a short time had intervened between the accident and Hutton's arrival and there was no evidence of an increased use of the aisle by customers after plaintiff's fall. "Whether the existence of a particular state of affairs at one time is admissible as evidence of the same state of affairs at another time, depends altogether on the nature of subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime. The question is one of materiality or remoteness of the evidence in the particular case." North Carolina Evidence: Stansbury, sec. 90, p. 170; *Gaffney v. Phelps,* 207 N.C. 553, 559, 178 S.E. 231; *Blevins v. Cotton Mills,* 150 N.C. 493, 498, 64 S. E. 428.

The statement of the witness Collins that "there would have had to been a wet condition" was probably excluded on the ground that it was an opinion or conclusion of the witness. The statement of the witness was in response to an inquiry as to the condition of the floor prior to plaintiff's fall. Counsel for defendant had repeatedly objected to questions of this purport, there was considerable confusion, and the reason for excluding this line of evidence is not at all clear. Testimony bearing upon the presence or absence of water on the floor in the main aisle both before and after plaintiff's arrival was not only material but related to an essential element of plaintiff's case. Witness had already testified that customers had tracked in water. The floor had not been mopped. When witness was finally permitted to whisper an answer to the court reporter she made the response above quoted. It is obvious that the response was instantaneous and "a shorthand statement of fact" to emphasize that the floor was wet. "The instantaneous conclusions of the mind as to the appearance condition, or mental or physical state of per-

sons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence . . ." *Watson v. Durham,* 207 N.C. 624, 625, 178 S.E. 218, quoting from *Bane v. R. R.,* 171 N.C. 328, 88 S.E. 477. See also *State v. Harris,* 209 N.C. 579, 580, 183 S.E. 740; *Street v. Coal Co.,* 196 N.C. 178, 183, 145 S.E. 11; *Kepley v. Kirk,* 191 N.C. 690, 694, 132 S.E. 788; North Carolina Evidence; Stansbury, secs. 125 and 126, pp. 233-243.

The excluded evidence referred to in the two preceding paragraphs was given consideration on the question of nonsuit.

Defendant contends that the ruling of the court below should be sustained on the ground, if on no other, that plaintiff was contributorily negligent as a matter of law. We refrain from factual discussion in this connection. Suffice it to say that this is a matter upon which reasonable minds might arrive at conflicting conclusions. It is a matter to be resolved by the jury. *Waters v. Harris,* 250 N.C. 701, 707, 110, S.E. 2d 283; *Lyle v. Megerle, supra; Clark v. Lansburg & Bro., supra; Yeager v. Chapman, supra; Tea Co. v. McLravy, supra.*

The judgment below is

Reversed.

BRANCH BANKING & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF ROBERT ALKIE WILLIAMS, DECEASED v. WILSON COUNTY BOARD OF EDUCATION.

(Filed 14 January, 1960.)

1. State § 3c—

Formal pleadings are not required in a proceeding under the State Tort Claims Act but it is required only, insofar as the statement of the basis of the claim is concerned, that an affidavit in duplicate stating the facts and circumstances surrounding the injury and giving rise to the claim be filed.

2. Same—

Ordinarily, a proceeding under the State Tort Claims Act should not be dismissed as upon demurrer upon the facts stated in the affidavit and the stipulation of the parties unless such facts disclose that recovery can not be had regardless of the evidence, as on the ground of governmental immunity or on the ground that such facts failed to present a claim cognizable under the Act.

3. State § 3b—

Liability under the State Tort Claims Act arises if the negligence

of a State employee is a proximate cause or one of the proximate causes of injury, and it is not required that the negligence of the State employee be the sole proximate cause thereof.

4. Same—

A county board of education or a city board of education is liable for injuries resulting from either negligence of commission or negligence of omission on the part of a driver of one of its school buses. G.S. 143-300.1.

APPEAL by plaintiff from *Frizzelle, J.*, June Civil Term, 1959, of WILSON.

This is a procedeeding brought pursuant to the provisions of the North Carolina Tort Claims Act for the wrongful death of Robert Alkie Williams, a nine year-old school boy. The Branch Banking and Trust Company, administrator of the estate of the aforesaid child, instituted this proceeding before the North Carolina Industrial Commission by filing a verified claim for damages against the Wilson County Board of Education. In addition to the claimant's name and address, the claim contains the following:

"3. That it hereby files a claim against Wilson County Board of Education, Wilson, N. C. for damages resulting from the negligence of Paul Douglas Lamm.

"4. That it has been damaged in the amount of $20,000 by reason of the negligent conduct of the employee or agent named above.

"5. That the injury giving rise to this claim occurred in front of A. B. Williams' home on U. S. 301, four miles south of Wilson, N. C. in Wilson County on April 30, 1957, at 3:15 p.m.

"6. That the injury occurred in the following manner: On April 30, 1957, Paul Douglas Lamm was operating a Wilson County school bus in a northerly direction along U. S. Highway 301 in the course of his employment as a bus driver by the Wilson County Board of Education. Robert Alkie Williams was a passenger on the bus. Paul Douglas Lamm stopped the bus and permitted Robert Alkie Williams to alight and start to cross the highway to his home situated on the westerly side of the highway. An automobile operated by one Geraldine Buzby passed the school bus and struck the Williams child as he crossed the highway inflicting injuries resulting in death. The negligent acts of Paul Douglas Lamm proximately causing the death of Robert Alkie Williams were as follows:

"a. He failed to supervise the activity of Robert Alkie Williams when discharging him from the school bus until he was safely across the highway or otherwise out of danger as required by G.S. 115-185 and the Rules, Regulations and Laws Governing Public School Trans-

portation in Wilson County issued by the Wilson County Board of Education.

"b. He failed to direct the monitor on his school bus to assist Robert Alkie Williams off the bus and to escort him across the highway in safety as required by G.S. 115-185 and the Rules, Regulations and Laws Governing Public School Transportation in Wilson County.

"c. He failed to keep a proper lookout for approaching cars.

"d. He permitted Robert Alkie Williams to alight from the bus when he knew or should have known an automobile operated by one Geraldine Buzby was approaching and might pass the bus and strike Robert Alkie Williams as he crossed the road.

"e. He failed to give adequate and timely warning to Robert Alkie Williams of the approaching Buzby automobile.

"f. He blew his horn in such a manner as to startle and confuse Robert Alkie Williams at a time just before the said Robert Alkie Williams was struck when he was immediately in front of the bus and in the act of crossing the highway.

"g. He discharged Robert Alkie Williams from his bus upon a heavily traveled highway without taking any precautions to enable the child to cross the highway in safety.

"7. That the damages claimed above consists of damages from wrongful death of Robert Alkie Williams proximately caused by negligence of Paul Douglas Lamm."

The defendant filed an answer or response to said claim in which it denied any act or acts of negligence on the part of its employee, and further pleaded the actionable negligence of Geraldine Buzby as the sole proximate cause of the accident and the resulting death of Robert Alkie Williams.

The defendant further pleaded that even if the defendant employee was negligent in any manner so as to render the defendant liable under the Tort Claims Act of the State of North Carolina, which is denied, then and in that event the negligence of Geraldine Buzby intervened and insulated any act of negligence on the part of the defendant employee and became the sole proximate cause of the death of Robert Alkie Williams.

When this cause came on for hearing before the hearing commissioner, attorneys for the respective parties entered into the following stipulations:

"1. That the Branch Banking & Trust Company is the duly qualified and acting administrator of the estate of Robert Alkie Williams, deceased, who died intestate a resident of Wilson County on April 30, 1957.

"2. That the death of Robert Alkie Williams resulted from injuries received on April 30, 1957, when he was struck by an automobile driven by one Geraldine Buzby.

"3. That Paul Douglas Lamm was on April 30, 1957, at the time of the accident which resulted in the death of Robert Alkie Williams, an employee of the Wilson County Board of Education and, as such employee, he was operating a Wilson County school bus and was in the course and scope of his employment at the time said accident accurred.

"4. That the subject claim for damages was filed May 21, 1958.

"5. That certain rules have been adopted by the Wilson County Board of Education and were in effect at the time of the death of Robert Alkie Williams; that a certain printed pamphlet entitled 'Rules, Regulations and Laws Governing Public School Transportation in Wilson County, issued by the Wilson County Board of Education, 1955,' contains the rules and regulations duly adopted by the Wilson County Board of Education for the operation of school buses, and the said rules were in effect at the time of this accident.

"6. That the death of Robert Alkie Williams resulted from the injuries that he received on April 30, 1957, when he was struck by an automobile driven by one Geraldine Buzby, proceeding in the same direction, who was then in the act of passing a Wilson County School bus that had stopped on U. S. Highway 301 and which was then exhibiting or had showing a mechanical 'Stop' sign extending from the side of the bus.

"7. That a copy of an alleged agreement between Geraldine Buzby and the Branch Banking & Trust Company, as administrator of the estate of Robert Alkie Williams, is a true copy of the contract between the parties named therein and that it was duly executed by those whose names appear on the document; that, should it be found to be admissible in evidence, which admissibility is not admitted by plaintiff, no objection will be raised by plaintiff on the grounds that it is a copy and not the original document. (This document was identified by being marked as 'Defendant's Exhibit 1.')

"8. That on the afternoon of April 30, 1957, the school bus was being operated, as aforesaid, over and along U. S. Highway 301, proceeding in a northerly direction; that U. S. Highway 301 at the place of the happening of the accident which caused the death of Robert Alkie Williams is a two-lane highway approximately 24 feet wide; that the two traffic lanes are divided in the middle by an intermittent white line; that the westerly lane accommodates traffic traveling in a southerly direction and the easterly lane accommodates traffic moving in a northerly direction."

After these stipulations were agreed upon and entered into, counsel for the defendant moved to dismiss the action for the reason that, "upon the facts appearing in the affidavit as constituting the basis for plaintiff's claim and upon the facts stipulated * * * it was apparent that Geraldine Buzby's negligence was at least one of the proximate causes, if not the sole proximate cause, of the death of Robert Alkie Williams; that, therefore, this action in tort cannot be sustained against the defendant under the Tort Claims Act."

The commissioner concluded that this motion to dismiss was in the nature of a demurrer, but that it was based not only on the allegations appearing in the affidavit of plaintiff filed 21 May 1958 but was also supported by the facts agreed to as set out in the stipulations appearing above; that, "even if the allegations of the affidavit alleged actionable negligence on the part of the driver of the school bus, which is questionable, said affidavit contains positive allegations of a negligent act of a third party, Geraldine Buzby, whose negligence proximately caused the death of Robert Alkie Williams; that, therefore, the affidavit of plaintiff alleged intervening negligence of a third party which would have insulated the negligence of the bus driver, had any been proved; that, therefore, on the basis of the allegations appearing in the affidavit of the plaintiff and on the agreed facts appearing in the stipulations," the commissioner was of the opinion that the motion to dismiss should be allowed, and entered an order accordingly.

The claimant appealed to the full Commission for review; the Commission likewise held, "From an examination of the affidavit filed and the stipulations of the parties, wherein plaintiff has stated the facts constituting its cause of action against the defendant, we think it affirmatively appears that the negligence of the defendant's driver, Paul Douglas Lamm, if any, was insulated by the active negligence of Geraldine Buzby, and that the result reached by the hearing commissioner should not be disturbed."

From the order affirming the order of the hearing commissioner, the plaintiff appealed to the Superior Court. The Superior Court affirmed the order of the Commission in all respects. Plaintiff appeals to the Supreme Court, assigning error.

Carr & Gibbons for plaintiff.
Gardner, Connor & Lee for defendant.

DENNY, J. No formal pleadings are required in a proceeding under our State Tort Claims Act. It is only necessary in order to invoke the jurisdiction of the Industrial Commission for the claimant

or person in whose behalf the claim is made to file with the Industrial Commission an affidavit in duplicate setting forth the material facts, as required by G.S. 143-297. This statute does not require the use of legal, technical or formal language, and the claimant is not held to the strict rules of pleadings 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." This the plaintiff has done on behalf of its intestate.

The appellant assigns as error the ruling of the court below to the effect that the hearing commissioner and the full Commission were correct in dismissing the plaintiff's claim upon the conclusion of law that the plaintiff's affidavit and the stipulations of the parties affirmatively show that the negligence of Geraldine Buzby insulated the negligence of the defendant's bus driver.

Plaintiff contends that its affidavit and stipulations stated facts which affirmatively show that the negligence of the defendant's bus driver was either the sole proximate cause or a joint and concurring proximate cause of the death of Robert Alkie Williams, and that it should have been permitted to introduce evidence of its claim as set forth in its affidavit.

We are inclined to the view that this assignment of error is not without merit. It was stipulated that the Wilson County Board of Education had adopted certain rules and regulations governing the operation of its school buses; that such rules and regulations were in effect at the time of this accident. However, we are not given the benefit of the requirements of those rules. What do the rules require of a bus driver in a situation like that described in the affidavit? We are not advised. The plaintiff was not permitted to introduce any evidence, not even the rules about which the parties stipulated. In our opinion, in an informal proceeding like that provided in our Tort Claims Act, the plaintiff is entitled to have its evidence heard, and the evidence, together with the informal pleadings, considered by the hearing commissioner in making his findings of fact and conclusions of law.

The factual situation here is wholly unlike that which existed in *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211. In the Turner case it made no difference what the evidence disclosed since the accident occurred prior to the effective date of Chapter 1256 of the Session Laws of 1955. Hence, at the time the accident occurred, the Gastonia Board of Education was clothed with governmental immunity and had not been authorized by law to waive it.

The second assignment of error is directed to the affirmance of

the court below of the allowance by the hearing commissioner of the motion to dismiss the proceeding, which motion was based on the ground that the Tort Claims Act applies only to claims arising *solely* from the negligence of a State employee or by an employee of a public agency covered by the Act.

The motion to dismiss the proceeding was based on the legal conclusion that no public agency covered by the Tort Claims Act can be held liable for the negligent acts of its employee unless the negligence of such employee was the *sole* proximate cause of the claimant's injuries and damages. In our opinion this is not a correct interpretation of the Tort Claims Act.

G.S. 143-291 provides: "The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the State Highway Commission, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of a negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, *under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.* (Emphasis added.) If the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses * * *."

The legal limitation on the right to allow a claim under the provisions of G.S. 143-291 is limited to the same category with respect to tort claims against the agency covered as if such agency were a private person and such private person would be liable under the laws of North Carolina.

It is not necessary to cite authorities in support of the fact that in a tort action the negligence of a private person need not be the sole proximate cause of the injury, but, in the absence of contributory negligence, such party is liable if his negligence was one of the proximate causes of such injury. In our opinion, it was not the intent of the Legislature to limit liability under the Tort Claims Act to situations where the negligence of an employee was the sole proximate cause of the injury or damages inflicted.

The defendant further cites in support of its position the case of *Flynn v. Highway Commission*, 244 N.C. 617, 94 S.E. 2d 571, which held that the State Highway and Public Works Commission could not be held liable for acts of omission on the part of one of its employees but only for acts of commission. The defendant points out that the plaintiff's brief concedes that all save one of the charges of negligence on the part of the school bus driver are directed toward failure omission. Be that as it may, with respect to a claim against a county school board, G.S. 143-300.1 provides: "The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged negligent act or omission of the driver of a public school bus who is an employee of the county or city administrative unit of which such board is the governing board, and which driver was at the time of such alleged negligent act or omission operating a public school bus in the course of his employment by such administrative unit or such board. * * *"

In view of the conclusion we have reached, the order dismissing this proceeding is set aside and the cause is remanded to the Superior Court to the end that it be remanded to the Industrial Commission for further proceedings in accord with this opinion.

We express no opinion on the merits of the plaintiff's claim or of the defendant's defenses.

Remanded.

JOHN PAUL FISHER, BY HIS NEXT FRIEND, M. M. FISHER
v. WILLIAM C. ROGERS.

(Filed 14 January, 1960.)

1. Damages § 12: Evidence § 44—

A surgeon who has treated and operated upon a two and one-half year old child to rectify an injury to the child's nose, which depressed all the bones of the nose as a unit, is competent to testify that such injury would result in the nose being smaller in adulthood than it naturally would have been, since such testimony relates to an ultimate and certain effect of the injuries and not merely a probable or possible effect.

2. Same—

The general rule is that a physician testifying as an expert as to the consequences of a personal injury should be confined to certain or probable consequences, and should not be permitted to testify as to possible consequences.

3. Appeal and Error § 41—

The admission of testimony of a physician that certain consequences were a possibility *held* not sufficiently prejudicial to justify a new trial in the light of the immediately following competent testimony of the surgeon as to the certain or probable consequences of the injury, there being other competent testimony that the injury was permanent in nature.

4. Damages § 13: Evidence § 44—

It is competent for a physician, qualified as an expert witness, to testify to the effect that most persons who develop epileptic seizures as a result of trauma to the head do so within a year of the time of injury although a small percent of others will develop such seizures in later years.

5. Appeal and Error § 41—

The admission of testimony of the injured child's mother and father that they were given instructions as to special care to be given the child *held* not prejudicial in view of the other competent evidence, the witnesses not testifying as to what the instructions of the physician were.

6. Damages § 15— Evidence held sufficient to warrant instruction as to damages for permanent injuries.

Where the evidence discloses that a two and one-half year old child received injuries which depressed the bones of his nose as a unit, and also sustained a linear skull facture, that the child had begun to talk prior to the injury and did not again talk until about eight months thereafter, and that the injury to the nose would result in the nose being smaller upon the child's maturity than it would otherwise have been, which would tend to reduce the breathing capacity, together with other expert testimony to the effect that persons who developed epileptic seizures from trauma to the head developed them within a year, although a small percentage of others will develop them later, *is held* sufficient to warrant the jury in finding that the child was permanently injured and that the injuries were of such nature that they might not manifest themselves until later in the child's life, and instructions to this effect are not prejudicial.

7. Appeal and Error § 24—

A misstatement of the contentions of a party should ordinarily be brought to the attention of the trial court in time for correction.

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

APPEAL by defendant from *Froneberger, J.*, 1 June 1959 Term, of MECKLENBURG.

Civil action for damages.

The jury found by its verdict that plaintiff was injured by the negligence of the defendant, as alleged in the complaint, and awarded him damages in the amount of $8,000.00.

From the judgment, defendant appeals.

Carswell and Justice for plaintiff, appellee.
Carpenter & Webb by John G. Golding for defendant, appellant.

PARKER, J., About 9:00 o'clock p. m. on 6 June 1958, the plaintiff, who was then two and one-half years old, and his sister, were sitting on the back seat of their father's automobile. The father and mother were sitting on the front seat. The father stopped the automobile on the public highway waiting for on-coming traffic to pass in order to make a left turn. He had his left arm extended out to indicate a left turn. Defendant ran into the automobile in the back with a 1950 GMC ton pickup truck, and turned it completely around across the center line in the middle of the two westbound lanes heading West on Wilkinson Boulevard.

As a result of the collision, two suits were brought: one, by plaintiff for personal injuries, and another by plaintiff's father. The two cases were consolidated for trial by consent. Judgments on both verdicts in favor of both plaintiffs were entered. Defendant did not appeal from the judgment entered against him in the father's action.

For the reason that appellant's assignments of error relate solely to matters pertaining to damages, the record states "testimony applicable to other issues in the trial is omitted."

When defendant's truck ran into the rear of the automobile in which plaintiff and his sister were sitting on the back seat, the front seat, on which their father and mother were sitting, was knocked completely loose from the floor of the automobile, and thrown into the rear on top of plaintiff and his sister. Plaintiff was under the seat. When they got the seat off plaintiff, he was on the floor. The children were pulled out of the right rear window of the autombile. When plaintiff was taken out of the automobile, he had tears in his eyes, his nose was bleeding and was completely mashed flat against his face, and he had a knot on his forehead. He was not making any sound or noise.

Plaintiff was carried from the scene in an ambulance to the emergency room at Memorial Hospital. In the emergency room he made no sound, his eyes were partially open, and he did not notice anybody. From Memorial Hospital he was taken to Charlotte Eye, Ear and Throat Hospital, where he was treated by Dr. S. S. Burns, Jr.

Dr. Burns was found by the Court, without objection, to be a duly licensed physician, and an expert witness, as to ear, nose and throat disorders and diseases. Dr. Burns examined plaintiff about two hours after he was injured in the emergency room at Memorial Hospital, and his testimony as to his condition then is in substance:

His major injury seemed to be to his nose. There were abrasions on his left wrist and lower left leg. His nose and eyes were uniformly swollen with a fresh collection of blood. All bones of the nose appeared to be depressed as a unit. The nasal airway was collapsed, partly swelling. The septum was slightly swollen, the center partition of the nose. The facial bones, other than the nasal, showed no evidence of depression. He was reasonably alert, and responded to directions, though not able to speak. He found no other injuries.

On the following day, Dr. Burns operated on plaintiff in the Charlotte Eye, Ear and Throat Hospital. He was given a light anesthesia vinthene, and the depressed nasal bones were elevated, and replaced in an elevated position. Packs of gauze were then placed in his nose to hold it up. Dr. Burns treated plaintiff the last time on 14 June 1958. At that time the nasal bones seemed to be healing well and in good position. The airway was good.

On the morning following plaintiff's injury he seemed drowsy. He did not talk or say any words. Dr. Burns testified "drowsiness indicates concussion or some injury to the brain." Dr. Burns on June 7th or June 8th referred plaintiff to Dr. William Pitts, a specialist in brain injury and treatment, because, in his opinion, plaintiff had suffered a concussion of the brain.

The mother of plaintiff, Mrs. Betty Fisher, testified prior to Dr. Burns. She testified on direct examination: the shape of his nose "is flatter and broader here and doesn't come up like it did before. He doesn't have a bridge. It sort of flattens and comes up at the end."

On direct examination Dr. Burns, a witness for plaintiff, was asked this question: "Mrs. Fisher has stated that Paul's nose, the bridge of his nose, is flatter now than it was before. Do you have an opinion as to what effect, if any, the type injury to Paul's nose for which you treated him could have on the growth and development of his nose?" Defendant's objection was overruled, and he excepted. Dr. Burns answered: "I can't give you statistics in terms of per cents but I would say that, in my experience, if there is an injury to both bones of the nose in a childhood, in later life in the adult the nose will be smaller than naturally it would have been."

Defendant assigns as error the admission of this testimony. Dr. Burns, who examined plaintiff and operated on his nose, had already testified that all the bones of plaintiff's nose appeared to be depressed as a unit, and by his operation the nasal bones were elevated. Dr. Burns testifying as an expert gave his opinion, based on his experience, as to the ultimate and certain effect of such injuries to the nose as plaintiff received. "Expert testimony of a future consequence of a prior and subsisting injury as evidence of prospective damages must

be in terms of the certain or probable and not of the possible." *Calder v. Levi,* 168 Md. 260, 177 A. 392, 97 A.L.R. 880. See 20 Am. Jur., Evidence, Section 795; *Dulin v. Henderson-Gilmer Co.,* 192 N.C. 638, 135 S.E. 614. The testimony was competent, and the assignment of error thereto is overruled. Dr. Burns immediately thereafter testified, without objection, in substance that a smaller nose tends to reduce the breathing capacity.

Defendant stipulated that Dr. William Pitts is a duly licensed physician practicing in the State, and specializes in the field of neurosurgery. The Court found as a fact that he was an expert in such field. Dr. Pitts, at the request of Dr. S. S. Burns, Jr., examined plaintiff three days after he was injured in Charlotte Ear, Nose and Throat Hospital. He testified as a witness for plaintiff in substance: X-rays made at Charlotte Memorial Hospital showed plaintiff had a fracture in the frontal region of the skull and fracture of the nose. At the time he saw him, plaintiff was rather restless, and there was marked ecchymosis, blueness about both eyes and across the bridge of the nose. He had no neurological change. His diagnosis at the time was cerebral concussion, fracture of the skull, and fractured nose. He performed no operation. Plaintiff was treated by him at the hospital. After plaintiff's discharge from the hospital, he saw him in his office at periodic intervals, some six, eight or ten times, the last examination being on 13 April 1959. Dr. Pitts was then asked this question on direct examination: "Doctor, what is the likelihood of having epileptic fits as a result of this injury?" Defendant's objection was overruled, and he excepted. Dr. Pitts answered: "This is a possibility but very unlikely. Most patients who have trauma to the head develop seizures, will develop them within a year of the time of the injury, although others will develop them later but that is a very small percentage." Defendant moved to strike out the answer. The court denied the motion, and defendant excepted. Defendant assigns as error the admission of the testimony, and the denial of his motion to strike out the answer.

We recognize the general rule that a physician testifying as an expert to the consequences of a personal injury should be confined to certain consequences or probable consequences, and should not be permitted to testify as to possible consequences. *Dickson v. Coach Co.* and *Chappell v. Coach Co.,* 233 N.C. 167, 63 S.E. 2d 297; *Alley v. Pipe Co.,* 159 N.C. 327, 74 S.E. 885; 20 Am. Jur., Evidence, Section 795.

The challenged testimony consists of two sentences. Webster's New International Dictionary, Second Edition, gives the following as one definition of seizure: "3. A sudden attack, as of a disease; a fit." It

seems manifest that, when Dr. Pitts used the word "seizures," he meant epileptic fits. In the first sentence of the challenged testimony, Dr. Pitts expressed his expert opinion in the terms of possible consequences. In the second sentence, Dr. Pitts expressed his expert opinion in the terms of certainty, and such testimony is competent. Conceding that the first sentence is incompetent, and the court erred in not striking it out, such error cannot justify a new trial, in the light of his competent expert opinion expressed in the second sentence. *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657; *Gaffney v. Phelps*, 207 N.C. 553, 178 S.E. 231.

Dr. Pitts testified on cross-examination in substance: Plaintiff had a linear skull fracture. There was no evidence of any particular permanent damage to the brain that he was able to determine, no focal damage. Additional time has passed without symptom.

After Dr. Pitts testified, plaintiff's mother was recalled as a witness, and testified in substance: Plaintiff's flattened nose pulls his eyes down at the center. His appearance is not like it was before he was hurt, they were not pulled down before. His mother, when she was first called as a witness, testified in substance: Plaintiff had started talking at the time he was injured. After that it was about eight months before he talked. He is talking some now. He does not talk like a normal three and one-half-year-old child, he talks like a two and one-half-year old.

Defendant assigns as error the admission of testimony by plaintiff's father, over his objection and exception, that Dr. Pitts gave instructions as to special care to be given plaintiff. He did not testify what these instructions were. Defendant assigns as error the admission of similar testimony by plaintiff's mother—there is no evidence in her or in any other testimony what these instructions were —, and of her further testimony that they carried out the instructions, that plaintiff didn't rest, and they called the doctor to get him to send phenobarbital, all over his objection and exception. These assignments of error are untenable, and are overruled.

Defendant assigns as errors these parts of the charge between the letters A and B, C and D, and E and F: "Plaintiff says and contends that the minor plaintiff, being 2½ years old at the time of the accident and just learning to talk, was injured violently or (A) injured permanently in that his skull was fractured (B), in that his nose was mashed down on his face and required an operation to have it replaced, and that, as a result of the severe impact, (C) that he would be permanently injured (D), and that you should award him permanent damages in a substantial amount. The plaintiff says and contends that the child is of such tender age he cannot speak for himself.

(E) The plaintiff says and contends that they have offered evidence tending to show that the injuries are of such a nature that they may not manifest themselves until later years of life of the minor (F) and that you should award substantial damages for the injuries to the child."

Immediately thereafter the court charged as follows, and defendant assigns as error that part between the letters G and H: "On the other hand, the defendant says and contends that, if you do come to reach that issue, that you ought to answer it in some figure commensurate with the injury that the defendant says and contends are of a minor nature; that the child's nose was broken and it has been repaired without permanent damage and that the frontal part of the child's head of that age was liable to heal up rapidly and will heal up rapidly and that no permanent injuries are manifest now since the accident has happened over a year ago, or about a year ago; (G) that if any permanent injury was to be manifested in the nature of epileptic fits or anything of that sort, it would have been manifested or come to light by now; (H) and that you ought to answer that issue in some nominal amount, if you do come to answer it at all, commensurate with the injuries that the defendant says are of a slight nature or that they are not of a permanent nature."

If defendant believed the trial judge was stating his contentions incorrectly in his charge, it was his duty to call the court's attention to the incorrectness before the case was finally given to the jury, so that it could be corrected. *In re Will of McGowan*, 235 N.C. 404, 70 S.E. 2d 189. All the evidence in the record shows permanent injury to plaintiff's nose, which will tend to reduce his breathing capacity. Considering the evidence that the child suffered in the collision a linear skull fracture, that he had started talking at the time he was injured, that after he was injured it was about eight months before he talked, that Dr. William Pitts, a specialist in neuro-surgery who treated plaintiff, expressed his expert opinion that "most patients who have trauma to the head develop seizures, will develop them within a year of the time of the injury, although others will develop them later, but that is a very small percentage," and all the other evidence, it is our opinion that such evidence would permit the jury, if they saw fit, to find that plaintiff was injured permanently in that his skull was fractured, and that such injuries are of such a nature that they may not manifest themselves until later years of plaintiff's life. Defendant's argument, that the trial judge's statement of the contentions assigned as errors presents an erroneous view of the law, or an incorrect application thereof, and that "contentions concerning damages were given where the Record did not contain evidence justi-

fying the awarding of the damages asserted," is untenable. All the assignments of error as to the statement of the contentions above set forth are overruled.

Other assignments of error are based on exceptions to the charge in respect to the measure of damage. Defendant contends "that the evidence presented in the trial below does not justify a recovery for any type of permanent injury or future damages," and therefore the charge in respect thereto is erroneous. These assignments of error are untenable. The evidence was sufficient to support a jury finding that the injured minor plaintiff suffered a permanent physical disability, impairing his earning capacity after majority, such as to warrant the instruction that the jury should consider such impairment existed in passing on the question of damages. *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326.

All assignments of error are overruled.

No error.

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

MRS. RAYMOND ADAMS, DR. C. T. JOHNSON, H. D. JONES AND MISS MARY McEACHERN, INDIVIDUALLY AND AS TRUSTEES OF FLORA MACDONALD COLLEGE, A CORPORATION, v. FLORA MACDONALD COLLEGE, A CORPORATION.

(Filed 14 January, 1960.)

1. Corporations § 32—

Upon the filing of a valid consolidation agreement by three educational corporations, the separate existence of each of the three consolidating corporations is terminated. G.S. 55A-42.

2. Colleges and Universities—

Where religious educational corporations are owned and controlled by certain Presbyteries of the denomination, the officers and trustees of the separate corporations have no legal rights in regard to the management of the properties which they may assert against the owning and controlling Presbyteries.

3. Same—

Where the Presbyteries owning and controlling three separate educational corporations ratify and confirm a consolidation agreement under which the three educational corporations were merged into one, the consolidation is validated and it is immaterial whether the consolidated agreement as executed conformed to that originally contemplated by the Presbyteries and the Synod, and any technical irregularities in regard to the authorization and execution of the agreement by the Board of Trustees and officers of any one of the corporations is cured.

4. Same—

Where the trustees of an educational corporation, at a meeting duly held and attended by more than a majority of them authorize and direct the execution by the corporation of a consolidation agreement, such action is sufficient predicate for the execution of the agreement after a temporary order restraining the consummation of the agreement had been dissolved, and technical objections to the validity of an authorization acted on at a meeting of the trustees subsequent to the dissolution of the restraining order are immaterial.

5. Same—

Objection that a consolidation agreement was executed on behalf of an educational corporation by the president of the college rather than the president of the corporation becomes moot when it appears that the person asserted to be the president of the corporation thereafter signs it.

APPEAL by plaintiffs from *Hall, J.*, May Civil Term, 1959, of ROBESON.

Civil action in which plaintiffs seek to have declared void a Consolidation Agreement between Presbyterian Junior College for Men, Inc., Peace College, Inc., and Flora Macdonald College, three non-stock educational corporations.

On July 1, 1957, the present plaintiffs instituted an action against Flora Macdonald College, a corporation, to enjoin the consolidation of said three colleges. In *Adams v. College*, 247 N.C. 648, 101 S.E. 2d 809, hereafter referred to as *first appeal*, this Court held that the demurrer to complaint was properly sustained but reversed the portion of the judgment which dismissed the action. (See opinion for full particulars.)

After decision on *first appeal*, to wit, on February 10, 1958, (after the Consolidation Agreement had been executed by Peace College, Inc., but before its execution by Flora McDonald College) plaintiffs instituted this (second) action against Flora MacDonald College, a corporation. In addition to facts alleged in their former action, plaintiffs alleged, in substance, that the only consolidation authorized by defendant's controlling Presbyteries was a consolidation of said three colleges and corporations; that the authorized consolidation was for a single corporation to establish and operate, in place of the three colleges then in operation, one new co-educational college to be located in or near Laurinburg, North Carolina; and that Peace College, Inc., had refused to enter a consolidation *as authorized*. Plaintiffs prayed, *inter alia*, that defendant, its trustees, officers, *etc.*, be restrained from executing a proposed consolidation agreement that would transfer, affect or impair defendant's title to its property or its authority to continue to operate Flora Macdonald College at Red Springs, North Carolina. On hearing in superior court to determine whether a tem-

porary restraining order should be continued in effect until final hearing, plaintiffs' application for injunctive relief was denied and their action dismissed.

In *Adams v. College,* 248 N.C. 674, 105 S.E. 2d 68, hereafter referred to as *second appeal,* this Court held erroneous the portion of the judgment which dismissed the action. It then appeared that said three corporations, subsequent to the hearing in superior court, had executed and filed in the office of the Secretary of State the Consolidation Agreement now challenged by plaintiffs. In remanding the case, this Court, in opinion by *Johnson, J.,* suggested the necessity for amended pleadings and additional necessary parties as prerequisite to a full and final determination of the validity of the (executed) Consolidation Agreement. (See opinion for full particulars.)

Thereafter, pursuant to court order, the Fayetteville Presbytery, the Wilmington Presbytery, the Orange Presbytery, Peace College, Inc., Presbyterian Junior College for Men, Inc., the First Presbyterian Church of Raleigh, Synod of North Carolina Presbyterian Church in the United States, and Consolidated Presbyterian College, Inc., were made additional parties defendant; and plaintiffs filed an amended complaint in which they attacked, on grounds considered in the opinion, the (executed) Consolidation Agreement.

A joint answer was filed in behalf of the Fayetteville Presbytery, the Wilmington Presbytery, the Orange Presbytery, Synod of North Carolina Presbyterian Church in the United States and Consolidated Presbyterian College, Inc. A separate answer was filed in behalf of the First Presbyterian Church of Raleigh.

Defendant Consolidated Presbyterian College, Inc., moved that the purported service of summons and amended complaint on (1) Presbyterian Junior College for Men, Inc., (2) Peace College, Inc., and (3) Flora Macdonald College, be quashed. This motion was denied. Thereupon, Consolidated Presbyterian College, Inc., filed an additional answer in which it affirmed and adopted in behalf "of said three predecessor corporations" the joint answer theretofore filed by Consolidated Presbyterian College, Inc., *et al.,* referred to above.

At trial, evidence was offered by plaintiffs and by defendants; and, at the conclusion of all the evidence, the court entered judgment of involuntary nonsuit. Plaintiffs excepted and appealed.

Varser, McIntyre, Henry & Hedgpeth and Douglass & McMillan for plaintiffs, appellants.

Smith, Leach, Anderson & Dorsett for defendants, appellees.

BOBBITT, J. If the Consolidation Agreement is valid, upon the

filing thereof on May 28, 1958, in the office of the Secretary of State, the separate existence of each of the three consolidating (predecessor) corporations terminated. G.S. 55A-42.

The Consolidation Agreement contains this provision: "Until such time as the Consolidated Presbyterian College shall be opened to students the consolidated corporation shall continue to operate Flora Macdonald College, Peace College, and Presbyterian Junior College for Men, at their present locations and under their present names; and for this purpose the present Board of Trustees of each of said Institutions shall be constituted as a Board of Managers for each respective institution to operate said institutions *in accordance with powers and authority delegated by the Board of Trustees of the consolidated corporation.*" (Our italics) If, as defendants assert, the Consolidation Agreement is valid, the plaintiffs, by virtue of the quoted provision, are presently members of the Board of Managers of Flora Macdonald College.

Prior to the filing of the Consolidation Agreement the plaintiffs were four of the thirty-eight members of the Board of Trustees of Flora Macdonald College, a corporation.

When the prior appeals were heard, the plaintiffs were seeking to enjoin a consolidation they alleged to be materially different from the consolidation contemplated by the Synod's resolutions of July 13, 1955, and of June 26, 1957, and thereafter ordered by the Fayetteville, Orange and Wilmington Presbyteries.

This Court, on *first appeal*, said: "The complaint and exhibits show that, while legal title to the property vests in defendant, the Fayetteville, Orange and Wilmington Presbyteries of the North Carolina Synod of the Presbyterian Church in the United States are the beneficial owners of defendant, and through trustees elected by them are in possession and control of its property and assets. As to this, plaintiffs' Exhibit D is explicit; and we find nothing in plaintiffs' allegations or exhibits in conflict therewith. No facts are alleged to support a contention that the defendant, its officers or trustees have any legal rights they may assert *against* the owning and controlling Presbyteries." Again: ". . . *the three Presbyteries*, not the Synod, own and control Flora Macdonald College."

When the former appeals were heard, the owning and controlling Presbyteries were not parties to the action. Plaintiffs, who derive their status as trustees from said Presbyteries, were seeking to enjoin Flora Macdonald College, a corporation, its trustees, officers, *etc.*, from effecting a consolidation alleged to be materially different from that authorized and directed by the three Presbyteries. This Court

recognized plaintiffs' legal capacity as trustees to assert such rights *in behalf* of said Presbyteries.

Whether the consolidation effected by the Consolidation Agreement is materially different from the consolidation originally contemplated by the Synod and by the three Presbyteries, on account of provisions relating to Peace College or otherwise, is now academic. At the hearing below, it was stipulated that the following resolution was adopted by the Fayetteville Presbytery on February 17, 1959, by the Wilmington Presbytery on February 19, 1959, and by the Orange Presbytery on February 20, 1959:

"RESOLVED, that this Presbytery does hereby expressly approve, ratify and affirm that agreement of consolidation which was executed by Peace College, Inc. on December 17, 1957, by Flora Macdonald College on May 7, 1958, by Presbyterian Junior College for Men, Inc. on May 12, 1958, and which was filed in the office of the Secretary of State of North Carolina on May 28, 1958, a certified copy of said executed agreement of consolidation being presented to this meeting.

"RESOLVED FURTHER, that this Presbytery does hereby specifically approve and affirm the right and authority of the Trustees and officers of Flora Macdonald College to execute said agreement of consolidation and does agree that such action was taken pursuant to and in compliance with the authority and instruction of a resolution adopted by this Presbytery (July 25, July 26, September 8) 1955."

Thus, each of the three owning and controlling Presbyteries has expressly approved, ratified and affirmed the specific Consolidation Agreement now challenged by plaintiffs. Moreover, they do so in their answer herein.

This Court, on *first appeal*, said: "Suffice to say, whether the consolidation presently authorized or any other consolidation that may be authorized is wise or prudent is for determination by the three controlling Presbyteries, not by the court." Indeed, the three controlling Presbyteries, if they determined it was wise or prudent to do so, could have directed a consolidation, on such terms as they deemed appropriate, of Flora Macdonald College and Presbyterian Junior College for Men, excluding Peace College altogether.

Plaintiffs contend the Consolidation Agreement was not legally authorized by the Board of Trustees of Flora Macdonald College, a corporation, or properly executed in its behalf. In this connection, plaintiffs cite G.S. 55-171. It is noted that Section 1 of the "Non-Profit Corporation Act," S.L. of 1955, c. 1230, effective July 1, 1957 provides: "All provisions relating to non-profit corporations appear-

ing in Chapter 55 of the General Statutes of North Carolina, as the same appears in Volume 2B and all supplements thereto, except as they apply to hospital service corporations regulated by Chapter 57, are hereby repealed and the following new Chapter, to be designated as Chapter 55A, is hereby inserted immediately following Chapter 55, and shall read as follows": The Consolidation Agreement refers specifically to G.S. 55A-39 through G.S. 55A-42.

It appears that the Consolidation Agreement was executed on behalf of Peace College, Inc., on December 17, 1957, the date it bears. There was a meeting of the Board of Trustees of Flora MacDonald College on February 11, 1958, the day after the present action was commenced, attended by twenty-four of the thirty-eight trustees, including three of the plaintiffs. The minutes show the adoption of a resolution which, omitting recitals, provided:

"That the Board take prompt and vigorous action to defend the suit seeking to set aside the will of Presbyteries and Synod;

"That the Board affirm its purpose and intent to comply with the direction and expressed wills of Orange, Fayetteville and Wilmington Presbyteries and the Synod of North Carolina as soon as the way may be cleared."

Flora MacDonald College was then temporarily restrained. "The meeting recessed to convene on three days notice at the call of the Chairman." The judgment (considered on *second appeal*) dissolving the temporary restraining order was signed March 22, 1958. Formal execution of the Consolidation Agreement was authorized at a "Recessed Meeting" held May 7, 1958. Thereupon, on May 7, 1958, the Consolidation Agreement was executed in the name of Flora Macdonald College, by Marshall Scott Woodson, as President, and by Charles W. Worth, as Secretary. The written consent of twenty-four of the thirty-eight trustees of Flora Macdonald College is attached to the Consolidation Agreement. Fourteen, including Halbert M. Jones, who presided at said meeting, signed such written consent on May 7, 1958. Each of the other ten signed within a few days thereafter. In a separate paper, these ten trustees specifically approved the resolution voted for by the fourteen at the meeting of May 7, 1958.

Plaintiffs, directing attention to the "Recessed Meeting" of May 7, 1958, contend that only sixteen trustees were present, including two of the plaintiffs; that only fourteen, less than a majority, voted for the resolution; and that no legal significance should be attached to the subsequent approval by the additional ten trustees. If the resolution adopted at the meeting of May 7, 1958, were *the sole authority* for the Consolidation Agreement, technical questions as to its authorization would be presented; but (apart from subsequent ratification

by the Presbyteries) we think the consolidation had been sufficiently authorized by the Board of Trustees of Flora Macdonald College at the meeting of February 11, 1958, and at prior meetings.

Finally, plaintiffs assert the Consolidation Agreement is invalid because the document is executed on behalf of Flora Macdonald College by Marshall Scott Woodson, as President. One of the plaintiffs testified that Woodson was President of the College but that Halbert M. Jones was President of the corporation. The minutes show that Jones was Chairman of the Board of Trustees. It appears that Woodson had executed legal documents in behalf of Flora Macdonald College, including notes and a deed, as President thereof. In any event, it appears that Halbert M. Jones signed the Consolidation Agreement on May 7, 1958; and the irregularity, if any exists, is technical rather than substantial.

It is quite evident that a majority of the Board of Trustees of Flora Macdonald College, at duly constituted meetings and otherwise, have approved the consolidation effected by the Consolidation Agreement. The trustees, including plaintiffs, as recited in the resolution adopted at their meeting on February 11, 1958, were "appointed by and responsible to" the Presbyteries which owned and controlled Flora Macdonald College. These three Presbyteries, as set forth above, have fully ratified the Consolidation Agreement as executed and filed. Such ratification suffices to cure technical irregularities, if any, in respect of the authorization and execution thereof by the Board of Trustees and officers of Flora Macdonald College.

Plaintiffs' contributions to Flora Macdonald College, whether in gifts or in service, their attachment to its traditions, and their desire that it continue to operate at Red Springs without involvement in the program of consolidation recommended by the Synod and directed by the Presbyteries, afford no basis for their prosecution of this action. They have no legal right to challenge a consolidation agreement fully ratified and approved by the Presbyteries which appointed them and to which they owe allegiance. In short, plaintiffs are not real parties in interest (G.S. 1-57), either individually or as trustees. Their status does not permit them to prosecute this action. As stated on *first appeal*, they do not have any legal rights "they may assert *against* the owning and controlling Presbyteries." Hence, the judgment of involuntary nonsuit will be affirmed.

Affirmed.

TROY LUMBER COMPANY, A CORPORATION, v. E. M. HUNT.

(Filed 14 January, 1960.)

1. Judgments § 38—

The plea of estoppel by judgment presents whether the former adjudication was on the merits and whether there is an identity of the parties, subject matter and the merits in the two actions within the purview of the doctrine of *res judicata.*

2. Same—

Generally, the plea of *res judicata* cannot be determined from the pleadings alone, but when the facts constituting the basis of the plea in bar appear on the face of the pleadings, the sufficiency of such plea may be tested by demurrer or motion to strike. G.S. 1-141, G.S. 1-126.

3. Pleadings §§ 15, 30—

A demurrer or a motion to strike admits for its purpose the truth of the factual averments well stated and relevant inferences of fact deducible therefrom, but it does not admit inferences or conclusions of law.

4. Judgments § 29—

A corporation is not barred from maintaining an action for damages to its vehicle by reason of a prior judgment in favor of defendant in an action by its president against the same defendant to recover for personal injuries arising out of the same accident, even though the president of the corporation is its controlling shareholder, and chairman of its board of directors, and has control of its action, since there is no identity or privity of parties within the purview of the doctrine of *res judicata.*

5. Judgments § 30—

A suit by the president of the corporation to recover for personal injuries received in a collision and a suit by the corporation owning the vehicle which was being driven by its president to recover for damages to its vehicle in the same collision, do not involve the same subject matter within the purview of the doctrine of *res judicata.*

6. Judgments § 29—

The fact that the president and controlling stockholder of a corporation exercises complete control of an action by the corporation to recover for damages to its vehicle resulting from a collision is not sufficient predicate for the plea of *res judicata* on the ground of a prior judgment in an action in which the president sued the same defendant individually to recover for his personal injuries in the same accident, there being other stockholders of the corporation and the corporation being a distinct entity from that of its shareholders.

APPEAL by defendant from *Phillips, J.,* May 1959 Civil Term, of MONTGOMERY.

Civil action to recover property damage to an automobile, heard upon plaintiff's demurrer and motion to strike defendant's pleas in

bar of *res judicata* and estoppel by judgment, filed *puis darrein continuance.*

From a judgment sustaining the demurrer, and striking out defendant's pleas in bar, defendant appeals.

David H. Armstrong for plaintiff, appellee.
W. D. Sabiston, Jr., for defendant, appellant.

PARKER, J. Defendant's pleas in bar of *res judicata* (*Sanderson v. Ins. Co.*, 218 N.C. 270, 10 S.E. 2d 802), and of estoppel by judgment (*Bank v. Evans*, 191 N.C. 535, 132 S.E. 563) go to plaintiff's entire cause of action, and if sustained, will destroy it.

When a former judgment is set up as a bar or estoppel, the question is whether the former adjudication was on the merits of the action, and whether there is such an identity of the parties and of the subject matter in the two actions, and whether the merits of the second action are identically the same, as will support a plea of *res judicata*. *Hayes v. Ricard*, 251 N.C. 485, 112 S.E. 2d 123; McIntosh, N. C. Practice & Procedure, 2d Ed., Sec. 1236(7).

Generally, the plea of *res judicata* cannot be determined from the pleadings alone. *Pemberton v. Lewis*, 243 N.C. 188, 90 S.E. 2d 245; *Reid v. Holden*, 242 N.C. 408, 88 S.E. 2d 125; *Craver v. Spaugh*, 227 N.C. 129, 41 S.E. 2d 82; *Dix-Downing v. White*, 206 N.C. 567, 174 S.E. 451; *Batson v. Laundry Co.*, 206 N.C. 371, 174 S.E. 90; *Hampton v. Spinning Co.*, 198 N.C. 235, 151 S.E. 266.

When, as here, the facts constituting the pleas in bar of *res judicata* and estoppel by judgment are shown on the face of the defendant's pleadings, the sufficiency of such pleas may be tested by demurrer or motion to strike. G.S. 1-141; G.S. 1-126; *Williams v. Hospital Ass'n.*, 234 N.C. 536, 67 S.E. 2d 662; *Hampton v. Pulp Co.*, 223 N.C. 535, 27 S.E. 2d 538; 19 Am. Jur., Estoppel, Sec. 182, p. 838.

The demurrer and motion to strike defendant's pleas in bar present squarely for decision the sufficiency of such pleas, because the demurrer, for the purpose, admits the truth of factual averments well stated, and such relevant inferences as may be deduced therefrom, but not legal inferences or conclusions of law asserted by the pleader, *McKinney v. High Point*, 237 N.C. 66, 74 S.E. 2d 440, and the motion to strike, for the purpose of the motion, makes similar admissions. *Trust Co. v. Currin*, 244 N.C. 102, 92 S.E. 2d 658.

On 10 November 1955, F. L. Taylor was operating a Cadillac automobile, owned by the plaintiff here, Troy Lumber Company, which was involved in a collision with an automobile driven by defendant E. M. Hunt. The present action is to recover property damage to the

automobile allegedly caused by the actionable negligence of the defendant.

The ultimate facts alleged in the pleas in bar are: Troy Lumber Company is a closely held family corporation. At the time of the automobile collision between the automobile driven by F. L. Taylor and defendant's automobile, F. L. Taylor was, and is now, the controlling stockholder of Troy Lumber Company, the chairman of its board of directors, its president, and has complete charge of its operations and business. Plaintiff instituted this action on 13 February 1956, and on the same day in the Superior Court of Moore County F. L. Taylor instituted an action against the defendant Hunt to recover damages for personal injuries sustained in the same automobile collision. F. L. Taylor employed counsel, David H. Armstrong, to bring both actions and verified the complaint here as president of plaintiff. Mr. Armstrong at the time of filing the pleas in bar here, 16 May 1959, is still counsel for Troy Lumber Company and F. L. Taylor.

The allegations of negligence in paragraphs 4, 5, 6 and 7 of the complaint here are identical with similar paragraphs in the complaint of F. L. Taylor against the same defendant.

In the action of F. L. Taylor against the defendant Hunt, Hunt answered, denying all allegations of negligence made against him in the complaint, pleading contributory negligence of F. L. Taylor, and setting up a counterclaim for damages to his person and property allegedly caused by the actionable negligence of Taylor.

At the September 1957 Civil Term of the Superior Court of Moore County, the action of *F. L. Taylor and Lumbermen's Mutual Casualty Co. v. E. M. Hunt* came on for trial before a judge and jury. Since Taylor had accepted compensation under the Workmen's Compensation Act, the Casualty Company was made a party plaintiff. *Taylor v. Hunt,* 245 N.C. 212, 95 S.E. 2d 589. Six issues were presented to the jury to answer. The first issue was as to whether Taylor was injured and damaged by the negligence of Hunt, as alleged, and the fifth issue was as to whether Hunt was injured and damaged by the negligence of Taylor, as alleged. The jury answered each of these two issues "No," and did not answer the issue of contributory negligence of Taylor, as alleged in the answer, and the three issues as to damages. The court entered judgment in accord with the verdict that Taylor recover nothing from Hunt, and Hunt recover nothing from Taylor. From the judgment, plaintiff and defendant appealed to the Supreme Court, which found no error on both appeals.

F. L. Taylor has at all times since the institution of the present action had control of it, as he also had control of his action against E. M. Hunt.

At the time of the automobile collision F. L. Taylor was operating the automobile of plaintiff in the course and scope of his employment, as president of plaintiff, and such injuries as he received were caused by the collision arising out and in the course of his employment with plaintiff.

Is there an identity of parties, or privity among the parties, in this suit, and the suit of *F. L. Taylor* and *Lumbermen's Mutual Casualty Co. v. Hunt,* within the rule requiring, *inter alia,* identity of parties to make a judgment in one proceeding *res judicata* in another? We think not. A corporation is an entity distinct from its shareholders, and the corporate entity is distinct, although all of its stock is owned by a single individual or corporation. 13 Am. Jur., Corporations, Sec. 6. To the same effect N.C.G.S. 55-3.1. F. L. Taylor has only a contingent derivative right of succession of property interest, with the other stockholders, from the Troy Lumber Company so far as to the present suit for damages is concerned. The admission that F. L. Taylor is the controlling stockholder of Troy Lumber Company, is chairman of its board of directors, its President, and has complete charge of its operations and business, is insufficient to establish identity or privity between him and the corporation for the purpose of *res judicata. Hornstein v. Kramer Bros. Freight Lines,* 133 F. 2d 143; *Macan v. Scandinavia Belting Co.,* 264 Pa. 384, 107 A. 750, 5 A.L.R. 1502; *Wolf v. Paving Supply & Equipment Co.,* (Municipal Court of Appeals for District of Columbia, 1 Oct. 1959), 154 A. 2d 544. As a general proposition it is held that a stockholder of a corporation is not a "party" to a suit merely by reason of the fact that the corporation is an actual party. Anno. 8 A.L.R., p. 295, and the many cases there cited. In addition, Lumbermen's Mutual Casualty Company is a party plaintiff in Taylor's suit against Hunt, and is not a party to the instant suit.

The subject matter of the two suits is different. Troy Lumber Company's suit is for damages to its automobile. F. L. Taylor's suit was for personal injuries to himself. Neither could assert their alleged damages in whole or in part for, or in the name of the other. *Queen City Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688; *Meacham v. Larus & Bros. Co.,* 212 N.C. 646, 194 S.E. 99; N.C.G.S. 1-57, "Every action must be prosecuted in the name of the real party in interest. . . ."

Since the essential elements of *res judicata* and estoppel by judgment are lacking, we would affirm the judgment below on the authority of *Queen City Coach Co. v. Burrell, supra,* were it not for F. L. Taylor's active participation in Troy Lumber Company's suit, that he is its controlling stockholder, its chairman of its board of directors,

its president, has complete charge of its operations and business, and that he personally was driving the automobile involved in the collision which damaged the corporate property.

This Court said in *Light Co. v. Insurance Co.*, 238 N.C. 679, 79 S.E. 2d 167: "The principle invoked is stated in Restatement of Judgments, sec. 84, as follows: 'A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or in the determination of a question of fact or a question of law with reference to the same subject matter or transactions; if the other party has notice of his participation, the other party is equally bound.' " Following that principle of law this Court held in *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E. 2d 492, that a father contingently liable under the family car doctrine, who defends as guardian *ad litem* a suit against his minor son, is estopped by judgment therein. That decision is correct, because the father as guardian *ad litem* had control over the defense of the cross action against his son, could cross-examine opposing witnesses, and offer witnesses of his own.

Plaintiff's demurrer and motion to strike defendant's pleas in bar admit, for the purpose of the hearing, that F. L. Taylor has at all times, since the institution of the two suits, had control of the instant case, and also his personal action. However, the pleas in bar contain no allegation that Troy Lumber Company had anything at all to do with the action of *F. L. Taylor and Lumberman's Mutual Casualty Co. v. Hunt*, and it is set forth in the pleas in bar that Troy Lumber Company has other shareholders than F. L. Taylor, and there is no allegation in the pleas in bar that these other shareholders had anything to do with Taylor's action for damages for personal injuries, or that any officer or agent of the corporation had anything to do with his personal action except himself.

If the present action had been tried first, and if F. L. Taylor had taken complete control of it, and continued such control until its final adjudication, would he be bound by the adjudication of litigated matters therein, as if he were a party, in the determination of the question as to whether Troy Lumber Company's automobile was damaged by the actionable negligence of Hunt? The very recent case of *Wolf v. Paving Supply & Equipment Company, supra*, answers the question, No. However, we are not called upon to answer that question here.

The principle of law quoted from *Light Co. v. Insurance Co., supra,*

is not applicable to the Troy Lumber Company upon the facts alleged in the pleas in bar.

The facts in *Philadelphia-Auburn-Cord Co. v. Shockcor,* 133 Pa. Super. 138, 2 A. 2d 501, come close to those involved in the present case. In that case the Court held: A judgment against the president of a corporation individually, in his action for injuries sustained in automobile collision, did not bar a subsequent action by the corporation for property damage to automobile in the same accident. Commenting on this case in *Hornstein v. Kramer Bros. Freight Lines, supra,* the Circuit Court of Appeals said: "There the president of the corporation had sued for personal injuries resulting from an accident and had lost. A subsequent action by the corporation for property damage, however, resulted in a verdict for the plaintiff which the Superior Court sustained. It appears from an examination of the briefs in this case that the individual plaintiff was the president and in control of the business of the plaintiff corporation."

Hornstein v. Kramer Bros. Freight Lines, supra, is the converse of that case. The plaintiff Frank Hornstein, while driving an automobile owned by Hornstein, Inc., was injured in a collision with a trailer truck driven by Robert E. Wheeler, an employee of Kramer Bros. Freight Lines, Inc. One Copping was the owner of the truck. Frank Hornstein sued Kramer Bros. Freight Lines, Inc., and Wheeler for personal injuries caused by the collision. Defendants filed a motion for summary judgment claiming that plaintiff's action was *res judicata.* A stipulation between the parties stated that Hornstein, Inc., sued Kramer Bros. Freight Lines, Inc., and Copping for damages to its automobile in the same collision. During the same term of court Copping sued Frank Hornstein for damages to his truck. The cases were tried together, and the issues of the negligence of Wheeler and Hornstein submitted to a jury, which found against Hornstein, Inc., in its action, and in favor of Copping in his suit against Frank Hornstein. Judgment was entered accordingly. The stipulation further stated Frank Hornstein was the President, Treasurer and General Manager of Hornstein, Inc., and either as trustee or individual owner, he voted the overwhelming majority of its stock. The defendants contended that Frank Hornstein and Hornstein, Inc., are substantially identical for the purpose of involving the doctrine of *res judicata.* The Court rejected the contention and following the decisions of the State of Pennsylvania, where the collision occurred, stated: "There is, therefore, out of the complexity of these three lawsuits *nothing to make the rules of res judicata* applicable in the case at bar

The facts alleged in defendant's pleas in bar are insufficient to make the rules of *res judicata* and estoppel by judgment applicable to the instant case, and to destroy plaintiff's action. Troy Lumber Company, a corporate entity distinct from its shareholders, which had nothing to do with F. L. Taylor's action, and which has other stockholders than F. L. Taylor, has a right to its day in court.

The judgment below is

Affirmed.

CONLEY C. GREER v. ODELL WHITTINGTON, JR., AND CITY SALES, INC.

(Filed 14 January, 1960.)

1. Trial § 6—

G.S. 1-180 applies not only to the charge but prohibits a trial judge from expressing an opinion on the evidence at any time during the trial as to what has or has not been shown by the testimony of a witness, and precludes the court from asking a witness questions for the purpose of impeaching or casting doubt on his testimony.

2. Same—

It is not improper for the trial court to ask a witness questions for the purpose of clarification of the witness' testimony, but in doing so the court should be careful not to express an opinion on the facts either directly or indirectly.

3. Same—

The questions asked a witness by the court in this case *are held*, in the light of all the facts and attendant circumstances, to constitute interrogation for the purpose of clarifying the witness' testimony, and not to amount to a cross-examination of the witness, although prolonged interrogation of a witness is not approved.

4. Same: Evidence § 58—

Remarks of the court during cross-examination of a witness to the effect that the cross-examination was not pertinent and that the court would say to the jury that the matter was immaterial, *held* not prejudicial in the absence of a showing that the tenor of the cross-examination was competent, material or relevant for any purpose, since the court, *ex mero motu*, has authority to control the cross-examination and to exclude or strike evidence which is wholly incompetent or inadmissible.

5. Trial § 19—

As a general rule, the court, in the exercise of its right to regulate and control the conduct of a trial, has the power of its own motion to strike evidence which is wholly incompetent or inadmissible for any purpose even though no objection is interposed to such evidence.

6. Evidence § 56—

Where a witness for plaintiff has testified to the effect that defendant drove his automobile into the rear of the automobile driven by plaintiff, causing it to turn over, testimony of a previous statement made by the witness to the effect that the accident resulted from the bad driving of plaintiff and that it would have been worse if the witness had not grabbed the wheel, *is held* competent in contradicting the witness on the subject matter about which he had been examined and not objectionable as being in contradiction of the witness on a collateral matter.

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

APPEAL by plaintiff from *Armstrong, J.*, 11 May 1959 Civil Term, of FORSYTH.

Civil action to recover damages for personal injuries.

The jury found by its verdict that the defendants were guilty of negligence, and that plaintiff was guilty of contributory negligence.

From judgment entered in accord with the verdict that plaintiff recover nothing from defendants, and dismissing the action and taxing plaintiff and his surety with the costs, plaintiff appeals.

Averitt & White by James G. White for plaintiff, appellant.

Womble, Carlyle, Sandridge & Rice by H. Grady Barnhill, Jr., for defendants, appellees.

PARKER, J. Plaintiff offered evidence tending to show that defendant Whittington drove his automobile against the rear bumper of an automobile plaintiff was driving, causing the automobile plaintiff was driving to turn over, and resulting in injuries to plaintiff. This occurred on a public highway. Defendants stipulated that Whittington at the time was an agent, servant and employee of City Sales, Inc., and acting in the scope of his agency.

Defendants offered evidence tending to show that Whittington was driving his automobile behind the automobile plaintiff was driving, that he noticed two automobiles coming up very close behind him, that he blinked his lights and started around the automobile in front of him, that the automobile in front suddenly swerved to the left, that he swerved to his left, applied his brakes and hit the dirt shoulder of the highway, that the automobile in front hit the dirt shoulder, tried to cut back, and turned over, that his automobile did not hit the automobile in front.

One Henry Berry Cason was a driver of one of the automobiles behind Whittington. He testified as a witness for plaintiff. He testified, *inter alia*, that the automobile Whittington was driving hit the automobile in front driven by plaintiff. After Cason had been ex-

amined in chief, and cross-examined, and after a redirect-examination and a recross-examination, the trial judge asked him twenty-six questions, to all of which plaintiff excepted. Plaintiff assigns this as error, contending that the questions asked by the judge amounted to a cross-examination of the witness, and were an expression of opinion by the court in violation of N. C. G.S. 1-180.

N. C. G.S. 1-180 does not apply to the charge alone. *In re Bartlett's Will,* 235 N.C. 489, 70 S.E. 2d 482. This statute prohibits a trial judge from asking questions which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness, and from asking a witness questions for the purpose of impeaching him or casting doubt on his testimony. *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *S. v. Perry,* 231 N.C. 467, 57 S.E. 2d 774; *In re Bartlett's Will, supra.*

In *Andrews v. Andrews,* 243 N.C. 779, 92 S.E. 2d 180, it is said: "It is not unusual nor improper for a trial judge to ask questions of a witness to make clear his testimony on some point, and sometimes to facilitate the taking of testimony, but frequent interruptions and prolonged questionings by the Court are not approved and may be held for prejudicial error if this tends to create in the minds of the jurors the impression of judicial leaning to one side or the other." However, a trial judge in asking a witness competent questions to obtain a proper understanding or clarification of what a witness has said or meant to say, or to bring out some fact overlooked, should be careful to prevent by word or manner what may be understood by the jury as the direct or indirect expression of an opinion on the facts. *S. v. Harvey,* 214 N.C. 9, 197 S.E. 620.

Plaintiff's complaint alleges that the time of the occurrence was about 6:00 o'clock p.m. on 11 October 1957. He states in his brief: "The court asked the witness for the plaintiff, Henry Cason, twenty-six questions concerning his whereabouts on the morning prior to the collision in question."

While we do not approve of a trial judge asking a witness so many questions, yet, an examination of these questions in the light of all the facts and attendant circumstances disclosed by the record up to that time shows that the questions asked by the judge were for the purpose of obtaining a proper understanding and clarification of the testimony. We are unable to perceive any substantial basis for the contention that these questions amounted to a cross-examination of Cason, or were asked for the purpose of impeachment, or amounted to the expression of an opinion by the judge, or were of such a prejudicial nature as to have had any appreciable effect on the results of the trial below. All the assignments of error to these twenty-six

questions by the judge are overruled. *S. v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264; *Andrews v. Andrews, supra; S. v. Perry, supra.* The cases relied on by plaintiff are clearly distinguishable.

There had been a strike at Holly Farms Poultry Company. The drivers had gone back to work, and 11 October 1957—the day plaintiff was injured—was the date of an election to determine whether the Teamsters' Union would represent the drivers. The union lost the election. Plaintiff and his witnesses, except two doctors and his wife, were members of the union, and had been out on strike. Whittington is president of City Sales, Inc., which, prior to 11 October 1957, had leased equipment to Holly Farms Poultry Company. The day of the election there had been a fight between Raymond L. Maynard, a striker, and James Smith, a non-striker, both drivers for the Holly Farms Poultry Company. One of the two automobiles behind Whittington, when he started to pass the automobile driven by plaintiff was an automobile owned by Maynard, and driven by Albert Motes.

J. B. Wiles, a witness for defendants, testified in chief: On 11 October 1957, he was a guard or watchman at Holly Farms Poultry Company. About five or six o'clock p.m., James Smith came to the plant. He had blood and skinned places on his face. As a consequence of what Smith told him, he went to look for Maynard at several places. Later he heard of the wreck in which plaintiff was injured, and went to the scene. The automobile plaintiff had been driving had been wrecked. The men who had been in it were not there. He and another officer looked at Whittington's automobile, and found no marks on it. He doesn't remember whether Maynard's automobile was there or not. He testified on cross-examination: "I was a guard at the plant. It was my duty to make arrests. I had authority to arrest anyone breaking about the plant there or anywhere in the town; I was a policeman and still am. I was paid by Holly Farms; neither the Town nor the County paid me anything. I received some fees for my work. There were some fees I received; they were not fees for appearance in court, they were fees for arrests, for speeding tickets, or parking tickets, anything. I suppose the defendants paid those, I don't know. I did not receive any County funds or Town funds at all. I received the witness fees and arrest fees from the Town; I suppose they were in turn collected from defendants as part of the costs." At this point the judge said: "What difference would any of that make?" Counsel for plaintiff replied: "I will ask him a question, I think in that regard." The judge: "It seems a waste of time about it. I will say to the jury it doesn't make any difference." Plaintiff excepted, exception 28. The judge

asked counsel what he was objecting to. Counsel replied, to the court's remarks. The judge replied he would overrule the objection. Counsel moved to strike it out. The judge sent the jury to its room, and the following proceedings were had in the absence of the jury, to which plaintiff excepted, exception 29. There were more remarks between the judge and counsel, and then the witness on cross-examination testified in substance: He has been working for the Poultry Farm since 1 February 1957 as a guard. He is a brother of Hoke Wiles, who testified for defendants. He knows defendant Whittington. He knows plaintiff and his witness, John Orr. He doesn't recall seeing them around the plant that day. He had not been employed specifically to deal with the strike and the labor difficulties there, but just generally as a guard or watchman. He did not see the collision. When he arrived at the scene, the occupants of the automobile had left. Plaintiff has no other exception as to Wiles' testimony, either when the jury was present or in its room.

Plaintiff has two assignments of error based on his exceptions numbered 28 and 29, and this is his entire discussion of it in his brief: "The court here interrupted the cross-examination of the defendants' witness, J. C. Wiles, to inquire, 'What difference would any of that make.' The court then made the statement, 'I will say to the jury that it doesn't make any difference.' Here the Court clearly expressed to the jury the opinion that the cross-examination was of no importance and amounted to an endorsement by the Court of the testimony of this witness. The Court undoubtedly has the power to regulate cross-examination. The proper manner of doing so is by sustaining objections. To comment upon the evidence is error."

Plaintiff in his brief does not contend that any of the evidence, in respect to which the judge made his comments, "What difference would any of that make," and "it seems a waste of time about it, I will say to the jury it doesn't make any difference," is competent, material or relevant for any purpose to the issues being tried. The burden is on appellant to show that it was competent, material or relevant, *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657, and that he has not done.

The remark by the judge was a statement of a legal objection to the evidence. A court is not bound to hear and determine a cause on incompetent evidence, but, as a general rule, in the exercise of its right to control and regulate the conduct of the trial, may, of its own motion, exclude or strike evidence which is wholly incompetent or inadmissible for any purpose, even though no objection is interposed to such evidence. *Electric Park Amusement Co. v. Psichos*, 83 N.J.L. 262, 83 A. 766; *Rider v. State*, 196 Ga. 767, 27 S.E. 2d 667; Stansbury,

North Carolina Evidence, Sec. 37; 88 C.J.S., Trial, Sec. 156; Conrad, Modern Trial Evidence, Vol. 2, p. 330; Jones, Commentaries on the Law of Evidence, 2d Ed., Vol. 5, p. 4527; 58 Am. Jur., Witnesses, Sec. 554.

In *Electric Park Amusement Co. v. Psichos, supra,* the Court said: "We have not been referred to any case which holds that a court may not on its own motion object to the competency, materiality, or relevancy of a question put to a witness, and either overrule it or admit it. We think it may do so."

"It is always in a judge's discretion, as indeed it is his duty, to stop an examination when he can see that its further progress will be futile; it is especially important to do so in a long case like this." *U. S. v. Coplon,* 185 F. 2d 629, 28 A.L.R. 2d 1041, cert. den. 342 U.S. 920, 96 L. Ed. 688.

As to the assignments of error, based on exceptions 28 and 29, prejudicial error is not shown, and these assignments of error are overruled.

John H. Orr, Jr., a witness for plaintiff, was riding in the car with plaintiff, when it turned over. Orr testified in chief to this effect: He felt a bump in the rear of the automobile in which he was riding, then he felt a sudden surge of speed, and the back end of their automobile went over on the shoulder. It whipped back on the road. Plaintiff was fighting for control, he lost control of it, and it turned over. On cross-examination he testified in substance: He figured it was Whittington's automobile which bumped them, and caused their automobile to turn over. Vernon Church is superintendent of transportation for Holly Farms Poultry Company. He can't honestly say he did or did not make this statement to Church the next morning: "Greer made a bad drive, and I grabbed the wheel; and if I hadn't grabbed the wheel the car would have gone into the ditch. . . . I don't remember telling him the reason the car turned over, that Conley made a bad drive and I grabbed the wheel."

Vernon Church testified as a witness for defendants. On direct-examination he testified that the first he knew of the accident was when John H. Orr, Jr., came into his office early the morning after. Then counsel for defendants asked Church what he said to Orr, and what Orr said to him. Counsel for plaintiff objected, unless it is offered for corroboration. The objection was overruled, and plaintiff excepted. Church replied: "I asked Mr. Orr what happened to him. He had a bandage on his head, and I asked him what happened to him; and Mr. Orr said, 'I was in a car with Greer down the road here. He made a bad drive. I grabbed the wheel or it could have been worse. We could have went over a bank.' "

Plaintiff assigns the admission of this evidence as error, contending that the evidence is incompetent, for the reason that it contradicts Orr on a collateral matter.

The real issue in this case was whether Whittington deliberately or negligently drove his automobile into the rear of the automobile plaintiff was driving, and caused it to turn over resulting in injuries to plaintiff, or whether plaintiff deliberately or negligently swerved his automobile to the left, as Whittington was attempting to pass, and in so doing, lost control of the automobile, causing it to turn over, thereby contributing proximately to his own injuries.

In our opinion, the prior inconsistent statement of Orr to Church relates to a matter which was pertinent and material to the pending inquiry, and to the subject matter about which he was examined, and was clearly competent as evidence. *S. v. McPeak*, 243 N.C. 273, 90 S.E. 2d 505; *S. v. Wellmon*, 222 N.C. 215, 22 S.E. 2d 437; *Keerans v. Brown*, 68 N.C. 43; *S. v. Patterson*, 24 N.C. 346; Stansbury, North Carolina Evidence, Sec. 48. This assignment of error is overruled.

The other assignments of error are to the charge. As to these, there is no citation of authority in plaintiff's brief. They merit no discussion, and are overruled.

In the trial below, we find no prejudicial error.

No error.

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

FLORENCE HARRELL, A WIDOW, v. H. EMMETT POWELL AND WIFE, MILDRED F. POWELL; WAYNE REDEVELOPMENT COMPANY, INCORPORATED, AND N. E. MOHN, JR.

(Filed 14 January, 1960.)

1. Pleadings § 15—

A demurrer admits relevant facts well pleaded and inferences of fact necessarily deducible therefrom.

2. Equity § 2: Limitation of Actions § 16—

Neither a statute of limitations nor laches may be taken advantage of by demurrer.

3. Estoppel § 6—

Ordinarily an estoppel, including estoppels by deed, must be pleaded, but when the matter constituting the basis of the estoppel is shown on the face of the opponent's pleading the estoppel may be raised by a special demurrer specifically pointing out the matter constituting the estoppel.

4. Husband and Wife § 4—

A married woman has the right to deal with her separate property to the same extent as if she were unmarried subject to the exceptions that she must comply with the provisions of G.S. 52-12 in contracting with her husband affecting the corpus or income of her estate and that she may not convey her real estate except with the written consent of her husband. G.S. 52-2, G.S. 39-7.

5. Same: Estoppel § 5—

While a deed or contract to convey executed by a feme covert without the joinder of her husband cannot estop her during coverture, the sole remedy against her during coverture being an action for damages, after the death of the husband the legal restrictions are removed and she is subject to be estopped to the same extent as any other person.

6. Same—

The rule that a married woman may be estopped by her separate deed or contract to convey realty after the death of the husband applies to a conveyance of lands held by them by the entireties, and she will be estopped by a warranty deed to lands held by the entireties notwithstanding that the husband at the time of the conveyance was mentally incompetent.

7. Same: Estoppel §§ 1, 8—

Whether a quitclaim deed constitutes an estoppel depends upon its language, and therefore a demurrer on the ground of estoppel by deed and contract to convey cannot be sustained when the instruments do not appear in the pleadings, but the estoppel must be pleaded so that the question may be determined on the basis of the terms of the option contract and whether the deed was a warranty deed or a quitclaim deed, and, if a quitclaim deed, its provisions.

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

APPEAL by plaintiff from *Sharp, S. J.*, June 1958 Term, of WAYNE.

The substance of the complaint is as follows:

Plaintiff, Florence Harrell, is widow of L. J. Harrell who died in January 1955. Prior to January 1950 plaintiff and her husband owned, as tenants by the entirety, a tract of land in Goldsboro Township, Wayne County, containing approximately 93 acres. On 23 January 1950 they executed and delivered to defendant, H. Emmett Powell, a purported option and contract to convey said land, which instrument is duly recorded in Book 353, at page 534, Wayne County Registry. About 14 September 1950 they executed and delivered to Wayne Redevelopment Company, Inc., assignee of Powell, a purported deed of conveyance for said land, which deed is dated 7 September 1950 and duly recorded in Book 360 at page 280, Wayne County Registry. For six years prior to his death L. J. Harrell, late husband of plaintiff, "due to emotional and mental strain and physical illness and infirmi-

ties, was mentally incompetent from lack of understanding to transact his business or to execute a valid contract or deed, and was, likewise, incompetent for want of understanding to join in a deed with plaintiff herein or to give his assent to a conveyance of any interest of plaintiff in and to the property described . . ." The corporate defendant executed and delivered to a trustee on 18 December 1956 a deed of trust to secure notes payable to defendants Powell and Mohn; this deed of trust is recorded in Book 450, at page 302, Registry of Wayne County. Subject to the deed of trust and at the instance of defendant Powell the corporate defendant conveyed the land in question to seven individuals as tenants in common by deed dated 20 December 1956 and recorded in Book 457, at page 584, Wayne County Registry. The deed purports to convey to Powell 89% undivided interest and Mohn 5%. The corporate defendant has been dissolved and Mohn is its process agent. Defendants are collecting substantial monthly rentals from this land. Plaintiff prays that all of the instruments referred to be declared void and clouds on plaintiff's title, for appointment of a receiver and an accounting for rents.

Defendants demurred to the complaint. The court sustained the demurrer.

From judgment sustaining the demurrer and dismissing the action plaintiff appealed and assigned error.

Lucas, Rand and Rose; Naomi E. Morris; George N. Vann, and Dees, Dees & Smith for plaintiff, appellant.

Hubbard & Jones and McLendon, Brim, Holderness & Brooks and Hubert Humphrey for defendants, appellees.

MOORE, J. This cause was here at the Fall Term 1958. *Harrell v. Powell,* 249 N.C. 244, 106 S.E. 2d 160.

The defendants state, as cause for demurrer, that the facts alleged in the complaint are insufficient to constitute a cause of action, that the action, if any, is barred by specified statutes of limitation and laches, that plaintiff is estopped by her contract and deed, and that plaintiff does not allege that L. H. Harrell was incompetent on the date of execution of the deed.

A demurrer is construed as admitting relevant facts well pleaded and inferences of fact necessarily deducible therefrom. *Board of Health v. Louisburg,* 173 N.C. 250, 253, 91 S.E. 1019. In the light of this principle, the allegation of incompetency of plaintiff's husband at the time of the execution of the deed is sufficient and the allegation for the purposes of this appeal is taken to be true.

Neither a statute of limitations nor laches may be taken advantage

of by demurrer. *Stamey v. Membership Corp.*, 249 N.C. 90, 96, 105 S.E. 2d 282; *Queen v. Sisk*, 238 N.C. 389, 392, 78 S.E. 2d 152.

"An estoppel is new matter and must generally be pleaded as a defense . . . and this applies to . . . estoppels by deed . . ." 1 McIntosh, North Carolina Practice and Procedure, sec. 1236(7), p. 673. Ordinarily the defense of estoppel may not be raised by demurrer. *Aldridge Motors, Inc., v. Alexander*, 217 N.C. 750, 756, 9 S.E. 2d 469. But "when the matter constituting the estoppel is shown on the face of the opponent's pleadings, the question of estoppel may be raised by demurrer. 19 Am. Jur., Estoppel, sec. 182, p. 839. But "the demurrer must be special, rather than general, and point out specifically the matter constituting the estoppel." *Perry v. Doub*, 238 N.C. 233, 237, 77 S.E. 2d 711.

The demurrer in this case with respect to estoppel is special. It says: "It appears from the complaint the plaintiff is estopped from asserting her claim by reason of her own action as tenant by the entirety in executing and assenting to the option and deed conveying the property in question to the Wayne Redevelopment Company, Inc., . . ."

This question then arises: Is plaintiff, under the circumstances alleged in the complaint, estopped by her option contract and deed to assert title to the *locus in quo*?

Since the Martin Act, Chapter 109, P.L. 1911, G.S. 52-2, "every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she was unmarried." This is subject to two exceptions: (1) She must comply with the provisions of G.S. 52-12 in contracting with her husband affecting the corpus or income of her estate; (2) She may not convey her real estate except with the written assent of her husband. G.S. 52-2; G.S. 39-7.

A married woman is *sui juris* with respect to her contracts. *Etheridge v. Wescott*, 244 N.C. 637, 642, 94 S.E. 2d 846; *Davis v. Cockman*, 211 N.C. 630, 632, 191 S.E. 322. Where a *feme covert* contracts to convey her land, without her husband joining in the contract, specific performance may not be enforced during the coverture, if he refuses to join in the conveyance, but she may be held responsible in damages. *Warren v. Dail*, 170 N.C. 406, 410, 87 S.E. 126. During coverture she is not estopped by her separate deed and such deed is void. *Buford v. Mochy*, 224 N.C. 235, 29 S.E. 2d 729. But where a married woman conveys her real estate without the assent of her husband, if she survives her husband she may not, after his death, recover the land or defeat the title of her grantee, or those in privity with him, on the ground that the deed was void for lack of assent of

her husband at the time of execution. *Mills v. Tabor,* 182 N.C. 722, 109 S.E. 850; *Sills v. Bethea,* 178 N.C. 315, 100 S.E. 593. It is true in these cases that there were acts on the part of grantors after death of the husbands which might be considered ratifications. But apparently these were not the controlling factors. In the *Sills* case, page 317, it is said: "While the husband lived the obligation of the contract could be enforced only by an action for damages . . . , for the reason that the court could not require specific performance because it could not compel the husband to give his written assent . . . , but the husband being dead there is no obstacle now in requiring the plaintiff to comply with her contract by specific performance."

This Court has said: "In this State the common law disabilities of a married woman to contract, with certain exceptions, have been removed and she is bound by an estoppel the same as any other person." *Tripp v. Langston,* 218 N.C. 295, 297, 10 S.E. 2d 916. But it is further stated: "Estoppel is applied against those who are capable of acting in their own right in respect of the matter at issue, and not against those under specific disability in respect of it. *Morris Plan Co. v. Palmer,* 185 N.C. 109, 116 S.E. 261. To the extent that a married woman is authorized to deal with her property as a *feme sole* she is liable on her contracts and subject to estoppel, *Council v. Pridgen,* 153 N.C., 443, 69 S.E. 404, but otherwise her disability may not be circumvented or the pertinent legal restrictions of coverture set at naught." *Buford v. Mochy, supra.* So, it would seem that so long as the "restrictions of coverture" remain, estoppel would not apply to a conveyance of realty by the wife without assent of the husband, but when the restriction is removed by death or divorce she is estopped by her contract.

It has been said that Article X, section 6, of the Constitution of North Carolina, and G.S. 52-2 do not affect estates by the entirety. *Davis v. Bass,* 188 N.C. 200, 207, 124 S.E. 566. But it is said in G.S. 52-2 that a conveyance of realty by a *feme covert* without assent of her husband is invalid and it is likewise held that neither the husband nor the wife can dispose of any part (of an estate by the entirety) without the assent of the other. *Gray v. Bailey,* 117 N.C. 439, 441, 23 S.E. 318. There is an analogy; the disability of the wife is substantially the same in the two situations. In estates by the entirety the husband has the same disability (except as to his right of possesion and to the rents and profits) as the wife.

It was said in *Hood v. Mercer,* 150 N.C. 699, 700, 64 S.E. 897, "that where the husband had conveyed the land by deed with warranty without the joinder of the wife, and survived her, his grantee acquired title, but this was by way of estoppel." See also *In re Brown* (W.D.

Ky. 1932), 60 F. 2d 269; *Carbon Co. v. Knight* (Md. 1955), 114 A. 2d 28, 51 A.L.R. 2d 1232. Also where land is held by the entirety and the husband conveys it to the wife and survives her, he is estopped to assert title by reason of survivorship. *Keel v. Bailey,* 224 N.C. 447, 449, 31 S.E. 2d 362; *Willis v. Willis,* 203 N.C. 517, 519, 166 S. E. 398; *Capps v. Massey,* 199 N.C. 196, 198, 154 S.E. 52. Where a husband and wife owned land as tenants by the entirety and executed a deed of separation in conformity with law, making a settlement and division of the property, the wife was held to be estopped to claim an interest in the realty thus settled on her husband, even though there was a reconciliation after execution of the deed of separation. *Jones v. Lewis,* 243 N.C. 259, 90 S.E. 2d 547. There the Court said: "It is well settled in this State that a conveyance from one spouse to the other of an interest in an estate held by the entireties is valid as an estoppel when the requirements of the law are complied with in the execution thereof." Indeed we see no reason why the principles of estoppel should not apply to the wife with the same vigor as to the husband, with respect to an estate by the entirety, where she has conveyed to a third party during coverture without the joinder of her husband and has survived the husband. After the death of the husband all disabilities are removed and she is a *feme sole* for all purposes and bound by her contracts.

Cases from other jurisdictions are of little assistance here, for the estate by the entirety has been differently construed in the different States and often modified by statute. But we find the following decisions to be in accord in principle with the conclusion reached here. *Simon v. Chartier* (Wis. 1947), 27 N.W. 2d 752; *Bank v. Benard* (Mass. 1935), 194 N.E. 839; *Demerse v. Mitchell* (Mich. 1915), 164 N.W. 97.

In the case at bar, however, there is nothing to indicate the terms of the deed and option contract referred to in the complaint. Ordinarily the grantor in a deed of bargain and sale is estopped thereby to assert after-acquired title. *Crawley v. Stearns,* 194 N.C. 15, 18, 138 S.E. 403. But as a general rule the grantor in a quitclaim deed is not so estopped. *Bryan v. Eason,* 147 N.C. 284, 292, 61 S.E. 71; 19 Am. Jur., Estoppel, sec. 9, p. 606. The provisions of a quitclaim deed may in some instances require a different result, however. The deed and contract, in the case *sub judice,* are not before us. Therefore the defense of estoppel must be affirmatively pleaded in the answer if defendant relies thereon.

Reversed.

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

LEWIS R. BRIGGS v. AMERICAN & EFIRD MILLS, INC.

(Filed 14 January, 1960.)

1. Contracts § 12—

When a written contract is free from ambiguity, interpretation is for the court.

2. Same—

In interpreting a contract, the court will ascertain the intent from the language used, the situation of the parties, and the objective sought to be accomplished.

3. Same—

Ordinarily the words employed in a written contract will be given their ordinary significance.

4. Master and Servant § 10— Facts alleged in the complaint held insufficient to show breach of contract of employment by employer.

The contract of employment for a term of three years provided that the employee should have exclusive charge of the employer's manufacturing operations. The contract provided that the employer might terminate the contract at any time for fraud or dishonesty of the employee but that upon physical incapacity of the employee his remuneration should continue for one year and in the event of discharge because of disagreement with the employee's policies or methods, or sale of its properties by the employer, or any other cause, the employee's remuneration should continue for a minimum of two years. Shortly before the expiration of the three-year term the employer placed another in complete charge of one of its manufacturing divisions, which was a mere segment of its extensive operations. *Held*, although a termination of the employee's contract for asserted incompetency or insubordination would obligate the employer to pay his compensation for two years thereafter, the placing of another in complete charge of one segment of its manufacturing business does not constitute a breach of the contract, there being no suggestion that the employee had been removed from supervision and control of the other divisions of the employer's business.

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

APPEAL by plaintiff from *Sharp, S. J.*, April 6, 1959 Extra Civil Term, of MECKLENBURG.

This action was begun 29 May 1958. The amended complaint alleges a contract of employment made 24 August 1955. A copy of the contract is annexed to the complaint. It provides for plaintiffs employment for a term of three years beginning 1 October 1955, and further provides: "Briggs shall be in exclusive charge of the manufacturing operations of American and Efird. He shall devote his full time and effort to this work. He shall report and be responsible to the Executive Vice-President of American and Efird. His title shall be that of Vice-President and Director of Manufacturing." As compen-

sation for the services to be rendered, defendant agreed to pay an annual salary of $24,000 and certain other perquisites specified in the contract.

The contract contained these further provisions: "For any fraud or dishonesty on the part of Briggs, American and Efird may terminate this contract at any time. In the event of physical incapacity on the part of Briggs, American and Efird shall nevertheless maintain its performance under this contract throughout one year of such incapacity. Thereafter, if such incapacity continues, American and Efird may cancel this contract.

"If for any other reason, whether because of disagreement with his policies and methods or sale of its properties or other cause, American and Efird terminates Briggs' services during the term of this contract, then American and Efird shall be liable to Briggs for compensation of a minimum of two years base pay."

The complaint alleges that plaintiff was an experienced executive, able to supervise the manufacturing operations of large textile mills, and because of this the parties expressly stipulated that Briggs should serve in the capacity of being in exclusive charge of the manufacturing operations and did not contemplate or provide that he should serve in any less capacity. He alleges that he served pursuant to the contract until 2 April 1958, "at which time, against the wishes and over the protests of the plaintiff, the defendant through its Executive Vice President promulgated an order designating another person General Manager of its Spun Fibers Division, placing such person in complete charge of said Division, and relieving the plaintiff of his duties and responsibilities with respect to manufacturing in the Spun Fibers Division.

"4. The said Spun Fibers Division was a manufacturing operation of the defendant corporation, producing worsted yarns, synthetic yarns and blends of synthetic and worsted yarns."

He alleges a termination of the contract by placing another person in charge of the Spun Fibers Division, entitling him to $48,000, two years' minimum base pay, as stipulated in the contract.

Defendant moved to strike from the complaint the allegations as to the motives inducing the parties to enter into the contract. The motion was allowed and defendant then demurred to the complaint for failure to state a cause of action. The demurrer was sustained. Plaintiff, having excepted to the order striking portions of the complaint and to the judgment, appealed.

Carpenter & Webb for plaintiff, appellant.

Helms, Mulliss, McMillan & Johnston for defendant, appellee.

RODMAN, J. The question presented is this: Did the placing of another person in charge of defendant's Spun Fibers Division terminate Briggs' service with defendant?

The answer is to be found in the contract. When a contract is in writing and free from ambiguity, interpretation is for the court. "When competent parties contract at arm's length upon a lawful subject, as to them the contract is the law of their case." *Suits v. Insurance Co.*, 249 N.C. 383, 106 S.E. 2d 579; *Barham v. Davenport*, 247 N.C. 575, 101 S.E. 2d 367.

When a court is called upon to interpret, it seeks to ascertain the intent of the parties at the moment of execution. To ascertain this intent, the court looks to the laguage used, the situation of the parties, and objects to be accomplished. Presumably the words which the parties select were deliberately chosen and are to be given their ordinary significance. *Casualty Co. v. Teer Co.*, 250 N.C. 547; *DeBruhl v. Highway*, 245 N.C. 139, 92 S.E. 2d 553; *Chambers v. Byers*, 214 N.C. 373, 199 S.E. 398; *Gilbert v. Shingle Co.*, 167 N.C. 286, 83 S.E. 337.

We examine the contract and allegations in the complaint in the light of these controlling rules. When we do so, it appears: Defendant's manufacturing operations are extensive; the Spun Fibers Division is a segment thereof; to supervise and direct its manufacturing operations, it desired a capable and experienced person; and to obtain such services defendant agreed to pay substantial compensation; each party regarded a fixed term for a number of years as best suited to accomplish the object of the contract, which was manifestly efficient and economical production of goods.

The parties recognized that conditions might arise which would cause a termination of the contract and cessation of plaintiff's services. If this cessation of services was due to plaintiff's physical disability, defendant obligated itself to "maintain its performance under this contract throughout one year of such incapacity"; if the termination of plaintiff's services was due to his intentional wrong (fraud or dishonesty) no obligation rested on defendant to make payment; if, however, the company terminated Briggs' services (1) by a sale of its properties, or (2) because of "disagreement with his policies and methods," or (3) for any other cause, the company obligated itself to pay the employee two years' salary, and this irrespective of the time when the contract was terminated.

Without these provisions the company would not be obligated to pay when the employee was physically unable to serve; but in the event of a sale of its properties, it would be obligated to the employee for the agreed compensation for the remainder of his term, *Woodley*

v. Bond, 66 N.C. 396, less what he could reasonably earn by other employment, *Thomas v. College,* 248 N.C. 609, 104 S.E. 2d 175; *Smith v. Lumber Co.,* 142 N.C. 26.

The parties desired to guard against a situation where the termination was based on asserted incompetency or insubordination (disagreement with his policies and methods.) Such a charge, if founded in fact, would, except for the contract provisions, relieve the employer of any obligation to pay. *Ivey v. Cotton Mills,* 143 N.C. 189. When the contract is read as a whole, it is, we think, apparent that the word "terminate" means "to put an end to, to make to cease, to end," Webster's New Int. Dic., and should be given its ordinary significance. The contract provides for payment upon termination of service. This means, we think, a complete termination and not a mere concentration of the area of service.

Plaintiff does not allege that the company has in fact ceased to use his services or that he is no longer in charge of a material part of its manufacturing operations. There is no allegation that he has been removed from all supervision and control. Manifestly, the parties contemplated that the employer should have the right to use the employee's services in its manufacturing operations to its advantage. A concentration of his talents in other manufacturing divisions so as to maintain efficient production would not, we think, be a breach of the contract, but, to the contrary would accomplish the purpose for which it was made—economical production of goods.

Plaintiff's allegation that the company terminated the employment by placing another in charge of the Spun Fibers Division is but a conclusion. It is not a statement of fact, and we think a conclusion based upon an erroneous interpretation of the contract. The facts alleged in the complaint differ materially from the situation described in *Mair v. Southern Minnesota Broadcasting Co.,* 4 A.L.R. 2d 273, and like cases on which plaintiff relies. In those cases there was in fact such a complete change in duties as to amount to a total cessation of the services contracted for.

The judgment sustaining the demurrer is

Affirmed.

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

BARBARA McDOWELL WHITE v. HENRY BERRY CASON, THE CITY OF WINSTON-SALEM AND NORFOLK & WESTERN RAILWAY COMPANY.

(Filed 14 January, 1960.)

1. Automobiles § 43: Municipal Corporations § 12: Railroads § 6—

Evidence tending to show that the driver of the car, his attention diverted by the laughing and talking of his passengers, in which he was participating, ran into the abutment of a railroad overpass in the center of the street, that the abutment had black and white stripes painted on it, had reflectors on it, and was readily visible a distance of some two hundred feet etc. *is held* to disclose that the negligence of the driver was the sole proximate cause of the accident, and nonsuit was properly entered as to the defendant municipality and the defendant railroad.

2. Automobiles § 7—

The driver of a motor vehicle is under the duty not merely to look but to keep a lookout in the direction of travel, and he is negligent in failing to see that which he could have seen and ought to have seen in the exercise of that degree of care required of him by law.

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

APPEAL by plaintiff from *Johnston, J.*, 13 July Term, 1959, of FORSYTH.

This is a civil action to recover for personal injuries to plaintiff, alleged to have been caused by the negligence of the defendants.

The facts necessary to an understanding of the disposition of this case are as follows:

The plaintiff, a young woman 23 years of age, was riding as a guest in the automobile owned and operated by Henry Berry Cason on 31 August 1958, at approximately 7:52 p.m. on Northwest Boulevard in the City of Winston-Salem, North Carolina. The defendant Norfolk & Western Railway Company had constructed and maintained an overpass across Northwest Boulevard with the consent and approval of the defendant City of Winston-Salem. In the center of said Boulevard there were heavy steel and concrete pillars, 3-½ feet wide, supporting the railroad bridge. The unobstructed area for passage of motor vehicles on either side of the center supports is 15.3 feet. The 1951 Ford automobile in which plaintiff was riding as a passenger approached the overpass from the west, traveling in an easterly direction. Plaintiff alleges that the defendant Cason crossed the white center line on Northwest Boulevard as the vehicle approached the bridge abutment in the middle of the street.

Plaintiff alleges that the defendant Cason was negligent in operating the Ford automobile on the left-hand side of the highway, or towards the left-hand side, in violation of G.S. 20-146, and in oper-

ating the vehicle without keeping a proper lookout and without observing the bridge abutment in the center of Northwest Boulevard. She alleges further that the defendant Cason failed to keep the automobile under proper control.

The plaintiff's evidence tends to show that the defendant Henry Berry Cason, the driver of the automobile involved, stopped for a red light at the intersection of Patterson Avenue and Northwest Boulevard, then made a left turn into Northwest Boulevard and continued in an easterly direction on said Boulevard. There were seven people in the car, four adults and three children. The defendant Cason, testifying as a witness for the plaintiff, said: "When we left that light we were all laughing and talking, and somewhere near the bridge abutment someone hollered in the car, I don't know who it was. When they hollered I applied my brakes on my car and the left front wheel locked up on it, which it had give trouble before, and that is about all that I recall of it. I don't believe I could say whether or not I saw the bridge abutment at any time before the accident, because I am not sure whether I did or didn't. I did see the obstruction in the center of the street an instant before I hit the abutment * * *. Before I hit the abutment in the center of the street I was running about 15 to 20 miles an hour."

On cross-examination this witness testified: "I told Mr. Randolph (plaintiff's attorney) that as all of us came up to the crossing there we were laughing and talking. Everybody in the car was carrying on, in conversation and laughing and talking, including me."

The evidence further tends to show that there was a street light burning on the west side of the overhead bridge at the time of the accident. Witnesses placed this light from 30 to 76 feet west of the bridge. There was another street light 220 feet west of the bridge. There were diagonal black and white stripes painted on the pillars supporting the bridge. There were three reflectors on each side of the bridge. These reflectors were on the three piers supporting the bridge. After the accident, the reflector pad remained on the center bridge abutment, but most of the reflector buttons were gone. That is, some of the reflectors were knocked out of the reflector pad; the broken parts of the buttons or lights were all right down in front of the defendant Cason's car. The box that held the reflector buttons was approximately 15 inches square, and it was located about three feet above the pavement.

When the investigating officers arrived at the scene of the accident they found the defendant Cason's car sitting against the bridge abutment, totally demolished. The right front of the automobile struck the abutment just about six inches to the right of the center of the

automobile. Officer Foreman testified: "As we approached the scene in the right-hand lane going east, which is the way we came upon the scene and also the way Mr. Cason was going, we could see the pier and the abutment and the car up against the pier for a distance of approximately 250 to 300 feet. * * * As I approach the trestle from back west going east, the way this car was going, I can see the abutment over on the right-hand side probably another 50 feet further than I can see the center one. You can see the one on the right-hand side back about 350 feet before you get to it; that one has black and white stripes on it, just like the one in the center * * *. The headlights of a vehicle approaching on the right-hand side of the highway would pick up the reflection of the reflectors in the center post at least 200 feet back. The headlights of an approaching vehicle would pick up the center post a good way back, before he came all the way out of the curve; he wouldn't have to be all the way out of it to pick up the lights on it." This witness further testified that at a point 100 to 150 feet away from the overhead bridge you could read the lettering on the trestle.

Officer Foreman also testified: "There at the hospital we asked Mr. Cason what had happened, why he hit the abutment. He said he didn't know what caused it; that he knew the abutment was there in the center of the street, but he didn't know what caused the accident. Mr. Cason said he had traveled over there quite frequently." (Mr. Cason, while testifying for plaintiff, denied making the statement that he was acquainted with the street at the point where the accident occurred.)

Officer Cottrell testified: "I was present at a conversation between Mr. Foreman (and) the defendant Henry Berry Cason * * *. We asked Mr. Cason if he knew what caused the accident. He said he didn't know, but he knew the railroad bridge was there."

Otis A. Jones, a surveyor, testified: "I do not believe you can see the bridge from a distance of 350 to 300 feet proceeding eastwardly in the right-hand lane * * *. In my estimation you have 180 feet of unobstructed vision of the pier in the middle as you proceed eastwardly towards the abutment, but you have to get a little closer to get a view of all the piers. You could see the center pier for a distance of about 180 feet."

At the close of plaintiff's evidence the defendant Henry Berry Cason moved for judgment as of nonsuit. The motion was denied. The defendants City of Winston-Salem and Norfolk & Western Railway Company moved for judgment as of nonsuit, and the motion was allowed. Whereupon, the plaintiff took a voluntary nonsuit as to the

defendant Henry Berry Cason. Judgment as of nonsuit was entered, and the plaintiff appeals, assigning error.

Clyde C. Randolph for plaintiff

Womble, Carlyle, Sandridge & Rice, By: H. Grady Barnhill, Jr., for defendant, City of Winston-Salem.

Craige, Parker, Brawley, Lucas & Hendrix, for defendant, Norfolk & Western Railway Company.

DENNY, J. A careful consideration of all the evidence adduced in the trial below leads us to the conclusion that the negligence of the defendant Cason, the driver of the automobile involved in the accident, was the sole proximate cause of the collision and the consequent injuries to the plaintiff. *Montgomery v. Blades,* 222 N.C. 463, 23 S.E. 2d 844; *Baker v. R. R.,* 205 N.C. 329, 171 S.E. 342.

In *Baker v. R. R., supra,* under a factual situation similar to that in the present case, the driver of the car fell asleep and ran his car into the center column of an overhead railroad bridge, injuring himself and killing his invited guest passenger, Heber C. Baker. Actions were brought against the defendant railroad for the wrongful death of Baker and for the driver's personal injuries. The cases were consolidated for trial, and judgment as of nonsuit was entered. The plaintiffs appealed.

Stacy, C. J., speaking for the Court, said: "That the driver of the automobile, who fell asleep and ran his car into the center post, injuring himself and killing his companion, cannot recover is too plain for debate. * * * He was not driving along a street which abruptly terminated in a river without barricade or lights * * *. Nor was he unfamiliar with the road. There are none so blind as those who have eyes and will not see. * * *

"It is equally clear, we think, that the negligence of the driver was the sole, proximate cause of plaintiff's intestate's death. (Citations omitted)"

The writer of the opinion quoted with approval from the case of *Becker v. Ill. Cent. R. Co.,* 147 So. 378, in which, among other things, it was said: " 'It must be conceded that, if there had been no center pier there could have been no collision therewith, but it does not follow that, because there was a pier, its presence can be said to have been the proximate cause of the collision. * * *' "

If it be conceded that the corporate defendants were negligent in the construction and maintenance of the supporting pillars in the center of Northwest Boulevard, which is not so decided, we hold that such negligence was passive and was insulated by the intervention

of the active negligence of Henry Berry Cason, the driver of the automobile in which the plaintiff was riding at the time of the collision. *Montgomery v. Blades, supra; Haney v. Lincolnton,* 207 N.C. 282, 176 S.E. 573; *Baker v. R. R., supra; Hinnant v. R. R.,* 202 N.C. 489, 163 S.E. 555; *Herman v. R. R.,* 197 N.C. 718, 150 S.E. 361.

We think the plaintiff's evidence clearly establishes the fact that the defendant Cason was negligent in the operation of his car in that he failed to see that which he could have seen and ought to have seen, and doubtless would have seen, if he had been exercising that degree of care required of him by law in the operation of his automobile. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

In the last cited case *Seawell, J.,* in speaking for the Court, said: "It is the duty of the driver of a motor vehicle not merely to *look*, but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen."

Upon all the evidence, we think it is manifest that the alleged negligence of the corporate defendants was not in law a proximate cause of plaintiff's injuries. *Herman v. R. R., supra.*

The judgment below is

Affirmed.

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

LUCY J. DRIVER v. HENRY GIBSON EDWARDS, A MINOR, BY JOE S. EDWARDS, GUARDIAN AD LITEM.

(Filed 14 January, 1960.)

1. Appeal and Error § 41; Trial § 16—

Ordinarily, error in the admission of incompetent evidence may be cured by the withdrawal of the evidence from the consideration of the jury by the court, but such error may not be cured when the admission of the incompetent evidence is protracted or a great length of time intervenes between the admission of the evidence and its withdrawal, so that it is apparent from the entire record that the prejudicial effect was not removed from the minds of the jury, and each case must be determined in the light of its particular facts.

2. Same: Evidence § 15—

In this action by a passenger in one car against the driver of the other car involved in the collision, error in the admission, over objections, of evidence to the effect that the driver of the car in which plaintiff was riding was intoxicated, that he had paid the damages for repair to the automobile driven by defendant, and had pleaded guilty to

a charge arising out of the collision *held* not cured by the subsequent withdrawal of the evidence by the court, since the error related to a great deal more than an isolated incidence.

APPEAL by plaintiff from *Clark, J.*, at April, 1959 Civil Term, of JOHNSTON.

Civil action to recover for personal injuries allegedly sustained as result of actionable negligence of defendant in an automobile collision on 1 December 1957, between a 1950 Ford automobile owned and operated by husband of plaintiff in which she was riding, and a 1955 Ford automobile owned and operated by defendant.

Defendant, answering the complaint of plaintiff, denied in material aspect the allegations of negligence therein set forth.

And "for a Third Further Answer and Defense, and as a plea in bar of the plaintiff's right to recover against the defendant, the defendant alleges and says:

"1. That the plaintiff, for value received, in full settlement and satisfaction of any and all demands for damages, loss or injury, that the plaintiff might have against the defendant on account of the collision referred to in the complaint, signed and executed a written release agreement releasing the defendant from all claims running in favor of the plaintiff; that said release agreement will be presented at the trial of this cause.

"2. That said settlement and release effectually adjusted and settled all matters and things that might arise out of the collision referred to in the complaint filed in this cause, and constituted an accord, and upon performance a satisfaction, which accord and satisfaction bars the plaintiff from all claims, action, or demands which she might assert against the defendant and in particular the claim for damages as set forth in the complaint filed in this cause."

Plaintiff, replying to this Third Further Answer and Defense, admits the signing of some paper writing, pleaded, in summary, that through fraud of defendant she was induced to sign the instrument of writing which defendant alleges to be a release agreement, and by reason thereof the paper writing is void and of no effect and should be so declared by the court.

And the record shows that after the jury had been selected but before pleadings were read or any testimony had been offered, and in the absence of the jury, defendant, through his attorneys, moved the court that the answer filed herein by defendant be amended so as to, among other things, (5) strike the entire Third Further Answer and Defense and eliminate paragraphs 1 and 2 of the said Further Answer and Defense.

The record of case on appeal shows that the trial court, in his discretion, allowed the motion to strike the entire Third Further Answer and Defense and eliminate paragraphs 1 and 2 thereof, and strike the entire reply of the plaintiff.

Plaintiff excepted thereto. This is plaintiff's Exception #1.

And, upon the evidence offered by plaintiff, motion for judgment as of nonsuit, made when plaintiff first rested, was denied.

Defendant offered evidence. In the course of which the following testimony of defendant was admitted over objection of plaintiff as indicated: " * * * I saw the driver of the other car. His name was Chester Driver. I got as close to him as any one usually would talking to anybody. I think he was under the influence of alcohol. I smelled alcohol or whiskey on his breath. He walked up to the car and we went back to look at his car."

"Q. How did he act? A. Well, he didn't say much; acted like he was a little nervous. I mean he acted like he didn't want to get around me, or anything * * *"

"The accident was investigated by Patrolman Carter. I was present when he came to scene and neither of the cars had been moved. Traffic was on the left side or moving in the southern lane; it could not move on the right side on account it was blocked by his car and a little bit of my car. Judy and I rode home with Mr. Carter."

"Q. I ask you if Mr. Driver has not paid the damage for fixing your automobile. A. Yes, sir * * *

"Q. Now, do you know of your own personal knowledge, whether or not Mr. Driver was charged with any violation as a result of this accident? A. He was charged with failing to yield the right of way.

"Q. Were you present when the case was tried? A. Yes, sir * * *

"Q. What happened? A. Well, he was tried and pleaded guilty.

"Q. He did what? A. He pleaded guilty, that it was his fault, and paid me off.

"Q. What did he plead guilty to? A. In Selma Recorder's Court over there.

"Q. Was Mr. Carter present? A. Yes, sir, he was present at the time."

The exceptions taken comprise numbers 3, 4, 5, 6 and 7.

Then the court interposed this statement: "Members of the jury, the court made an erroneous ruling on that evidence. The driver of the other vehicle, by the name of Driver, isn't a party to this action; the plaintiff was a passenger, and the driver of the other vehicle, his statements about the matter would be hearsay, and would not come under the Section that would apply if he were the defendant; so I am going to have to strike this testimony as to the last several ques-

tions, including what his testimony was about any statements that the driver of the other vehicle made, and any other statement about what he did with reference to payment for the car, and also the statement about the charge that was against him. Please dismiss that from your minds and give that no further consideration in your deliberation on this case. As I say, it is not competent evidence, as I understand the law under this situation, and that is the reason I have to make this ruling. Please abide by those instructions. All right, go ahead."

Motion of defendant for judgment as of nonsuit at close of evidence was denied.

The case was submitted to the jury upon the issues shown in the record, and the jury answered in the negative the first issue, that is, "Was the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint?" Thereupon the trial judge entered judgment that plaintiff have and recover nothing of the defendant, and that the action be dismissed at the cost of plaintiff who excepted and appeals *in forma pauperis,* and assigns error.

Joseph H. Levinson, James R. Pool for plaintiff, appellant.
Taylor, Allen & Warren for defendant, appellee.

WINBORNE, C. J.: While it is difficult to see how the plaintiff could be prejudiced by the striking of defendant's plea in bar, and plaintiff's reply thereto, assignment of error No. 1, it seems clear that assignments of error 3, 4, 5, 6 and 7, taken together, present error for which a new trial should be granted. *In Re Will of Yelverton,* 198 N.C. 746, 153 S.E. 319; *Cauley v. Ins. Co.,* 220 N.C. 304, 17 S.E. 2d 221; *S. v. Broom,* 222 N.C. 324, 22 S.E. 2d 926.

In the *Yelverton* case, opinion by STACY, C. J., the Court said: "It is undoubtedly approved by our decisions that the trial court may correct a slip in the admission of isolated or single points of evidence by withdrawing such evidence at any time before verdict and instructing the jury not to consider it, * * * but this may not be done without ordering a mistrial where the inadvertence is protracted and injury would result to the appellant by such action," citing *Gattis v. Kilgo,* 131 N.C. 199, 42 S.E. 584. And the Court goes on to quote this from opinion by BROWN, J., in *Parrott v. R. R.,* 140 N.C. 546, 53 S.E. 432, "When we can see that the appellant has been really injured in such case, we will always order a new trial." And the Court concludes in the *Yelverton* case, *supra,* by saying that "On this phase of the case, therefore, the principal question presented resolves itself into an interpretation of the record * * *."

And in the *Cauley* case, *supra*, *Stacy, C. J.*, considering the same principle, declared that "The most serious exception appearing on the record is the one presented in connection with the testimony of plaintiff's brother, who was allowed to say the payee of this $5.25 check admitted to him in the presence of the bank teller that he had made a change from "Branch Banking & Trust Company" to "First-Citizens Bank & Trust Company" without any authority. True the evidence was later stricken out and the jury was instructed not to consider it, but difficulty arises in assigning it to its proper place. Was it such a slip as could be cured by withdrawing the evidence or was it a fatal inadvertence? * * * While not altogether free from difficulty * * * a careful persual of the entire record leaves us with the impression that the ruling should be sustained" (cited cases are deleted).

Moreover, in the *Broom* case, *supra*, the Court in opinion by *Devin*, J., later C. J., it appears that "the evidence was improvidently and doubtless inadvertently admitted. It was in no way connected with the crime with which defendant was charged * * *

"The trial judge subsequently, realizing the evidence afforded by these exhibits was not pertinent, withdrew this evidence from the consideration of the jury, but we think this came too late. Some time had elapsed, and in the meantime twelve other witnesses had been examined. The impression made upon the minds of the jurors by these exhibits thus presented could not then be removed," citing the cases *Gattis v. Kilgo*, *Parrott v. R. R.*, and *In Re Will of Yelverton*, *supra*.

And the opinion ends with this decision: "We conclude that the evidence afforded by the exhibits was incompetent and that the error in admitting them was material and prejudicial, necessitating a new trial."

In the light of these decisions it would seem that each case must be interpreted in respect to the particular factual situation. Here while the taking of the evidence is not protracted in point of time, it is more than an isolated or single point. The volume of evidence received is so prejudicial that it would be calculated to injure plaintiff in her case, and from the verdict rendered it most likely did influence the jury.

By the withdrawal the trial judge did the best that could be done to wipe out the harmful effect of the evidence. Nevertheless, it is of such character that the Court is constrained to hold that plaintiff is entitled to a

New trial.

LEX A. SCHWABENTON v. SECURITY NATIONAL BANK OF GREENSBORO.

(Filed 14 January, 1960.)

1. Banks and Banking § 3—

The deposit of money in a bank creates the relationship of debtor and creditor between the bank and the depositor.

2. Payment § 4—

The burden is upon the debtor to establish his plea of payment.

3. Banks and Banking § 10—

A bank debiting the account of a depositor has the burden of showing the authority for entering such debit.

4. Same—

A bank relying upon G.S. 53-52 has the burden of showing delivery of the check to the depositor more than sixty days before claim is made that the check was a forgery.

5. Same—

The claim of depositor against the bank for debiting the depositor's account with forged checks is barred as to each individual forgery in sixty days after receipt by the depositor of the cancelled checks from the bank without calling the bank's attention to the fact that the checks were forged.

6. Same—

A depositor receives cancelled checks from a bank within the meaning of G.S. 53-52 upon delivery of the vouchers into the depositor's possession, actual or constructive, and when the bank mails statements and checks to the depositor, the depositor receives such checks as of the time the depositor accepts them from the post office in person or through his authorized agent, and it makes no difference whether the depositor looks at his statement or whether the depositor's agent, authorized to receive mail from the post office, extracts such vouchers from the statement before the depositor has an opportunity to examine them.

APPEAL by defendant from *Armstrong, J.*, March 16, 1959 Civil Term, of GUILFORD (Greensboro Division).

Plaintiff seeks to recover various amounts charged to his bank account with defendant. The charges are based on checks purporting to bear plaintiff's signature. They are payable to cash and endorsed by one Ingram, an employee of plaintiff. The first assertedly improper debit was made in August 1953. One or more such charges were made each month thereafter. The last such debit was made on 21 December 1954. The amended complaint fixes the aggregate of such charges at $12.189. Plaintiff testified he first discovered that an improper charge had been made to his account on 5 January 1955.

On 28 January 1955 he filed with defendant a detailed list of the alleged forged checks.

Defendant denied making an improper debit to plaintiff's account. It also alleged that it furnished plaintiff each month with a statement of his account, showing in detail each debit and credit and accompanied the monthly statements with the checks or vouchers on which it relied to support each charge. It alleged plaintiff was negligent in failing to examine the monthly statements and in failing to warn it of the alleged forgeries. It also pleaded the provisions of G.S. 53-52 as a protection against claims based on checks delivered more than sixty days prior to demand for reimbursement.

The following issues were submitted:

"(1) Were any of the checks, of Plaintiff's Exhibits 6 through 48, signed by the plaintiff or by anyone upon his authority or at his direction?"

"(2) Did the plaintiff receive any of the cancelled checks which are represented by Plaintiff's Exhibits 11 through 48?"

"(3) What amount is the plaintiff entitled to recover?"

The court gave peremptory instructions with respect to each issue, directing the jury to answer the first and second issues in the negative and the third issue in the sum of $12,189. Following the instruction the jury returned and, having answered "no" to the first issue, "yes" to the second issue, and "$3,175 plus interest" to the third, the court refused to accept the verdict. It again peremptorily instructed the jury to answer the second issue "no" and the third issue "$12,189," the amount claimed by plaintiff. The jury retired and changed the answers to accord with the court's instruction. Judgment was entered on this verdict whereupon defendant excepted and appealed.

Hoyle & Hoyle, Jordan, Wright, Henson & Nichols, and Karl N. Hill, Jr., for plaintiff, appellee.

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

RODMAN, J. Plaintiff testified he neither signed nor authorized the signing of his name to the disputed checks.

When one deposits money in a bank, the relationship of debtor and creditor is created. A debtor who pleads payment has the burden of establishing his plea. *Finance Co. v. McDonald,* 249 N.C. 72, 105 S.E. 2d 193. Defendant, as a debtor, must not only show it made the debit entry; it must show the authority for making such entry. *Sides v. Bank,* 246 N.C. 672, 100 S.E. 2d 67; *Arnold v. Trust*

Co., 218 N.C. 433, 11 S.E. 2d 307; *Bank v. Thompson*, 174 N.C. 349, 93 S.E. 849.

The court properly overruled defendant's motion to nonsuit and correctly placed on defendant the burden with respect to the first issue. We do not deem it necessary to decide whether there was any evidence with respect to any item which would support an affirmative answer to the first issue.

There is little, if any, disagreement between the parties on the facts relating to the second issue. Certainly there is evidence from which a jury could find that monthly statements of plaintiff's account were delivered to him or to his authorized agent at the Bank or were mailed to plaintiff. The evidence tends to show that the checks were mailed to the customer if not called for by the 10th of the month, and with perhaps one or two exceptions plaintiff's statements and cancelled checks were mailed to him. The evidence is sufficient for a jury to find that these statements contained the written instruments on which defendant relied in making each charge. The envelopes in which the bank mailed most of the monthly statements were offered in evidence. Plaintiff, Ingram (his employee who cashed the forged checks), and Dwight Lohr (another employee of plaintiff) each had keys to plaintiff's post office box. Ingram customarily got the mail from the Post Office and carried it to plaintiff's office. Plaintiff was a salesman. His business frequently called him out of town for several days at a time. He testified when he examined his bank statement he did not see any of the forged checks and not until January 1955 did he learn that any forged checks had been charged to his account.

The statute, G.S. 53-52, provides:

"No bank shall be liable to a depositor for payment by it of a forged check or other order to pay money unless within sixty days after the receipt of such voucher by the depositor he shall notify the bank that such check or order so paid is forged."

The burden is on the bank seeking the protection afforded by this statute to show delivery of the voucher to the depositor more than sixty days before the claim is made. When that fact is established, it constitutes a complete defense to a claim based on such voucher. Where several vouchers paid and delivered at different times are made the basis of a claim, the statute applies and bars not from the delivery of the first nor the last such voucher but runs against each individual voucher from the date of its delivery. The mailing of the statements and checks and the acceptance thereof from the Post Office by plaintiff in person or through his authorized agent constituted a "receipt" by plaintiff within the meaning of the statute.

Once the vouchers came into plaintiff's possession, actual or constructive, by delivery to his authorized agent, the clock started, and time began to run against the depositor. It makes no difference whether he looked at his statement and failed to discover the voucher, or, if, as is here suggested, the agent was again unfaithful to his trust and extracted the vouchers from the statement before the depositor had an opportunity to examine the statement. *Fuel Co. v. Bank,* 210 N.C. 244, 186 S.E. 362; *Trust Co. v. Bank,* 166 N.C. 112, 81 S.E. 1074; *Cesaroni v. Savannah Bank & Trust Co.,* 82 S.E. 2d 172; *Holloman v. R. R.,* 172 N.C. 372, 90 S.E. 292; *Lynch v. Johnson,* 171 N.C. 611 (at p. 613 and 620), 89 S.E. 61; *Atlantic Coast Line R. Co. v. Seward,* 142 So. 881; *Carter v. St. Louis-San Francisco Ry. Co.,* 18 S.W. 2d 376; *Fort Worth Elevators Co. v. Keel & Son,* 231 S.W. 481; *Payne v. Johnson, Fluker & Co.,* 108 S.E. 803; *Aetna Casualty & Surety Co. v. Patton,* 57 S.W. 2d 32; *McNeill v. Fidelity & Casualty Co. of N. Y.,* 82 S.W. 2d 582, 2 C.J.S. p. 1240.

There was evidence from which the jury could, as they originally did, answer the second issue "yes." The court was in error in refusing to accept the verdict and in requiring the jury to answer the issue in the negative. Based on an affirmative answer to the second issue, the jury had to determine which vouchers were called to the Bank's attention as illegal within the sixty-day period. Only such vouchers could constitute a valid claim against defendant.

New trial.

STATE v. JIM A. THORNTON.

(Filed 14 January, 1960.)

1. Criminal Law §§ 121, 140—

Defendant may file in Supreme Court on appeal a written motion in arrest of judgment for insufficiency of the indictment. Rule 21, Rules of Practice in the Supreme Court.

2. Criminal Law § 13—

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in the warrant or indictment.

3. Indictment and Warrant § 9—

A bill of particulars cannot supply any matter which the indictment must contain in order to charge a criminal offense.

4. Embezzlement § 1—

The offense of embezzlement is entirely statutory.

5. Embezzlement § 4—

An indictment for embezzlement must aver the name of the owner or owners of the property embezzled or, if the owner is a corporation, the name of the corporation should be given, and the fact that it is a corporation stated unless the name itself imports a corporation.

6. Same—

An indictment for embezzlement of the property of "The Chuck Wagon" is fatally defective in the absence of allegation that the owner of the property was a corporation, since such name does not import a corporation. G.S. 55-12.

7. Criminal Law § 121—

The legal effect of arresting the judgment on a fatally defective indictment is to vacate the plea and the judgment, but the State may thereafter proceed upon a sufficient indictment if it so elects.

APPEAL by defendant from *McKinnon, J.*, February 1959 Term, of ORANGE.

The defendant was tried upon the following bill of indictment:

"The jurors for the State upon their oath present, That Jim A. Thornton late of the County of Orange, on the 20th & 31st day of December A. D. 1958, in the county aforesaid, was the agent, consignee, clerk, employee and servant of one The Chuck Wagon, and as such agent, consignee, clerk, employee and servant as aforesaid, was then and there entrusted by the said The Chuck Wagon to receive money for the said Chuck Wagon. And that being so employed and entrusted as aforesaid, the said Jim A. Thornton then and there did receive and take into his possession and have under his care, for and on account of the said The Chuck Wagon, certain property, to wit: Six and no/100 ($6.00) Dollars. And that afterwards, to wit, on the day and year aforesaid, in the county aforesaid, he, the said Jim A. Thornton (then and there being of the age of sixteen years and more) knowingly, wilfully, fraudulently, corruptly, unlawfully and feloniously did embezzle and convert to his own use, and did take, make away with and secrete with intent to embezzle and fraudulently convert to his own use, the said Six and no/100 ($6.00) Dollars so received by him as aforesaid and then and there belonging to the said The Chuck Wagon against the form of the statute in such cases made and provided and against the peace and dignity of the State."

Plea: Guilty.

From a judgment of imprisonment, defendant appeals.

Malcolm B. Seawell, Attorney General, and T. W. Bruton, Assistant Attorney General for the State.

McRae, Cobb & Berry for defendant, appellant.

PARKER, J. Defendant, as he had a right to do, filed in this Court a written motion in arrest of the judgment of the Superior Court, upon the ground of insufficiency of the indictment. Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 544, 558; *S. v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401.

It is an essential of juridiction that a criminal offense shall be sufficiently charged in a warrant or an indictment. *S. v. Wallace and Holder ante,* 378, 111 S.E. 2d 714; *S. v. Strickland,* 243 N.C. 100 89 S.E. 2d 781; *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

This Court said in *S. v. Cox,* 244 N.C. 57, 92 S.E. 2d 413:A "defect in a warrant or bill of indictment is not cured by the statute which enables the defendant to call for a bill of particulars, G.S. 15-143. This section applies only when further information not required to be set out in the indictment is desired. The 'particulars' authorized are not a part of the indictment. Request for bill of particulars is addressed to the discretion of the court. Such a bill therefore does not supply any matter which the indictment must contain."

Embezzlement was not an offense at common law. *S. v. Maslin,* 195 N.C. 537, 143 S.E. 3; *S. v. McDonald,* 133 N.C. 680, 45 S.E. 582; *S. v. Hill,* 91 N.C. 561. The offense of embezzlement is entirely statutory. *S. v. Blair,* 227 N.C. 70, 40 S.E. 2d 460; *S. v. Whitehurst,* 212 N.C. 300, 193 S.E. 657; *S. v. Maslin, supra; S. v. McDonald, supra.*

The indictment was drawn under the provisions of G.S. 14-90. This statute makes it a felony for the class of persons specified in, and amenable to, that statute to embezzle money, goods, etc., "belonging to any other person or corporation, which shall have come into his possession or under his care." See *S. v. Blair, supra; S. v. Whitehurst, supra.*

It seems certain that "The Chuck Wagon" is not a natural person. This is said in 29 C. J. S., Embezzlement, Section 31b (1), In General: "It has been held that, where the owner of the embezzled property is an association, partnership, corporation, or other firm or organization, there must be allegations showing such organization to be a legal entity capable of owning property as such or the individuals comprising the same and owning the property should be set out as owners." Section 31b (2), Corporations, states: "In a prosecution for embezzlement from a corporation, the indictment or in-

formation should allege its incorporation and give its corporate name as fixed by law. . . ."

An exhaustive annotation in 88 A. L. R. 485, *et seq.* thoroughly discusses, and cites many cases, on the question now under consideration. One line of authorities holds to the proposition that, in a prosecution for larceny or embezzlement, it is necessary to allege in the indictment that the owner of the property, if not a natural person, is a corporation or otherwise a legal entity capable of owning property. Another line of authorities is cited, where in some jurisdictions the foregoing rule has been relaxed, and which holds that where the name of the company alleged in the indictment imports an association or a corporation capable of owning property as a legal entity, it is not necessary to allege specifically that it is a corporation. See 18 Am. Jur., Section 45.

In *S. v. Grant,* 104 N.C. 908, 10 S.E. 554, the indictment charged the larceny of a barrel of kerosene oil, the property of "The Richmond and Danville Railroad Company." This Court said: "We are also of the opinion that the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment." The allegation in the indictment clearly imports that the owner of the property charged to have been stolen is a corporate entity capable of owning property, and was held sufficient.

In *Gibson v. State,* 13 Ga. App. 67, 78 S.E. 829, the Court held: "The words 'Morning Star Colored Baptist Church' import a religious association, and such a right to the possession of property suitable for church purposes as will authorize the ownership of any property used by it which may have been stolen to be laid in such a congregation of persons." See also *Mattox v. State,* 115 Ga. 212, 41 S.E. 709.

Davis v. State, 196 Ind. 213, 147 N.E. 766, was a prosecution for embezzlement, and the ownership of the money allegedly embezzled was charged in the indictment as being in Newton County Farm Bureau. The Court said: "In this State, an unincorporated lodge or society is an 'association' within the statute, so as to make its treasurer liable for the embezzlement of its funds in his hands. . . . The name 'Newton County Farm Bureau' imports a corporation or an association. It could be either. And it is not necessary that there be a statement in the indictment as to which it is."

In *Nickles v. State,* 86 Ga. App. 290, 71 S.E. 2d 578 (1952), the Court accurately and tersely stated what we consider the better rule, as follows: "Larceny after trust is a species of larceny and in prosecutions for the former offense, as in those for the latter, it is neces-

sary to allege ownership of the property in a person, corporation, or other legal entity capable of owning property, in order to enable the accused to know exactly what charge he will be called upon at the trial to meet, and to enable him, if such should be the case, to plead a former acquittal or conviction. . . . If the property alleged to have been stolen is that of an individual, the name of the individual, if known, should be stated; if it is the property of a partnership, or other *quasi* artificial person, the names of the persons composing the partnership, or *quasi* artificial person, should be given; if it is the property of a corporation, the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation." Our case of *S. v. Grant, supra,* is in accord with this view.

G.S., Ch. 55, Business Corporations Act, Art. 3, Formation, Name and Registered Office, Section 55-12, Corporate Name, (a) reads: "The corporate name shall contain the wording 'corporation,' 'incorporated,' 'limited' or 'company' or an abbreviation of one of such words." The former Chapter 55 of G.S., entitled "Corporations," in Section 55-2, subsection 1, provided "The name adopted must end with the word 'company,' 'corporation,' 'incorporated' or the abbreviation 'inc.' . . . ."

In the indictment *sub judice,* there is no allegation that "The Chuck Wagon" is a corporation, and the words "The Chuck Wagon" do not import a corporation.

The bill of indictment on its face is fatally defective. The motion in arrest of judgment is allowed, and it is ordered that the judgment be arrested.

The legal effect of arresting the judgment is to vacate the plea of guilty and the judgment of imprisonment below, and the State, if it so desires, may proceed against the defendant upon a sufficient indictment. *S. v. Wallace and Holder, supra,* and cases there cited.

The case on appeal before us contains only the organization of the court, the indictment, the plea, the judgment, appeal entries, and assignments of error.

Judgment arrested.

J. G. ROBBINS AND WIFE, FAITH P. ROBBINS v. C. W. MYERS TRADING POST, INC.

(Filed 14 January, 1960.)

1. Damages § 12—

In an action to recover damages for breach of a contract for the construction of a dwelling in accordance with specifications that it should be exactly like another dwelling, with minor differences, and should be constructed with the same kind of materials used in such other dwelling, a witness who had never seen the house referred to in the specifications is not competent to testify as to the difference in value of the house as constructed and its value had it been constructed in accordance with the specifications.

2. Evidence §§ 35, 42—

A witness is not competent to testify to a fact beyond his personal knowledge or to base an opinion upon facts of which he has no knowledge.

3. Contracts § 27—

Where plaintiff's evidence makes out a *prima facie* case of breach of contract, motion to nonsuit is properly denied irrespective of the evidence of damage, since breach of contract entitles the injured party to nominal damages at least.

4. Contracts § 29—

The measure of damages for breach of a contract for the construction of a house in accordance with the plans and specifications is the cost of labor and material required to make the building conform to the contract, provided the defects can be remedied without substantial destruction to any part of the building, but if a substantial part of what has been done must be undone in order to remedy the deficiencies, the measure of damages is the difference in value between the house as constructed and its value had it been constructed in accordance with the agreement.

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

APPEAL by defendant from *Olive, J.*, March 16, 1959 Term, of FORSYTH.

This action was instituted 16 March 1959 for recovery of damages for alleged breach of a building contract.

Complaint alleges that defendant contracted to construct on plaintiffs' land a dwelling house according to certain plans and specifications and in a workmanlike manner for a price of $10,000.00, defendant completed the structure and delivered possession to plaintiffs and plaintiffs paid the full contract price, and plaintiffs occupied the building as a home and discovered that inferior materials had been used in the construction and the structure had not been built in a workmanlike manner. Plaintiffs ask for $5,000.00 damages.

Answer admits ownership of the land by plaintiffs, execution of the contract, construction of the building by defendant, and payment of the contract price by plaintiffs. Defendant denies that materials and workmanship were inferior and alleges that the contract was performed in accordance with the terms thereof.

The pertinent terms of the contract are in substance as follows: Defendant "agrees to commence and complete in a satisfactory manner and as a first class turn key job the entire construction of said dwelling . . . it being understood and agreed that said dwelling shall be exactly like house built on Endsley Ave. house #13 (except for specified differences not material on this appeal) . . . to use the same kind of material used in Endsley Ave. house #13."

Plaintiffs' evidence tends to show that shortly after the house was occupied serious defects in materials and workmanship were discovered. Large cracks appeared in the stoops at the front and rear of the house; bricks pulled apart from the cement; the stoops separated from the house. The cement steps leading from the basement cracked and fell in so that the earth could be seen through the cracks; the cement blocks in the retaining wall for the steps separated. The plastic pipe leading from the well to the house broke and had to be repaired. The ceptic tank was improperly installed, permitting water to seep out and rise to the surface, causing the ground around it to be wet and miry, and producing offensive odors. The paint on the exterior of the building has begun "flaking off" and is in poor condition. The outside walls are of clapboard design; some of the boards are not smooth and have bark on them; some of the narrow boards have split where they are nailed. There is a leak around the chimney and water runs therefrom into the living room. The chimney is improperly constructed so that the fireplace in the basement smokes and cannot be used. The furnace and basement fireplace are on the same chimney flue and to correct this and make the basement fireplace usable, it is necessary to build another chimney or rebuild the present chimney. The furnace throws out soot and the heat registers cannot be individually cut off. Several doors are defective. Two of the inside doors cannot be closed. The basement door has a two-inch crack "where it closes." There is a crack in the back door through which water leaks into the house. There is no sill under the partition between the living room and kitchen. The foundation support for the house is inadequate and the floor joists sag; there is need for four substantial pillars or supports. The interior walls are of knotty pine paneling, the material is of poor quality, and 137 knot holes were filled with putty and painted over. The floors, except in the kitchen and bathroom, are of factory

grade (lowest grade) oak boards 12 to 24 inches in length; the floors have opened and left cracks at the sides and ends of the boards; the boards are splintering at the ends; when the floors are swept the dust goes into the cracks. The floors are uneven, insufficiently nailed, move up and down and squeak when walked on. The tile floors in the kitchen and bathroom have cracks between the squares; the squares themselves are cracked. Defendant offered to make some adjustments, repairs and replacements, but these would not have remedied the deficiencies.

Defendant's evidence tends to show: Plaintiffs complained about the furnace and cement work. Defendant adjusted and repaired these and Mrs. Robbins gave written statements that these were satisfactory. Defendant offered to make the chimney and floors satisfactory even if it required replacing them, but plaintiffs would not permit him to do so. The house is in reasonably satisfactory condition and needs only minor adjustments such as new houses usually require. The adjutments, replacements and repairs can be made for less than $500.00, and defendant has offered to make them. The materials used in the building are superior in all respects to those used in the house on Endsley Avenue, house #13.

The jury found that the defendant had breached the contract and awarded damages in the amount of $2,000.00.

From judgment in accordance with the verdict defendant appealed and assigned errors.

Leake & Phillips and W. Z. Wood for plaintiffs.
Craige, Parker, Brawley, Lucas & Hendrix for defendant.

MOORE, J. Witness A. E. Gentry, an experienced building contractor, testifying for plaintiffs, gave as his opinion that the value of the building on the date possession was delivered to plaintiffs was from $7,500.00 to $8,000.00. Over objection of defendant he testified it would have been worth from $9,000.00 to $9,500.00 had it been constructed according to contract. On cross-examination he stated: "I don't know a thing about the Endsley house, I never have seen it." Defendant moved to strike Gentry's testimony concerning value. The court overruled the motion to strike. This was error.

The contract provides that the building "shall be exactly like house built on Endsley Ave. house # 13" (with minor exceptions) and shall be constructed of "the same kind of material used in Endsley Ave. house #13." These are the plans and specifications. Plaintiffs offered no evidence whatsoever as to the plan of or materials used in the

Endsley Avenue house. The witness Gentry never saw it and was not qualified to testify what the value of the building would have been if constructed "exactly like" and of the "same kind of material" as the Endsley Avenue house. A witness is not competent to testify to a fact beyond his personal knowledge or to base an opinion upon facts of which he has no knowledge. *Rankin v. Helms,* 244 N.C. 532, 540, 94 S.E. 2d 651; *Warren v. Insurance Co.,* 215 N.C. 402, 404-5, 2 S.E. 2d 17; *Harrison v. Railroad,* 194 N.C. 656, 660, 140 S.E. 598.

Defendant insists that its motion for nonsuit should have been allowed since there was no competent evidence on the part of plaintiffs as to the extent, if any, of their damages and no evidence upon which the jury could have based an award of damages. Plaintiffs' evidence makes out a *prima facie* case of breach of contract with respect to the quality of workmanship. "Where plaintiff proves breach of contract he is entitled at least to nominal damages." *Sineath v. Katzis,* 218 N.C. 740, 756, 12 S.E. 2d 671. See also *Tillis v. Cotton Mills, ante,* 359. The court correctly overruled the motion to nonsuit.

"The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its equivalent. What the equivalent is depends upon the circumstances of the case. In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value." 9 Am. Jur., Building and Construction Contracts, sec. 152, p. 89; *Twitty v. McGuire,* 7 N.C. 501, 504. The difference referred to is the difference between the value of the house contracted for and the value of the house built—the values to be determined as of the date of tender or delivery of possession to the owner.

Since there must be a new trial the following observations are in order. Defendant's evidence tends to show that such defects as do exist may be readily remedied without substantial destruction of any part of the building. Should the jury accept this view, the measure of damages is the cost of labor and material to make the building conform to the contract. *Moss v. Knitting Mills,* 190 N.C. 644, 649, 130

S.E. 635. Plaintiffs' evidence tends to show that in order to remedy deficiencies a substantial part of what has been done must be undone. If the jury accepts plaintiffs' theory of the case, the measure of damages is the "difference in value" rule stated above.

New trial.

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

WILSON COUNTY, A MUNICIPAL CORPORATION v. MAUDE H. WOOTEN, INDIVIDUALLY, AND MAUDE H. WOOTEN, EXECUTRIX OF THE WILL OF MAMIE L. HARRELL, DECEASED.

(Filed 14 January, 1960.)

1. Estates § 9—

While survivorship by operation of law in joint tenancies in personalty has been abolished, G.S. 41-2, joint tenancies with right of survivorship may be created by contract.

2. Same: Banks and Banking § 4—

Where two persons *sui juris* enter into a contract that funds on deposit in their joint account should constitute a joint tenancy with right of survivorship, the survivor is entitled to the funds free from the claims of the heirs or the personal representative or creditors of the deceased tenant in the absence of allegation and evidence that the tenancy was established with the intent to defraud the creditors of the deceased tenant.

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

APPEAL by plaintiff from *Paul, J.*, March Term, 1959, of WILSON.

This is an action against Maude H. Wooten, individually and as executrix of the last will and testament of Mamie L. Harrell, deceased, a former resident of Durham County, North Carolina, but who was residing in Wilson County, North Carolina, at the time of her death, to recover $1,478.00 which the Welfare Departments of Durham and Wilson Counties paid to the said Mamie L. Harrell in Old Age Assistance, pursuant to the provisions of G.S. 108-17 through 108-43. An Old Age Assistance Lien was duly filed by the plaintiff in the office of the Clerk of the Superior Court of Wilson County, North Carolina, and docketed in Lien Docket 4, page 367.

This cause was heard below by the Presiding Judge, without a jury, upon the pleadings and stipulated facts. It was agreed that the court, after hearing arguments of counsel, might consider the pleadings and agreed facts and then enter judgment out of term, out of the county,

and out of the district. The pertinent parts of the judgment entered below on 18 August 1959, as of the March Term 1959, are as follows:

"It does not appear from the pleadings nor from the agreed facts when the written agreement (Plaintiff's Exhibit B) was executed by Mamie L. Harrell and Maude H. Wooten and delivered to the National Bank of Wilson, nor from what source Mamie L. Harrell acquired said funds. The pleadings and agreed facts do not suggest that the arrangement or agreement among Mamie L. Harrell, Maude H. Wooten, and the National Bank of Wilson was other than bona fide, nor do they suggest that Mamie L. Harrell failed to make a full disclosure of said agreement and savings account to the Welfare Departments when she applied for and received Old Age Assistance grants from said departments.

"From the pleadings and said agreed facts, the court concludes as a matter of law that the balance of $1639.55 in the savings account as set out in * * * the agreed facts, upon the death of Mamie L. Harrell on October 29, 1957, under the terms of the written agreement or contract executed by Mamie L. Harrell and Maude H. Wooten and filed with the National Bank of Wilson, in which banking institution said funds had been deposited, became the property of Maude H. Wooten, personally, and that said savings account did not pass to Maude H. Wooten, as executrix of the estate of Mamie L. Harrell.

"The court is of the opinion and further concludes as a matter of law that the said Maude H. Wooten's right of survivorship in the $1639.55 savings account in the National Bank of Wilson became effective upon the death of Mamie L. Harrell pursuant to the terms of the written agreement or contract executed by said parties and filed with said bank.

"The agreed facts stipulate that Maude H. Wooten, executrix, tendered to plaintiff a check for $185.83 as the remaining funds and only money of the Harrell estate subject to application on plaintiff's claim; that plaintiff declined to accept said check. No argument or question has been made as to the proper handling and distribution of the assets of said estate EXCEPT as it relates to the $1639.55 savings account item. Plaintiff contends, and has asked the court to decree that, under the facts of this case, it is entitled to have its claim paid in full from the $1639.55 item as assets of the Mamie L. Harrell estate. The defendant, Maude H. Wooten, individually, denies that said savings account item is an asset of the estate; she denies that any part of said savings account item is subject to, or should be reached as an asset of the Harrell estate in discharging plaintiff's claim. Such has been the theory of this trial.

"It is, therefore, ordered, adjudged and decreed that plaintiff is not entitled to recover of the defendant any portion of the $1639.55 savings account item to the discharge of its Old Age Assistance Liens, nor is it entitled to recover any portion of said $1639.55 savings account item to the discharge of its claim filed with Maude H. Wooten, executrix for Old Age Assistance grants made to Mamie L. Harrell by said Welfare Departments. This action by plaintiff, as it relates to said $1639.55 savings account item, is dismissed."

From the foregoing judgment the plaintiff appeals, assigning error.

Carr & Gibbons for plaintiff.
Moore & Moore for defendant.

DENNY, J. It is conceded that Mamie L. Harrell and Maude H. Wooten established a joint savings account in the National Bank of Wilson pursuant to a contract duly executed by the parties, referred to hereinabove as plaintiff's Exhibit B, and which reads as follows:

"We agree and declare that all funds now, or hereafter, deposited in this account are, and shall be our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account or any part thereof may be withdrawn by, or upon the order of either of us or the survivor.

"It is especially agreed that withdrawals of funds by the survivor shall be binding upon us and upon our heirs, next of kin, legatees, assigns and personal representatives."

All deposits in the above account were made by the decedent. Therefore, the question for determination is whether a creditor of the decedent has a claim against the decedent's money deposited in such account, superior to the rights of the surviving tenant. There seems to be no question about the right of a creditor to levy upon and take the interest of a living tenant in a joint tenancy for the satisfaction of his debts. Powell on Real Property (1956), section 618; Thompson on Real Property, Joint Tenancy, Volume 4, section 1783; *Woolard v. Smith,* 244 N.C. 489, 94 S.E. 2d 466; *Spikings v. Ellis,* 290 Ill. App. 585, 8 N.E. 2d 962; *Gwinn v. Commissioner of Internal Revenue,* 287 U.S. 224, 77 L. Ed. 270.

The survivorship in joint tenancies by operation of law has been abolished in this jurisdiction. G.S. 41-2. However, such a tenancy may be created by contract. *Taylor v. Smith,* 116 N.C. 531, 21 S.E. 202; *Jones v. Waldroup,* 217 N.C. 178, 7 S.E. 2d 366; *Wilson v. Ervin,*

227 N.C. 396, 42 S.E. 2d 468; *Bunting v. Cobb,* 234 N.C. 132, 66 S.E. 2d 661; *Bowling v. Bowling,* 243 N.C. 515, 91 S.E. 2d 176.

Under common law principles applicable to joint tenancies the survivor takes the entire property, free and clear of the claims of heirs or creditors of the deceased tenant, and the personal representative of such tenant has no right, title or interest therein. *Spikings v. Ellis, supra; Petty v. Petty,* 220 Ky. 569, 295 S.W. 863; *In re Jackson's Estate,* 112 Cal. App. 2d 16, 245 P 2d 684; *In re Kaspari's Estate* (N.D.), 71 N.W. 2d 558; *Hill v. Havens,* 242 Iowa 920, 48 N.W. 2d 870; *In re Ware's Estate,* 218 Miss. 694, 67 So. 2d 704; *In re Zaring's Estate,* 93 Cal. App. 2d 577, 209 P 2d 642; *Able-Old Hickory Building & Loan Ass'n. v. Polansky,* 138 N.J. Eq. 232, 47 A 2d 730; *Bradley v. State,* 100 N.H. 232, 123 A 2d 148; *Guitner v. McEowen,* 99 Ohio App. 32, 124 N.E. 2d 744; *Hoover v. Hoover,* 90 Ohio App. 148, 104 N.E. 2d 41; *City of Corning v. Stirpe,* 27 N.Y. Supp. 2d 418, 262 App. Div. 14, Affirmed 293 N.Y. 808, 59 N.E. 2d 176; *Goggin v. Goggin,* 59 R.I. 145, 194 A 730, 113 A.L.R. 569; *Musa v. Segelke & Kohlhaus Co.,* 224 Wis. 432, 272 N.W. 657, 111 A.L.R. 168; 48 C.J.S., Joint Tenancy, section 1, page 910, *et seq.;* 14 Am. Jur., Cotenancy, section 6, page 80.

Our Legislature has not enacted any statute with respect to the rights of creditors against property held by virture of a contract creating a joint tenancy with right of survivorship, except as to the right of survivorship in bank deposits created by a written agreement by husband and wife. Chapter 404 of the Session Laws of North Carolina, 1959, codified as G.S. 41-2.1.

Therefore, we are constrained to follow the applicable principles of the common law with respect to such tenancies and to apply them in this case. To hold otherwise would invade the field of legislation, which is outside the proper sphere of judicial interpretation.

In the absence of allegations and proof that a joint tenancy with the right of survivorship was made with the intent to defraud creditors, the surviving tenant will take the assets held in such tenancy, free from the claims of the heirs or creditors of the deceased tenant. *Bradley v. State, supra.* It follows, therefore, that since there is no allegation of fraud or evidence tending to show that the tenancy involved herein was established with the intent to defraud the creditors of the deceased tenant, we hold that the defendant, Maude H. Wooten, took the proceeds of the savings account involved, free from the claims of the heirs or creditors of the deceased tenant, Mamie L. Harrell.

Hence, the judgment of the court below is in all respects. Affirmed.

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

KENNETH AARON BEAVER v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES.

(Filed 14 January, 1960.)

1. Automobiles § 2—

Where the Department of Motor Vehicles has in its files certificates showing two separate convictions of a person of operating a motor vehicle in excess of 55 m. p. h., the Department has authority to suspend such person's license, and its act in doing so is not void, G.S. 20-16 (a). If the suspension by the Department was due to a mistake of law or fact such person's remedy is by application for a hearing under G.S. 20-16 (c) or by application to the Superior Court under G.S. 20-25, but he may not contemptuously disregard the order of suspension.

2. Same—

Where the Department of Motor Vehicles has notified a driver of the suspension of his license because of two convictions of speeding, G.S. 20-16 (9), the Department properly complies with the statutory mandate by adding an additional period of suspension on notification of the conviction of such person of operating a vehicle without a license during the term of suspension, and properly adds another period of suspension for a second conviction of this offense, notwithstanding any error in the certification of one of the convictions for speeding, such person having failed to follow the statutory procedure to show that the original suspension was erroneous.

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

APPEAL by petitioner from *Armstrong, J.*, September 14, 1959 Civil Term, of FORSYTH.

This action was begun 26 June 1959. Petitioner seeks *certiorari* to review and vacate an order of the Department of Motor Vehicles (hereafter called Department) made 6 August 1958 suspending his license to operate a motor vehicle for a period of two years beginning 1 June 1959.

Respondent demurred to the petition for failure to state facts sufficient to justify the relief sought. The demurrer was sustained and petitioner appealed.

Eugene H. Phillips for petitioner, appellant.

Attorney General Seawell and Assistant Attorney General Pullen for respondent, appellee.

RODMAN, J. The facts alleged and stipulated by the parties necessary for a determination of this appeal are: (1) On 4 November 1957 the recorder's court of Orange County certified to the Department that petitioner was on that date convicted of speeding at 70 m.p.h. on 16 October 1957. (2) On 2 November 1957 the clerk of the general county court of Alamance County certified to the Department that petitioner was, on 28 October 1957, convicted of "speeding in excess of 55 miles per hour," which offense occurred on 16 October 1957, and that a fine of $5 had been imposed and petitioner taxed with the costs. (3) On 27 November 1957 the Commissioner of Motor Vehicles issued his "OFFICIAL NOTICE AND RECORD OF SUSPENSION OF LICENSE" of petitioner; the date of suspension as given was 1 December 1957 and informed petitioner "you May Apply for a New License June 1, 1958 Provided you have Complied with the Safety Responsibility Laws." The cause of suspension was shown as "Two Offenses of Speeding Over 55 m.p.h., G.S. 20-16(9) 1: October 28, 1957 2: November 4, 1957." The following appears on the notice of suspension: "The above named person will take notice that the law forbids said person to drive a motor vehicle upon the highways of the state during the period of suspension." (4) On 6 February 1958 the municipal court for Winston-Salem certified to the Department that petitioner was, on 4 February 1958, convicted of having on 20 January 1958 operated his motor vehicle after his license had been suspended. (5) On 19 February 1958 the Commissioner issued his official notice and record of suspension of petitioner's driver's license for a period of one year beginning 1 June 1959, the date the prior suspension terminated. This notice likewise warned petitioner not to drive a motor vehicle on the highways during the period of suspension. (6) On 28 July 1958 the municipal court of Winston-Salem certified to the Department that petitioner had been charged with operating a motor vehicle on 14 July 1958 while his license was suspended and had been convicted of the offense on 28 July 1958.

Upon receipt of the July notice of conviction, the Department, on 6 August, issued notice of suspension of petitioner's license for an additional period of two years, such suspension to begin 1 June 1959. This order of suspension is asserted by the petitioner to be invalid.

In addition to the facts stated above, the petition alleges with respect to the certification by the Alamance County court:

"11. Actually the full entry of the Alamance Court as initially made and at the time the first report thereof was submitted to the respondent by the Clerk of said court was as follows:

" 'Number 43674 *STATE vs. KENNETH AARON BEAVER.* Speeding in excess of 55 miles per hour. Plead guilty. Let prayer for judgment be continued on condition that defendant pay fine of $5.00 and cost.'

"12. Subsequent thereto the judgment entry of the Alamance County Court was corrected to read as follows:

" 'Number 43674 *STATE vs. KENNETH AARON BEAVER.* Speeding 70 miles per hour in 60 mile zone. Plead guilty. Let prayer for judgment be continued on condition defendant pay fine of $5.00 and cost.' "

Certification of the judgment as corrected was made to the Department on 8 April 1959.

Error is here asserted on the assumption that the suspension in effect from 1 December 1957 to 1 June 1958 was void. Therefore the first suspension for operating without a license was void and such suspension afforded no basis for a second suspension for the second conviction of operating without a license.

To support his theory, petitioner contends: The Legislature in 1957 (G.S. 20-141(b) 5) permitted the operation of motor vehicles on certain roads at speeds up to 60 m.p.h. The road on which he was driving in Alamance County on 17 October 1957 was a road on which speeds up to 60 m.p.h. were lawful. Hence his plea of guilty to "Speeding 70 miles per hour in a 60 mile zone" as shown by the copy of the amended judgment furnished the Department on 8 April 1959 was not an admission of a violation of the law. Licenses, as he argues, cannot be suspended under G.S. 20-16(a)(9) for excessive speed on a road where a speed up to 60 m.p.h. is permissive, and as to such roads, suspension can only be effected because of speed in excess of 75 m.p.h. as authorized by G.S. 20-16(a)10. Hence he says there was only one legal conviction for speeding in excess of 55 m.p.h., that is, the conviction in Orange County; and since two such legal convictions are necessary, the Department was without authority to suspend the license in November 1957.

It is not now necessary to determine the effect of the 1957 amendment (G.S. 20-141(b) 5) on G.S. 20-16(a) 9. It is sufficient to decide that the action of the Department in suspending the operator's license was not void.

The Department is authorized to suspend an operator's license "upon a showing by its records or other satisfactory evidence that

licensee" had been convicted of specified offenses. G.S. 20-16(a). It is here established by allegation and stipulation that when petitioner's license was originally suspended, the Department had in its files certifications from two courts of this State showing convictions in each court on charges of operating his motor vehicle on 16 October 1957 in excess of 55 m.p.h. This evidence was sufficient to authorize the Department to act. Having authority to suspend, it necessarily follows that the suspension was not void. *Carmichael v. Scheidt,* 249 N.C. 472, 106 S.E. 2d 685; *Winesett v. Scheidt,* 239 N.C. 190, 79 S.E. 2d 501; *Atlantic Coast Line R. Co. v. Florida,* 295 U.S. 301, 79 L. Ed. 1451.

If petitioner had been improperly deprived of his license by the Department due to a mistake of law or fact, his remedy was to apply for a hearing as provided by G.S. 20-16(c) or by application to the Superior Court as permitted by G.S. 20-25. At a hearing held pursuant to either of these statutory provisions he would be permitted to show that the suspension was erroneous. *In re Wright,* 228 N.C. 301, 45 S.E. 2d 370, s.c., 228 N.C. 584, 46 S.E. 2d 696. Petitioner could not contemptuously ignore the quasi-judicial determination made by the Department.

A license is required of one who operates a motor vehicle on the highways of this State. G.S. 20-7; *S. v. Correll,* 232 N.C. 696, 62 S.E. 2d 82. Conviction of operating a motor vehicle when operator's license has been suspended makes mandatory an additional suspension of his license, G.S. 20-28. Since the original suspension made in 1957 was binding and enforceable until vacated in the manner provided by law, the Department properly complied with the statutory provision by adding an additional period of suspension on his first conviction for operating without a license, and upon his second conviction for operating without a license the Department properly suspended the license for the additional period required by the statute.

The judgment is

Affirmed.

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

KATHLEEN DAVIS LEMON, EXECUTRIX OF THE ESTATE OF DUNCAN E. LEMON, DECEASED v. BUCHAN LUMBER COMPANY, INCORPORATED, AND LOWE'S ASHEBORO HARDWARE, INC.

(Filed 14 January, 1960.)

1. Sales § 30—

The manufacturer may be liable to the purchaser for an injury resulting from some latent defect in the article sold or from a danger inherent in its use for the purpose for which the manufacturer knew the article would be put, but in the purchaser's action to recover for such injuries he must allege the facts supporting the conclusion that the article was dangerous in one of these respects.

2. Same— **Complaint held insufficient to state cause of action against manufacturer on ground of inherent danger or latent defect in article sold.**

The complaint alleged that defendant manufacturer sold lumber which he knew was to be used as joists and framing in construction work, that the specifications called for yellow pine, that the lumber delivered contained some white pine mixed with the yellow, that a piece of this lumber was used as a joist, and that it broke while plaintiff's intestate was standing upon it, resulting in intestate falling to his fatal injury. It was further alleged that this particular piece of lumber had a whorl of knots grouped together on its underside, that the difference in the kind of pine and the existence of the knots were readily observable, that it thus was dangerous and unsafe for the use for which it was intended, and that the manufacturer knew or should have known of the defects in the exercise of ordinary care and inspection. *Held:* Defendant's demurrer was properly allowed since such piece of lumber would not be dangerous when employed in some uses in the construction work, and the manufacturer is not required to anticipate the use to which each particular piece of lumber would be employed.

3. Negligence § 7—

A person is under duty to anticipate only those consequences which in the ordinary course of human experience may reasonably be expected to result in injury to others.

APPEAL by plaintiff from *Sharp, S. J.*, September, 1959 Term, of RANDOLPH.

Plaintiff seeks damages on account of the death of her intestate. As the basis for recovery, the "further amended" complaint alleges in brief these facts: Buchan Lumber Company (hereafter called Buchan) is engaged in the manufacture and sale of lumber; Buchan transacts its business at Asheboro through its agent, Lowe's Asheboro Hardware, Inc., (hereafter called Hardware); National Food Stores, Inc., engaged in the construction of a building at Asheboro, contracted with Buchan through its agent, Hardware, for lumber of grade number 2 to be used as joists and framing in the building then being con-

structed; grade 2 is a grade for yellow but not for white pine; Buchan, through its agent, Hardware, pursuant to said contract, delivered pine lumber two inches thick, ten inches wide, in lengths of ten, fourteen, and eighteen feet; a part of the lumber so delivered was white pine and not yellow pine; the distinguishing characteristics of white and yellow pine are plainly visible and readily discernible; plaintiff's intestate was, in November 1956, employed by National Food Stores as a carpenter and was, on 20 December 1956, engaged in the construction of the building where the lumber purchased from Buchan was being used; while he was standing on a joist resting across two metal beams, the joist suddenly broke, causing him to fall from the roof about 23 feet to the ground; he sustained injuries which caused his death; the joist on which he was standing was white pine "containing a whorl of knots grouped together occupying more than two-thirds of the cross section at a point where a hole about one-half inch in diameter extended diagonally several inches into the wood rendering it dangerous and unsafe for the use for which it was intended, which facts were known, or should have been known in the exercise of ordinary care . . ."; the piece of lumber was laid across the metal beams with the hole and knots on the lower side; defendants, knowing the use to which the lumber was to be put, to wit, the construction of a building, were under the duty to inspect, and failure to inspect and discover the knots so readily discernible was a negligent breach of duty owing to plaintiff's intestate.

Defendants demurred for failure to state a cause of action. The demurrer was sustained. Counsel for plaintiff stated in open court that further amendment of the complaint was not desired; whereupon judgment was entered dismissing the action, and plaintiff appealed.

Harold I. Spainhour and Ferree & Anderson for plaintiff, appellant.

McElwee & Ferree for Buchan Lumber Company, Inc., defendant, appellee.

Miller and Beck for Lowe's Asheboro Hardware, Inc., defendant, appellee.

RODMAN, J. Plaintiff's cause of action is laid in tort and not in contract. The fact alleged and admitted by the demurrer that defendant, having a contract to deliver yellow pine had in fact delivered a mixture of yellow and white pine gave plaintiff no right of action. The damages, if any, resulting from the breach of contract by delivery of a less valuable article could only be claimed by the purchaser.

Plaintiff, if she is to recover, must allege some breach of duty owing her intestate by defendants which proximately caused his death. Recognizing this requirement, she alleges the lumber was sold for use as joists and framing and because of knots, holes, and the kind (white pine instead of yellow) was not fit for the purpose intended and was inherently dangerous.

Liability may be imposed on a manufacturer who sells an article likely to cause injury in its ordinary use because of some latent defect or because inherently dangerous in the use to which he knows it will be put. *Dalrymple v. Sinkoe,* 230 N.C. 453, 53 S.E. 2d 437; *Gas Co. v. Montgomery Ward,* 231 N.C. 270, 56 S.E. 2d 689.

It is not sufficient to merely allege that an article is inherently dangerous. Unless the mere descriptive name indicates the dangerous character, the pleader must set out the facts which are relied upon to fix the dangerous character of the article. We quoted, with approval, in *Kientz v. Carlton,* 245 N.C. 236, 96 S.E. 2d 14, this excerpt from *Campo v. Scofield,* 95 N.E. 802: " . . . since the duty owed by a manufacturer to remote users does not require him to guard against hazards apparent to the casual observer or to protect against injuries resulting from the user's own patently careless and improvident conduct, the complaint was properly dismissed."

The approval there given was repeated in *Tyson v. Mfg. Co.,* 249 N.C. 557, 107 S.E. 2d 170, where additional authorities are cited.

There were no hidden defects in the lumber sold to National Food Stores. Plaintiff alleges the distinction between white and yellow pine and the presence of knots in the boards were apparent and discoverable on a casual inspection. The allegations are not sufficient to hold defendants on the theory that they sold an inherently dangerous article or an article dangerous because of hidden defects. Nor are the allegations sufficient to impose liability on the theory that defendant, in total disregard of the safety of the ultimate user carelessly and negligently sold an article which would likely prove dangerous in the intended use—construction of a building. To so hold would require the vendor to know where and how each board would be placed, the distance to be spanned, the weight to be supported, and many other factors which the manufacturer could not know but which would be known to the carpenters and others working on the building. A particular plank unfitted for a joist might be entirely fit and proper for use in framing, or unfit for joists in one place and fit for them in a different place. The law imposes liability for failure to anticipate those consequences which in the ordinary course of human experience might reasonably be expected to result in injury to others. *Burr v.*

Everhart, 246 N.C. 327, 98 S.E. 2d 327; *Brady v. R. R.*, 222 N.C. 367, 23 S.E. 2d 334. The law does not require a vendor to stretch foresight into omniscience. *Gant v. Gant*, 197 N.C. 164, 148 S.E. 34.

The facts alleged are insufficient to show that defendant should reasonably have anticipated the particular use of the board with the alleged readily observable defects in such manner as to cause injury to anyone. *Chambers v. Edney*, 247 N.C. 165, 100 S.E. 2d 343; *Stultz v. Benson Lumber Co.*, 59 P 2d 100; *Kramer v. Mills Lumber Co.*, 24 F 2d 313, and annotations 60 A.L.R. 366.

Affirmed.

STATE v. FRANCES SHUMAKER.

(Filed 14 January, 1960.)

1. Criminal Law § 75: Evidence § 25—

Original or duplicate original deposit slips, prepared in the ordinary course of business, typwritten by defendant or by someone under her direction and found in the company's files of which she was the authorized custodian, are competent in evidence.

2. Criminal Law § 76: Evidence § 26—

Photostatic copies of deposit slips and checks made by an employee of a bank in the usual course of business and identified by such employee are competent as primary evidence without proof of the loss or destruction of the originals. G.S. 8-45.1, *et seq.*

3. Criminal Law § 108—

A statement of the court that the case had been ably argued by both sides and that the jury should take into consideration all the contentions advanced in the respective arguments and any other contentions which may reasonably arise from a consideration of all the evidence, cannot be prejudicial as unduly emphasizing the contentions of the State.

4. Criminal Law § 156—

Objection to the charge for failure of the court to elaborate on the facts or to its failure properly to state the contentions must be brought to the court's attention in apt time.

APPEAL by defendant from *Farthing, J.*, February 9, 1959 Term, GUILFORD Superior Court (High Point Division).

Criminal prosecution upon a bill of indictment charging the defendant with the crime of embezzlement. Upon the trial the State introduced evidence tending to show the following: The defendant was employed by Automatic Lathe Cutterhead Company, Inc., in the

capacity of bookkeeper. She kept the records of sales and accounts, received payments by cash and check, prepared deposit slips, endorsed the checks by use of a company stamp, "Payable to the order of Wachovia Bank & Trust Company, High Point, N. C." It was her duty to deposit company checks and cash in the company's bank account. She was not authorized to sign or to cash checks or endorse them except by use of the stamp, and then only for deposit. Items of cash and checks for deposit were entered on deposit slips by typewriter. The originals were kept in the office under the control of the defendant. According to the testimony of Clarice Snipes, another employee, "Frances Shumaker made them out. Mrs. Shumaker took those deposits to the bank. On occasions when Mrs. Shumaker did not actually make out the deposit slips, she had help when she was rushed and trying to get to the bank before the bank closed. Someone in the office would at her request help her list the checks. . . . On those occasions, after someone assisted her in making out a list of checks, she took the deposit slip to the bank. When someone assisted her, it was done under her supervision and control."

The defendant kept the books showing charges and credits to the accounts of the various customers. These records were in her own handwriting. The bank made microfilms of the deposit slips listing the checks and cash credited to the account of Automatic Lathe Cutterhead Company, Inc.

The State introduced (1) the deposit slips kept in the office under the defendant's control; (2) the microfilms of deposit slips left at the bank with the deposits; (3) microfilms of checks endorsed by defendant; and (4) the books of account kept by and in the handwriting of the defendant.

The State introduced evidence that on numerous occasions the defendant endorsed company checks, received the amount in cash. On one occasion the company received two checks for $600 each and $300 in cash to reimburse the company for payments it had made on certain stock transactions. These items were delivered to the defendant for deposit in the company's bank account. The checks were deposited but the cash was not deposited and not accounted for. The photostats of the deposit slips in the bank showed discrepancies between them and the copies which the defendant kept under her control in the company records.

The accountant who analyzed the office copies of the deposit slips and the microfilm copies kept by the bank, and the account books kept by the defendant, testified that checks in the amount of $3,346.29 were endorsed by the defendant. "When I say there was a total of

$3,346.29 in checks cashed by Frances Shumaker, all I know is the checks have her signature on the back." During the period September 15, 1957, to March 31, 1958, a total amount of $1,950.82 cash was entered on the receipt journal but not on deposit slips.

At the close of the State's evidence the defendant moved to dismiss. The motion was denied and the defendant rested without offering evidence and renewed the motion, which was likewise denied. The jury returned a verdict of guilty as charged. From the judgment of imprisonment of not less than two years nor more than five years, the defendant appealed.

Malcolm B. Seawell, Attorney General, Glenn L. Hooper, Jr., Assistant Attorney General for the State.

Robert S. Cahoon, George W. Gordon for defendant, appellant.

HIGGINS, J. The exceptive assignments argued in defendant's brief involve these questions: (1) Did the court commit error by admitting in evidence, over defendant's objection, the bank deposit slips retained by the depositor? (2) By admitting in evidence, over defendant's objection, the microfilm copies of endorsements on checks and deposit slips delivered to the bank? (3) Did the court, in its charge, give undue emphasis to the State's evidence and contentions?

The defendant's objections to the admissibility of the retained deposit slips is unsound. These slips were introduced as originals or duplicate originals. They were typewritten by the defendant or by someone under her direction. It was the defendant's duty to make and file them. She was the authorized custodian. They were in the files when she left. Clearly they were admissible. The duplicates of the deposit slips were filed with the bank at the time the deposits were made. The bank made photostats of these slips and of the checks. Dorothy Bowling testified: "I am employed in the main office of Wachovia Bank & Trust Company. . . . The various papers marked for the purpose of identification (here the numbers are given) are photostatic copies of original slips on deposit with the Wachovia Bank & Trust Company for Automatic Lathe Cutterhead Company for the period of time from September 23, 1957 to March 1, 1958. I personally made these photostats."

The defendant objected to the use of photostats on the ground the State did not "first account satisfactorily for nonproduction of the originals," citing among others the leading case of *People v. Wells*, 380 Ill. 347. Under the North Carolina Uniform Photographic Copies of Business and Public Records Act (G.S. 8-45.1, *et seq.*), any photo-

graphic, photostatic, or microfilm is as admissible in evidence as the original itself. The statute makes the photostat or microfilm reproduction primary evidence. Whether the original is in existence is immaterial. Of course, use of the reproduction does not render the original inadmissible.

Our statute making the reproduction competent evidence is modeled on the Act of Congress relating to the same subject. See 28 U.S.C.A. 1732. More than 30 states have similar statutes. At the time *People v. Wells, supra,* was decided, Illinois did not have any statutory provision for the use of photostats. The opinion in the *Wells* case is based on the lack of statutory authority for such evidence.

One of the leading cases on the subject of reproductions is *U. S. v. Manton,* 107 Fed. 2d 834 (Cert. denied, 309 U.S. 664): "It is argued that the original checks themselves were the best evidence and that their absence should have been accounted for as a prerequisite to the admission of the recordaks. With this contention we cannot agree. These recordaks are made and kept among the records of many banks in due course of business and are within the words of 28 U.S.C.A. 695 (now 1732). Their accuracy is not questioned. They represent, in the course of a year, perhaps millions of transactions. No one at all familiar with bank routine would hesitate to accept them as practically conclusive evidence. As proof of payment they constitute not secondary but primary evidence." See also, *U. S. v. Kushner,* 135 Fed. 2d 668; *Beard v. U. S.* 222 Fed. 2d 84.

Enough appears in the evidence in this case to show a regular employee of the Wachovia Bank & Trust Company in the usual course of business made the photostats. She identified them. From this showing they were admissible in evidence. The deposit slips kept by the defendant, the microfilms of those at the bank, and the books and records kept by the defendant in her own handwriting showed discrepancies analyzed and summarized by the accountant. All were properly identified and received in evidence.

The assignments of error based on exceptions to the charge are without merit. The charge was concise, contained a short review of the evidence, accurately stated the law applicable thereto. With respect to the contentions, the court said: " . . . This case has been ably argued to you by counsel for the defendant and counsel for the State; they have advanced contentions in their able arguments and the court charges you that you will take into consideration all of the contentions advanced to you in arguments for the defendant and in arguments for the State; you will also take into consideration any other contentions which may reasonably arise in your minds from

your consideration of all the evidence in this case." See *State v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768.

At the close of the charge, the court made this inquiry of defense counsel: "Gentlemen, is there anything further for the defendant, with reference to the law, facts or the contentions?" The reply was, "No, sir." Complaint of failure to state the facts or contentions made after verdict comes too late. *Bank v. Slaughter*, 250 N.C. 355, 108 S.E. 2d 594; *In re Will of Crawford*, 246 N.C. 322, 98 S.E. 2d 29.

In the trial below, we find

No error.

STATE OF NORTH CAROLINA EX REL ELWOOD C. LONG, RELATOR v. SAM G. SMITHERMAN.

(Filed 14 January, 1960.)

1. Elections § 8—

Findings that the summons and complaint in an action to try title to public office were not served on the defendant within ninety days after his induction into the office supports judgment dismissing the action. G.S. 1-522.

2. Statutes § 5a—

Where the language of a statute expresses the legislative intent in clear, positive and understandable language, it must be given its express effect and there is no room for construction.

3. Appeal and Error § 21—

A sole exception to the court's sustaining defendant's motion to dismiss and to the signing of the judgment presents the questions only whether error of law appears on the face of the record proper and whether the facts found support the judgment.

APPEAL by plaintiff from *Phillips, J.*, at May Term, 1959, of MONTGOMERY.

Civil action in the nature of *quo warranto* to determine the right of plaintiff to the office of Sheriff of Montgomery County, leave having been granted pursuant to provisions of G.S. 1-516 by the Attorney General for North Carolina to plaintiff to bring and prosecute the said civil action in the Superior Court of Montgomery County in the name of the State of North Carolina, ex rel the plaintiff above named, versus the defendant above named, to try and determine the right and title of the said Elwood C. Long to the office of Sheriff of Montgomery County.

The record proper shows:

(1) That summons, dated 26 March, 1959, was issued to the coroner of Montgomery County, and returned by the coroner endorsed as follows: "Received March 26, 1959; Served April 4, 1959, by delivering a copy of the within summons and a copy of the complaint to each of the following defendants: Sam G. Smitherman— and signed 'J. C. Wallace, Coroner, Montgomery County'."

(2) That at the time of issuance of said summons Relator filed a complaint duly verified as set forth in the record on appeal.

(3) That on 29th day of April, 1959, attorneys for Sam G. Smitherman gave notice to the Relator, Elwood C. Long, or his attorneys of record (a) that defendant had filed in the above entitled action a motion to dismiss the same for failure to comply with Sec. 1-522 of the General Statutes of North Carolina, a copy of the motion being attached; and (b) that defendant would ask that said motion be heard before trial at the May 18, 1959 Term of Superior Court of Montgomery County— which notice was served on attorneys for Relator on 30 April, 1959, and on Relator on 1 May, 1959.

(4) That affidavit and answer to the motion was filed 18 May, 1959; and

(5) That "on the 18th day of May, 1959, after the case had been duly calendared, a hearing on said motion was had at the regular May 1959 Civil Term of Montgomery County Superior Court before the Honorable F. Donald Phillips, Judge presiding, upon the summons, complaint, authority of the Attorney General, motion of defendant, notices and order of the Clerk, the affidavit of S. H. McCall, Jr., and after the hearing of said matter and the argument of counsel, the court entered its judgment as follows:

"May Term 1959

"This Cause coming on to be heard and being heard before the Honorable F. Donald Phillips, Judge presiding at the May 18th Term 1959 of the Superior Court of Montgomery County, upon the motion of the defendant, Sam G. Smitherman, to dismiss the above entitled action under the provisions of Section 1-522 of the General Statutes of North Carolina, and the court having heard the matter upon the summons, complaint, motion, answer to motion and affidavits filed by the Relator, and after arguments by counsel, both for the Relator and the defendant, and it appearing to the court and the court finds as a fact that the summons and the complaint in the above entitled action were served on the defendant, Sam G. Smitherman, on the 4th day of April 1959, which was more than ninety (90) days after his induction into the office of Sheriff of Montgomery County, North

Carolina, on December 31, 1958, contrary to the provisions of Section 1- 522 of the General Statutes of North Carolina;

"It Is, Therefore, Ordered, Adjudged and Decreed: That this action be dismissed and that the Relator be taxed with the costs to be assessed by the Clerk. This 18th day of May 1959."

Upon the ruling of the court and the entering of the judgment as aforesaid, the Relator, in open court, gave the following notice of appeal (in pertinent part):

"To the foregoing judgment and the findings and rulings therein contained the plaintiff in apt time excepts in open court and gives notice of appeal to the Supreme Court of North Carolina, further notice waived * * * (Signed) F. Donald Phillips."

And Relator appeals to Supreme Court and assigns error.

Harold W. Gavin, S. H. McCall for relator, appellant.
Charles H. Dorsett, David H. Armstrong for defendant, appellee.

WINBORNE, C. J. In Article 41 of Chapter 1 of the General Statutes of North Carolina pertaining to actions in the nature of *quo warranto* it is provided in G.S. 1-522 that "All actions brought by a private relator, upon the leave of the Attorney General, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dimiss the action at any time before the trial, at the cost of the plaintiff."

The language of this statute is clear, positive and understandable. It requires no construction. *S. v. Carpenter,* 173 N.C. 767, 92 S.E. 373. "When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." See headnote #2 in *School Comrs. v. Aldermen,* 158 N.C. 191, 73 S.E. 905.

It is under this section that the motion of defendant to dismiss the action is made. And from the judgment from which appeal is taken it appears that the judge of Superior Court finds as a fact that the summons and complaint in the action were served on the defendant on the 4th day of April, 1959, which was more than ninety days after his induction into the office of Sheriff of Montgomery County, on 31 December, 1958, that is, not within the ninety days

next after his induction in office. Indeed this fact is not controverted. Therefore the facts on which the motion is based clearly come within the provisions of the statute G.S. 1-522.

And in the record of case on appeal the Relator appellant assigns as error, 1, "the ruling of the court in sustaining or allowing the defendant's motion to dismiss"; and, 2, "the signing of the judgment as appears of record."

There is no exception or assignment of error challenging the facts found. Therefore, the only questions presented by the assignments of error are (1) Is there error in law appearing on the face of the record proper; (2) Do the facts found support the judgment. See Sec. 21, Appeal and Error, Strong's N. C. Index; *Burnsville v. Boone*, 231 N. C. 577, 58 S.E. 2d 351.

In the light of the factual situation the case comes clearly within the purview and meaning of the statute G.S. 1-522. The record fails to show any assignment of error with respect to any particular question of law, and the facts found support the judgment.

Hence the judgment is

Affirmed.

STATE OF NORTH CAROLINA EX REL ROBERT RAY HUNSUCKER, LLOYD HICKS, AND ELBERT HAYWOOD, ELECTORS, RELATORS v. SAM G. SMITHERMAN.

(Filed 14 January, 1960.)

APPEAL by plaintiffs from *Phillips, J.*, at May Term, 1959, of MONTGOMERY.

Civil action in the nature of *quo warranto* to determine right of Elwood C. Long to the office of Sheriff of Montgomery County, leave having been granted pursuant to provisions of G.S. 1-516 by the Attorney General for North Carolina to plaintiffs to bring and prosecute civil action in Superior Court of Montgomery County in the name of the State of North Carolina captioned as first hereinabove set forth, to try and determine the right and title of the said Elwood C. Long to said office of Sheriff.

Plaintiffs appeal.

Gerald R. Chandler for relators, appellants.

Charles H. Dorsett, David H. Armstrong for defendant, appellee.

PER CURIAM. This is companion case to *Long v. Smitherman, ante,* 682 on appeal to Supreme Court, Fall Term 1959. The decision there is controlling here.

Hence under authority of decision here in that case, the judgment from which this appeal is taken is

Affirmed.

STATE v. VERNON H. LACKEY.

(Filed 14 January, 1960.)

1. Criminal Law § 104—

It is only in rare instances that a verdict may be directed for the State in a criminal presecution, and in the absence of an admission or presumption calling for an explanation on the part of a defendant it is error for the court to direct a verdict of guilty even though guilt may be inferred from defendant's own testimony.

2. Criminal Law § 32—

Defendant's plea of not guilty disputes the credibility of the evidence, even when uncontradicted, and the presumption of innocence can be overcome only by the verdict of a jury.

APPEAL by defendant from *Campbell, J.*, at February, 1959 Term, of CATAWBA.

Criminal prosecution upon a warrant issued out of the Municipal Court of the city of Hickory charging "that Vernon H. Lackey on or about the 23rd day of July, 1958, in Catawba County, Hickory Township, city of Hickory, did unlawfully and wilfully operate a motor vehicle upon the public highway while in an intoxicated condition against the statute" etc.

The record discloses that defendant plead not guilty, but after hearing the evidence the judge found him to be guilty; and judgment was signed ordering payment of a fine, and surrender of license for revocation. Defendant gave notice of appeal, and bond in sum of $300 was fixed.

In Superior Court defendant again pleaded not guilty. And upon trial there the State offered evidence tending to show in summary that on 23 July 1958, about ten minutes after midnight, a State Highway patrolman saw defendant operating a convertible automobile on Highway #70 traveling in a westerly direction toward Hickory; that defendant's car was weaving right much over the road all the way for a mile; that the officer stopped defendant, and smelled very strong

odor of alcohol on his breath, and he was in a staggering condition; and that the officer put him under arrest "for drunk driving."

The defendant testified briefly as follows: " * * * I am an automobile dealer— 64 years old * * * On July 23rd of last year I left my office about 6 P.M., and went home. When I got home I mixed a drink consisting of quinine water and vodka. The amount of vodka was a one-ounce jigger. I then sat down and read the paper and later * * * I made another one consisting of the same thing * * * About 7:00 I would say I drank both of these whiskies."

And defendant continued: "At that time I was under treatment from the doctor. I had had an injury to my back about a month earlier and it grew worse * * * so I went to Dr. Jim Keever, and he prescribed some form of pill, to relieve the pain, which I got and was taking * * * I took one of the pills at 6 o'clock when I got home. I think the directions read one every six hours as needed. So the pain was right much severe and about 7:00 I took another one, and about an hour later, around 8:00, I took another one. I didn't seem to get any relief as it read as needed, why, that's what I was doing. In all I took four of those things * * * in about three and a half hours * * * the last * * * around 9:30. I did not have anything else to drink. About 9:30 * * * I left * * * to get some sandwiches * * * and I went on uptown and by the garage and was there checking over some salesmen's reports for the day's work * * * I was there around an hour or a little longer * * * When I left that place I drove out to Mull's Motel to get the sandwiches. I don't remember leaving the garage but I do remember after I got out to Mull's Motel parking and standing there talking to some one. I got the sandwiches and something happened. I don't know what. It was a funny sensation * * * a feeling that didn't come from drinking liquor that came over me. I can't describe it. It seemed I was in a daze or something; I couldn't think. It was kind of a buzzy, dizzy feeling. I began to feel it when I was in the garage."

Then on cross-examination, defendant testified: "Yes, I was driving a car on this night on a public highway."

Then on re-direct examination, defendant stated: "I didn't know what was in those pills at the time. The doctor had not told me at the time what was in the pills."

Then Dr. J. W. Keever testified as witness for defendant in pertinent part as follows: " * * * I examined Mr. Lackey for a back injury about July 12, 1958 * * * I diagnosed his condition as lumbago and I gave him a prescription * * * that particular ailment is very painful * * * the box which you hand me * * * with some pills in it,

is the prescription in question. If Mr. Lackey took four of those pills, one about 6:00 one at 7:00, another in a half hour or about then, and another at 9:30 * * * as to what would be the effect upon him in his head, in his feeling after that, I would say that if he took it according to that it would be to me, or to most people, quite devastating.

"As to what way it would affect him, it would be a depressant, the heart and everything. The effect upon his powers of perception would be poor * * * very poor, and upon his powers of memory, the same, poor. I mean by that it would certainly deaden his perception and deaden his memory * * * Yes, I definitely have an opinion satisfactory to myself as to the effect upon the rationality of Mr. Lackey from the taking of these pills in the manner he stated he had taken them and as to what that effect would be. I think he would be irrational; I'm sure he would."

Then on cross-examination Dr. Keever continued: "The date of the prescription was July 12, 1958. Yes, there is a narcotic in those pills. Definitely, I would say that the quantity of those narcotics which Mr. Lackey took together with the quantity of alcoholic beverage which he said he took would make him drunk."

And on re-direct examination the doctor concluded his testimony by saying, "Yes, I have an opinion as to whether the pills alone would have produced the intoxicating effect, leaving out the question of whiskey; and my opinion is that definitely it would. No, I did not at any time reveal to Mr. Lackey the ingredients of those pills."

When defendant rested his case his attorneys presented to the judge in writing and in apt time certain requests for special instructions, which the judge declined to give. Exception.

After hearing the evidence for the State and for defendant, and the charge of the court, the jury returned a verdict of guilty. Thereupon the court entered judgment that defendant pay "a fine of $100 and the costs, and that he surrender his license to the clerk of court to be transmitted to the Department of Motor Vehicles in Raleigh as provided by law * * *." Defendant gave notice of appeal, and appealed therefrom to Supreme Court and assigns error.

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

Young M. Smith for defendant, appellant.

WINBORNE, C. J. Among the assignments of error presented by defendant is that based upon exception to the closing instruction given by the court to the jury in this language: "The court further in-

structs you that if you find the facts to be as all of this evidence tends to show and you so find those facts beyond a reasonable doubt, then it would be your duty to return a verdict of guilty as charged."

Decisions of this Court indicate that the exception is well taken. See *S. v. Godwin,* 227 N.C. 449, 42 S.E. 2d 617, where as here there is no admission or presumption calling for explanation or reply on the part of defendant. There the court said that the peremptory character of the instruction, almost identical with the above, would seem to be in excess of approved practice. And it is there declared that it is only in rare instances that a verdict may be directed for the State in a criminal prosecution.

Moreover, "the plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is the presumption of innocence, which can only be overcome by the verdict of a jury." *S. v. Riley,* 113 N.C. 648, 18 S.E. 168. See also *S. v. Blue,* 219 N.C. 612, 14 S.E. 2d 635, and cases cited. And this has been held to be the correct doctrine, though guilt may be inferred from the defendant's own testimony as in *S. v. Green,* 134 N.C. 658, 46 S.E. 761.

For error thus appearing there must be a

New trial.

F. L. TAYLOR v. DENTON HATCHERY, INC.

(Filed 14 January, 1960.)

1. Judgments § 29—

An adjudication on the merits in plaintiff's action against an employee or agent individually is *res judicata* on the issue of negligence and bars a subsequent action by the plaintiff against the employer or principal sought to be held liable solely upon the doctrine of *respondeat superior.*

APPEAL by plaintiff from *Phillips, J.,* May 1959 Civil Term, of MONTGOMERY.

On 10 November 1955 plaintiff, while driving his automobile northwardly along State Highway 109 about nine miles north of Denton, N. C., was involved in a collision with an automobile owned and being driven by E. M. Hunt. For the purposes of this appeal, it is admitted that Hunt was president of defendant, Denton Hatchery, Inc., and was about his duties as president, agent and employee of defendant at the time of the collision. Both automobiles and both drivers were injured.

Plaintiff instituted an action against E. M. Hunt, individually, in the Superior Court of Moore County. Plaintiff alleged that he had suffered personal and property damage because of the actionable negligence of Hunt in causing the collision. Plaintiff alleged that Hunt was negligent in that he (1) was driving in a reckless manner in violation of G.S. 20-140, (2) was driving at an excessive speed in violation of G.S. 20-141, (3) failed to keep a reasonable lookout, (4) failed to keep his vehicle under proper control, (5) drove to the left of the center of the highway in violation of G.S. 20-148, and (6) failed to take proper precautions to prevent injury to others. Hunt answered, denied the material allegations of the complaint, pleaded contributory negligence and set up a counterclaim for personal and property damages. Plaintiff replied, denied the material allegations of the counterclaim and pleaded contributory negligence. This cause came on for trial at the September 1957 Term of Moore County. The verdict of the jury was that neither of the parties was damaged by the negligence of the other. From judgment in conformity to the verdict plaintiff and Hunt both appealed. This Court found no error in the trial. *Taylor v. Hunt,* 248 N.C. 330, 103 S.E. 2d 287. There had been a prior appeal in this cause. *Taylor v. Hunt,* 245 N.C. 212, 95 S.E. 2d 589. These decisions set out the factual and procedural situations in more detail.

After the termination of the action referred to in the preceding paragraph, plaintiff learned that E. M. Hunt was president, agent and employee of defendant, Denton Hatchery, Inc., at the time of the accident. Plaintiff instituted the present action. The allegations of the complaint in the present action, including the specific allegations of negligence, are identical with those in the case of *Taylor v. Hunt,* above referred to, except that in the present action it is alleged that E. M. Hunt, at the time of the collision in question, was agent and employee of defendant and "was acting in the scope of his authority and employment and in the furtherance of his duties" as such.

Defendant herein filed answer and, *inter alia,* pleaded the judgment, judgment roll and Supreme Court decisions in the case of *Taylor v. Hunt* as an estoppel to the maintenance of the present action and alleged that the matters and things involved in the present action are *res judicata.*

Plaintiff demurred to this plea in bar on the grounds that there was lack of privity between E. M. Hunt and defendant and the prior suit was against E. M. Hunt as an individual and not in his representative capacity as agent of defendant.

The court overruled the demurrer. At the hearing on the demurrer

plaintiff admitted that the factual allegations in the plea in bar are true. Therefore the court dismissed the action.

From judgment overruling the demurrer and dismissing the action plaintiff appealed and assigned error.

David H. Armstrong for plaintiff, appellant.
W. D. Sabiston, Jr., for defendant, appellee.

MOORE, J. There is a single question for decision on this appeal. Is the judgment in the case of *Taylor v. Hunt,* referred to above, *res judicata* of the matters alleged in the complaint and is it a bar to the prosecution of the instant action? The question must be answered in the affirmative.

"While a person injured by the tort of a servant may bring suit against either the master or servant, a recovery against the master has been held to bar a subsequent action against the servant, and a recovery against the servant has been held to bar a subsequent action against the master, or, at least, to fix the maxium limit of the master's liability; and, where plaintiff in an action against an employee is defeated on the merits, the judgment is generally regarded as a bar to a subsequent action against the employer, and vice versa, at least when the master is not guilty of any independent or concurrent wrong, but must be held, if at all, under the doctrine of respondeat superior." 50 C.J.S., Judgments, sec. 757, p. 279.

Plaintiff first sued Hunt, the agent, and was defeated on the merits. In the case at bar there is no allegation that defendant, the principal, was guilty of any independent or concurrent wrong. The principal, if liable at all, must be held under the doctrine of *respondeat superior.* Therefore the judgment in the suit against Hunt bars the maintenance of the present action.

The applicable principle of law has been repeatedly stated in decisions of this Court. In *Pinnix v. Griffin,* 221 N.C. 348, 350, 20 S.E. 2d 366, it is said: "We have held that the verdict and judgment against the plaintiff on the issue of negligence in an action against the servant is conclusive and bars a later action by the same plaintiff against the principal. This is the law when the master is not guilty of any independent or concurrent wrong but must be held, if at all, under the doctrine of *respondeat superior.*" Holdings to the same effect appear in *Stone v. Coach Co.,* 238 N.C. 662, 664, 78 S.E. 2d 605; *Leary v. Land Bank,* 215 N.C. 501, 506, 2 S.E. 2d 570; *Morrow v. R. R.,* 213 N.C. 127, 129, 195 S.E. 383; *Whitehurst v. Elks,* 212 N.C. 97, 98, 192 S.E. 850.

Ordinarily, in order for a judgment to constitute an estoppel there must be identity of parties, subject matter and issues, and only parties and privies are barred and estopped by a judgment. But, conceding that Hunt and defendant are not in privity, the factual situation presented by the case at bar is an exception to the general rule. *Leary v. Land Bank, supra,* and the authorities therein cited and discussed.

Plaintiff makes the ingenious argument that the negligent conduct complained of was the direct act of defendant, since a corporation can act only through agents. He further contends that the suit against Hunt as an individual was improper since he was acting in his representative, rather than his individual, capacity. To so hold would work a denial of an injured plaintiff's option to sue either the principal or agent or both. That he has this option and right is repeatedly stated in the authorities above cited. See also *Trust Co. v. R. R.*, 209 N.C. 304, 309, 183 S.E. 620. Plaintiff's contention is without merit.

The further contentions of plaintiff have no merit. The ruling of the court below is in accord with settled principles of law.

Affirmed.

JOHN H. GALES AND WIFE, JULIETTE SMITH GALES v. DAVID CARMER SMITH, EXECUTOR OF THE ESTATE OF J. O. SMITH.

(Filed 14 January, 1960.)

1. Executors and Administrators § 24d—

In assessing damages in an action in *quantum meruit* for services rendered decedent under an implied contract to pay for them, the benefits received by plaintiffs and their children from the deceased, including the use of the home and farm while performing the services, should be deducted from the value of the services rendered.

2. Executors and Administrators § 24a—

An action to recover for services rendered decedent in reliance on a parol contract to convey is not based on breach of the contract to convey but upon breach of an implied promise to pay the reasonable value of the services, and the court should be careful not to leave the impression with the jury that they may award damages for breach of the unenforceable contract.

APPEAL by defendant from *Hall, J.*, February, 1959 Civil Term, BRUNSWICK Superior Court.

After hearing the evidence offered by the adverse parties, the court, without objection, submitted the following issues:

"1. Did the defendant's intestate, J. O. Smith, during his lifetime enter into an agreement and contract with the plaintiffs, John H. Gales and wife, Juliette S. Gales, as alleged in the Complaint?

"2. If so, did the plaintiffs, John H. Gales and wife, Juliette S. Gales, render services to said J. O. Smith in good faith, relying on a contract and agreement with him, as alleged in the Complaint?

"3. What amount, if any, are the plaintiffs entitled to recover of the defendant?"

The jury answered the first and second issues, "Yes," and the third issue, "$8,850." From the judgment on the verdict, the defendant appealed.

Herring, Walton & Parker, Rountree & Clark for defendant, appellant.

E. J. Prevatte, Kirby Sullivan, By: E. J. Prevatte for plaintiffs, appellees.

HIGGINS, J. The issues of fact arising on the pleadings and the principles of law applicable thereto are fully stated in the opinion of *Bobbitt, J.*, on the former appeal reported in 249 N.C. 263, 106 S.E. 2d 164. As pointed out in that opinion, the plaintiffs are entitled to recover the reasonable value of the services they rendered to J. O. Smith and his wife under such circumstances as implied a promise to pay for them.

As a further defense, the defendant alleged the plaintiffs and their children had a home on, and support from the defendant's farm during the entire period covered by their claim. The defendant offered evidence tending, in some degree at least, to support the allegations of this further defense.

On the issue of damages (assuming the plaintiffs have prevailed on the preceding issues) the plaintiffs are entitled to recover the difference between the reasonable value of the services rendered and the reasonable value of the benefits received. Research has failed to disclose a decision of this Court directly in point on this accounting aspect of a case based on *quantum meruit*. See *Sawyer v. Cox*, 215 N.C. 241, 1 S.E. 2d 562. Directly in point, however, is *Hendrickson v. Meredith*, 161 Va. 193, 170 S.E. 602; *Kearns v. Andree*, 107 Conn. 181, 193 A. 695; *Brown v. Woodbury*, 183 Mass. 279, 67 N.E. 327; *Warren v. Interstate Realty Co.*, 192 Ill. App. 438; *Cohen v. Stein*, 61 Wis. 508, 21 N.W. 514; *Kirkpatrick v. Jackson*, 256 Wis. 208, 40 N.W. 2d 372;

Roske v. Ilykanyics (Minn.) 45 N.W. 2d 769. See also 59 A.L.R. 604, and 69 A.L.R. 14.

On the issue of damages the court should have charged the jury that the amount found to be the reasonable value of the services rendered should be offset by the reasonable value of the benefits the plaintiffs and their children received from the defendant, including the use of his home and farm. Failure of the court so to charge is directly challenged by Assignment of Error No. 2, based on Exception No. 6. We hold the court's failure in this respect was prejudicial error.

By other assignments the defendant complains the court over-emphasized the importance of the alleged contract to convey the farm and in view of the wording of the issues submitted, the complaint seems to be well founded. The contract to convey was in parol. It was unenforceable under the statute of frauds. Evidence relating to it was admissible only because of its bearing on the question whether the services were rendered and accepted with the expectation the defendant would pay the plaintiffs for them. The foundation of this action is not the breach of the parol contract to convey, but the breach of the implied contract to pay reasonable value for services rendered and accepted under circumstances showing payment was expected. The instructions may have left the jurors with the mistaken belief they were awarding damages for breach of contract to convey the farm.

For the reasons assigned, the judgment of the superior court is set aside and the defendant awarded a

New trial.

WALTER S. FEARRINGTON v. JANIE S. FEARRINGTON

(Filed 14 January, 1960.)

1. Divorce and Alimony § 24—

In this proceeding for modification of an order for the custody of the minor child of the parties the court found upon supporting evidence that at the time the decree was rendered awarding custody of the child to its mother, the child was in the actual, if not the nominal, custody of a married couple, that the misconduct of the wife, asserted as a change of condition, did not affect the interest of the child upon the mother's visits to the child in the home of such couple, and that the best interest of the child demanded that she remain in the home of such couple. *Held:* The findings support the order denying modification of the decree.

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

FEARRINGTON *v.* FEARRINGTON.

APPEAL by plaintiff from *Johnston, J.*, in Chambers in FORSYTH on 25 April 1959.

Deal, Hutchins and Minor for plaintiff, appellant.
Hoyle C. Ripple for defendant, appellee.

RODMAN, J. This is an appeal from an order with respect to the custody of the minor child of plaintiff and defendant.

The parties were married in August 1948. A child, Diana, was born 5 August 1952. The parties separated 5 October 1953. At or about the time of the separation plaintiff delivered the child with her personal effects to D. B. Sprinkle and wife Bessie.

This action was begun by the issuance of summons 7 October 1955. The primary purpose of the action was to obtain a divorce *a vinculo*. The pleadings adverted to the birth of the infant. Defendant in her answer asked that she be awarded custody. Judgment was entered in November 1955 divorcing the parties. Defendant was given custody of the infant subject to visitation rights granted plaintiff, who was required to pay $10 per week for the support of the child.

On 20 March 1959 plaintiff, pursuant to the provisions of G.S. 50-13, gave notice that he would move, because of changed conditions, to have custody of the infant. In his motion plaintiff asserted that defendant was no longer fit to have custody.

Defendant resisted the motion. She asserted if there was to be any modification of the original order, custody should be awarded to the Sprinkles.

The parties were heard on affidavits. Based on the evidence submitted, the court found plaintiff and defendant each contributed to the support of the minor child, but the amounts so contributed were insufficient, and the deficiency was supplied by the Sprinkles, with whom the child had resided since 1953, except for occasions when she visited her parents; the Sprinkles were people of excellent reputation; the child is deeply attached to them; they are caring for her physical and spiritual well-being; the father has remarried; he and his wife both work, one at night and the other during the day; they do not have adequate help to properly care for the child; "If Diana be placed with her father, she would be torn or removed from Mrs. and Mr. Sprinkle, whom she dearly loves and enjoys, and their home, which is actually the only real home she has ever known and in which she is very happy, which would disturb and frustrate her personality, and would likewise remove her from Wiley School, where she has started and which she enjoys, and she would be placed in the Lewis-

ville School, which would interrupt Diana's elementary school training by taking her away from her present teachers and school mates with whom she has started, which would further tend to frustrate and disturb her personality and happiness; and that to remove Diana from the Sprinkle home would be removing her from Mrs. Bessie Sprinkle who has been a real mother to her, to a new home with a new mother, which would tend to further confuse and frustrate Diana."

The court found defendant had been guilty of misconduct, but such misconduct did not vitally affect the child "since Diana is being almost entirely supervised and reared by Mrs. Bessie Sprinkle and in the home of the Sprinkles, where Mrs. Janie Fearrington visits, and upon such visits and elsewhere in the presence of Diana she conducts herself as a kind, loving, caretaking mother should . . ."

Based on the findings made, the court concluded the charges complained of were not such as to materially affect the rearing, education, and life of the child and were not such as to require modification of the custody order made in 1955.

The judge who heard the present application for custody of the minor also heard the divorce action and made the award of custody now sought to be modified. The child was then as now in the actual, if not the nominal, custody of the Sprinkles. There is no suggestion that there has been any change which in any manner affects the fitness of the Sprinkles to care for and nurture the child. The order indicates the court's intention to continue the control and custody as is now in practical operation. The evidence supports the findings of fact, and the facts found support the order. *In re McWhirter*, 248 N.C. 324, 103 S.E. 2d 293; *In re Gibbons*, 247 N.C. 273, 101 S.E. 2d 16; *Holmes v. Sanders*, 246 N.C. 200; 97 S.E. 2d 683; *Griffith v. Griffith*, 240 N.C. 271, 81 S.E. 2d 918; *Gafford v. Phelps*, 235 N.C. 218, 69 S.E. 2d 313.

Affirmed.

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

IN RE THE WILL OF ROWENA M. SHUTE.

(Filed 14 January, 1960.)

1. Wills §§ 2, 12—

In order to make or revoke a will the testator must have mental capacity to comprehend the natural objects of his bounty, to understand the kind, nature and extent of his property, to know the manner in which he desires his act to take effect, and to realize the effect his act would have upon his estate, and the lack of any one of these elements of testamentary capacity renders the testator incapable of making or revoking his will.

2. Wills § 25—

An instruction which, by the use of the conjunctive "and," has the effect of placing the burden upon propounders to prove that at the time testatrix tore the paper writings she did not possess each and every one of the essential elements of mental capacity to revoke the instrument, must be *held* for prejudicial error.

3. Appeal and Error § 42—

Conflicting instructions on the burden of proof, one erroneous and the other correct, must be *held* prejudicial, since it cannot be determined which instruction the jury followed.

APPEAL by Pickett King, propounder, from *Johnston, J.*, February, 1959 Mixed Term, of UNION.

Petition was filed 7 December 1957 to propound in solemn form paper writings purporting to be the last will and testament of Rowena M. Shute, who died 1 January 1957. The petitioner is Mrs. Maude S. Squires, a beneficiary under the purported will. There are twelve respondents. Pickett King, respondent, answered, admitted the allegations of the petition and made himself a propounder. Mrs. Juanita Gordon, respondent, filed answer in the nature of a caveat to the purported will. By leave of court, Mrs. Ed. Ballenberger, respondent, adopted the answer of Mrs. Gordon.

The petition alleges in substance that Rowena M. Shute executed a valid holograph will and delivered it to another for safe keeping, thereafter she partially mutilated the will by tearing, she lacked mental capacity to revoke the will at the time she mutilated it, and the pieces have been preserved and are the last will and testament of Rowena M. Shute.

The caveat denies the material allegations of the petition and alleges that testator had capacity to revoke and did revoke the purported will.

At the trial in Superior Court issues were submitted to the jury and answered as follows:

"1. Were the paper writings offered for probate as the last will and testament of Rowena M. Shute written entirely in her handwriting, subscribed by her and deposited by her for safekeeping in the manner required by law? Answer: Yes.

"2. If so, did the said Rowena M. Shute, at the time of the tearing of said paper writings, have sufficient mental capacity to revoke her will? Answer: Yes.

"3. Are the said paper writings offered for probate, and every part of both, the last will and testament of Rowena M. Shute? Answer: No."

From judgment declaring that the paper writings are not the last will and testament of Rowena M. Shute, Pickett King, propounder, appealed and assigned errors.

M. T. Leatherman, C. E. Leatherman, Harvey A. Jonas, Jr., and Brock Barkley for appellant.

O. L. Richardson and A. A. Reaves for Caveators, appellees.

MOORE, J. Propounder assigned as error the following portion of the judge's charge to jury:

"Now, members of the jury, the Court instructs you that if the propounders have satisfied you by the greater weight of the evidence, the burden being upon the propounders to so satisfy you that at the time the paper writings were torn there at the hospital, in the presence of Rowena M. Shute and Mr. Day, that she didn't have sufficient mental capacity to revoke her will, that is that she didn't possess mind sufficient to understand without prompting what she was engaged in, *and* the kind and extent of her property, *and* the natural objects of her bounty, *and* the manner in which she desired the disposition of her property to take effect, *and* the effect which the disposition of her property would have upon her estate, then it would be your duty to answer this second issue NO." (Emphasis ours.)

Propounder's position is well taken. The court placed on the propounders the excessive burden of showing that testator was lacking in *all* of the elements of mental capacity essential to the revocation of a will. To establish mental incapacity for revoking a will, it is sufficient to negative only one of the essential elements. *In re Will of Kemp,* 234 N.C. 495, 499, 67 S.E. 2d 672 (wherein *In re Will of Efird,* 195 N.C. 76, 141 S.E. 460, is distinguished).

"One lacking testamentary capacity is not competent to revoke a

prior will. The same degree of mental capacity is necessary to revoke a will as to make one." 57 Am. Jur., Wills, sec. 458, p. 322.

A person has sufficient mental capacity to make a will or to revoke a prior will if he (1) comprehends the natural objects of his bounty, (2) understands the kind, nature and extent of his property, (3) knows the manner in which he desires his act to take effect, and (4) realizes the effect his act will have upon his estate. *In re Will of Tatum,* 233 N.C. 723, 727, 65 S.E. 2d 351; *In re Will of York,* 231 N.C. 70, 71, 55 S.E. 2d 791; *In re Rawlings' Will,* 170 N.C. 58, 63, 86 S.E. 794.

If all the elements of testamentary capacity are essential to make or revoke a will, obviously the lack of any one of them renders the testator incapable of performing such act. The vice of the challenged instruction is the connecting of the stated elements by the conjunction "and," for thereby the court declares to the jury that propounders must show the lack of all of the essentials of testamentary capacity in order to prevail on the second issue.

It is true that the court, elsewhere in the charge, properly instructed the jury as to the essential elements of testamentary capacity, that is, capacity to make or revoke a will. But this does not nullify the prejudical effect of the erroneous instruction. Where instructions in regard to a material matter are conflicting, one erroneous and the other correct, a new trial must be granted, for the jury is not supposed to know which one is correct and this Court cannot say that they did not follow the erroneous instruction. *Morgan v. Oil Co.,* 238 N.C. 185, 196, 77 S.E. 2d 682.

New trial.

PAULETTE FIELDS, BY HER NEXT FRIEND, ODELL FIELDS v. THE DURHAM CITY BOARD OF EDUCATION.

(Filed 14 January, 1960.)

1. Schools § 7½—

Demurrer is properly sustained in an action by a pupil against a city board of education to recover for an injury resulting from alleged negligence when the complaint contains no allegations to the effect that the defendant had procured liability insurance or had waived its immunity as authorized by G.S. 115-53, since, except for such liability as may be established under the State Tort Claims Act a county or city board of education is immune from tort liability unless its immunity is waived by statute.

2. Same—

G.S. 115-27 merely authorizes a county and city board of education to prosecute and defend suits in its corporate name, and the statute does not purport to waive a board's immunity to liability for tort.

APPEAL by plaintiff from *Hall, J.,* October Term, 1959, of DURHAM.

The plaintiff, an eleven year-old child, was duly enrolled in Burton School, which is included in and constitutes a part of the Durham City School System. According to the allegations of the complaint, the plaintiff was injured during school hours, on or about 29 May 1958, by stepping through a break in an iron grate, a part of the drainage system which had been constructed by the defendant through the school grounds. Defendant is a body corporate and was engaged in the administration of the public schools of the City of Durham and exercised a necessary governmental function by virtue of Chapter 115 of the North Carolina General Statutes.

The plaintiff alleges that she was injured by reason of the negligence of the defendant. The defendant demurred to the complaint upon the ground that it does not contain facts sufficient to constitute a cause of action, in that it does not appear from the facts alleged that the defendant has waived its governmental immunity. The demurrer was sustained and the plaintiff appeals, assigning error.

Daniel K. Edwards for plaintiff.

Spears, Spears & Powe and Alexander H. Barnes for defendant.

DENNY, J. Under the provisions of G.S. 115-27, county and city boards of education are respectively created "a body corporate," capable of "* * * prosecuting and defending suits for or against the corporation." This, however, does not mean that the Legislature has waived immunity from liability for torts for such boards.

Generally speaking, such an agency may sue or be sued on contracts entered into and duly executed by it. Likewise, a county or city board of education may not take private property for public use without paying just compensation therefor. *Eller v. Bd. of Education,* 242 N.C. 584, 89 S.E. 2d 144.

On the other hand, such board, unless it has duly waived immunity from tort liability, as authorized in G.S. 115-53, is not liable in a tort action or proceeding involving a tort except such liability as may be established under our Tort Claims Act. G.S. 143-291 through 143-300.1; *Turner v. Bd. of Education,* 250 N.C. 456, 109 S.E. 2d 211; *Eller v. Bd. of Education, supra; Smith v. Hefner,* 235 N.C. 1, 68

S.E. 2d 783; *Hansley v. Tilton,* 234 N.C. 3, 65 S.E. 2d 300; *Benton v. Bd. of Education,* 201 N.C. 653, 161 S.E. 96.

G.S. 115-53 provides in part, "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 * * *.

"Except as hereinbefore expressly provided, nothing in this section shall be construed to deprive any county or city board of education of any defense whatsoever to any such action for damages, or to restrict, limit, or otherwise affect any such defense which said board of education may have at common law or by virtue of any statute * * *."

It is clear that the Legislature has not waived immunity from tort liability as to county and city boards of education, except as to such liability as may be established under our Tort Claims Act, but has left the waiver of immunity from liability for torts to the respective boards and then only to the extent such board has obtained liability insurance to cover negligence or torts.

Therefore, in the absence of an allegation in the complaint in a tort action against a city board of education, to the effect that such board has waived its immunity by the procurement of liability insurance to cover such alleged negligence or tort, or that such board has waived its immunity as authorized in G.S. 115-53, such complaint does not state a cause of action. There being no such allegation in the plaintiff's complaint herein, the ruling of the court below in sustaining the defendant's demurrer will be upheld.

Affirmed.

ROY OXENDINE v. H. S. LEWIS.

(Filed 14 January, 1960.)

1. Appeal and Error § 55: Parties § 1—

The heirs of the deceased grantee in a deed are necessary parties to an action to determine whether the grantee took a life estate or the fee simple, and where the action is solely between the person owning the asserted reversion and his vendee, the cause must be remanded for necessary parties.

APPEAL by defendant from *McKinnon, J.*, at Chambers, ROBESON Superior Court, November 6, 1959.

Civil action for specific performance of a written contract to convey a described tract of land. The plaintiff tendered his fee simple deed and demanded payment of the purchase price. The defendant refused to accept the deed and to pay the purchase price upon the ground that plaintiff did not hold and could not convey title in fee simple as called for in the contract. By agreement the court heard the case without a jury.

The parties stipulated: (1) On November 24, 1924, the plaintiff acquired a fee simple title to the land involved; (2) on May 10, 1932, the plaintiff (and wife) executed a deed to Melinda Oxendine Hunt (this controversy involves the interpretation of that deed); (3) Melinda Oxendine Hunt died prior to the execution of the contract now sought to be enforced, leaving as her heirs at law the plaintiff, Roy Oxendine, and others not named and not parties to this action.

The granting clause in the deed to Melinda Oxendine Hunt is as follows: "The parties of the first part . . . do hereby bargain, sell and convey unto the said party of the second part, and to her heirs and assigns forever, the following lands . . ., to-wit: A life estate in and to the following described tract of land, to-wit:" (Description by metes and bounds). Immediately below the description appears the following: "It is distinctly understood between the parties of the first part and the party of the second part that the said Melinda Oxendine Hunt is to have a lifetime right and full control of the possession of the property herein conveyed and that the remainder, subject to said lifetime right, is retained by Roy Oxendine."

"To have and to hold the above described lands and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, forever." Then follow clauses of general warranty.

The court held the deed to Melinda Oxendine Hunt conveyed only life estate to her and upon her death Roy Oxendine became the owner in fee and can now convey a good and complete title. From the

judgment that the contract be specifically performed, the defendant appealed.

W. H. Humphrey for defendant, appellant.
Johnson & Biggs, E. M. Johnson for plaintiff, appellee.

HIGGINS, J. Involved in this action are apparently conflicting provisions of a deed. The court is called upon to resolve the conflict. In order that its judgment may be binding on all parties in interest and be a final termination of the controversy, the court should have before it all the heirs at law of Melinda Oxendine Hunt. The absent heirs are not bound by the judgment in a cause to which they are not parties. Our procedure requires that they be brought in and given an opportunity to be heard. *Britt v. Children's Homes,* 249 N.C. 409, 106 S.E. 2d 474; *Morganton v. Hutton & Bourbonnais Co.,* 247 N.C. 666, 101 S.E. 2d 679; *Edmondson v. Henderson,* 246 N.C. 634, 99 S.E. 2d 869.

The judgment of the Superior Court of Robeson County is set aside. The cause is remanded for additional parties.

Remanded.

STATE v. LEWIS LYNN, JR.

(Filed 14 January, 1960.)

1. Criminal Law § 159—

The filing of brief by appellant after the expiration of the time allowed results in an abandonment of the assignments of error except those appearing on the face of the record which are cognizable *ex mero motu.*

APPEAL by defendant from *Carr, J.,* October Term, 1959, of ALAMANCE.

On June 15, 1959, in the Burlington Municipal Recorder's Court, defendant pleaded guilty to a warrant charging that, while living with his wife, he wilfully failed to provide adequate support for his two children, aged nine and four, a violation of G.S. 14-325. The judgment then pronounced imposed a prison sentence of twelve months, suspended for three years on condition, *inter alia,* that defendant pay to the clerk of said court, for the support of said children, the sum of $15.00 on Friday of each week, beginning July 17, 1959, "until further orders of Court."

Later, the said recorder's court and also Judge Carr, after *de novo* hearing on defendant's appeal as provided by G.S. 15-200.1, found as a fact that defendant had wilfully violated said condition and ordered that defendant serve said prison sentence. Defendant excepted to the "judgment and finding of facts" of Judge Carr and gave notice of appeal.

Appellant was allowed fifteen days from October 21, 1959, to serve statement of case on appeal but did not serve such statement until November 24, 1959. The record on appeal was docketed in this Court. Rule 28 (Rules of Practice in the Supreme Court, G.S. 4A, p. 185) required that appellant's brief be filed by noon on Tuesday, December 1, 1959. On December 8, 1959, appellant having failed to file brief, the Attorney General moved that the appeal be dismissed and the judgment affirmed. Thereafter appellant filed a brief.

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

Walter D. Barrett for defendant, appellant.

PER CURIAM. ". . . the filing by the defendant appellant of his brief too late works an abandonment of the assignments of errors, except those appearing on the face of the record, which are cognizable *ex mero motu.*" *S. v. Evans,* 237 N.C. 761, 75 S.E. 2d 919, and cases cited; Strong, North Carolina Index, Vol. 1, Criminal Law § 159, and cases cited.

No error appears on the face of the record. Indeed, the evidence set out in appellant's belated statement of case on appeal fully supports Judge Carr's findings of fact and judgment. Hence, the judgment is affirmed and defendant's appeal therefrom is dismissed.

Judgment affirmed, appeal dismissed.

STATE v. LACY JACOBS.
AND
STATE v. JOHN OWENS.

(Filed 14 January, 1960.)

1. Larceny §§ 1, 8—

The wrongful asportation of the goods of another must be done with the felonious intent to appropriate the goods to the taker's own use in order to constitute larceny, and an instruction which omits the element of *animo furandi* must be *held* prejudicial.

APPEAL by defendants from *Hobgood, J.*, Regular March 1959 Term, of ROBESON.

Criminal prosecution upon separate bills of indictment charging Larceny and Receiving Stolen Property. The cases were consolidated for trial.

Plea: Not Guilty by each defendant.

Verdict: Guilty as to each defendant of felonious larceny.

From judgments of imprisonment, each defendant appeals.

Malcolm B. Seawell, Attorney General, and Glenn L. Hooper, Jr., Assistant Attorney General, for the State.

Britt, Campbell & Britt for defendants, appellants.

PER CURIAM. Defendants assign as error this part of the charge: "The Court instructs you that larceny is the felonious taking and carrying away of the personal property of another."

Defendants further assign as error this part of the charge: "Now, gentlemen of the jury, if you find from this evidence, bearing in mind the instructions which the Court has given you, as to the law, that on the 10th of October, 1958, the two defendants together, that is Lacy Jacobs and John Owens, did go upon the premises of Sallie Oxendine and did then and there take, steal and carry away from said premises a thousand pounds of seed cotton, the same being the property of Sallie Oxendine and Raymond Jones, and if you find these facts beyond a reasonable doubt, you will find these two defendants, or whichever one of these defendants, you so find beyond a reasonable doubt, guilty of the felonious larceny of said cotton."

The parts of the charge set forth above are clearly erroneous, in that he did not charge, *inter alia*, that the taking must be done *animo furandi*, with a felonious intent to appropriate the goods taken to the defendants' own use. The Attorney General, with commendable candor, confesses error. *S. v. Booker*, 250 N.C. 272, 108 S.E. 2d 426; *S. v. Cameron*, 223 N.C. 449, 27 S.E. 2d 81; *S. v. Holder*, 188 N.C.

561, 125 S.E. 113; *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560, where proper definitions of larceny are given.

Defendants are entitled to a new trial, and it is so ordered.

New trial.

BONNER D. SAWYER, ADMINISTRATOR OF THE ESTATE OF M. J. DAWSON, DECEASED, AND ODELL BARTLETT v. W. (WADE) W. WHITFIELD AND WIFE, MINERVA P. WHITFIELD.

(Filed 14 January, 1960.)

1. Appeal and Error § 8—

In an action by an administrator to recover the balance of the contract price for the construction of a house by his intestate, an order permitting plaintiff, after notice, to view the premises in order to ascertain the facts in regard to defendants' defense that the work was defective and not in accordance with the plans and specifications, is an interlocutory order and defendants' appeal therefrom will be dismissed as premature.

APPEAL by defendants from an interlocutory order entered by *McKinnon, J.,* June, 1959 Term, ORANGE Superior Court.

Civil action brought by the plaintiff to recover $4,000 alleged to be the balance due for work done by his intestate in the construction of a dwelling for the defendants who are in possession.

The defendants claimed payment had been made for all work done. As a further defense, they alleged the work was defective and not in accordance with the plans and specifications.

At the June, 1959 Term of Superior Court the plaintiff moved for, and obtained, an order requiring the defendants to admit three appraisers and one photographer into the building for the purposes of examining and inspecting the structure. As stated in the motion, the administrator had had no opportunity to inspect the building. The builder, his intestate, is dead. The presiding judge, in his discretion, entered an order permitting the examination to be made upon three days' notice to the defendants. They excepted to the order and appealed.

Henry A. Whitfield, L. J. Phipps for defendants, appellants.
James R. Farlow for plaintiff, appellee.

PER CURIAM. The builder was dead. The plaintiff, as administra-

tor, had no personal knowledge of the defects, if any, in the structure. The defendants were in possession. The court entered the order in its discretion. Besides, it is interlocutory and hence not appealable.

Appeal dismissed.

RADFORD WHITLEY v. HARRY L. WADE.

(Filed 14 January, 1960.)

APPEAL by defendant from *Clark, J.*, March Term, 1959, of JOHNSTON.

This action was instituted by the plaintiff to recover damages to his Ford automobile in the alleged sum of $1,480.00, resulting from a collision between said automobile and an Oldsmobile owned and operated by the defendant and caused by the alleged negligence of the defendant.

The collision occurred about 5:00 p.m. on 20 April 1958 on the highway leading from Wendell to Smithfield, at or near the intersection of the said highway with the highway leading from Clayton to Wilson. The plaintiff was traveling in a southerly direction on the dominant highway toward Smithfield; the defendant was traveling in an easterly direction toward Wilson and entered the Wendell-Smithfield road headed toward Wendell.

The defendant set up a cross-action in his answer for damages to his Oldsmobile in the sum of $1,034.66.

The plaintiff's evidence tends to show that the defendant cut to his left before reaching the intersection of said roads and drove across a paved area in front of Barnes' Store and entered the dominant highway north of the intersection at an angle of about 45 degrees and drove into the path of plaintiff's automobile.

The defendant's evidence tends to show that he stopped at a stop sign placed on the servient highway about 30 feet from the intersection of the servient and dominant highways; that he stopped again before turning left at the intersection and then proceeded northwardly toward Wendell for about 90 feet on the dominant highway, when plaintiff approached him on the defendant's side of the road and hit the right front of his car resulting in substantial damages to both vehicles.

The jury returned a verdict in favor of the plaintiff for $1,480.00. Judgment was entered on the verdict, and the defendant appeals, assigning error.

IN RE WILL OF ROBERTS.

E. J. Wellons, Wood & Spence, Robert A. Spence for plaintiff.
Smith, Leach, Anderson & Dorsett for defendant.

PER CURIAM. This was a case for the twelve. The evidence was in sharp conflict — in fact, irreconcilably so. The jury accepted the plaintiff's version of how the collision occurred. We have carefully examined all the defendant's assignments of error and the exceptions on which they are based, and, in our opinion, they present no prejudicial error of sufficient magnitude to justify a new trial. Moreover, no new or novel question of law is involved in the appeal.

In the trial below there is in law

No error.

IN THE MATTER OF THE WILL OF HUBERT E. ROBERTS, DECEASED.

(Filed 29 January, 1960.)

1. Wills § 7—

A dispositive paper writing signed by testator and witnessed at his request and in his presence by two witnesses, although they signed it on separate occasions, is sufficient to constitute the instrument an attested will, it not being required that the witnesses sign in the presence of each other.

2. Wills § 8—

An instrument in the handwriting of testator, disclosing dispositive intent, and found after his death in his safe, is sufficient to constitute the instrument a holographic will, and the presence of a printed letterhead at the top of the page is immaterial.

3. Wills §§ 6, 8—

While the provisions of the statute in regard to the execution of a will are mandatory and not directory and must be strictly complied with, the statutory provisions must at the same time be reasonably construed so as to effectuate the intent of the statute and not to defeat it.

4. Wills § 22—

The burden is upon propounder to establish by the greater weight of the evidence that the paper offered for probate was executed in compliance with statutory requirements. G.S. 31-3.

5. Wills §§ 6, 8—

It is not required that a will be on a single sheet of paper or that the sheets constituting the instrument be physically attached, or that the signature of the testator appear on each sheet, but it is sufficient if the evidence discloses that the separate sheets constitute but a single instrument. In a holographic will sequence of the language is of less significance

than in an attested will since proof of the handwriting of the testator and his signature establishes the dispositive provisions as a will.

6. Wills § 24— Evidence held sufficient to warrant peremptory instruction as to validity of holographic will.

Evidence tending to show that four sheets, bearing the same date, each sheet being in the handwriting of testator, were found folded together, that the folds of all four sheets coincided, and that the four sheets considered together disclosed a coherent and complete testamentary disposition of testator's estate, and that his signature appeared at the end, *is held* sufficient, notwithstanding that a few words on one sheet, also in testator's handwriting, were in a different ink, to warrant a peremptory instruction by the court that if the jury found by the greater weight of the evidence the facts to be as all the evidence tended to show to answer the issue in the affirmative, caveators having offered no evidence in support of their contentions to the effect that it was impossible to tell whether any sheets had been removed.

7. Trial § 29—

When all the evidence justifies but a single inference in favor of the party having the burden of proof, an instruction to find the issue in the affirmative if the jury finds the evidence to be true will be upheld. The distinction is noted between a directed verdict and a peremptory instruction.

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

APPEAL by caveators from *Farthing, J.*, March Term, 1959, of MADISON.

The jury having answered the issue *devisavit vel non* in favor of the propounders, it was adjudged that the paper writing, and every part thereof, theretofore probated in common form and offered in evidence as Exhibit A, is the last will and testament of Hubert E. Roberts, deceased.

Hubert E. Roberts died November 27, 1956, at the age of 61 or 62. On November 30, 1956, Exhibit A was probated in common form and administratrices c. t. a. were appointed.

Hubert E. Roberts had been married but left no lineal heirs. His wife had died in 1947. The only child, a son, had been killed in 1945 while serving in the U. S. Air Force.

The caveators are twelve collateral heirs, first and second cousins, of Hubert E. Roberts. One resided in Marshall, N. C., four resided in other sections of North Carolina; and the remaining seven resided either in Washington, D. C., or in Maryland.

The propounders are Mrs. Vena C. Davis, Hattie T. Teague and Julia R. Elam, as administratrices c. t. a. and individually, and Lucille Roberts and Grace Conner, who filed a joint answer to the

caveat, and The Shriner's Hospital for Crippled Children, a corporation, for which a separate answer was filed.

All interested persons were cited and made parties to the proceedings.

Exhibit A (the original was filed here for inspection) consists of four sheets, identified in the evidence as Sheets 1, 2, 3 and 4. The four sheets are the same size, 8½" by 11", the same kind of paper and bear this letterhead: "ROBERTS PHARMACY — Established 1882 — The Rexall Store — Phone 6 — Marshall, N. C." The writing on each of the four sheets is set forth below:

"Sheet 1

"7/14/5

"Last will and testament.

"I Hubert E. Roberts of Marshall Madison County, N. C. Being of sound mine and capable of executing a valad deed or contract do make, Publish and declare this to be my last will and testament Hereby revoking all other wills or codicils herefore made by me.

"I give to my best friend and helper Mrs. Vena Davis, $5000.00. The house on hill st. known as the Church house. The stock and fixtures of Roberts Pharmacy. The two pictures in Dining room, The girl in prison and the Driving of the cows.

"I give to my cousin Mrs. Hillard Teague $5000.00. The two companion pictures in hall The Deers.

"Sheet 2

"7/14/51

"I leave in care of Marshall Presbitiran church $5000.00 for the Interest to be used to keep the Roberts Cemetary mowed and in repair. This should be done once weekly during sumer, for this trouble I give the Church 5% of the Interest.

"I leave in care of the Shrine Hospital Greenville, S. C., for the period of 25 years, the rent from the Roberts Pharmacy building and the Dodson building on Main St. This to be collected by them and the building to be kept in repair and first class condition and not to be rented to Jews. A sealed letter will be left with this will to be opened in 25 yrs.

"Sheet 3

"7/14/51

"I give to Lucille Roberts: The lot on Roberts Road. The Rector house to Hill St. Also picture head in bed room upstairs.

"I give to Julia Roberts Elam $5000.00 and one cluster diamond ring.

"Mrs. O. C. Rector. One picture the 3 horse Heads, one Diamond ring, vase in Hall.

"Mrs. J. H. Sprinkle, One diamond Ring, one chair with arms made by my Grandfather, The Long Pitcher in dining room.

"Sheet 4

"My home on the hill will go to Mrs. Bob Davis as long as she will keep Frank Fowler's room as is today and all the ruddunts of my estate to her Mrs. Bob Davis.

"I leave Miss Grace Connor $1000.00

"(s) H. E. Roberts
7/14/51

"Witness
(s) Claude Sawyer
(s) Eloise Ball"

The caveat alleged (a) undue influence by Mrs. Vena C. Davis, and (b) mental incapacity, but no evidence was offered to support these allegations. The caveat alleged further: "(c) That said purported will is not signed in the handwritting of the deceased. That said several pages of said will were not written prior to the affixing of the signature. That said purported will had been opened by others than the deceased and tampered with and altered."

"Mrs. Vena C. Davis" and "Mrs. Bob Davis" are one and the same person.

The caveators offered no evidence. When the propounders had offered their evidence, the caveators rested and moved for a directed verdict. Their motion was denied. The court submitted the issue *devisavit vel non* to the jury under this (peremptory) instruction: " . . . if you are satisfied from the evidence that you have heard, that the evidence is true, and find the facts to be as the evidence tends to show in this case, you will answer the issue submitted to you YES. If you fail to so find, you will answer the issue NO."

Propounders' evidence will be set forth in the opinion.

On appeal from said judgment, the caveators assign as error (1) the denial of their motion for a directed verdict and (2) the court's said peremptory instruction to the jury.

Uzzell & Dumont and A. E. Leake for caveators, appellants.

J. Y. Jordan, Jr., H. Kenneth Lee and Robert P. Smith for propounder The Shriner's Hospital for Crippled Children, appellee.

Mashburn & Huff, by Joseph B. Huff, and Clyde M. Roberts for other propounders, appellees.

BOBBITT, J. Three witnesses testified that all writing on the four sheets comprising Exhibit A, except the signatures of Claude Sawyer and Eloise Ball on Sheet 4, was in the handwriting of Hubert E. Roberts, and a witness testified that Exhibit A was found among the valuable papers and effects of Mr. Roberts in the inner compartment of his safe.

Two witnesses testified that the words "Will of H. E. Roberts," appearing on the envelope, Exhibit B, referred to below, were in the handwriting of Hubert E. Roberts. This envelope was not offered for probate.

Claude Sawyer, aged 69, testified: He had known Mr. Roberts "about all of his life" and, in the period before his death, had seen him "most every day." In response to Mr. Roberts' request, he "went back of the prescription counter." Mr. Roberts stated: "I want you to witness my will." Mr. Roberts "signed it, dated it, and handed me his pen, and I signed it over here on the left." Mr. Sawyer identified Mr. Roberts' signature and his own signature on Sheet 4 of Exhibit A. On cross-examination, Mr. Sawyer testified: He and Mr. Roberts were the only persons present. "There were several sheets . . . as many as three or four sheets." "He (Mr. Roberts) laid all of the sheets down together. That's the one (referring to Sheet 4) I signed. He did not read his will to me."

Mrs. Eloise Ball Riddle testified: She (then Eloise Ball) worked for Mr. Roberts from May, 1950, through October, 1951. She identified her signature and the signature of Mr. Roberts on Sheet 4 of Exhibit A. On one occasion, while she was working in the drugstore, Mr. Roberts acknowledged before her his signature on Sheet 4 of Exhibit A. ". . . I could not say that I remember signing his will, because I signed several papers for him and witnessed his signature, and he did not tell me I was witnessing his will." The incident took place "in the prescription room of the drugstore." No one was present other than she and Mr. Roberts.

A witness testified that Robert Davis, husband of Mrs. Vena C. Davis, was a first cousin of Hubert E. Roberts; and that Mrs. Garfield Davis, the mother of Robert Davis, was "the only living aunt" of Hubert E. Roberts.

If the four sheets constitute one complete and integrated document, the evidence was positive and uncontradicted that Exhibit A was executed in accordance with statutory requirements as an attested will *and* as a holographic will. G.S., Vol 2A, Recompiled 1950, § 31-3.

Sheet 1 bears the date, "7/14/5," and each of Sheets 2, 3 and

4 bears the date, "7/14/51," in the handwriting of Hubert E. Roberts. Mrs. Riddle did not work for Mr. Roberts after October, 1951. While it does not appear that Chapter 1098, Session Laws of 1953, now G.S. 31-1 *et seq.*, effects any statutory change relevant to the case *sub judice*, it is noted that Section 16 of said 1953 Act provides: "This Act does not have the effect of rendering invalid any will executed or probated prior to July 1, 1953."

The fact that Mr. Sawyer and Mrs. Riddle signed as witnesses on separate occasions is immaterial. Both signed as witnesses in the presence of Mr. Roberts. It is not required that subscribing witnesses sign in the presence of each other. *In re Will of Franks,* 231 N.C. 252, 255, 56 S.E. 2d 668, and cases cited.

Caveators contend the evidence is not sufficient to support a finding that *the four sheets* constitute a single document executed by Hubert E. Roberts as his last will and testament; but, if considered sufficient for submission to the jury, the evidence did not warrant the peremptory instruction.

The only testimony as to the circumstances under which the four sheets comprising Exhibit A were found and the condition thereof when found is the testimony of Charles Mashburn. Mr. Mashburn, an attorney at law and resident of Marshall, had been employed by Mrs. Vena C. Davis to represent her in connection with the Hubert E. Roberts' estate.

On direct examination, Mr. Mashburn testified, in substance, as follows: Mr. Roberts had, in his drugstore, "a large steel safe." The outer door had a combination lock. An inner compartment was locked by key. On or about November 29, 1956, two days after Mr. Roberts' death, Mr. Mashburn, in company with Mrs. Vena C. Davis and Mrs. Clyde Roberts, went to the safe. The inner compartment was locked. Mr. Mashburn obtained the key, which was on Mr. Roberts' key ring, and opened the inner compartment. Mr. Mashburn found, "in the inner locked compartment of the safe," along with insurance policies, Series E. Bonds, keepsakes of Mr. Roberts' son, receipts, *etc.*, the envelope, Exhibit B, bearing the words, "Will of H. E. Roberts," which contained, "folded together," the four sheets comprising Exhibit A. In the outer portion of the safe, there were "a large group of narcotics and various things a duggist would keep locked up."

On cross-examination, Mr. Mashburn testified, in substance, as follows:

He knew Mr. Roberts but was not his attorney. He had heard Mr. Roberts had been sick and "in the hospital in Asheville some-

time prior to his death." He did not know whether Mrs. Davis was in charge of the store in Mr. Roberts' absence. He did not recall whether the outer door of the safe was open or closed, locked or unlocked; and he was not sure whether Mrs. Davis gave the key to him or whether it was in the store. The four sheets of paper, Exhibit A, "were in the same condition when (he) found them that they are in now." They were not fastened together, "(j)ust folded together."

Additional testimony of Mr. Mashburn, on cross-examination, was as follows: "I am not sure whether the envelope marked EXHIBIT B is in the same condition as when I found it in the safe. I am not positive as to whether or not the envelope had been opened. However, this piece of Scotch tape was on there at the time. I don't recall whether or not the cross ink marks on the back were on there at the time. I don't recall whether it had been split open at the top. It is split open now. I would not know whether it had been previously opened prior to the Scotch tape being put on it. I could not tell from this whether or not the Scotch tape is over the ink cross-marks. I don't believe the will was read at that time in the drugstore. I believe it was carried to Mr. Roberts' office or to the Clerk of Court's office. I believe that I took the will out of the safe and carried it to Mr. Roberts' office before the Clerk ever got there. I don't recall that we notified the Clerk to come to the drugstore. I don't recall that the Clerk did go to the drugstore. I don't recall what the condition of the envelope was when the Clerk went to Mr. Roberts' office. . . . I believe that I first read the will in Clyde Roberts' office."

Inspection of (original) Exhibit B discloses: It is a white stamped envelope, size 4¼" by 9½"; and on the front, in the upper left corner, are the printed words: "After 5 days, return to ROBERTS PHARMACY, Box 2, MARSHALL, N. C." In the upper right corner, part of the envelope itself, is three cents uncancelled United States postage. The words, "Will of H. E. Roberts," appear on the front. The flap is now firmly sealed to the back of the envelope. It appears that, apart from the glue or other adhesive on the flap, it was sealed by Scotch tape, a portion of which remains, over *the line* where the edge of the flap contacts the back of the envelope. Crossing said line, there are three "X" marks, in ink. While there is no evidence relating thereto, it may be inferred from the physical appearance that these "X" marks, parts of which are obscured, were made prior to the sealing of the envelope with Scotch tape. It appears that the top of the envelope, now open, was opened by cutting or tearing or both.

Inspection of (original) Exhibit A discloses: The four sheets are now fastened together by a staple in the upper left corner. Near this staple, on each of the four sheets, there are several holes, ostensibly made by stapling or attempted stapling. (Note: None of the evidence relates to these holes or as to when and under what circumstances the four sheets were fastened by the staple now holding them together.) All handwriting on Sheets 1, 2 and 4, and also the handwriting on the front of the envelope, is in light blue ink. As to Sheet 3, the date, "7/14/51," the words "I give to Lucille Roberts," and the words, "I give to Julia Roberts," are in light blue ink. All other handwriting on Sheet 3 is in darker blue ink.

The right to dispose of property by will is statutory. *Peace v. Edwards,* 170 N.C. 64, 86 S.E. 807; *In re Will of Crawford,* 246 N.C. 322, 98 S.E. 2d 29. "The provisions of the statute are, of course, mandatory and not directory, and therefore there must be a strict compliance with them before there can be a valid execution and probate of a holograph script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It must be construed and enforced strictly, but at the same time reasonably." *In re Will of Jenkins,* 157 N.C. 429, 435, 72 S.E. 1072; *Alexander v. Johnston,* 171 N.C. 468, 88 S.E. 785.

Upon the issue *devisavit vel non,* the burden of proof was on the propounders to establish, by the greater weight of the evidence, that the paper writing offered for probate, Exhibit A, was executed in compliance with requirements of G.S. 31-3. *In re Will of Morrow,* 234 N.C. 365, 67 S.E. 2d 279; *In re Will of Chisman,* 175 N.C. 420, 95 S.E. 769; *In re Will of Hedgepeth,* 150 N.C. 245, 63 S.E. 1025.

This Court, opinion by *Allen, J.,* in *In re Swaim's Will,* 162 N.C. 213, 78 S.E. 72, Ann. Cas. 1915A 1207, which involved the probate of two separate sheets *as an attested will,* quoted, with approval, from the opinion of *Chief Justice Gibson* in *Wikoff's* Appeal, 15 Pa. 281, 53 Am. Dec. 597, the following: "It is a rudimental principle that a will may be made on distinct papers, as was held in *Earl of Essex's* case, cited in *Lee v. Libb,* 1 Show. 69. It is sufficient that they are connected by their internal sense, by coherence or adaptation of parts."

The general rules have been stated as follows: "A will need not be written entirely on one sheet of paper, but may be written on several separate sheets, even though there is confusion in the order of their arrangement, provided the sheets are so connected together that they may be identified as parts of the same will. A valid will

may be written on several sheets of paper without attaching them where the principle of integration may be applied. While connection by the meaning and coherence of the subject matter is sufficient, as physical connection by mechanical, chemical, or other means is not required, although it is sufficient when made, in the absence of such physical connection, the papers must be identified as one will by their internal sense, by coherence, or adoption of the several parts. Where there is sufficient credible proof of the identity of disconnected sheets propounded as one will, neither the physical nor coherent rule of attachment is applicable." 94 C.J.S., Wills § 162; 57 Am. Jur., Wills § 224; Thompson on Wills, Third Edition, § 105; Page on Wills, Lifetime Edition, § 242; Annotation: "Validity of will written on disconnected sheets," 38 A.L.R. 2d 477, where many decisions, involving variant factual situations, are discussed.

Where a will is written on two or more separate sheets, the statute, G.S. 31-3, does not require that they be physically attached or that the signature of the testator appear on each sheet. It is sufficient if the signature of the testator appears in any part of the will. *In re Will of Williams,* 234 N.C. 228, 66 S.E. 2d 902, and cases cited. In *Alexander v. Johnston, supra,* the signature of the testatrix did not appear on the sheet containing the dispositive provisions but the words, "Julia W. Johnston Will," were on the "lightly sealed" envelope in which the sheet was found; and the sheet and envelope were established as the holographic will of Julia W. Johnston.

In *In re Will of Lowrance,* 199 N.C. 782, 155 S.E. 876, a holographic will consisting of two sheets, folded together but not attached, was established. The two sheets were found *in a sealed envelope* on which appeared the words, "My Will," in the handwriting of the testatrix. This Court, rejecting caveators' principal contention, held that an otherwise valid holographic will was not invalidated because printed matter, in the nature of a letterhead, appeared on each of the two sheets.

In the *Swaim* case, which involved *an attested will,* the bases upon which the two sheets were held to constitute a single document were these: (1) The testimony of Mr. Gwaltney, the draftsman, "established the fact that the two sheets were written at the same time, that both were read to the testator as his will, and were present at the time of the execution . . ." (2) ". . . the papers themselves bear intrinsic evidence that, while separate, they were tacked together in the mind of the testator," it appearing that the fourth page of the first sheet, "concludes in the middle of an item of the will and a description of a tract of land, which is concluded on the first page

of the second sheet, and both sheets are in the handwriting of the same person." In the *Lourance* case, which involved *a holographic will,* there was no verbal sequence, that is, "the finishing on one sheet of a sentence begun on another," 38 A.L.R. 2d 486, but both sheets were in the handwriting of the testatrix, folded together, and found in the sealed envelope.

In an attested will, the primary significance of such verbal sequence is that it tends to identify the unsigned sheets as constituent parts of the testator's will. In a holographic will, such verbal sequence is of less significance; for, in such case, the relationship between the testator and the writing is established by the fact that each of the sheets is in the handwriting of the testator. *Alexander v. Johnston, supra.* Here, each of the four sheets comprising Exhibit A is identified by Hubert E. Roberts in his own handwriting. True, the four sheets are not connected by verbal sequences; but the provisions of each sheet do disclose unequivocally that such sheet was intended by the writer (Hubert E. Roberts) to be a constituent part of his will.

The *intrinsic evidence* that the four sheets are constituent parts of a single document includes the following: (1) Each of the four sheets bears the same date. (2) Each sheet, being in the handwriting of Hubert E. Roberts, is unmistakably identified. (3) The four sheets, when found, were folded together; and the originals indicate plainly that the crease marks, where folded, are identical on all four sheets. (4) The four sheets, considered together, disclose a coherent and complete testamentary disposition of his estate.

It is idle to speculate as to why the writing on Sheet 3 is partly in light blue ink and partly in darker blue ink. The significant fact is that all is in the handwriting of Hubert E. Roberts. Moreover, it is noteworthy that the date, "7/14/51," is in light blue ink, the same as on the other sheets and on the envelope.

It is noted that Mrs. Vena C. Davis was a principal and the residuary legatee (Sheets 1 and 4) under the terms of Exhibit A. It is further noted that her interest as residuary legatee (Sheet 4) is not increased, but is substantially impaired, by the dispositive provisions on Sheets 2 and 3.

Even so, caveators contend that "it is impossible to tell whether or not any sheets had been removed." In their brief, they refer to the holes now appearing in the upper left corner of each sheet, ostensibly made by staples (later removed) or by attempted stapling, as indicating that one or more sheets, once a constituent part of Exhibit A, had been removed. Absent evidence with reference thereto, we do

not think such inference may be reasonably drawn from the staple holes *now appearing* thereon.

Caveators contend it appears that the envelope, Exhibit B, had been opened before Mr. Mashburn found it. Conceding that the envelope, Exhibit B, had been opened before it was found by Mr. Mashburn (for there is no evidence it was then sealed), the question as to who opened it and under what circumstances is not answered by the evidence. Can it be reasonably inferred that some person other than the testator opened the envelope and withdrew therefrom another sheet that was a constituent part of Mr. Roberts' will? We think not.

Bearing further on caveators' said contentions, Mr. Sawyer's testimony is to the effect that when he witnessed Mr. Roberts' will there were "as many as three or four sheets." This testimony, competent under *In re Swaim's Will, supra,* and admitted without objection, while it does not specifically identify Sheets 1, 2 and 3, does dispel the idea that there were more than four sheets and that one or more had been removed. In short, we do not think a reasonable inference may be drawn from the evidence that one or more sheets, other than the four sheets comprising Exhibit A, ever constituted constituent parts of Mr. Roberts' will.

True, it would seem that Mr. Mashburn might have taken more careful notice of what occurred on the occasion Exhibit A was found in the inner compartment of Mr. Roberts' safe. This is especially true in the light of hindsight. Even so, this is a proceeding *in rem;* and the solemn act of Hubert E. Roberts may not be nullified on the ground that Mr. Mashburn was unable to answer certain questions as to what he might have observed. It may be conceded that the cross-examination of Mr. Mashburn had a bearing upon the credibility of his testimony; but, under a peremptory instruction, the credibility of the testimony is for determination by the jury. Nothing in the record indicates that counsel for caveators did not argue or have opportunity to present their arguments as to the credibility of the testimony prior to the court's submission of the issue to the jury for its determination.

"The rule is that where all the evidence bearing on an issue points in the same direction and justifies as the single inference to be drawn therefrom an answer in favor of the party having the burden of proof, an instruction to find in support of such inference if the evidence is found to be true, will be upheld. This is a peremptory instruction, as distinguished from a directed instruction." *Peek v. Trust Co.,* 242 N.C. 1, 11, 86 S.E. 2d 745, and cases cited.

The only reasonable conclusion to be drawn from the facts as

shown by the testimony and by the documentary evidence is that the four sheets comprising Exhibit A constitute the last will and testament of Hubert E. Roberts. Hence, the peremptory instruction was appropriate.

No error.

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

RALPH E. SHOE v. ROY M. HOOD AND WIFE, BESSIE C. HOOD.

(Filed 29 January, 1960.)

1. Automobiles § 50—

Since the owner-passenger ordinarily has the right to control and direct the operation of a vehicle, the negligence of the driver, operating the vehicle with the owner-passenger's permission or at his request, will be imputed to the owner-passenger, nothing else appearing. This rule also applies if the owner-passenger is the wife of the driver.

2. Husband and Wife §§ 2, 3—

A husband is not the agent of his wife merely because of the marital relationship and neither a husband nor wife is ordinarily responsible for the torts of the other. G.S. 52-15. However, the negligence of the husband in operating a vehicle may be imputed to the wife when she is the owner thereof and a passenger therein, since such imputed negligence is not based strictly on the law of agency.

3. Automobiles § 50—

While the presumption that a driver of a vehicle is the agent of the owner riding therein as a passenger is a rebuttable presumption, the burden is upon the owner-passenger to show a bailment or other circumstances under which the owner-passenger relinquishes the incidents of ownership and the right to control the operation of the vehicle.

4. Same—

Evidence disclosing that the wife was the owner of an automobile and that while it was being driven by her husband to his work she was a passenger therein for the purpose of returning the car to their home so that she might use it during the day if she so desired, is sufficient to warrant an instruction that as a matter of law the husband and wife were engaged in a joint venture and the negligence, if any, of the husband was to be imputed to the wife.

5. Appeal and Error § 42—

An instruction which presents an incorrect application of the law must be held for prejudicial error even though the instruction is given in stating the contention of the parties.

6. Automobiles § 17—

The lateral boundary lines of a street intersecting another at a dead-end must be extended entirely across the street intersected to determine the area of the intersection.

7. Automobiles § 8, 17— Where vehicles approach intersection from opposite directions G.S. 20-154(a) applies to motorist turning left to enter intersecting street and G.S. 20-155(a) has no application.

The evidence disclosed that defendants' vehicle entered a four-lane street with the green or caution light from a dead-end street intersecting it from the east, turned into the inside northbound lane, traveled some forty to seventy feet and attempted to enter a dead-end street intersecting it from the west, that plaintiff, traveling south on the four-lane street was following two cars on the inside southbound lane as the traffic light on the four-lane highway was turning green, that plaintiff turned into the outside southbound lane and struck defendants' car when all but two feet of defendants' car had cleared the intersection. *Held*: The evidence discloses that the two vehicles were traveling in opposite directions and meeting until defendants' vehicle turned left to enter the street intersecting the four-lane street from the west, and it was incumbent upon defendants before making a left turn across the southbound lanes to give a plainly visible signal of intention to turn, G.S. 20-155(b) and to ascertain that such movement could be made in safety, G.S. 20-154(a), without regard to which vehicle entered the intersection first. G.S. 20-155(a) has no application and an instruction in regard to the law where two vehicles approached an intersection at about the same time must be held for prejudicial error.

8. Automobiles § 17—

While the courts will not take judicial notice of a municipal ordinance, the rights of the parties at a street intersection at which traffic control signals are maintained will be determined upon the basis that a motorist must give the lights their well recognized meaning and give that obedience to them which a reasonably prudent operator would give, notwithstanding that the ordinance is not introduced in evidence.

9. Automobiles §§ 8, 17—

While a driver entering an intersection faced with a green light is not under duty to anticipate that the driver of a vehicle approaching from the opposite direction will turn left across his path of travel without giving a signal of his intention or that he will neglect to yield the right of way, the fact that he enters the intersection with the green light does not relieve him of the legal duty to maintain a reasonable lookout, keep his vehicle under proper control, and to drive his vehicle at a speed which is reasonable and prudent under the circumstances.

10. Automobiles § 41g—

Defendant's evidence on her counterclaim that she was riding as a passenger in a car turning left at an intersection, that the driver of the car gave a signal of his intention to turn left, and that the car was struck by a car which was proceeding in the opposite direction and entered the intersection at a fast and excessive speed under the circumstances, is sufficient to overrule the motion to nonsuit the counterclaim

even though the negligence, if any, of the driver of the car in which plaintiff was riding is imputed to plaintiff, and even though defendant entered the intersection with the green light.

11. Negligence § 26—

Nonsuit on the ground of contributory negligence is proper only when the evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may reasonably be drawn therefrom.

APPEAL by defendants from *Phillips, J.*, March, 1959 Civil Term, of CABARRUS.

Plaintiff alleges that he was damaged in his person and property by reason of collision between his automobile and one driven by male defendant and owned by feme defendant and in which feme defendant was riding, defendants are husband and wife, and collision proximately resulted from acts of negligence of defendants in that defendants failed to yield the right of way, failed to keep a reasonable lookout, drove recklessly and gave no signal of intention to make a left turn.

Defendants denied the allegations of negligence and pleaded contributory negligence. Feme defendant set up counterclaim for personal injury and property damage and alleged that plaintiff was guilty of actionable negligence in failing to yield the right of way, turning from straight line without ascertaining the movement could be made in safety, violating speed regulations, driving recklessly, failing to keep reasonable lookout and exercise proper control.

The collision occurred about 7:20 A. M. on 3 December 1957 at an intersection of streets in the City of Charlotte. Tryon Street runs north and south. It has four lanes, two for southbound traffic and two for northbound. The Southern Railway over-pass two-track bridge crosses Tryon Street obliquely — the bridge runs northeast and southwest. Immediately south of the bridge Sixteenth, a two-lane street, intersects Tryon at right angles from the east. This is a "T" intersection — Sixteenth does not cross Tryon. Immediately north of the bridge, Tryon is intersected from the west by Duls Lane, a two-lane street. Duls "dead ends" at Tryon and does not cross it. Duls enters Tryon at an angle from the northwest. Tryon is 40 feet wide. It is estimated that the distance from the entrance of Duls to the entrance of Sixteenth is from 47 to 70 feet. Traffic on Duls and Sixteenth is controlled at the entrances to Tryon by electric traffic lights. At the intersection with Sixteenth the traffic in the two northbound lanes on Tryon is controlled by lights. Likewise at the Duls intersection the traffic in the two southbound lanes

are controlled by lights. All the lights above referred to are synchronized so that when lights are green facing traffic proceeding into Tryon from Duls and Sixteenth, the lights facing traffic on Tryon are red in both directions, and vise versa. For one traveling southwardly on Tryon the street is definitely downgrade for the last 150 feet before reaching the Duls intersection.

Neither party pleaded or offered evidence of the city ordinance of Charlotte relative to traffic lights at intersections. The maximum speed limit in the vicinity of the collision was 35 miles per hour.

Plaintiff's evidence is briefly summarized as follows:

The weather was clear but Tryon Street was wet because the "street washer had been along." Plaintiff was traveling south in his automobile on Tryon in the inside lane toward the Duls intersection. There were two cars ahead of him. As he started down the hill the traffic light was red. When he was about 150 feet from the intersection the light changed to green. He gave a turn signal, entered the outside lane and approached the intersection at 20 to 25 miles per hour. As he reached the corner of Duls Street defendants' automobile was in the inside lane of Tryon headed north and, without any signal, defendant suddenly turned to the left, accelerated and attempted to enter Duls across plaintiff's line of travel. Plaintiff "locked" his brakes and turned right in an attempt to avoid collision but unavoidably struck defendants' automobile. Plaintiff's automobile was damaged and he received personal injuries. Male defendant was driving and feme defendant was riding in the car. Title to the car was registered in the name of feme defendant. Defendants are husband and wife. Defendants had entered Tryon from Sixteenth on "caution" light, made a sweeping turn to right, then a sweeping turn to left and the collision occurred.

Defendants' evidence shows in substance: Defendants entered Tryon from Sixteenth on the green light, proceeded to the inside lane on Tryon, turned to the right, then gave mechanical turn signal indicating a left turn into Duls. At this time there were three cars approaching from the north in the inside lane, the front car was about 125 feet from the Duls intersection. These cars were slowing for the light. After defendants had proceeded two car lengths, they turned left to enter Duls. At this time the nearest southbound car in the outside lane was 300 feet away. After defendants had made the left turn toward Duls they heard tires squeal and saw plaintiff pull from behind the second car in the inside lane and approach defendants at a high rate of speed from the outside lane. The two remaining cars in the inside lane stopped. Defendants' automobile was struck by plain-

tiff's car after all of defendants' automobile had gotten into Duls Street except about 2 feet of the rear end. Defendants' speed was from 10 to 15 miles per hour. Feme defendant's automobile was damaged and she suffered serious personal injuries.

At the close of all the evidence the court allowed motion for involuntary nonsuit of feme defendant's counterclaim.

The jury answered the issues of negligence and contributory negligence in favor of plaintiff and awarded him damages.

From judgment in accordance with the verdict defendants appealed and assigned errors.

E. Johnston Irvin and John Hugh Williams for plaintiff.
Ray Rankin and Carswell & Justice for defendants.

MOORE, J. Appellants assign as error the peremptory instruction contained in the following portion of the judge's charge: "It being admitted that the defendant, Bessie C. Hood, was the owner and an occupant of the automobile at the time and place in question and that it was being driven at the time by her husband with her consent for the common benefit and purpose of both, the Court instructs you that this would mean a joint enterprise of the two defendants at the time and place in question. The Court further charges you, as the owner of the automobile in which she was riding, the defendant, Bessie C. Hood, had equal right to direct and control its movements and conduct of her husband, the driver, in respect thereto, and was in law chargeable with responsibility for the negligent operation of the automobile. The control required is the legal right to control rather than actual physical control."

Plaintiff alleges that defendants were engaged in a "joint enterprise" and the automobile in which they were riding was "under the control and custody of both . . . (and) was used as a family car." Defendants admit that the car was owned by Bessie C. Hood and was being driven by Roy M. Hood, both were riding in the vehicle at the time of the accident and it "was used by both defendants as a means of transportation." Roy M. Hood testified defendants are husband and wife and on the occasion in question he was on his way to work and his wife was along for the purpose of returning the car to their home. He also gave testimony that he furnished the money to purchase the automobile, it was registered in his wife's name, the wife was unemployed and the car is the only one they had.

The owner-passenger of an automobile ordinarily has the right to control and direct its operation. So then, when he seeks to re-

cover from a third party damages resulting from a collision of the vehicle with some other automobile or object, the negligence, if any, of the party who is operating the automobile with the owner-passenger's permission or at his request is, nothing else appearing, imputed to the owner-passenger. *Dosher v. Hunt,* 243 N.C. 247, 251 90 S.E. 2d 374; *Harris v. Draper,* 233 N.C. 221, 225, 63 S.E. 2d 209. If the owner-passenger is the wife of the operator the same rule applies. *Harper v. Harper,* 225 N.C. 260, 265-6, 34 S.E. 2d 185; *Ross v. Burgan* (Ohio 1955), 126 N.E. 2d 592; *Schumann v. United States* (EDNY 1954), 122 F. Supp. 107; *Kline v. Barkett* (Cal. 1945), 158 P. 2d 51; *Freeman v. Scahill* (N. H. 1954), 32 A. 2d 817; *Griswold v. Newman* (N. Y. 1940), 21 N. Y. S. 2d 315; *Guy v. Union St. Ry.* (Mass. 1935), 193 N.E. 740.

It is true that the accident in the *Harper* case occurred in South Carolina and the law of that jurisdiction applied. Even so, the authorities cited in support of the legal principles pronounced therein on this point are North Carolina cases. Furthermore, it is cited with approval in *Tew v. Runnels,* 249 N.C. 1, 7, 105 S.E. 2d 108.

The rationale of the Harper decision is that "the owner of an automobile has the right to control and direct its operation . . . (and where) the owner possessed the right to control, that he did not exercise it is immaterial."

A husband is not the agent of his wife merely because of the marital relationship and neither a husband or wife is ordinarily responsible for the torts of the other. G.S. 52-15. "Strictly speaking, the person operating with the permission or at the request of the owner-occupant is not an agent or employee of the owner, but the relationship is such that the law of agency is applied." *Harper v. Harper, supra; Litaker v. Bost,* 247 N.C. 298, 101 S.E. 2d 31.

Where it is admitted or proven that the wife was owner-occupant of an automobile operated by her husband, a presumption arises that the husband was her agent in the operation, or rather the inference is permitted that any negligence on his part in the operation of the automobile is imputed to her. But such presumption or inference is not absolute and irrebuttable. But it casts upon her, who is in possession of the facts, the burden of showing a bailment, other disposition or prevailing condition by which she relinquished, for the time being, the incidents of ownership and the right to control the manner and methods of its use. *Harper v. Harper, supra; Sink v. Sechrest,* 225 N.C. 232, 34 S.E. 2d 2; *Gaffney v. Phelps,* 207 N.C. 553, 178 S.E. 231; *Ross v. Burgan, supra;*

"The test is this: Did the owner, under the circumstances dis-

closed, have the legal right to control the manner in which the automobile was being operated — was his relation to the operation such that he would have been responsible to a third party for the negligence of the driver?" *Harper v. Harper, supra;* Restatement of Torts, sec. 491 (1938).

Where the owner-occupant of an automobile claims to be a guest in the vehicle while driven by another and the evidence with respect to such contention is susceptible of conflicting interpretations, it presents a question of fact for the jury. *Harris v. Draper, supra.* "Where, however, reasonable minds can reach but one conclusion from the uncontradicted facts, the question becomes one of law for the court." 4 Cyc. of Automobile L. & P.; Blashfield, sec. 2292, p. 326.

In the instant case the facts are not in dispute. The husband purchased the automobile and registered the title in the name of the wife. It was freely used by both. The wife was the owner. It is presumed that the husband intended the automobile as a gift to her. On the occasion in question there is nothing to indicate that the wife had relinquished control. It is true that the husband was driving to his work. But the wife accompanied him to return the car to their home that she might, if she desired, have the use of it during the day. It follows that the purpose for which she accompanied her husband was to maintain control and possession of the vehicle. The court was correct in instructing the jury as a matter of law that the defendants were joint adventurers and the negligence, if any, of the husband was to be imputed to the wife.

Defendants contend the court erred in reading G.S. 20-155(a) to the jury and applying it to the factual situation in this case by instructing the jury as follows: "The plaintiff further insists and contends that if you believe his testimony that you should find that he (defendant) violated another section of the statute, that is, that his automobile and the defendant's automobile were approaching the intersection about the same time and that he failed to yield the right of way because he was on the left, the plaintiff on the right, and that in failing to yield the right of way when the automobiles were reaching the intersection at about the same time, that this was a violation of the statute and if such violation on his part was one of the proximate causes of the plaintiff's injuries and damages, then the plaintiff would be entitled to have you answer the first issue Yes."

We agree that the challenged instruction is erroneous. An instruction which presents an incorrect application of the law, even though given in stating the contentions of the parties, is error.

Lookabill v. Regan, 245 N.C. 500, 502, 96 S.E. 2d 421. The instruction offends in two aspects.

A careful reading of the instruction as related to the factual situation involved clearly shows that the court assumed that the intersection in which the collision occurred consisted only of that area included within the extension of the lateral boundaries of Duls Lane to the center of Tryon Street. This area is only one-half of the intersection. The intersection embraces that area lying within the lateral boundaries of Duls Lane extended to the east side of Tryon. An "intersection" is defined as "The area embraced within the prolongation of the lateral curb lines or, if none, the lateral boundary lines of two or more highways which join one another at an angle whether or not one such highway crosses the other." G.S. 20-38(1). All the testimony in the case, including that of plaintiff, shows that defendants were in the intersection first. The court could not have made the challenged application of G.S. 20-155(a) had a proper construction been placed upon the statute defining "intersection."

Furthermore, G.S. 20-155(a) has no application to the factual situation here presented. A motorist proceeding from Sixteenth Street into Tryon may enter the Duls Lane intersection only from the south. Indeed, this is what defendants did. Defendants testified that they traveled westwardly from Sixteenth to the inside northbound lane of Tryon, turned right and proceeded northwardly about two car lengths and then turned left. Plaintiff testified that when he first saw defendants their vehicle was in the inside lane of Tryon. The plaintiff said: "When I got right here, to the corner of Duls Street, I saw a 1954 Plymouth (defendants' car) coming up here going north towards Concord from Charlotte. At that time that car was on the inside lane, rather than the outside lane next to the curb; and when I got to the corner of Duls this car turned and started into Duls Avenue." So plaintiff and defendants were going in opposite directions and meeting, until defendants turned left. Where motorists are proceeding in opposite directions and meeting at an intersection controlled by automatic traffic lights, G.S. 20-155(a) has no application. A similar situation was presented in *Fowler v. Atlantic Co.,* 234 N.C. 542, 67 S.E. 2d 496 — vehicles meeting at an intersection controlled by lights. The Court said: "This is not a case where a vehicle approaching from a side street has a favored position by virtue of having entered the intersection first. (Citations omitted). Here the vehicles were meeting as they approached the intersection. Hence, the applicable statutes are G.S. 20-155(b) and G.S. 20-154." In the instant case, it was incumbent upon defend-

ants, before making a left turn across the southbound lanes, to give a plainly visible signal of intention to turn (G.S. 20-155(b)) and ascertain that such movement could be made in safety (G.S. 20-154(a)). This, without regard to which vehicle entered the intersection first.

It is quite possible that the erroneous application of G.S. 20-155(a) proceeded from a misinterpretation of the holding in *Hudson v. Transit Co.*, 250 N.C. 435, 108 S.E. 2d 900. This case involved a divided highway. There was a grass plot 30 feet wide separating the eastbound and westbound lanes. Another highway crossed at right angles. The court treated the two crossings as separate intersections. The vehicles involved approached and entered the intersection at right angles to each other. One of the Vehicles did not have a view of the controlling lights. The Court declared, with respect to this vehicle, that the driver was "charged with the duty to yield the right of way to vehicles moving in eastbound traffic . . . that is, traffic approaching the *intersection* from his right at approximately the same time." (Emphasis ours). The controlling distinction between this case and the instant case is that in the former the duty relates to one entering the intersection, in the latter the duty relates to one already in the intersection and intending to turn. The second paragraph of 20-38(1) now reads in part: "Where a highway includes two roadways thirty (30) feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection." Chapter 1087, Session Laws 1957.

It is observed that neither party to the action *sub judice* pleaded or offered in evidence the city ordinance relating to traffic lights at street intersections. G.S. 20-158(c) is inapplicable to an intersection controlled by traffic light located within a municipality. The Court will not take judicial notice of a municipal ordinance. Even so, where the evidence discloses that there are automatic traffic lights at a street intersection within a municipality, when the ordinance establishing them has not been pleaded or proved, "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." *Hudson v. Transit Co., supra; Wilson v. Kennedy*, 248 N.C. 74, 79-80, 102 S.E. 2d 459; *Funeral Service v. Coach Lines*, 248 N.C. 146, 151, 102 S.E. 2d 816; *Williams v. Funeral Home*, 248 N.C. 524, 528, 103 S.E. 2d 714.

After the jury had deliberated for some time they returned to

the courtroom and the foreman asked the judge the following question: "We would like to know if anyone has a right to go ahead on a green light when the road is obstructed or when there is a car going in front of him; does he have a right to keep going when the light turns green?"

Defendants assign as error the court's instruction in response to the question, as follows: "When the light is green in the direction which they are traveling they have a right to proceed in that direction and they have a right to assume that anyone that is going to enter an intersection will let them proceed into the intersection without crossing in front of them. In other words, no one is charged with the duty of anticipating negligence on the part of anyone else."

We agree that the court committed error in so responding. The fault in the instruction lies in its inadequacy. It is correct as far as it goes. It gives only the portion of the applicable rule favorable to plaintiff. It is true that the operator of a motor vehicle is under no duty to anticipate negligence on the part of others in the absence of anything which should give notice to the contrary; the law does not impose upon a driver facing a green light the duty to anticipate that one proceeding in the opposite direction and intending to make a left turn across his path of travel will negligently fail to give a signal of this intention or neglect to yield the right of way. But the fact that he may have a green light facing him, as he approaches and enters an intersection where traffic is controlled by automatic traffic lights, does not relieve him of the legal duty to maintain a reasonable lookout, keep his vehicle under proper control and to drive his vehicle at a speed which is reasonable and prudent under the circumstances. *Funeral Service v. Coach Lines, supra; Wilson v. Kennedy, supra; Hyder v. Battery Co.*, 242 N.C. 553, 557, 89 S.E. 2d 124; *Cox v. Freight Lines*, 236 N.C. 72, 78, 72 S.E. 2d 25.

Feme defendant asserts that the court erred in granting plaintiff's motion for nonsuit of her counterclaim. The position is well taken. If the jury should believe defendants' evidence, hearinbefore summarized, and reject plaintiff's showing, they would be justified in returning a verdict in favor of the feme defendant awarding her damages. The evidence in the case is in direct conflict. Nonsuit on the ground that a party is guilty of contributory negligence as a matter of law will be granted only when the evidence of such party establishes the facts necessary to show contributory negligence so clearly that no other conclusion may reasonably be drawn therefrom.

Keener v. Beal, 246 N.C. 247, 252, 98 S.E. 2d 19, and cases there cited.

The ruling of the trial court on the motion for nonsuit of defendant's counterclaim is reversed and a new trial is ordered.

New trial.

T. P. WARREN v. EDWARD R. WHITE, JR.

(Filed 29 Jaunary, 1960.)

1. **Frauds, Statute of § 5—**

Where an incorporator and owner of almost all of the capital stock of a corporation, in hiring a new manager after the company was in serious financial difficulties and the original capital lost, promises that he would personally pay to the manager any sums the manager advanced in the company's behalf, the promise is an original promise not coming within the purview of the statute of frauds, G.S. 22-1, since the promisor has a personal, immediate and pecuniary interest in the matter as distinguished from an indirect benefit which would accrue to him by virtue of his position as stockholder, officer or director of the corporation.

2. **Same—**

Where there is no conflict in the evidence as to the situation of the parties and that defendant promised to pay plaintiff for any sums advanced by plaintiff in behalf of defendant's corporation, the main controversy being whether such promise was conditional or unconditional, the court may submit the case to the jury upon instructions to answer the issue of whether defendant promised to pay plaintiff any sums so advanced in the negative if the jury were not satisfied from the greater weight of the evidence that the promise was unconditional and that defendant made the promise, and the refusal to submit an issue tendered as to whether the promise was an original promise will not be held for error.

APPEAL by defendant from *Olive, J.,* April 20 Term, 1959, of FORSYTH.

Civil action to recover $4,693.13, allegedly advanced by plaintiff to Winston-Salem Motors, Inc., in reliance upon the oral promise and agreement of defendant, the corporation's chief stockholder, "that he (defendant) would personally pay to plaintiff any sums plaintiff advanced upon the company's behalf." Answering, defendant denied the alleged agreement.

The corporation, organized in late August, 1957, entered the automobile business under an Edsel dealership. Defendant, a physician, was the principle investor in this venture and owned all capi-

tal stock except $2,000.00. He anticipated that the venture, in two or three years, would become a profitable investment. According to defendant, "the condition of the company was horrible," in October, 1957, when defendant first contacted plaintiff. The Universal C. I. T. Corporation had given notice that it would repossess the cars in the company's possession and foreclose its "floor-plan" covering such cars, thus forcing the company out of business.

Plaintiff had had some thirty years experience in the automobile business. Upon recommendation of a mutual friend, defendant sought plaintiff's advice and offered him the position of general manager of the company. Defendant testified: "I told him (plaintiff) . . . all the money that I had originally placed in this corporation was already lost."

Plaintiff and defendant managed to stall the Universal C. I. T. Corporation a few days while they negotiated with the Wachovia Bank and Trust Company. Upon assurances that additional capital would be invested in the company, Wachovia agreed to finance the company's new cars under a floor plan arrangement.

Plaintiff became general manager, acting in this capacity from October, 1957, to July, 1958. Then, or shortly thereafter, the company went out of business. Plaintiff received, as salary for his services as general manager, the sum of $100.00 per week.

The Edsel did not receive public favor. There were few sales. The Wachovia financing plan did not cover used cars. The Federal Government attached the company's bank account for failure to pay social security taxes. From March, 1958, the transactions involving "traded-in" used cars were handled through a bank account in plaintiff's name at the City National Bank. According to plaintiff, the agreement was that the handling of these used cars was to be plaintiff's personal responsibility and project, for his own profit or loss. According to defendant, these transactions were to be for the account of the company.

It appears that plaintiff, while serving as general manager, advanced his own funds to or for the benefit of the company in an amount (the exact amount being in dispute) in excess of $4,693.13. The sum of $4,693.13 represents, according to plaintiff's contention, the aggregate of six items for which he was not reimbursed either by defendant or by the company. However, at the trial, plaintiff stipulated that the amount sued for in the complaint is subject to a credit of $710.00, to wit, company funds under his control, and asserted a claim for the balance, to wit, $3,983.13.

The court submitted, over defendant's objection, and the jury

answered, these issues: "1. Did defendant contract and agree with plaintiff that he would personally pay the plaintiff any sums plaintiff advanced to Winston-Salem Motors, Inc., as alleged in the Complaint? Answer: Yes. 2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,000.00."

Judgment for plaintiff, in accordance with the verdict, was entered. Defendant excepted and appealed, assigning errors.

Eugene H. Phillips for plaintiff, appellee.
Clyde C. Randolph, Jr., for defendant, appellant.

BOBBIT, J. Defendant's principal assignments of error, directed to rulings on evidence, failure to nonsuit, submission of issues and portions of the charge, draw into focus this crucial question: Is recovery on the alleged oral agreement barred by the statute of frauds?

G.S. 22-1, in pertinent part, provides: "No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." (Statute of Frauds and Perjuries, 1678, 29 Car. II, c. 3, § 4, Wigmore on Evidence, § 2454, note 6.)

The following statement by Mr. Justice Clifford in *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360, was quoted with approval by this Court in *Dale v. Lumber Co.*, 152 N.C. 651, 68 S.E. 134, and in *Garren v. Youngblood*, 207 N.C. 86, 176 S.E. 252, 95 A.L.R. 1132, *viz.*: "But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although *the performance of it* may incidentally have the effect of extinguishing that liability." (Our italics)

Too, in the *Dale* and *Garren* cases, this Court quoted with approval this summary (headnote in official U. S. report) of the rules underlying decision in the leading case of *Davis v. Patrick*, 141 U.S. 479, 12 S. Ct. 58, 35 L. Ed. 826, *viz.*: "In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) if the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but if he has a per-

sonal, immediate and pecuniary interest in a transaction in which a third party is *the original obligor,* the courts will give effect to the promise. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understand it to be a collateral or direct promise." (Our italics)

In *Garren v. Youngblood, supra,* the plaintiff recovered on an oral agreement by defendant, an officer, director and stockholder of a bank, that he would be personally responsible for any loss plaintiff might sustain if her funds were permitted to remain on deposit with the bank. This agreement was held to be an original promise upon sufficient consideration and that G.S. 22-1 did not apply. It is noted that the plaintiff, after the bank closed, had filed her claim against the bank and had received a dividend thereon.

In *Brown v. Benton,* 209 N.C. 285, 183 S.E. 292, the defendants, the main stockholders of a corporation, agreed orally to be personally responsible for merchandise shipped to the corporation. According to plaintiff, the understanding was that plaintiff would ship and bill the lumber to B. L. Johnson Company "and they (defendants) would be personally responsible to me." It was held that plaintiff had declared upon an original promise, not within G.S. 22-1. Plaintiff's recovery was upheld.

In *Farmers Federation, Inc., v. Morris,* 223 N.C. 467, 27 S.E. 2d 80, plaintiff sold merchandise to a corporation engaged in the restaurant business upon the defendant's request that credit be extended to the corporation and that he (defendant) would be responsible for all bills so contracted. It was admitted that the defendant was the president and a stockholder in the corporation. The defendant, by answer and by his testimony, denied that he had made the alleged oral promise. Upon the plaintiff's appeal from a verdict in favor of the defendant, a new trial was awarded for error in excluding testimony proffered by plaintiff tending to show *the extent* of the defendant's interest in the corporation and its business. Plaintiff's said proffered testimony was held competent "to show that the defendant had a personal, immediate and pecuniary interest in the transaction."

Decisions in many jurisdictions are reviewed in Annotation, 35 A.L.R. 2d 906, under the caption, "Statute of frauds: promise by stockholder, officer, or director to pay debt of corporation." Two quotations point out the distinction recognized in our decisions, *viz.:*

"As applied to promises by stockholders, officers, or directors, to pay a debt of the corporation, it may be said that the promise is

original where the promisor's primary object was to secure some direct and personal benefit from the performance by the promisee of his contract with the corporation, or from the latter's refraining from exercising against the corporation some right existing in him by virtue of the contract. The benefit to the promisor is to be distinguished from the indirect benefit which would accrue to him merely by virtue of his position as a stockholder, officer, or director. If the benefit accruing is direct and personal, then the promise is original within the rule above discussed, and the validity thereof is not affected by the statute of frauds." 35 A.L.R. 2d 910. As supporting this statement, these North Carolina decisions are cited: *Satterfield v. Kindley,* 144 N.C. 455, 57 S.E. 145, 15 L.R.A. (N.S.) 399, 12 Ann. Cas. 1098; *Beck v. Halliwell,* 202 N.C. 846, 163 S.E. 747; *Brown v. Benton, supra; Farmers Federation, Inc., v. Morris, supra. Gennett v. Lyerly,* 207 N.C. 201, 176 S.E. 275, discussed below, is cited as "recognizing rule."

"Where an oral promise by a stockholder, officer, or director of a corporation is collateral in form and effect, and the consideration was not intended to secure or promote some personal object or advantage of the promisor—as distinguished from the benefit accruing to a person from the mere fact of his being a stockholder, officer, or director—, the promise is collateral and within the statute of frauds." 35 A.L.R. 2d 914. As supporting this statement *Gennett v. Lyerly, supra,* is cited. *Satterfield v. Kindley, supra,* is cited as "recognizing rule."

Defendant relies largely on *Gennett v. Lyerly, supra,* and on *Myers v. Allsbrook,* 229 N.C. 786, 51 S.E. 2d 629.

In *Gennett v. Lyerly, supra,* the defendant, E. Lyerly, who was otherwise engaged in the hosiery business, was the president, treasurer and the owner of a large amount of stock in the Yeager Manufacturing Company, of which his brother, Walker Lyerly, was secretary and general manager. Yeager Manufacturing Company was engaged in the manufacture of furniture; and, on certain orders to plaintiff for lumber, notations made by Walker Lyerly were to the effect that payment was guaranteed by "E. Lyerly." There was no evidence that E. Lyerly had guaranteed payment, orally or otherwise, or had authorized Walker Lyerly to obligate him for such payment. The language upon which the present defendant relies is part of a discussion to the effect that, if an oral promise had been made by defendant, such oral promise would be within G.S. 22-1 because the evidence in that case did not disclose that E. Lyerly had "a personal, immediate, and pecuniary benefit in the transaction." While the de-

cision in *Gennett v. Lyerly, supra,* is fully supported on other grounds set forth in the opinion, it is noted that the opinion cites in support of the statement upon which the present defendant relies the original decision in *Peele v. Powell,* 156 N.C. 553, 73 S.E. 234, apparently overlooking the fact that this decision was reversed on rehearing in *Peele v. Powell,* 161 N.C. 50, 76 S.E. 698.

Myers v. Allsbrook, supra, involved an entirely different factual situation. There the plaintiff sued on defendant's alleged oral promise to pay his brother's pre-existing debt. Moreover, there was neither allegation nor evidence that the alleged oral promise was made for the defendant's benefit or that he had any personal, immediate or pecuniary interest in the transaction.

WALKER, J., in *Whitehurst v. Padgett,* 157 N.C. 424, 73 S.E. 240, citing *Peele v. Powell, supra,* said: ". . . a promise is not within the statute of frauds, if it is based upon a consideration and is an original one, and . . . it is original if made at the time or before the debt is created, and the credit is given solely to the promisor or to both promisors, as principals; . . ." The decision in the *Whitehurst* case is succinctly and accurately stated in the third headnote, *viz.:* "When a tenant of a farm has applied to a merchant to furnish him with fertilizers for making the crop on the leased premises, saying that the landlord would pay for them, the assertion of the tenant will not of itself render the landlord liable; but if the latter, when called upon by the merchant at the time of the transaction, says, 'All right, go ahead and furnish (the lessee) and I will see that you get the money,' his words may amount to a binding and sufficient promise under the statute of frauds, as he had a direct and pecuniary interest in the making of the crop as the landlord of the first promisor." In accord: *Dozier v. Wood,* 208 N.C. 414, 181 S.E. 336.

It is unnecessary to consider in detail the evidence as to what was said by defendant preceding the advancement by plaintiff of his own funds in payment of the six items aggregating $4,693.13. The evidence is uncontradicted that these amounts were advanced to discharge obligations of the corporation and that the corporation had no funds for the payment thereof. Suffice to say, the evidence was amply sufficient to support the jury's finding that defendant contracted and agreed with plaintiff "that he (defendant) would personally pay the plaintiff any sums plaintiff advanced to Winston-Salem Motors, Inc., as alleged in the Complaint."

Defendant testified that he advanced in excess of $23,000.00 to the corporation during the period plaintiff was general manager.

It is noted that the evidence does not disclose the name of any other stockholder or indicate that such other stockholder advanced additional funds or otherwise participated in the corporation's affairs. Defendant's testimony is explicit that, for the time being, he had advanced all the money he had or could borrow, but anticipated that he would thereafter receive additional funds from his professional earnings. (Note: According to plaintiff, defendant gave assurance that he would also obtain funds from an anticipated sale of his Myrtle Beach property.) In these circumstances, the advancements by plaintiff were made. There can be no doubt but that defendant was personally, directly and pecuniarily interested in the continuance in business of the corporation and would be the principal beneficiary if this were accomplished and the principal loser if it were forced out of business.

Under these circumstances, we are of opinion, and so hold, that G.S. 22-1 is not a bar to plaintiff's recovery on the alleged oral agreement.

Even so, defendant asserts that the court, in lieu of the first issue submitted, should have submitted an issue tendered by him, to wit: "Did the defendant make an original promise to plaintiff to repay loans made by plaintiff to Winston-Salem Motors, Inc.?" Suffice to say, the jury's answer to the first issue submitted established that defendant did make such original promise as alleged in the complaint. In this connection, see *Garren v. Youngblood, supra,* and *Taylor v. Lee,* 187 N.C. 393, 121 S.E. 659.

Defendant quotes this statement from 20 A.L.R. 2d 248: "Where the language used, together with the surrounding facts and circumstances, makes it doubtful whether the parties intended by the promise to create an original obligation or a collateral one to answer for the debt or default of another, the question is one of fact to be determined by the jury, or other trier of facts." As indicated, the rule embodied in the quoted statement is applicable when the particular expressions relied upon as constituting the alleged oral promise are of such doubtful meaning that diverse inferences may be drawn as to what the parties mutually understood. 49 Am. Jur., Statute of Frauds § 63. It has no application to the present factual situation.

The only inference that may be drawn from the evidence is that both plaintiff and defendant knew the company was in "desperate financial condition" when plaintiff made the advancements. Indeed, under the evidence, it would be fanciful to suggest that the advancements were made by plaintiff in reliance on the credit(?) of the corporation.

Defendant testified: ". . . there is no question but what he paid out these sums that have been testified. There was personal promise on my part, as distinguished from the corporation, that he would be paid only if these conditions were met." Asked whether he told plaintiff that he (defendant) "did make a good income and would see that he was paid anything that he did advance to the company," defendant answered: "Yes, I said that—yes, I did meet him. Yes, I said I had a good income. The amount was not $35,000.00. The wording was such that I would—that Mr. Warren would lose no money." Again: "I did testify a moment ago that it was my intention to pay Mr. Warren upon proper certification that certain sums were due, providing that things were done in a certain and specialized manner, and that when Mr. Warren left the company and certain things were discovered after he left, and we were unable to close the books, and we were unable to give an accounting, this contract was null and void."

It is noted that defendant, in his answer, simply denied he had entered into the oral contract alleged by plaintiff. He made no allegations to the effect that he had agreed personally to repay plaintiff but only on certain conditions. Defendant's evidence, as indicated, takes a different turn. The substance of his testimony is that he made the oral promise but is not liable because plaintiff failed to comply with certain conditions. These conditions are rather vaguely defined in defendant's testimony. The purport of his testimony is that plaintiff as general manager did not handle either the separate account for the resale of "traded-in" used cars and other transactions in the manner it was agreed he should do. Too, defendant's testimony questions the accuracy of plaintiff's accounting as to the handling of the "traded-in" used cars and the accuracy of plaintiff's testimony as to amounts received by plaintiff from the corporation or for which the corporation should receive credit. As to these matters, the evidence was in conflict. Indeed, under the evidence, it seems that the principal controversy on the first issue was not whether defendant made an original promise as alleged but whether such promise was made unconditionally or made subject to certain conditions.

It is noted that the court, with reference to the first issue, instructed the jury as follows: ". . . if you are satisfied from the evidence and by its greater weight that there was an agreement entered into but that it was on a condition or conditions, and not an unconditional promise to pay, it would be your duty to answer this first issue 'No.' And, in any event, if you are not satisfied by the greater weight of the evidence that the plaintiff and defendant contracted and agreed that

the defendant would personally pay to plaintiff any sums plaintiff advanced to Winston-Salem Motors, Incorporated, it would be your duty to answer this issue 'No.' " Under these circumstances, we find no error in the submission of the first issue or in the charge in relation thereto.

Having discussed so fully defendant's principal assignments of error, we refrain from particular discussion of defendant's assignments of error relating to the evidence and the court's instructions relevant to the second issue. Suffice to say, we have considered these assignments of error and none discloses error deemed sufficiently prejudicial to warrant a new trial.

No error.

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

IN THE MATTER OF THE WILL OF MARY T. PENDERGRASS, DECEASED.

(Filed 29 January, 1960.)

1. Executors and Administrators § 31: Wills § 15—

It is the public policy of this State that wills should be probated, but this rule does not preclude the beneficiaries of an estate from agreeing among themselves to a disposition of the property different from that directed in the will, and they may enter into a consent judgment embodying their agreement even prior to the death of testator which will estop them from claiming under the will, such agreement not being contrary to public policy but being a family settlement favored by the law, which will be upheld when the rights of creditors are not impaired and when fairly made by all the interested parties.

2. Judgments § 25—

A consent judgment is a contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and a consent judgment is binding and may not be set aside without the consent of all the parties thereto except for fraud or mistake in an independent action.

3. Equity § 1—

Equity regards the substance and not the form, and is not bound by the names parties give their transactions.

4. Executors and Administrators § 31: Wills § 15— Consent judgment held in effect a family settlement precluding distribution of property under terms of the will.

In a proceeding to set aside a deed from mother to son and a contract between them for the support and maintenance of the mother, a consent judgment was entered which stipulated that the deed and contract should

be set aside for mental incapacity, that any will of the mother should not be offered for probate, that if any will executed by her should be offered for probate the judgment should be *res judicata* as to the mental incapacity of the mother, that no demand of accounting should be made against the son in possession of the land, etc. *Held*: The consent judgment constitutes a family settlement supported by sufficient consideration, and while a paper writing executed by the mother was properly offered for probate, the consent judgment constitutes an estoppel, and upon the death of the mother her property must be divided equally among her children in accordance with the purport of the family agreement.

4. Wills § 46:—Executors and Administrators § 31—

A devisee or legatee may renounce his right under a will, and thus a beneficiary may enter into an agreement in writing with the remaining beneficiaries for the distribution of an estate in a manner different from that provided in the will.

5. Executors and Administrators § 31—

The mutual promises of the parties to a family settlement made for the sake of family harmony, the settlement of controversies and the avoidance of further litigation, constitutes sufficient consideration to support the agreement.

6. Wills § 17½—

All matters pertaining to the probate of a will in solemn form and to the distribution of the decedent's estate are matters for the probate court, and it is proper to plead in such proceedings a consent judgment constituting a family settlement.

7. Insane Persons § 3—

Notwithstanding that an adjudication of incompetency raises only a rebuttable presumption of mental incapacity and does not ordinarily constitute *res judicata* of the matter, such adjudication, in proper instances, may operate as an estoppel.

8. Appeal and Error § 56—

Where, upon the uncontroverted facts, appellant is not entitled to the relief sought by him, the judgment of the lower court reaching the correct result will not be disturbed for mere technicalities of procedure.

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

APPEAL by propounders from *Nimocks, E. J.*, March, 1959 Civil Term, of WARREN.

A paper writing, dated 28 May 1948, purporting to be the last will and testament of Mary T. Pendergrass was probated in common form in Warren County on 20 May 1957. It purports to make bequests of $1.00 each to testatrix's daughters, Addie Hicks, Bessie Robertson, Sallie Elmore and Minnie Peoples, and testatrix's sons,

E. J. Pendergrass and W. H. Pendergrass, and a bequest of $1000.00 to her daughter, Mary Kitrell, and to will the residue of testatrix's estate to her daughter-in-law, Sally Read Pendergrass, wife of W. H. Pendergrass.

The five daughters and two sons named in the paper writing were all of the children of Mary T. Pendergrass.

On 29 August 1957 all of the children, except W. H. Pendergrass and Addie Hicks, filed caveat. Addie Hicks had died and her sons, W. T. Hicks and Hugh D. Hicks, joined in the caveat. W. H. Pendergrass and wife, Sallie Read Pendergrass, are propounders. The estate consists of land and money.

The caveat alleges that testatrix had insufficient mental capacity to make a will, the execution of the paper writing was procured by undue influence and duress, and W. H. Pendergrass and wife, Sally Read Pendergrass, propounders, are estopped to attempt to probate the will in solemn form and to deny the incompetency of testatrix by reason of a consent judgment entered at the October Term 1948, Superior Court of Vance County (further reference to this judgment hereinafter).

At the trial of caveat proceedings propounders offered the testimony of the two witnesses to the purported will. This evidence tended to show formal execution according to statutory requirements.

Caveators offered in evidence the summons, complaint, answer and judgment (referred to in caveat) in the action entitled "George W. Elmore and E. J. Pendergrass, next friends of Mary T. Pendergrass, vs. W. H. Pendergrass." This action had been instituted to set aside a conveyance of land from Mary T. Pendergrass to W. H. Pendergrass and a contract between the same parties for support and maintenance of Mary T. Pendergrass by W. H. Pendergrass, both instruments dated 23 January 1948. The complaint alleged that Mary T. Pendergrass lacked mental capacity to execute a deed or make a contract.

(The purported will was executed during the pendency of this action, 28 May 1948.)

This action was tried at the October 1948 term of Vance County, *Judge R. Hunt Parker* (now *Justice Parker* of this Court), presiding. The judgment recites findings of fact in substance as follows (numbering ours):

(1) Four physicians and eight lay witnesses testified that Mary T. Pendergrass was mentally incompetent on 23 January 1948 to execute a deed or make a contract; W. H. Pendergrass testified in his own behalf.

(2) After the testimony was in the parties announced to the court that they "had entered into an agreement for settlement of this controversy subject to the approval of the Court."

(3) All parties requested that three issues be submitted to the jury and, by consent, be answered so that the verdict would declare: (a) the mental incompetency of Mary T. Pendergrass; (b) her mental incompetency was known to W. H. Pendergrass at the time of the purported execution of the instruments in controversy; and (c) the consideration for the conveyance was inadequate. The issues were accordingly submitted to and answered by the jury as agreed.

(4) The parties further agreed: The deed and contract be adjudged null and void; the clerk of the court appoint a guardian for Mary T. Pendergrass to administer her funds then on deposit with the clerk; all the children of Mary T. Pendergrass and their spouses — all being of age — sign and consent to all the terms of this judgment and be bound thereby as fully as if parties to the action; all said parties, including Mary T. Pendergrass, be forever barred and estopped from suing for or otherwise demanding an accounting of W. H. Pendergrass and E. J. Pendergrass with respect to any and all transactions they had had with Mary T. Pendergrass, not the subject of the controversy in this action; W. H. Pendergrass not be repaid the cash consideration recited in the deed; it is "AGREED between the parties that Mary T. Pendergrass is an incompetent, and that any Will or Wills which she has made in the past shall not be offered for probate by any of the children or relatives of Mary T. Pendergrass, and that if any Will is offered for probate that the same may be caveated and that this judgment will be *res adjudicata* of the mental incapacity of Mary T. Pendergrass to execute any purported Last Will and Testament"; no charge for rent be made against W. H. Pendergrass for 1948 and prior years; all the children be allowed to see and visit their mother wherever she may be living.

(5) The "agreements herein contained are fair, reasonable, proper and just to Mary T. Pendergrass, incompetent."

It was adjudged (paraphrased in part):

(a) The agreements are ratified and confirmed "as fully as if reiterated herein"; the deed and contract are declared null and void; the clerk is ordered to appoint guardian for the incompetent.

(b) The "agreement heretofore set out in the judgment be and the same are binding as fully as if reiterated on the parties to this action and upon the children of Mary T. Pendergrass consenting thereto as fully as if they were parties to this action, and shall be *res judicata* as to them and shall operate as an estoppel in any

controversy that may arise with reference to the matters heretofore set out in the settlement of this action."

(c) "It is the purpose and intent of this judgment to settle all matters in controversy, or that might be in controversy, between the children of Mary T. Pendergrass, and to prevent any controversy between them in the future; and to effectuate fully that intent and purpose the children of Mrs. Mary T. Pendergrass, who are all over the age of twenty-one years, and their husbands and wives have signed by consent this judgment, and agree and consent to be bound forever by its terms, so that it shall forever bar and estop them from any possible controversy in the past or in the future in any proceeding or any action at law or suit in equity concerning all the matters and things consented to in this judgment; and they consent and agree that they shall be as fully bound by its terms as if they were parties hereto, and agree that this judgment shall operate to estop them as if they were parties hereto; the intent and purpose being to have a full and complete settlement of all things and matters covered in this judgment in order that now and hereafter there may be peace and harmony among the children of Mary T. Pendergrass; and as evidence of their full knowledge of the contents of this judgment and their consent thereto they have signed their names to this judgment in the presence of the Clerk of the Superior Court of Vance County."

Judge Parker signed the judgment and following the words, "We consent," all attorneys of record and all the children of Mary T. Pendergrass and their spouses, including W. H. Pendergrass and Sally Read Pendergrass, signed their names to the judgment in the presence of the clerk, who also signed as "witness."

Upon the admission in evidence of the judgment roll in the case of "George W. Elmore and E. J. Pendergrass, next friends of Mary T. Pendergrass, vs. W. H. Pendergrass," *Judge Nimocks* submitted the issue of *devisavit vel non* and peremptorily instructed the jury to answer it "no." The jury responded in accordance with the instruction.

From judgment declaring the paper writing not to be the last will and testament of Mary T. Pendergrass, propounders appealed and assigned errors.

Banzet & Banzet for propounders, appellants.

A. A. Bunn, Gholson & Gholson, John Kerr, Jr., William W. Taylor, Jr., and Charles T. Johnson, Jr., for Caveators, appellees.

MOORE, J. Propounders insist a new trial should be granted and assign three reasons therefor: (1) That the court erred in admitting in evidence the consent judgment of 1948 and ruling, in effect, that propounders were estopped thereby to probate the will of Mary T. Pendergrass, for that "a contract, cast in the form of a consent judgment, among children of a living mother to nullify her will is contrary to the public policy of the State" and void, and, if otherwise valid, is void as to Sally Read Pendergrass for want of consideration; (2) that there was error in the holding that propounders were concluded on the issue of mental capacity by the consent judgment, in that an adjudication of incompetency is only evidence of mental incapacity in another and different action; and (3) that in its charge to the jury the court erroneously directed a verdict in favor of caveators who had the burden of proof on the issue of mental capacity and undue influence.

It is against the public policy of North Carolina to *fraudulently* suppress, withhold, conceal or destroy a will. The destruction or concealment of a will, for a fraudulent purpose, has by statute been made a misdemeanor. G.S. 14-77. If an executor fails to apply for probate of a will, any devisee, legatee or other interested party may make application after a limited time. G.S. 31-13. Every clerk of the court has authority to compel the production of a will withheld or concealed. G.S. 31-15. ". . . (I)t is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law." *Wells v. Odum*, 207 N.C. 226, 228, 176 S.E. 563.

"It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent juridiction, and that such contracts cannot be nullified or set aside without the consent of the parties thereto, except for fraud or mistake, and that in order to vacate such judgment an independent action must be instituted." *Spruill v. Nixon*, 238 N.C. 523, 526, 78 S.E. 2d 323. If not against public policy, the consent judgment admitted in evidence in the case at bar is a valid and subsisting contract and binding upon the propounders and caveators as well.

It is our opinion, and we so hold, that the consent judgment was a family settlement. "Family settlements, . . . when fairly made, and when they do not prejudice the rights of creditors, are favorites of the law. . . . They are made in recognition of facts and circumstances known, often, only to those who have lived in the sacred

family circle, and which a just family pride would not expose to those who neither understand nor appreciate them. They proceed from a desire on the part of all who participate in them to adjust property rights, not upon strict legal priciples, however just, but upon such terms as will prevent possible family dissensions, and will tend to strengthen the ties of family affection. The law ought to, and does respect such settlements; it does not require that they shall be made in accord with strict rules of law; nor will they be set aside because of objections based upon mere technicalities." *Tise v. Hicks,* 191 N.C. 609, 613, 132 S.E. 560. Our Superior Courts will exercise their equity jurisdiction to affirm and approve family agreements when fairly and openly made. *Reynolds v. Reynolds,* 208 N.C. 578, 622, 182 S.E. 341. Our Court is in accord with the holdings in other jurisdictions. Family settlements are almost universally approved. Annotation, 97 A.L.R., Will, Agreement among beneficiaries, section II, pp. 469-70. Wisconsin seems to be the only jurisdiction that holds a directly contrary view. *Graef v. Kanouse* (Wis. 1931), 238 N.W. 377.

Equity regards substance, not form, and is not bound by names parties give their transactions. *Schumaker v. Bank* (CC4C 1931) 52 F. 2d 925. W. H. Pendergrass in open court solemnly agreed that the jury should find that his mother was mentally incompetent (a fact to which four physicians and eight lay witnesses attested), that he knew she was incompetent when he made the contract with her and procured from her a conveyance of her land, and that the consideration given her by him was inadequate. In substance this was an admission of fraud. There are reasonable inferences which may be drawn from the record, that he and his wife had closed their doors to other members of the family and would not permit the other children to see their mother, and that he knew that the purported will had been executed pending the trial of the cause in which the consent judgment was entered. By the terms of the consent judgment he was released from any accounting of his transactions with his mother and from payment of rent. He and his wife, together with all the other children of Mary T. Pendergrass and their spouses, consented and agreed in writing, with the approval of the court, "that any will or wills which she (Mary T. Pendergrass) has made in the past shall not be offered for probate" and if offered for probate shall be "caveated and this judgment will be *res adjudicata* of the mental incapacity of Mary T. Pendergrass," that they shall be fully bound by the judgment and it shall "operate as an estoppel." The agreement recites it was to settle all matters in controversy between the chil-

dren and prevent any future controversy, that there might be peace and harmony among them. Yet, W. H. Pendergrass and wife, Sally Read Pendergrass, seek to probate the will and take the property in contravention of their solemn engagement.

The sense and intent of the agreement is that the children and their spouses put an end to controversy, avoid further litigation, live in peace, harmony, mutual respect and natural affection as befits a family, and upon death of the mother share equally in her estate, if any she has.

In North Carolina a devisee or legatee may disclaim or renounce his right under a will. *Perkins v. Isley,* 224 N.C. 793, 797, 32 S.E. 2d 588. An agreement in writing between the widow and heirs of a decedent to share in and distribute his estate in a different manner from that provided in his will has been upheld. *Kirkman v. Hodgin,* 151 N.C. 588, 66 S.E. 616. Our Court declines to " 'make a will' for the decedent, agreeable to the desire of the parties interested; *In re Will of Westfeldt,* 188 N.C. 702, 125 S.E. 531; unless the doctrine of family settlement applies, when the jurisdiction is somewhat extended . . ." *Bailey v. McLain,* 215 N.C. 150, 155, 1 S.E. 2d 372. Caveators may be estopped by their conduct from attacking the validity of a will. *In re Will of Averett,* 206 N.C. 234, 173 S.E. 621.

Family settlements for distribution of estates contrary to testamentary dispositions are almost universally approved, upheld and enforced, where the rights of creditors are not impaired and in the absence of fraud. Annotation, 38 A.L.R., Family Settlement, section II, pp. 735-6; 57 Am. Jur., Wills, sec. 1005, p. 653. But such agreements are uniformly declared invalid unless all who receive an interest under the will join in the agreement. *Greene v. King,* (Conn. 1926), 132 A. 411; *Hunter v. Jordan* (Wash. 1930), 291 P. 47. Family agreements for settlement of estates contrary to the provisions of wills have been upheld even when made before the death of the testator. Annotations, 38 A.L.R., Family Settlements, sec. IV, pp. 753-4, and 118 A.L.R., Family Settlement, Sec. IV, pp. 1362-3.

"Moreover, according to the great weight of authority, in the absence of fraud, a contract to dispose of the property in a testate estate in a manner different from the will is valid, even though it contemplates the rejection of the will when offered for probate or its setting aside when admitted to probate. . . . The foregoing views are based upon the theory that while a testator has a right to dispose of his property by will and may make such disposition as may suit his purpose so long as it is not prohibited by law, the persons in-

terested in his estate either as beneficiaries under the will or by intestate succession have an equal right to renounce the will by agreement. Most authorities hold that an agreement to disregard the provisions of a will and not to probate it, or, if it has already been probated, to set the probate aside, is not invalid as contrary to public policy, or as in violation of a statute penalizing the fraudulent destruction of a will, and that such an agreement will be enforced except as to persons in interest under the will who are not parties thereto." 57 Am. Jur., Wills, Sec. 1013, p. 657. See also Annotation, 117 A.L.R., Suppression of Will, sec. II, pp. 1250-1-2; *Brakefield v. Baldwin* (Ky. 1933), 60 S.W. 2d 376.

In the instant case, we hold that the consent judgment is not *contra bonos mores* and is valid. All persons named as beneficiaries in the purported will are parties to the consent judgment. Rights of creditors are unimpaired. It was openly and fairly made and no taint of fraud is apparent. There is ample consideration to support the agreement. The mutual promises for the sake of family harmony and good will, the settlement of controversies and the purpose to avoid further litigation outweigh mere pecuniary considerations. *Tise v. Hicks, supra;* Annotation, 97 A.L.R., Will, Agreement among beneficiaries, sec V, pp. 471-2.

It was proper to plead the consent judgment in the caveat proceedings. "The modern tendency is to extend the jurisdiction of the probate court in respect to matters incidental and collateral to the exercise of its recognized powers." *In re Noble* (Kan. 1935), 41 P. 2d 1021, 97 A.L.R. 463. All matters pertaining to the probate of the will in solemn form and to the distribution of decedent's estate are matters for the probate court. We do not intimate that propounders should not have exhibited the paper writing to the clerk of superior court. In all cases it is the best practice to deliver purported wills to the probate court along with all other related documents that proper orders or disposition may be made with respect thereto.

Ordinarily an adjudication of incompetency is not *res judicata* of the mental condition of the subject of the inquiry, especially as to those not parties or privies to the hearing, and only raises a rebuttable presumption of mental incapacity. *Medical College v. Maynard,* 236 N.C. 506, 509, 73 S.E. 2d 315. But in this case the consent judgment may not be limited to its evidentiary value with respect to the mental condition of the testator. It estops all parties thereto from insisting on the probate of the will or, at least, from taking any benefits thereunder.

Whether the court was correct in giving a peremptory instruction affecting the validity of the will is unimportant in this case. At least the paper writing is an empty shell so far as the contracting parties are concerned; and all the devisees and legatees therein are parties to the contract. The Court will not permit the propounders to circumvent and ignore their solemn agreement. Equity will not allow technicalities of procedure to defeat that which is eminently right and just. We have repeatedly held that "if the correct result has been reached, the judgment should not be disturbed even though the court may not have assigned the correct reasons for the judgment entered." *Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E. 2d 411.

No error.

PARKER and HIGGINS, JJ., took no part in the consideration or decision of this case.

KATHRYN P. SHEPARD v. RHEEM MANUFACTURING COMPANY, PIEDMONT NATURAL GAS COMPANY, INC., AND ERVIN CONSTRUCTION COMPANY, INC.

(Filed 29 January, 1960.)

1. **Gas § 1— Complaint held to allege cause of action against construction company for negligence in installation of gas water heater.**

Allegations that a construction company constructed a house in which it installed a gas water heater, that the construction company assured the prospective purchaser that such heater was absolutely safe, that it knew, or should have known in the exercise of due care, that the heater was not equipped with an automatic safety device to shut off the gas in the event of failure of the main burner to ignite, and that it installed such heater in a closed utility room without providing certain minimum ventilation openings in accordance with well established installation procedures, that plaintiff thereafter purchased the house and was injured in an explosion proximately resulting from the alleged negligence, *are held* to state a cause of action against the construction company.

2. **Gas § 2— Complaint held to state cause of action for negligence of gas company in continuing to furnish gas after knowledge of dangerous conditions.**

Allegations to the effect that a gas company in turning its gas into the system of lines and appliances in plaintiff's house, went to the utility room and adjusted the controls and lighted the burners on the gas water heater therein installed, and some four months later again went to the premises at the request of the plaintiff to adjust the controls on the gas water heater, that the gas company in making the adjustments saw

or should have seen that the heater was not equipped with an automatic safety device and that the utility room was not constructed with the minimum ventilation openings in accordance with well established installation procedures, and negligently continued to furnish gas into plaintiff's house without giving warning as to the danger, *are held* sufficient to state a cause of action against the gas company for injury sustained by plaintiff in an explosion allegedly proximately resulting from such negligence.

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

APPEAL by plaintiff from *Sharp, Special J.*, April 6, 1959 Extra Civil Term, of MECKLENBURG.

Civil action to recover for personal injuries sustained by plaintiff allegedly from actionable negligence of defendant Rheem Manufacturing Company, concurred in by defendants Ervin Construction Company and Piedmont Natural Gas Company, heard upon separate demurrers of Ervin Construction Company and of Piedmont Natural Gas Company, Inc., both of which were sustained. Plaintiff appeals to Supreme Court and assigns error.

Blakeney, Alexander & Machen, Hedrick & McKnight for plaintiff, appellant.

Kennedy, Covington, Lobdell and Hickman, Mark R. Bernstein for Piedmont Natural Gas Company, appellee.

McDougle, Ervin, Horack & Snepp, Helms, Mullis, McMillan & Johnston for Ervin Construction Company, appellee.

WINBORNE, C. J.: Plaintiff in brief on her appeal (1) as to demurrer of defendant Ervin says: "By its written demurrer Ervin Construction Company, Inc., one of the three defendants in this action, challenges the sufficiency of the complaint to state a cause of action as to it, and, the demurrer having been sustained by judgment of the court below, the facts of the case for purposes of this appeal are those well pleaded in the complaint."

They are briefly summarized as follows: That Ervin Construction Company, a developer, builder and seller of residential properties, submitted to the plaintiff and her husband plans and specifications for a home which it proposed to erect on a lot owned by it in Charlotte, North Carolina, and offered to build the home in a workmanlike manner according to said plans and specifications and upon its completion, to sell and convey the home to the plaintiff and her husband; that the specifications called for the installation of a gas water heater, and during the negotiations Ervin Construction Company gave

repeated assurances to the plaintiff and her husband that the proposed system for heating water by natural gas would be absolutely safe for use in the home as proposed by it.

It is alleged that the plaintiff and her husband then agreed to purchase the dwelling upon its completion, and, in reliance upon Ervin's representations of complete safety, agreed to the installation therein of an automatic gas water heater.

That during construction, the defendant erected as a part of the house a small utility room and installed therein an automatic gas water heater which it knew, or in the exercise of due care under the circumstances should have known, was not equipped with an automatic safety device which would shut off the supply of raw gas to the burners in the event of a failure of the main burner to ignite or in the event of an extinguishment of the pilot light. And that, although the defendant thus knew or should have known that gas was liable to escape from said heater, and that although proper and well established installation procedures require that closed rooms, wherein gas water heaters are to be installed, be provided with certain minimum ventilation openings, (specifically described in the allegations of the complaint), the defendant negligently failed to provide any ventilation in said room to prevent the accumulation therein of unburned gas.

And that after it had created this dangerous condition on the premises, Ervin Construction Company sold and conveyed the house to the plaintiff, who was subsequently injured in an explosion of natural gas that had accumulated in the utility room as a direct result of the Construction Company's negligence.

Plaintiff in treating of the demurrer of Ervin Construction Company contends, and rightly so, that the Ervin Construction Company as vendor of the house would be and is liable as the contractor who was in exclusive charge of the building of the house.

And with respect to the assurances of safety Ervin Construction Company is alleged to have given to the plaintiff and her husband, they tend to show that the Construction Company incurred a more positive duty of care by giving such assurances.

In this connection plaintiff calls attention to North Carolina cases which it contends make this abundantly clear. For example, it is said: "If a seller, not knowing or caring whether his representations are true or false, goes so far as to represent that the article sold is safe for a certain use, while it is imminently dangerous when put to that use, he is liable for negligence." *Dalrymple v. Sinkoe,* 230 N.C. 453,

53 S.E. 2d 437. See also *Rulane Gas Co. v. Montgomery Ward*, 231 N.C. 270, 56 S.E. 2d 689.

Now (2) as to demurrer of defendant Piedmont Natural Gas Company, plaintiff says: "By written demurrer Piedmont Natural Gas Company, Inc., one of the three defendants in this action, challenged the sufficiency of the complaint to state a cause of action as to it, and on April 8, 1959, judgment was entered by the court sustaining that demurrer: On April 17, 1959, the plaintiff's motion for leave to file an amendment to the complaint against this defendant was granted, and accordingly the complaint was amended. On the same day Piedmont Natural Gas Company, Inc., demurred *ore tenus* to the amended complaint, and the order entered by the court sustaining this demurrer *ore tenus* is subject of this appeal."

Accordingly, the facts of the case for purposes of this appeal are the facts well pleaded in the complaint. They may be briefly summarized as follows: During the Fall of 1955, the defendant Ervin Construction Company, Inc., erected a house which the plaintiff and her husband agreed to purchase upon completion. As a part of the home, that defendant built a small utility room and installed therein an automatic gas water heater which was not equipped with an automatic safety device that would shut off the supply of raw gas to the burners in the event of a failure of the main burner to ignite or in the event of an extinguishment of the pilot light. Although proper and well established installation procedures require that closed rooms, wherein gas water heaters are to be installed, be provided with certain minimum ventilation openings (specifically described in the allegations of the complaint), the construction company negligently failed to provide any ventilation in said room to prevent the accumulation therein of unburned gas. After this dangerous condition had been created upon the premises, the plaintiff and her husband, who had no experience or special knowledge of their own concerning safety devices or gas water heaters or any skill, knowledge or experience concerning proper installation procedures for such appliances with respect to ventilation, purchased said home and thereafter used it as their residence.

At some time prior to the conveyance, but after the dangerous condition had been created on the premises by the construction company, application was made to the defendant gas company for service connections which shortly thereafter were made.

On or about the time the plaintiff moved into the dwelling, Piedmont Natural Gas Company went upon the premises and turned its gas into the system of gas lines and appliances in the house, and on

that occasion went into the utility room where it adjusted the controls and lighted the burners on the gas water heater. Some two to four months later, the gas company again went upon the premises at the request of the plaintiff and her husband to adjust the control on the gas water heater and again went into said utility room and made such adjustments.

Although on these occasions the gas company saw the imminently and inherently dangerous situation existing in the house, it negligently continued to furnish gas as fuel to the plaintiff without giving any warning as to said danger. Later, the plaintiff was seriously injured in an explosion of natural gas that had accumulated in the utility room as a direct result of the negligence of the defendants.

Plaintiff, in treating of the demurrer of Piedmont Natural Gas Company, says that it may be conceded that as a basic general rule a gas company has no duty to inspect pipes and appliances owned by and under the exclusive control of a customer prior to turning its gas into the customer's system, or to maintain a schedule of periodic inspections thereafter; however, there is a well established exception to the rule which clearly applies to this case under the allegations of the complaint as amended.

In *Graham v. North Carolina Butane Gas Co.*, 231 N.C. 680, 58 S. E. 2d 757, this Court said: "Where a gas company, which is engaged in supplying gas to a customer's building, becomes aware that such gas is escaping from the gas fixtures on the premises into the building, it becomes the duty of the gas company to shut off the gas supply until the further escape of gas from the fixtures can be prevented, even though the fixtures do not belong to the company and are not in its charge or custody. If the gas company continues to transfer gas to the fixtures on the premises after it learns that the gas is escaping therefrom, it does so at its own risk, and becomes liable for any injury proximately resulting from its act in so doing."

Accordingly it would seem that accepting as true the allegations of the complaint as amended, a cause of action is stated as to defendant Piedmont Natural Gas Company.

It may be noted that in this opinion the Court is considering only matters of pleading. What the facts may develop to be on the trial in Superior Court, this Court has and expresses no opinion.

For reasons hereinabove stated the judgments of the court below in sustaining the demurrers of Ervin Construction Company and Piedmont Natural Gas Company are

Reversed.

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

KATHRYN P. SHEPARD v. RHEEM MANUFACTURING COMPANY, PIEDMONT NATURAL GAS COMPANY, INC., AND ERVIN CONSTRUCTION COMPANY, INC.

(Filed 29 January, 1960.)

1. Pleadings § 15—

A demurrer tests the sufficiency of a pleading, admitting for the purpose, the truth of the allegations of fact therein stated and relevant inferences of fact necessarily deducible therefrom.

2. Pleadings § 3a—

The complaint must contain a plain and concise statement of the facts constituting the cause of action. G.S. 1-122.

3. Pleadings § 15—

A complaint will be liberally construed upon demurrer with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment and presumption, and the pleading must be fatally defective before it will be rejected as insufficient.

4. Gas § 1: Sales § 30—

Allegations to the effect that defendant manufactured a gas water heater without an automatic safety device to shut off the gas in the event the pilot light was extinguished or the main burner failed to ignite, that the heater was defectively constructed so that water leaked from the coils down the flue and extinguished the pilot light, and that plaintiff was injured in an explosion resulting when the accumulation of gas was ignited by a spark from her washing machine, *are held* to state a cause of action against the manufacturer.

5. Negligence § 8—

Insulating negligence relates to proximate cause, and is an intervening act which could not have been reasonably foreseen and which becomes the sufficient cause of the injury, and thus breaks the causal connection of the primary negligence.

6. Gas § 1: Sales § 30— Complaint held not to allege negligence of co-defendants insulating as a matter of law alleged negligence of appealing defendant.

Allegations to the effect that a construction company constructed a utility room and installed a gas water heater therein without providing the minimum ventilation required by accepted construction methods and that the gas company continued to furnish gas to the residence after it knew or should have known of the danger from the lack of ventilation and the want of an automatic safety device on the heater, etc., *are held* not to allege such negligence on the part of the construction company or the gas company as to insulate the alleged negligence of the manufacturer of the heater in constructing it without a safety device and in constructing it in a defective manner so that water leaked from the coils down the flue, extinguishing the pilot light, resulting in an explosion injuring plaintiff.

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

APPEAL by defendant Rheem Manufacturing Company from *Sharp, Special J.*, at August 17, 1959 Schedule A Term, of MECKLENBURG.

Civil action to recover for personal injuries sustained by plaintiff as result of alleged actionable negligence of defendants instituted as entitled in No. 254 *ante*, 746, heard upon separate demurrers filed by its several defendants. The court overruled the demurrer of this defendant, but separately heard and sustained the demurrers of its codefendants. Hence this defendant, the appellant, Rheem Manufacturing Company pursuant to Rule 4 (a) filed its petition for writ of *certiorari* for the purpose of obtaining a review of the order of the Superior Court judge, overruling the demurrer of this defendant to plaintiff's complaint as amended— at the same time the appeals of plaintiff from judgments sustaining the demurrers of its co-defendants are heard and considered in said No. 254 at Fall Term 1959.

The record discloses that defendant Rheem Manufacturing Company filed answer to complaint as originally framed, but demurred to the amended complaint.

Defendant excepts to judgment overruling demurrer, and petitions for writ of *certiorari*, which was granted, and case set to be heard at the call of the 26th District with the appeal in this case.

This defendant files brief in Supreme Court.

The amended complaint, to which this defendant demurred *ore tenus*, in pertient part is as follows:

"2. That the defendant, Rheem Manufacturing Company is a foreign corporation which manufactures and sells automatic gas water heaters for installation and use in residences owned or purchased by members of the general public.

"3. That the defendant, Piedmont Natural Gas Company, Inc., upon information and belief, is a New York corporation authorized to do business in North Carolina, and is a public utility company which sells and delivers natural gas for commercial and residential use under franchise issued to it by the North Carolina Utilities Commission.

"4. That the defendant Ervin Construction Co., Inc., is a North Carolina Corporation * * * engaged in the business of developing, constructing and selling residential properties.

"5. That the residential model automatic gas water heaters made and sold by the defendant Rheem Manufacturing Company are so constructed that the water in the tank is heated by means of a main gas burner located at the bottom of a flue which runs vertically through the center of the tank; that the temperature of the water in the tank is controlled by means of a thermostat which is tied in to the gas supply line that feeds the main gas burner; that when the water in the

tank has been heated to the desired temperature according to the thermostat setting, the gas supplied to the main burner is shut off by the thermostat; and that when the water temperature drops below the thermostat setting the supply of gas to the main burner is reopened and is to be ignited at the burner by a small pilot light which is intended to burn constantly, said pilot light being fed by gas through another line which is uncontrolled by operation of the thermostat.

"6. That natural gas is lighter than air, and when mixed with ordinary elements of the atmosphere is a highly inflammable and inherently dangerous substance.

"7. That by means of pamphlets, some of which were attached to and shipped with its gas water heaters, and by other means, the defendant Rheem Manufacturing Company advertised and represented to the public in general, and to the plaintiff and her husband in particular, that its gas water heaters were safe for use and were equipped with safety devices which would assure 100% control of both the main gas supply and the pilot gas supply— that is, that in the event of failure of the main burner to ignite due to the extinguishment of the pilot light, supplies of raw gas both to the main burner and pilot jet would be completely and automatically shut off, thereby preventing the escape and accumulation of unburned gas in the room where the heater is located.

"8. That on or about June 4, 1955, the defendant Ervin Construction Co., Inc., submitted to the plaintiff and her husband, Perry H. Shepard, plans and specifications for a home which it proposed to erect at 4009 Whitehall Drive, Charlotte, N. C.; that the defendant Ervin Construction Company, Inc., offered to construct said proposed residence in a workmanlike manner according to said plans and specifications and upon its completion to sell and convey it to the plaintiff and her husband.

"9. That the specifications for said proposed residence called for the installation of a 30 gallon gas water heater; that on several occasions during negotiations for the purchase of said home, the plaintiff and her husband questioned representatives of Ervin Construction Co., Inc., concerning the safety of gas water heaters and the plaintiff and her husband were thereupon repeatedly assured and reassured by the defendant Ervin Construction Co., Inc., that the proposed system for heating water by natural gas would be absolutely safe for use in the home as proposed by it.

"10. That the plaintiff and her husband agreed to purchase said home upon its completion and relying on the advertisements and representations of complete safety which were published and made by

the defendants, agreed to the installation therein of a 30 gallon gas automatic water heater.

"11. That proper and well-established installation procedures require that closed rooms, wherein gas water heaters are to be installed, and used, shall be provided with two (2) free air openings • • • that said openings are required in order, among other things, to provide ventilation sufficient to avoid the accumulation of burned and unburned gas.

"12. That, upon information and belief, during the process of construction of said home, the defendant Ervin Construction Co., Inc., purchased from the defendant Rheem Manufacturing Company, or from one of its agents and dealers, a 30 gallon capacity residential model automatic gas water heater which was manufactured by the defendant Rheem Manufacturing Company, and installed it in said home • • •

"13. That said water heater was located and installed by the defendant Ervin Construction Co,, Inc., in a small utility room which was built on to the rear portion of said house; that the said utility room, in interior dimensions, was approximately 6 feet wide, 7½ feet long and 8 feet high; and that said room was constructed so that it was virtually air tight, there being no provision made for filtration of air or gases to or from it.

"14. That the defendant Ervin Construction Co., Inc., in the installation of said water heater negligently and carelessly failed to provide said utility room with any ventilation openings, but on the other hand sealed it tightly so that escaping gas would and did accumulate therein; and that neither the plaintiff nor her husband had any experience or had any special knowledge of their own concerning safety control devices on gas water heaters, neither could ascertain by inspection of the heater whether or not it was equipped with such controls, and neither had any skill, knowledge or experience concerning proper installation procedures for such appliances with respect to the ventilation required where such appliances are installed in closed rooms.

"15. That contrary to the advertisements and representations of the defendant Rheem Manufacturing Company, upon information and belief, the said water heater was not equipped with an automatic control device which would shut off all gas in the event of failure of the pilot light flame or the failure of the main burner to ignite.

"16. That, upon information and belief, the tank of said water heater was constructed by the defendant Rheem Manufacturing Company in a careless and negligent manner in that defective materials or work-

manship or both were employed in fabrication of the flue which ran through the center of the tank directly over the main and pilot gas burner— the same being constructed in such a manner that it would not withstand normal water pressures within the tank and would develop leaks, causing water to run down the flue and onto the pilot light in such a way as to extinguish it.

"17. That during the times herein mentioned the defendant Piedmont Natural Gas Company advertised and represented to the public in general and to the plaintiff and her husband in particular, that natural gas was safe for use in operating home appliances such as the automatic water heater herein described.

"18. That after the said negligently constructed water heater was negligently installed in the closed and unventilated room as hereinabove described, application was made to the defendant Piedmont Natural Gas Company, Inc. for service connection of its gas pipe lines to the gas system in said house, and, upon information and belief, shortly thereafter such connection was made by it.

"19. That on or about the 20th day of December, 1955, and after the unsafe condition hereinabove described was created by the defendants, the plaintiff and her husband, being unaware of said dangerous condition and being unable by ordinary care to learn of said danger, paid the purchase price for said house and the same was conveyed to them by the defendant Ervin Construction Co., Inc.

"20. Upon information and belief, that on or about the 22nd day of December, 1955, the defendant Piedmont Natural Gas Company, Inc. went upon the said premises for the purpose of turning its gas into the system of gas lines and appliances which had been installed in said house by the defendant Ervin Construction Co., Inc., that it did turn its gas into said system, and on that occasion adjusted the controls on the gas appliances in said house, and went into said utility room where it adjusted the controls and lighted the burner of said gas water heater; that at some time between January 1, 1956, and March 31, 1956, Piedmont Natural Gas Company, Inc. again came upon said premises at the request of plaintiff and her husband to adjust the controls on said gas water heater, and it again went into said utility room and made such adjustment; that in so doing, the defendant Piedmont Natural Gas Company, Inc., on both occasions, saw the imminently and inherently dangerous situation then and there existing, and thereby obtained actual knowledge of facts concerning the defective heater and its improper installation which put said defendant on notice of said dangerous situation; and that thereafter it carelessly and negligently furnished to the plaintiff and her husband

gas as fuel for said heater until November 29, 1956, without giving either of them any warning as to said danger.

"21. That the said water heater was operated continuously in the plaintiff's home from the 22nd day of December, 1955, until November 29, 1956, without unusual incident; and that during said period the plaintiff and her family lived in said house continuously and said hot water heater was operated throughout that period without giving to them any warning of its defects or of the dangerous situation caused by the negligence of the defendants, as hereinabove alleged.

"22. That, upon information and belief, during the night or early morning of November 28-29, 1956, the said water heater, as a direct result of the negligence of the defendant Rheem Manufacturing Company in constructing it, developed a water leak in the flue; that the leaking water ran down the flue and onto the pilot light, extinguishing it; that as a result of the negligent failure of the defendant Rheem Manufacturing Company to equip said heater with a safety control which would cut off the supply of gas to the pilot light in the event of its failure, raw and unburned gas continued to flow through said burner and escaped into the utility room; and that as a result of said negligence of the defendant Rheem Manufacturing Company and the joint and concurring negligence of the defendant Ervin Construction Co., Inc., in failing to provide said room with proper ventilators and of the defendant Piedmont Natural Gas Company, Inc., in failing to exercise the duty required of it upon receiving notice of the dangerous situation, a heavy concentration of raw gas accumulated in said room.

"23. That on the 29th day of November, 1956, at about 2:00 P.M., the plaintiff carried clothes into said utility room for the purpose of washing them in an electrically operated washing machine which was located near said heater in the room; that, upon information and belief, when the plaintiff turned on the switch of said washing machine an electrical spark in the motor thereof ignited the gas which had accumulated in said room causing a terrific flash fire or explosion seriously burning the plaintiff as is hereinafter set out.

"24. That the extensive burns, injuries and damages which the plaintiff has sustained and will be required to sustain in the future as a result of said fire or explosion were directly caused by the negligence of the defendant Rheem Manufacturing Company, which negligence joined and concurred with the negligence of its co-defendants, in that:

"(a) The said Rheem Manufacturing Company advertised and represented that said water heater was equipped with an automatic safety control which would prevent the escape of raw and unburned

gas when it knew or by the exercise of due care should have known that such representations and advertisements were false and that the plaintiff would be thereby misled.

"(b) It knew, or in the exercise of due care under the circumstances should have known, that said heater was constructed with defective materials or workmanship in such a manner that it would develop a leak in the flue and that water from the leak would run down the flue and extinguish the pilot light.

"(c) It failed to equip the said heater with an automatic safety valve which would control and shut off the supply of raw gas to the pilot burner in the event of failure of the pilot light.

"(d) It sold and delivered said water heater for the use to which it was put when it knew, or in the exercise of due care under the circumstances should have known, that it would be put to that intended use and that when so used it would be an inherently and imminently dangerous instrumentality.

"25. That the extensive burns, injuries and damages which the plaintiff has sustained and will be required to sustain in the future as a result of said explosion were directly caused by the negligence of the defendant Ervin Construction Co., Inc., which negligence joined and concurred with the negligence of its co-defendants, in that:

"(a) The said Ervin Construction Co., Inc., represented to the plaintiff and her husband and assured and reassured them that said water heater would be installed in a safe and proper place and manner, and that when installed by said Company and put to the use for which it was intended, said heater would be absolutely safe for such use when it knew or, in the exercise of due care under the circumstances, should have known that said representations and assurances were false and that when so used said heater would be an inherently and imminently dangerous instrumentality.

"(b) It installed and sold said heater to the plaintiff and her husband at a time when it knew or, in the exercise of due care under the circumstances, should have known that the same was not equipped with an automatic safety valve which would control and shut off the supply of raw gas to the burners in the event of a failure of the main burner to ignite or in the event of an extinguishment of the pilot light.

"(c) Though it knew or in the exercise of due care under the circumstances should have known that gas was liable to escape from said heater, it failed to provide any ventilation in said room to prevent accumulation of unburned gas therein.

"26. That the extensive burns, injuries and damages which the plaintiff has sustained and will be required to sustain in the future as a

result of said fire or explosion were directly caused by the negligence of the defendant Piedmont Natural Gas Company, Inc., which negligence joined and concurred with the negligence of its co-defendants, in that:

"(a) The said Piedmont Natural Gas Company, Inc. advertised and represented that natural gas was safe for domestic use in home appliances, including automatic hot water heaters such as the one involved here, when it knew that unless great care is exercised in the manufacture and installation of the appliance in which the gas is to be used, such gas is an inherently and imminently dangerous substance.

"28. That as a direct and proximate result of the joint and concurring negligence of the defendants, as hereinabove set out, the plaintiff has been and will be severely damaged * * *."

Demurrer *ore tenus* is overruled, and judgment of Superior Court sustained.

Blakeney, Alexander & Machen, Hedrick & McKnight for plaintiff, appellee.

Robinson, Jones & Hewson for defendant Rheem Manufacturing Company, appellant.

WINBORNE, C. J. The grounds upon which defendant Rheem Manufacturing Company demurs are substantially these: (1) That the complaint as amended fails to state a cause of action against it, and (2) that the complaint contains allegations constituting judicial admissions by the plaintiff as the pleader thereof, from which it follows as a matter of law that the negligence of this defendant, if any, was not a proximate cause of plaintiff's injury by reason of intervening negligence of Ervin Construction Company.

"The office of demurrer is to test the sufficiency of a pleading, admitting for the purpose, the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted." *Stacy, C.J.*, in *Ballinger v. Thomas*, 195 N.C. 517, 142 S.E. 761. *Clinard v. Lambeth*, 234 N.C. 410, 67 S.E. 2d 452. *Belch v. Perry*, 240 N.C. 764, 84 S.E. 2d 186, and numerous other cases.

A complaint must contain a plain and concise statement of the facts constituting a cause of action. G.S. 1-122. Both the statute, G.S. 1-151, and decisions of this Court require that in the construction of a pleading for the purpose of determining its effect its allegations shall be construed with a view to substantial justice between the parties. Every reasonable intendment and presumption must be in favor

of the pleader. Indeed a pleading must be fatally defective before it will be rejected as insufficient. *Ins. Co. v. McCraw*, 215 N.C. 105, 1 S.E. 2d 369; *Belch v. Perry, supra,* and cases there cited, and numerous others.

Applying these principles to the facts alleged in the amended complaint here tested in respect to the first question above stated it appears that the case comes within the purview of the line of cases of which *Gas Co. v. Mongomery Ward & Co.*, 231 N.C. 270, 56 S.E. 2d 689, is typical. There in opinion by *Devin, J.*, later C. J., it is said: "The general rule is that one who authorizes the use of a potentially dangerous instrumentality in such a manner or under such circumstances that it is likely to produce injury is held responsible for the natural and probable consequences of his act to any person injured who is not himself at fault. Known danger attendant upon a known use imposes obligation upon him who authorizes it • • • An article is said to be imminently dangerous when, though it may safely be used for the purpose intended, if properly constructed, yet by reason of defective construction a threatened injury may be reasonably apprehended from its use," citing authorities.

Now as to the second question: "Insulating negligence relates to proximate cause, and is an intervening act which could not have been reasonably foreseen and which becomes the efficient cause of the injury, and thus breaks the causal connection of the primary negligence" —headnote 4 in the *Montgomery Ward* case, *supra.* In the light of this definition applied to the facts alleged in the complaint, the Court is unable to hold as a matter of law that the negligence of Rheem Manufacturing Company, if any, is insulated by that of Ervin Construction Company, if any. It may be that when the evidence is introduced such an issue may arise.

Let it be noted that in this opinion the Court is considering only matters of pleading. What the facts may develop to be on the trial in Superior Court this Court has expressed no opinion and does not now do so.

For reasons stated the judgment of the court overruling the demurrer of Rheem Manufacturing Company is

Affirmed.

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

J. B. POTTER AND WIFE, FANNIE LEWIS POTTER v. HERBERT POTTER.

(Filed 29 January, 1960.)

1. Easements § 3—

Where the owner of a tract of land conveys a portion thereof, the grantee takes the portion conveyed with the benefits or burdens of all those apparent and visible easements then existing which thus constitute easements appurtenant.

2. Same—

While unity of title in the entire tract and a severance of such title is prerequisite to the creation of an easement by implication, ownership of the entire tract by tenants in common is sufficient unity of title to support an implied grant of easement upon the subsequent division of the land between them.

3. Same—

While the location of a cartway must be definite to support an easement by implication, and a substantial deviation may be deemed an abandonment of such easement, the question of whether there has been such deviation as to work an abandonment is for the determination of the jury.

4. Same—

An easement by implication must be appurtenant to a specific parcel of land.

5. Same—

Evidence that two tenants in common divided the land between them, that at the time of the division there existed a cartway from the highway across the lands of one to the lands of the other, that such cartway was reasonably necessary for access to the lands of such other, that plaintiffs acquired by *mesne* conveyances the title to the dominant tenement, but with further evidence that each plaintiff owned separate parcels of the dominant tenement conveyed to them by separate deeds, is insufficient to establish plaintiffs' right to an easement appurtenant in the absence of evidence that such cartway was necessary for access to both tracts, or, if to only one, which one, since the evidence must show the specific parcel of land to which the easement is appurtenant.

APPEAL by plaintiffs from *Craven, S. J.*, July, 1959 Term, of BRUNSWICK.

Summons was issued and duly served 1 June 1959.

Plaintiffs' complaint is summarized as follows:

In 1897 F. M. Galloway conveyed to W. H. C. Potter and J. C. Potter a tract of land in Town Creek Township, Brunswick County, containing 261 acres. In 1902 J. C. Potter and wife conveyed the northern part of the tract to W. H. C. Potter and "plaintiffs have by *mesne* conveyances become the owners of this (northern part)." In 1914 W. H. C. Potter and wife conveyed to J. C. Potter the southern

part and "defendant has, by *mesne* conveyances, become the owner of (southern part)." At the time of the conveyance by Galloway the "Loop Road," a public highway, crossed the southern part now owned by defendant; at all times since the conveyance by Galloway the "Loop Road" has been the only highway crossing or "bordering upon either tract." At the time of the conveyance by Galloway there was a cart road leading from the "Loop Road" northwardly back into the whole of the 261-acre tract. The cart road was at all times, until April 1956, used and maintained by the owners of the land, including plaintiffs and defendant, "for the mutual benefit of both tracts (northern and southern parts)." This cart road is the only means of ingress and egress to and from plaintiffs' land. During this time there was "a slight relocation of a part of said road." Plaintiffs and their predecessors in title have continuously used the cart road since 1902 and the use has been "adverse under claim of right, continuous, uninterrupted, open, peaceable, and exclusive with full knowledge of the owners" of the southern part. In April 1956 defendant obstructed the cart road and objected to further use thereof by plaintiffs. The cart road is the only "feasible means of access to plaintiffs' property." Plaintiffs ask injunctive relief.

Defendant denies the allegations of the complaint with respect to the roads, pleads adverse possession of his tract of land for 20 years and for 7 years under color of title, the statute of frauds, and the 3, 6, and 10 years statutes of limitations.

The parties stipulated in substance as follows:

The "Loop Road" crosses defendant's land, but no public highway crosses or borders on plaintiffs' lands. Plaintiffs' land and defendant's land adjoin. The conveyance by Galloway and the cross-conveyances by W. H. C. and J. C. Potter were as alleged in the complaint. Plaintiffs are owners of the northern part of the 261-acre tract by *mesne* conveyances from W. H. C. Potter and defendant is the owner of the southern part by *mesne* conveyances from J. C. Potter. Plaintiff J. B. Potter owns a portion of the northern part and his wife and co-plaintiff, Fannie Lewis Potter, owns the rest; they acquired their respective parcels by separate deeds. Defendant acquired the southern part of the 261-acre tract by deeds dated 4 April 1929 and 16 May 1932.

Plaintiffs' evidence, consisting of the testimony of male plaintiff and five other witnesses, tends to show:

Male plaintiff is a son of W. H. C. Potter and nephew of J. C. Potter. W. H. C. Potter and J. C. Potter are both dead, the latter died about 1953. Defendant is a son of J. C. Potter and first cousin of male plaintiff.

In 1958 plaintiffs filed petition to have a cartway laid out by a jury of view. A voluntary nonsuit was entered in this proceeding at the preceding term.

Male plaintiff testified: "The land I have been referring to as mine, actually one tract is owned by my wife. That is designated on the map as the Fannie Lewis Potter land. I own one by myself and she owns the other tract by herself."

Plaintiffs do not live on their land. None of it is cleared; there are no buildings on it. It is all woodland. Plaintiffs have had hogpens on it.

The public highway, "Loop Road," has been in substantially the same location since 1901. It formerly crossed Cherry Tree Branch "a little below where it is now." It runs generally east and west.

The cart road in question joins the "Loop Road" west of Bull Pond Branch, runs northwardly and about parallel to the Branch for 250 to 300 yards, then "moves off from the Branch and straight up" into plaintiffs' land; it goes into plaintiffs' wood and forks, one fork goes toward Cherry Tree Branch and the other to Hayes (a point unlocated by the evidence). The cart road has been used continuously from 1901 to April 1956 for hauling timber, kindling, lightwood, turpentine, wood, wood mold, posts and straw from the "northern part." It was used two or three times a month, sometimes every week. Male plaintiff has traveled the road with defendant and with J. C. Potter. The road is in about the same condition it was in 1901. There is no other road leading from plaintiffs' property to a public road, no other road leading from their property.

The cart road has been in the same location since 1901, except for a change in the 1930s. "At first the old road was about 100 yards from Bull Pond Branch, then it was moved to the edge of the field (defendant's) and is about 25 yards from Bull Pond Branch . . . (it) was changed a little from up on the hill to the edge of the branch . . ." It was moved by J. C. Potter.

Neither defendant nor his predecessor in title objected to or interferred with the use of the road until April 1956. Prior to that time there was no question or controversy about it. In April 1956 defendant erected a wire fence across it at one place and a slab gate at another. He told male plaintiff he was going to keep it closed, that he didn't want to pay taxes on the road for someone else to use. At the time the road was obstructed timber was being hauled from plaintiffs' land. The cutting and hauling of timber from their land could not be completed after defendant closed the road.

At the close of plaintiffs' evidence the court allowed defendant's motion for involuntary nonsuit.

From judgment nonsuiting and dismissing the action plaintiffs appealed and assigned error.

E. J. Prevatte and Herring, Walton & Parker for plaintiffs, appellants.

Kirby Sullivan for defendant, appellee.

MOORE, J. The sole question for decision is whether or not the court erred in granting defendant's motion for nonsuit.

Plaintiffs allege ownership of a private easement of cartway appurtenant to their land over the land of defendant to the public highway by reason of implied grant and prescription. They seek to enjoin defendant from obstructing the cartway.

We assume that plaintiffs do not rely on adverse user for twenty years under claim of right as a basis for relief since there is no discussion, argument or citation of authorities with respect to prescription in their brief. They rely solely upon the principle of implied grant.

It is settled law in this jurisdiction that where an owner of a tract of land conveys a portion thereof, the grantee takes the portion conveyed with the benefits or burdens of all those apparent and visible easements which appear at the time of the conveyance to belong to it, as between it and the property which the grantor retains. *Bradley v. Bradley,* 245 N.C. 483, 96 S.E. 2d 417; *Barwick v. Rouse,* 245 N.C. 391, 95 S.E. 2d 869; *Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323; *Carver v. Leatherwood,* 230 N.C. 96, 52 S.E. 2d 1; *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517; *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224. Stated another way: ". . . (W)here, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of the severance, is in use and is reasonably necessary to the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law. . . . The underlying basis of the rule is that unless the contrary is provided, all privileges and appurtenances as are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant." *Barwick v. Rouse, supra,* quoting from 17 Am. Jur., 945, Easements Implied, section 33.

"No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts." *Carmon v. Dick, supra.* "There are three essentials to the creation of an easement by implication of law upon severance of title. They are: (1) A separation of the title; (2) before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. 'Separation of title implies, of course, unity of ownership at some former time as the foundation of the right. The easement derives its origin from a grant and cannot legally exist where neither the party claiming it nor the owner of the land over which it is claimed, nor anyone under whom they or either of them claim, was ever seized of both tracts of land. This unity of title must have amounted to absolute ownership of both the *quasi-* dominant and *quasi*-servient tenements.' " *Bradley v. Bradley, supra,* quoting in part from 17 Am. Jur., Easements, section 34, page 948. "The greater weight of the authorities seem to hold that no easement or *quasi*-easement will be created by implication, unless the easement be one of strict necessity, but we think that means only that the easement should be reasonably necessary to the just enjoyment of the properties affected thereby. . ." *Packard v. Smart, supra,* at page 484.

Defendant contends that there is no showing in the case at bar that the cartway existed at the time the lands of plaintiffs and defendant were owned as a unit by F. M. Galloway. Indeed, the evidence does not show that the cartway existed prior to 1901. Galloway conveyed the entire tract to W. H. C. and J. C. Potter, as tenants in common in 1897. However, there is evidence of continuous use of the cartway from 1901 until the Potters divided the tract between them and from that time until it was obstructed in 1956. The question arises: Was the ownership by W. H. C. and J. C. Potter as tenants in common such unity of title and the division of the land between them such serverance as to support an implied grant of easement?

No case in this jurisdiction has come to our attention which supplies the answer. It has been held in other jurisdictions that a sale of both parts of an estate at the same time to different purchasers gives rise to an easement by implication. *Cassidy v. Cassidy,* (Ill. 1923), 141 N.E. 149; *Baker v. Rice* (Ohio 1897), 47 N.E. 653. And the weight of authority here and in England is that on a partition or division of property between tenants in common, a right to use

a visible way will pass by implication. *Jones v. Bethel* (Ohio 1925), 152 N.E. 734; *O'Daniel v. Baxter* (Ky. 1901), 65 S.W. 805; *Leathers v. Craig* (Tex. 1921), 228 S.W. 995; *Kaiser v. Somers* (Ind. 1923), 138 N.E. 20. See also Annotations, 164 A.L.R., Visible Easements, section VI, pp. 1008-9, and 34 A.L.R., Visible Easement, section VI, pp. 246-7, for discussion and citation of cases.

Jones v. Bethel, supra, presents a factual situation almost identical with the case *sub judice.* The owner of a tract of land conveyed it to tenants in common who made use of a private roadway thereon leading to a public road which crossed one end of the property. The cotenants divided the land so that access to one part was only by way of the private road. Plaintiff and defendant therein acquired title by *mesne* conveyances from the original cotenants. Defendant obstructed the private roadway and cut off plaintiff's access to the highway. The Court said: ". . . the situation of the parties at the time this land was aparted constitutes the operative facts to support the claim of a grant by implication. . . . Furthermore, the fact that the title to this land as a separate tract was made by partition is recognized by authorities as affording a stronger presumption of an implied grant than one which might arise under the facts in *Baker v. Rice, supra,* (in which a parent conveyed portions of his land to his children). . . . (W)e conclude that the test of reasonable necessity for the way in question is all that may be made in the instant case, . . . In view of these considerations it is our conclusion that at the time Albert and Joshua Bethel (the cotenants) aparted their lands by mutual conveyances the way in controversy here is shown to have been used as the only outlet for the part it reached of the land Albert took, that it was reasonably necessary for the enjoyment of that part of the land, that no other way from that part of the land was practicable if at all possible, and that it added to its value and was therefore conveyed to Albert by implied grant in the deed from Joshua Bethel."

We are advertent to the decision of this Court in *White v. Coghill,* 201 N.C. 421, 160 S.E. 472. In that case petitioner was devised a tract of land without any way of egress to a public road except over the land of another devisee of the testator. Petitioner contended that she was entitled to a "way of necessity." The Court, after defining "way of necessity," concluded: ". . . the case at bar does not fall within the foregoing principles. There is no allegation in the petition that any *roadway* or *easement existed* or was used for the benefit of the land owned by the plaintiff, nor is there any provision in the devise creating such an easement. Hence, the situation

is that, according to the allegations of the plaintiff, she owns lands not accessible to a highway except by crossing the lands of defendants. These facts invoke the application of C.S., 3835 and 3836 (G.S. 136-68 and 136-69) as the exclusive remedy to which plaintiff is entitled." (Emphasis ours.) The holding in this case is not contrary to the principles set out in the two preceding paragraphs.

Except for the matter discussed below, plaintiffs' evidence makes out a *prima facie* case of easement of roadway by implied grant. The evidence and stipulations tend to show that both parts of the land were unified in title under the tenants in common, W. H. C. and J. C. Potter. A visible cartway was in continuous use serving the northern and southern portions and giving access to the public road. There was a severance and division of the land by cross-conveyances between the co-owners. The fact that these deeds were made at separate times seems inconsequential in light of all the circumstances and in the absence of some further showing. The road was in continuous use for the benefit of the northern portion until obstructed in 1956. No other way exists for ingress and egress to and from the northern portion. It is true there was a change or deviation in the location of a portion of the road. While the location of the cartway must be definite and specific and a substantial deviation might be deemed an abandonment of the easement, the question as to whether there was such deviation as to work an abandonment is for the jury. *Speight v. Anderson,* 226 N.C. 492, 497, 39 S.E. 2d 371; *Hemphill v. Board of Aldermen,* 212 N.C. 185, 188, 193 S.E. 153. It must be borne in mind that an easement by implication, if it exists at all, is appurtenant to a specific parcel of land. *Carmon v. Dick, supra.* Plaintiffs in the instant case own the "northern part" in two separate tracts; male plaintiff owns one, feme plaintiff the other. The complaint does not make this clear — it leaves the impression there is only one tract. Had the facts been clearly pleaded in this respect, the complaint would have been demurrable for misjoinder of causes of action. Defendant asserts that there is a variance between allegation and proof and the ruling of the court on the motion to nonsuit was proper for this reason. But we are disposed to regard the situation presented as a failure of proof. *Whichard v. Lipe,* 221 N.C. 53, 54, 19 S.E. 2d 14. There is sufficient evidence to take the case to the jury had the "northern part" constituted one tract or been under one ownership. But the evidence fails to disclose on which of plaintiffs' tracts the cartway lies and which it benefits or has benefitted. Is it situated on both tracts and has it served both tracts? If not, which one? Has the use been continuous

and necessary to both tracts? Has there been a discontinuance of use and abandonment of the easement as to one tract and, if so, which one? Is there an alternate way available to one tract and not the other? The evidence does not answer these questions. It must be shown that the easement, if any, is appurtenant to the specific tract of each plaintiff before both may be entitled to the relief sought. The evidence fails to show that it is appurtenant to both tracts in this case; if it is appurtenant to only one, it does not disclose which one.

Affirmed.

FRANCES C. WILLIAMS v. RUDOLPH S. STRICKLAND, H. H. STRICKLAND AND STRICKLAND ENTERPRISES, INC., ORIGINAL DEFENDANTS, AND CATHERINE V. STRICKLAND AND FRANCES G. STRICKLAND, ADDITIONAL PARTIES DEFENDANTS.

(Filed 29 January, 1960.)

1. Pleadings § 16—

A demurrer *ore tenus* to the jurisdiction of the court or for failure of the complaint with its amendments to state a cause of action may be interposed after the jury has been impaneled. G.S. 1-134.

2. Pleadings § 17b—

A demurrer *ore tenus* must distinctly specify the grounds of objection to the complaint, or it may be disregarded. G.S. 1-128.

3. Pleadings § 15—

Upon demurrer the complaint must be liberally construed with a view to substantial justice between the parties, and the pleader will be given every reasonable intendment in his favor. G.S. 1-151.

4. Negligence § 20—

In this action against a corporation and against individuals who were the stockholders and officers of the corporation, to recover for injuries received at an auto race track, the complaint alleged that the four individual defendants were operating the track as their own business individually and as a partnership and that "if . . . the individual defendants were attempting to operate" the race track "as a corporation . . ." and further alleged that "defendants" were negligent in specified aspects. *Held:* Construing the complaint liberally it sufficiently alleged negligence on the part of the individual defendants.

5. Games and Exhibitions § 2—

A person purchasing an admission ticket and entering on a race track conducted for profit is an invitee.

6. Same—

As a general rule the owner or operator of an automobile race track

is charged with the duty of exercising care commensurate with the known or reasonably foreseeable dangers to prevent injury to patrons.

7. Pleadings § 15—

A demurrer *ore tenus* raises no issue of fact, since a demurrer admits, for the purpose of testing the sufficiency of the pleading, all relevant facts well pleaded and legitimate inferences of fact deductible therefrom, except facts contrary to matters of which the court is required to take judicial notice or facts contrary to those declared and established by a valid statute applicable to and controlling the subject. A demurrer does not admit conclusions of law.

8. Pleadings § 19c—

A joint demurrer by all of the defendants must be overruled if the complaint states a good cause of action as to any one of them, the court having jurisdiction of the parties and the cause.

9. Games and Exhibitions § 2— Complaint held to state cause of action for negligence in failing to provide reasonably safe place for patrons of auto race.

The complaint alleged that the auto race track in question was constructed without provision for the seating of patrons, that a cable some eighteen inches above the ground was the sole barrier between the race track proper and the area from which patrons were impliedly invited to watch the races, that the individual defendants constructed the track in this manner and leased the premises to the corporate defendant for this purpose, and that plaintiff was injured while standing at the end of the track in a place of special danger, when struck by a wheel which came off of one of the racing cars making the turn at the end of the track. The complaint further alleged that defendants knew, or in the exercise of due care should have known, that it is not uncommon for wheels to come off racing cars during a race, and that injury to patrons therefrom was likely unless the patrons were protected by a fence, wall or barricade of sufficient height, etc. *Held*: The complaint is sufficient to state a cause of action against the individual defendants.

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

APPEAL by plaintiffs from *Frizzelle, J.*, May Civil Term, 1959, of NASH.

Civil action to recover damages for personal injuries.

Plaintiff amended her complaint twice, once as a matter of right before the time for answering had expired, and once by order of court. The four individual defendants and the corporate defendant filed separate answers to the complaint amended as a matter of right, and a joint answer to the amendment allowed by order of court.

After the jury had been impaneled to try the case, defendants demurred *ore tenus* to the complaint without specifying any grounds of objection.

From a judgment sustaining the demurrer *ore tenus* and dismissing the action, plaintiff appeals.

Don Evans for plaintiff, appellant.
Gardner, Connor & Lee for defendants, appellees.

PARKER, J. This is a summary of the complaint and its two amendments, except where the exact words are quoted:

In 1957 two men and their wives — the four individual defendants — purchased a tract of land, which was conveyed to them in fee simple, and began the construction thereon of a stock car race track. On 14 August 1957, the four individual defendants organized Strickland Enterprises, Inc., the corporate defendant, to engage in the amusement business, including the operation of a stock car race track. The four individual defendants are the sole stockholders and officers of this corporation. After the race track was completed, the four individual defendants leased the race track premises to the corporate defendant.

On 24 August 1957, the four individual defendants began holding stock car races on the premises and charging admission thereto under the name of Edgecombe Speedway. Edgecombe Speedway was and is open to the public as a place of amusement, and the operators of it invited the public to attend the stock car races. Large numbers of people attended the races.

On 22 September 1957, plaintiff, with numerous other persons, purchased from the operators of Edgecombe Speedway admission tickets. There were no grandstand or bleacher seats provided, and plaintiff, with a crowd of other spectators, stood up beyond one end of the race track to watch the races. During the races, and while a number of racing cars were going around the race track at high speeds, a wheel came off one of the racing cars making a turn at the end of the race track near which plaintiff and a crowd of spectators were standing, and "flew" toward plaintiff at a high speed striking her and causing her serious injuries.

Defendants were negligent, which negligence was the proximate cause of her injuries, in that: One. They provided no seats of any kind for paid spectators, who were required to stand near the race track to see the races. Two. They failed to provide a fence, wall, or barricade of sufficient height and strength to protect plaintiff and other paid spectators from wheels that at times come off speeding stock car racers and fly through the air at high speeds, though defendants knew, or, in the exercise of due care, should have known, that it is not uncommon for wheels to come off such racing cars during a race, and might likely injure a spectator. In spite of this foreseeable danger,

defendants only strung one cable about 18 inches high above the ground, separating the race track proper from the area in which plaintiff, and other paid spectators were standing watching the races. Three. They failed to inspect the racing cars prior to the race during which plaintiff was injured to see if the wheels of the racing cars were in safe condition for racing. Four. Defendants failed to warn plaintiff of the increased danger of standing near the end of the race track, and failed to fence off or rope off such area, though defendants knew, or should have known, such area was relatively more dangerous for spectators during a race than the area surrounding other parts of the race track.

At the time of plaintiff's injuries the four individual defendants had actual control of the operations of Edgecombe Speedway. "Whatever attempts the four individual defendants later made to operate Edgecombe Speedway as a corporation, at the time plaintiff was injured, these four individual defendants were operating, conducting, managing and controlling the affairs of Edgecombe Speedway as their own business individually, and as a partnership."

If at the time of plaintiff's injuries the four individual defendants were attempting to operate Edgecome Speedway as a corporation, the corporation was managed and controlled by them as their own business individually, and is in fact their *alter ego,* and was being used for the sole purpose of permitting them, owners of the race track, to operate a dangerous enterprise under a corporate guise, and thereby to shield themselves from personal liability for acts of negligence. The corporation, when organized, was under capitalized, and is insolvent, and was at the time plaintiff was injured.

Plaintiff prays that she have judgment against the four individual defendants and the corporate defendant for $15,500.00, and that the court, if necssary, in the exercise of its equitable powers look behind the corporate entity, and consider who are the real and substantial parties.

The record shows that, after the jury had been impaneled to try the case, "the defendants filed a demurrer *ore tenus* to the plaintiff's complaint." At that stage of the trial, defendants had a right to demur *ore tenus* to the jurisdiction of the court, and that the complaint with its amendments does not state facts sufficient to constitute a cause of action. N.C.G.S. 1-134. However, the demurrer *ore tenus* "must distinctly specify the grounds of objection to the complaint, or it may be disregarded." G.S. 1-128; *McKinley v. Hinnant,* 242 N.C. 245, 87 S.E. 2d 568; *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555. The demurrer *ore tenus* here specifies no ground of objection to the com-

plaint and its amendments. The judgment of the court merely recites that the demurrer *ore tenus* is sustained, and the action is dismissed.

All the defendants have filed a joint brief. They contend that the complaint alleges "Whatever attempts the four individual defendants later made to operate Edgecombe Speedway as a corporation, at the time plaintiff was injured, these four individual defendants were operating, conducting, managing and controlling the affairs of Edgecombe Speedway as their own business individually, and as a partnership," and this allegation is repugnant to the allegations in plaintiff's pleadings where "the specific acts of negligence complained of are alleged to be those of both the individuals and the corporation," and further that the above quoted allegation is repugnant to the prayer for judgment against the corporate defendant for $15,500.00. That these repugnant statements of fact destroy and neutralize each other, and the demurrer should be sustained.

The complaint and the amendments thereto allege that, after the race track was completed, the four individual defendants leased the race track premises to the corporate defendant, but no specific date is stated. The complaint specifically alleges that at the time plaintiff was injured the four individual defendants were operating, conducting, managing and controlling the affairs of Edgecombe Speedway as their own business individually and as a partnership. The complaint and its amendments do not allege as a fact that the corporate defendant operated the race track at the time plaintiff was injured; it alleges that if at the time plaintiff was injured, the individual defendants were attempting to operate Edgecombe Speedway as a corporation, etc.

The complaint alleges that "defendants" — not individual defendants and corporate defendant, but merely "defendants" — were negligent, and then follow statements of facts of alleged negligence. Upon the demurrer *ore tenus,* construing the complaint and its amendments liberally for the purpose of determining the effect of their allegations, with a view to substantial justice between the parties, and making every reasonable intendment in favor of the pleader (G.S. 1-151; *McKinley v. Hinnant, supra; Joyner v. Woodard,* 201 N.C. 315, 160 S.E. 288), it is our opinion that the word "defendants" in respect to the allegations of negligence manifestly refers to the individual defendants, and not to them and the corporate defendant. Defendants' contention of repugnancy in this respect is untenable.

Defendants further contend that plaintiff in his pleading has undertaken to state one or more causes of action against the individual defendants as officers and stockholders of the corporate defendant and as partners, and as individual owners of a race track and against the

corporate defendant on one or more theories, no one of which is explicit in statement of facts on which it is based, and the demurrer should be sustained. That each defendant is entitled to a plain and concise statement of the facts constituting the cause of action against him.

Since plaintiff purchased an admission ticket, and entered on the race track premises, a business conducted for profit, in the character of a patron, he occupied the status of an invitee. *Hahn v. Perkins*, 228 N.C. 727, 46 S.E. 2d 854.

"One who invites the public to attend a race between motor vehicles and charges an admission fee is bound to exercise reasonable care to make the place provided for spectators reasonably safe, but, although a spectator is injured, no liability may be imposed on the persons conducting the races, in the absence of a showing of negligence on their part." 61 C.J.S., Motor Vehicles, p. 682.

The general rule is that the owner or operator of an automobile race track is charged with the duty of exercising reasonable care, under the circumstances present, for the safety of patrons, that is a care commensurate with the known or reasonably foreseeable danger. Annotation, 37 A.L.R. 2d 393, where many cases are cited.

Smith v. Agricultural Society, 163 N.C. 346, 79 S.E. 632, Ann. Cas. 1915B, p. 544, was an action for injuries sustained by plaintiff, who was caught by his foot in the trail rope of a balloon which ascended from the fair grounds of defendant, and was carried in the air for some distance. Plaintiff paid his fare for entrance to the fair. The Court said, first quoting from 38 Cyc., 268: " 'The owner of a place of entertainment is charged with an affirmative, positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed.' He is not an insurer of the safety of those attending the exhibition, but he must use care and diligence to prevent injury, and by policemen or other guards warn the public against dangers that can reasonably be foreseen."

In *Hallyburton v. Burke County Fair Association*, 119 N.C. 526, 26 S.E. 114, 38 L.R.A. 156, it was held that defendant, under whose auspices and on whose grounds a horse race took place, is not negligent, and therefore responsible for an injury caused to a spectator, who had paid his entrance fee and was standing where spectators usually stand when watching a race, by a horse which bolted the track, when defendant had provided a building from which the race

could be safely viewed, and had enclosed the race track on both sides by a substantial railing.

This is said in Annotation, 37 A.L.R. 2d 394: "If the need is obvious or experience shows that an automobile race of the character and in the place proposed requires, in order to afford reasonable protection to spectators, the erection of fences or similar barriers between the track and the places assigned to them, it becomes a part of the duty in exercising reasonable care for their safety to provide fences or barriers, the adequacy of which is dependent on the circumstances present, principally the custom of the business." In this same annotation (1954) 398, will be found a number of cases in respect to the absence or inadequacy of fences, barricades, or other protective devices, where under the circumstances of individual cases, a recovery has been upheld and denied.

In *Atlantic v. Rural Exposition, Inc. v. Fagan* (1953), 195 Va. 13, 77 S.E. 2d 368, 37 A.L.R. 2d 378, the court affirmed a judgment on a verdict of a jury against both the lessor and the lessee, the sponsors, promoters, and supervisors of an automobile racing exposition, upon evidence sufficient to pose a question of fact as to whether the defendants had exercised that care to protect the plaintiff, as a spectator, which might, under the circumstances shown, be expected of reasonably prudent persons acting under the same or similar circumstances, commensurate with the known and reasonably foreseeable dangers, particularly in the matter of providing an adequate fence which would be reasonably calculated to safeguard spectators at a stock car race in the event of detachment of a wheel of a racing car at a point at or near the bleachers.

In *Gibson v. Shelby County Fair Ass'n.*, 241 Iowa 1349, 44 N.W. 2d 362, Max Gibson, an infant, by his next friend, sued the Shelby County Fair Association and its directors for personal injuries sustained as the result of being struck by a wheel which became detached from a racing car, while plaintiff was a spectator at a hot rod race on the fair grounds owned by the defendant association. The Supreme Court held that the petition stated a cause of action predicating defendants' liability on their leasing of premises so defective that they could not be safely used for the express purpose of the lease. In its opinion, the Supreme Court of Iowa said: "When premises are leased for a public use the owner is charged with liability if a member of the public, rightfully on the premises, is injured because of a defective or dangerous condition that was known to the lessor or by reasonable inspection might have been known at the time of leasing. Restatement Torts, sec. 359; *Larson v. Calder's Park Co.*, 54 Utah 325, 180 P. 599,

4 A.L.R. 731; *Arnold v. State,* 163 App. Div. 253, 148 N.Y.S. 479; *Barrett v. Lake Ontario Beach Imp. Co.,* 174 N.Y. 310, 66 N.E. 968, 61 L.R.A. 829; *Oxford v. Leathe,* 165 Mass. 254, 43 N.E. 92; *Junkerman v. Tilyou Realty Co.,* 213 N.Y. 404, 108 N.E. 190, L.R.A. 1915 F. 700; *Sulhoff v. Everett,* 235 Iowa 396, 16 N.W. 2d 737."

A demurrer *ore tenus* raises no issue of fact, since for the purpose of presenting the legal question involved, it admits all relevant facts well pleaded, and legitimate inferences of fact reasonably deduced therefrom, except when the facts alleged are contrary to those of which the court is required to take judicial notice, and when opposing facts are declared and established by a valid statute applicable to and controlling the subject, but not conclusions of law. McIntosh, N.C. Practice & Procedure, Vol. 1, p. 647; *Chew v. Leonard,* 228 N.C. 181, 44 S.E. 2d 869.

All the defendants joined in the demurrer *ore tenus.* It is apparent that the trial court had jurisdiction of the parties and the cause: defendants make no contention to the contrary. Therefore, if the complaint with its amendments set forth a good cause of action as to any one of the defendants, the joint demurrer *ore tenus* will be overruled. *Paul v. Dixon,* 249 N.C. 621, 107 S.E. 2d 141.

If, liberally construed, any portion of the complaint with its amendments, or to any extent, presents facts sufficient to constitute a cause of action against any defendant, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will be sustained against the joint demurrer *ore tenus* filed by all the defendants, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, and the demurrer *ore tenus* here filed cannot be sustained unless the complaint with its amendments is wholly insufficient as to all defendants. *Paul v. Dixon, supra; McDaniel v. Quakenbush,* 249 N.C. 31, 105 S.E. 2d 94; *S. v. Trust Co.,* 192 N.C. 246, 134 S.E. 656; *Hartsfield v. Bryan,* 177 N.C. 166, 98 S. E. 379; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807, Ann. Cas. 1916E, p. 250.

The complaint alleges that the four individual defendants owned in fee the race track premises, and "at the time plaintiff was injured, these four individual defendants were operating, conducting, managing, and controlling the affairs of Edgecombe Speedway as their own business individually, and as a partnership." We think that the complaint with its amendments contains a sufficient statement of a cause of action against the four individual defendants predicating their liability, at least, on their failure to exercise care commensurate with the known or reasonably foreseeable dangers incident to motor ve-

hicles racing at high speeds for the reasonable protection and safety of plaintiff, a patron, and its other patrons, watching the race, in that no seats of any kind were provided for plaintiff and there was an absence or inadequacy of fences, barricades, or other protective devices around the race track for plaintiff's safety, while she was watching the racing automobiles.

This is only the pleading stage of this lawsuit.

The judgment below sustaining the demurrer *ore tenus,* and dismissing the action is

Reversed.

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

SOUTHEASTERN BAPTIST THEOLOGICAL SEMINARY, INC. v. WAKE COUNTY AND THE TOWN OF WAKE FOREST.

(Filed 29 January, 1960.)

1. Taxation § 19—

Statutes enacted by the General Assembly in the exercise of the authority granted by the Constitution to exempt certain classes of properties from taxation, Constitution of N. C., Article V, Section 5, are to be strictly construed, when there is room for construction, against exemption and in favor of taxation, but this rule of strict construction does not require that the statute be narrowly construed but only that its application should be restricted to those classifications coming clearly within its terms.

2. Statutes § 5a—

The words of a statute must be given their natural and ordinary meaning.

3. Taxation § 20—

Dwellings rented by a nonprofit educational institution to married students and instructors, and its registrar, which properties are near to and used in connection with its main plant, the dormitory accomodations on the campus being inadequate to its needs, are exempt from taxation under the provisions of G.S. 105-296 (4), and the fact that there was no adjustment in the salaries of the instructors and the registrar predicated upon the amount of rents paid for their respective premises does not alter this result.

4. Appeal and Error § 49—

The findings of fact of the trial court are conclusive on appeal when supported by competent evidence.

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

APPEAL by defendants from *Clark, J.*, at November 1958 Civil Term, of WAKE.

Controversy without action originally submitted under G.S. 1-250 upon agreed statement of facts relating to the taxable status of sixteen separate units located in Town of Wake Forest in Wake County, heard in this Court on former appeal as No. 461 at Spring Term 1958, reported in Vol. 248 of North Carolina Supreme Court Reports at page 420 (103 S.E. 2d 472).

There the judgment from which appeal was taken was vacated in its entirety, without approving or disapproving any of the rulings on which judgment was based. And it is there said that if the parties so desire, they may submit an agreed statement setting forth with particularity in respect to each of the sixteen properties "the facts upon which the controversy depends" as required by G.S. 1-250.

The record on this appeal shows that the controversy arises out of facts which have been agreed to by the parties and are submitted in part as follows:

"3. That the said Seminary is a non-profit corporation, and its activities are specifically limited to educational purposes, and it is an educational institution as defined in General Statutes of North Carolina, Section 105-296.

"4. That the said Seminary acquired the properties hereinafter listed by a Warranty Deed from the Trustees of Wake Forest College, bearing date June 29, 1956, and recorded July 9, 1956, in Book 1244 at page 333, Registry of Wake County, and since receiving said deed the said Seminary has been and now is the owner of said properties in fee simple, and said Seminary is in the exclusive possession and control of same. * * *

"6. That said properties consist of separate units, located as shown in map hereto attached and made a part hereto as Exhibit "B"; and there are buildings on each unit, and the buildings thereon are presently used as residences exclusively by the officers, instructors, students and their families of said Seminary, and have been so used since the acquisition of title; and the occupants pay reasonable rentals to the Seminary, the names, amount of rent and the relationship, if any, of the occupant of each property to the Seminary being as set forth in Exhibit "A" hereto attached. (Exhibits A & B deleted)

"7. That Wake Forest College, former owner of said properties, regularly and for a number of years listed said properties for taxation with Wake County and the Town of Wake Forest, and paid the *ad valorem* taxes assessed against same. That during tax listing time for the year 1957 the said Seminary consulted the tax listing authori-

ties of both Wake County and the Town of Wake Forest and advised said authorities of facts and circumstances existing in relation to said properties and advised them that it was the opinion of the Seminary that said properties were exempt from taxes by reason of the provisions of General Statutes of North Carolina, Section 105-296 (4), and Article 5, Section 5 of the Constitution of North Carolina, and requested said taxing authorities to eliminate said properties from tax listings for the year 1957 and future years.

"8. That said taxing authorities, both of Wake County and the Town of Wake Forest, refused to accept the Seminary's views, and, over its objection, caused said properties to be listed on the tax abstracts for the year 1957 and placed values thereon as follows: (List and valuation here shown).

"9. That against said properties Wake County has assessed taxes for 1957 in the total amount of $684.50.

"10. That against said properties the Town of Wake Forest has assessed taxes for 1957 in the amount of $457.83.

"11. That the said Seminary has paid both items of taxes as assessed to Wake County and to the Town of Wake Forest, and has made said payments under protest, and has made written demand upon the respective taxing authorities for refund within thirty days thereafter, all in conformity with the provisions of General Statutes of North Carolina, Section 105-267; and said taxing authorities of Wake County and the Town of Wake Forest have refused said demands.

"12. That the said Seminary contends that said properties are exempt from said tax assessment, by reason of General Statutes of North Carolina, Section 105-296 (4), and Article 5, Section 5 of the Constitution of North Carolina; that the amount paid to Wake County and to the Town of Wake Forest should be refunded; that the listings and the assessments made for 1957 should be nullified, and also the listings for future years to be prohibited so long as same are used as residences by the officers, instructors and students of the Seminary.

"13. The taxing authorities of both Wake County and the Town of Wake Forest contend that said properties are not exempt from taxes, or that there may be doubts in this respect, and that they are without authority and are unwilling to assume the responsibility of exempting said properties until there has been a legal determination of the question involved.

"Wherefore, the respective parties pray that the court consider the facts submitted and render an appropriate judgment based upon

said facts, and particularly determining whether the properties listed are and should be exempt from *ad valorem* taxes of Wake County and the Town of Wake Forest."

The record also shows that as of the November 1958 Term of Superior Court of Wake County, judgment was filed by *Clark, J.* presiding, 16 February 1959, as follows:

"This cause coming on to be heard before the undersigned at the November 1958 Term of the Superior Court of Wake County, as a controversy without action, and it appearing that all parties had stipulated and agreed to a considerable part of the facts necessary to adjudicate this controversy, but that it would be necessary to hear evidence as to certain other facts, and all parties having waived trial by jury and agreed that the court should hear the evidence, make its findings as to additional facts not set out in the stipulation, together with its conclusions of law; and render judgment accordingly, out of term and out of the district; and the court having heard the testimony of Gordon M. Funk, who testified for plaintiff and whose testimony was the only evidence offered by either plaintiff or the defendants, makes the following findings of fact, in addition to the facts set forth in the stipulation of the parties as "Agreed Statement of Facts" in thirteen paragraphs in pages 2 through 12, inclusive, of the transcript of the hearing before this court:

"1. That there are sixteen properties which plaintiff contend are tax exempt, eleven of which were rented by the Seminary, the income from them being paid by each tenant into the office of the business manager, and placed in the general operation fund of the Seminary used to pay the expense of its educational program. All of these properties are within one block of what is admitted to be the original campus or main part of the Seminary.

"2. That five of the eleven houses rented were rented to students in the Seminary who, with their families, occupied these quarters and paid rent each month into the office of the business manager. These five properties are designated:

200 North Avenue
206 North Avenue
309 West Avenue
112 South Wingate Street
114 South Wingate Street

"None of these houses were officially designated or earmarked as dormitories or as apartments or quarters for married students. The apartments and facilities on the main campus for married students were fully occupied, and the Seminary had no other facilities to make

available to these students with families near to the campus. Many of the students at the Seminary are married and have families due to the age group which makes up the Seminary student body. There was a shortage of housing for such students.

"3. That two of the sixteen properties in question, namely:

319 West Avenue

108 South Wingate

were rented to instructors employed by the Seminary. These teachers occupied the houses with their families as private residences. These two houses were not earmarked or designated as instructors' quarters. The rental resulted simply from the fact that these two instructors need some such housing and the Seminary had these units vacant. The use of these quarters had no effect upon the salaries of either of these instructors and was in no way connected with their employment or the particular positions they held. No deduction was made for the rent charged.

"4. One of the parcels in question, namely: 315 West Avenue was rented to the Registrar of the Seminary who occupied it with his family as a private residence. The duties of the Registrar were to maintain the academic records of all students, to act as secretary to the faculty, and to advise those making policies as to academic rules.

"5. Of the sixteen properties in question, three were rented to other employees of the Seminary as private residences; of these:

210 North Wingate was rented to the 'Head Custodian' whose duty it was to supervise some 5 or 6 janitors who were employed to maintain cleanliness in the Seminary buildings and to see that the janitorial services, as ordered, were properly carried out.

204 North Avenue was rented to a carpenter employed by the Seminary.

216 North Wingate was rented to the manager of the Seminary Cafeteria.

"In none of these three cases was there any specific connection between the job of the employee and the assignment of quarters. Use of the quarters was in no way treated as compensation and no payroll deduction was made for rent due.

"6. Two of the sixteen properties had vacant houses on them. They were:

312 Falls Road

203 North Wingate Street

"These residences were in poor state of repair and unfit for occupancy. One is now a student parking lot and the other now a trailer park for students.

"7. One of the properties in question was vacant lot. This was:
303 Pine Street.

"A duplex student apartment building is now on the lot.

"8. On two of the properties a building designed for (and which now is) the Seminary Cafeteria was under construction. About 20% of the construction work had been completed. After completed, the cafeteria was used primarily by students but was also open to the general public. This building is on both lots designated:
102 South Wingate
106 South Wingate."

Hence, "upon the agreed statement, stipulation and facts found, the court concludes as a matter of law:

"(1) All of the sixteen properties in question are so located with reference to the main buildings of the Seminary as to come within the definition of the term 'additional adjacent land' as used in G.S. 105-296 (4). 218 N.C. 718.

"(2) The five properties rented to married students were 'wholly devoted to educational purposes' to the same extent as the dormitory buildings or married student apartments since such use represented overflow from the inadequate facilities on the main part of the campus. Therefore, these are exempt under G.S. 105-296 (4).

"(3) That two of the properties were actually used as residences by instructors of the Seminary and therefore are specifically exempt by the express provision of the statute.

"(4) That the Registrar of the Seminary is an 'officer' within the meaning of the statute, his duties being comparable to that of the secretary of a business firm and his position being one of authority and trust and official in nature. Therefore, the premises used as a residence by the Registrar of the Seminary is exempt under the express provision of G.S. 105-296 (4).

"(5) That the three properties, to wit:
210 North Wingate Street
204 North Avenue
216 North Wingate Street
being rented to other employees of the Seminary (the custodian, cafeteria manager and carpenter) were not wholly devoted to educational purposes. Plaintiff has shown no specific connection between the assignment of these quarters and the work of these employees at the Seminary nor are these employees shown to be 'officers or instructors.' Therefore, these three properties are subject to taxation under the rule of *Rockingham v. Board of Trustees*, 219 N.C. 342.

"(6) That the vacant houses and the vacant lot are reasonably

necessary for the convenient use of the Seminary, taking into consideration the facts established by the evidence of the need for additional housing for married students with families needing accomodations on or near the main part of the campus. It was reasonably necessary for these properties to be so held by the Seminary until it could convey them to actual use as it later did. Therefore these four properties are exempt.

"(7) The two properties on which construction of the cafeteria building had begun was in 'actual use' within express terms of the statute. The problem created by the fact that the public patronized the cafeteria after it was completed some time later, would not arise until such use is made of the building. Any material amount of business done by the general public in the cafeteria would, in the opinion of the court change its tax status. However, as of January 1, 1957, a necessary Seminary building was being constructed on these lots and they are therefore exempt. Its status in later years depends on its use in later years."

Therefore it is held that plaintiff is entitled to recover as taxes paid the amounts stated as paid upon all the parcels listed except "as to the three:

210 North Wingate Street
204 North Avenue
216 North Wingate Street"

as to which plaintiff has failed to show wherein same come within the statutory exemptions.

And in accordance therewith judgment is entered in favor of plaintiff against defendants, except with respect to the three items which the court held to be taxable. Defendants except and appeal to Supreme Court and assign error.

Mordecai, Mills & Parker for plaintiff, appellee.

Thomas A. Banks, J. C. Keeter, Wright T. Dixon, Jr., for defendants, appellants.

WINBORNE, C. J. The Constitution of North Carolina, Article V, Section 5, declares in respect to property exempt from taxation, that "The General Assembly may exempt * * * property held for educational, scientific, literary, charitable or religious purposes * * *." And pursuant to the authority so given by the Constitution the General Assembly has enacted a statute, G.S. 105-296, declaring in pertinent part that "the following real property, and no other shall be exempted from taxation * * *: (4) Buildings, with the land actually occupied,

wholly devoted to educational purposes, belonging to, actually and exclusively occupied and used for public libraries, colleges, academies, industrial schools, seminaries, or any other institutions of learing, together with such additional adjacent land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, and also buildings thereon used as residences by the officers or instructors of such educational institutions."

In this connection this Court stated in *Harrison v. Guilford County,* 218 N.C. 718, 12 S.E. 2d 269, that statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation (citing cases).

"By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed • • • but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used," *Stacy, C. J.,* in *S. v. Whitehurst,* 212 N.C. 300, 193 S.E. 657.

The words used in the statute must be given their natural or ordinary meaning. 71 C.J. 353, *Borders v. Cline,* 212 N.C. 472, 193 S.E. 826.

The words of G.S. 105-296 (4), given their ordinary meaning, are clear and require no construction. Hence, testing the findings of fact in respect to each unit of property here under consideration, in the light of language of the statute G.S. 105-296, it appears that the thirteen units listed by the court below as exempt come within the description of property permissively exempt from taxation under the Constitution and the statute. It is axiomatic in this State that the findings of fact made by the judge of Superior Court, if supported by any competent evidence, are conclusive and binding on appeal to this court. And the findings of fact so made in instant case appear to be supported by sufficient competent evidence.

Finally it may be noted that since plaintiff has not appealed, question as to correctness of the conclusion of law in the light of the findings of fact in respect to the three units held to be taxable is not before the Court for decision.

In the record of case on appeal defendants list many exceptions and assignments of error. They have been given due consideration, and in them prejudicial error is not made to appear.

The judgment from which appeal is taken is

Affirmed.

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

EUGENE E. MAYNARD v.
DURHAM AND SOUTHERN RAILWAY COMPANY.

(Filed 29 January, 1960.)

1. Master and Servant § 39½: Torts § 8a: Cancellation and Rescission of Instruments § 9—

The burden is upon the party attacking an instrument for fraud or undue influence to establish his allegations by the preponderence or greater weight of the evidence. This rule applies to the attack of a release under the Federal Employer's Liability Act.

2. Master and Servant § 39½: Torts § 8a—

The payment to an employee of his wages for the period of time he did not work because of injury is sufficient consideration to support the employee's execution of a release from liability, the employee not being entitled as a matter of law to such wages.

3. Same—

Testimony of an employee that he signed the release in question without reading it or understanding its contents, that the employer's agent did not make any false representations or do anything to induce the employee not to read the instrument, but merely failed to explain the paper to the employee, and that neither at that time thought that the injury would develop into any permanent disability, *is held* insufficient to set aside the release for fraud or duress.

PARKER, J., dissents.

APPEAL by plaintiff from *Williams, J.*, 2 April Regular Civil Term, 1959, of WAKE.

This is a civil action instituted pursuant to the provisions of the Federal Employers' Liability Act, by the plaintiff, an apprentice railroad section foreman, against his employer, Durham and Southern Railway Company, to recover for personal injuries allegedly sustained on 22 August 1955 while assisting in the loading of a motorized track car into the rear of one of the defendant's trucks in Dunn, North Carolina.

The evidence tends to show that shortly before noon on the date in question the plaintiff and three section laborers were instructed by the defendant's roadmaster, Mr. Tillerson, to load a two-man motorized track car into the rear of the defendant's ton and one-half truck which was parked near the crossing. The truck on which the car was to be loaded was an ordinary flat body truck with a canvas top supported by wooden ribs. The distance between the bed of the truck and the ribs supporting the canvas top was about three and one-half or four feet.

The plaintiff was instructed by the defendant's section foreman,

Mr. Parrish, to get up in the bed of the truck and catch the end of the track car when the other men lifted it, to keep it from rolling back on the men who were lifting it into the truck. When the plaintiff got into the bed of the truck, the three section laborers, according to plaintiff's testimony, suddenly and without warning shoved the track car into the truck, without giving him an opportunity to move out of the way. Plaintiff testified: "When I was in the truck, I was in a stooped position. I couldn't straighten up for the top of the truck. Then they shoved the thing in on me * * * catching my legs across the bottom frame of the car and the iron of the motor car caught me in the chest and my back because it was against the top braces * * *. When the truck was pushed in on me and I was caught between it and the top, I felt a sharp, stabbing, sickening pain in the small of my back, and it kind of cut my wind off there for a minute, and then they released the car and I got out and it kind of eased off after a little bit until I started to step back and then I had the same pain again * * *."

The plaintiff's foreman, J. H. Parrish, who directed the loading of the track car, was used by plaintiff as a witness. This witness testified: "The only thing I heard Mr. Maynard say was 'wait a minute, don't shove it on me.' * * * The car was handled in a safe manner. * * * The men rolled it up normally. Mr. Maynard made no complaint to me. Very likely I would have seen it if the men had rammed the motor car on Mr. Maynard. I was there. I didn't see it happen. I heard no complaint from him. It was something like two weeks after that I did hear about it. That was the first time that I heard about him having hurt his back."

The evidence further tends to show that the plaintiff made and signed an accident report on 23 August 1955 in which he answered the question as to the "Probable Period of Disability: None is expected." He likewise answered the question, "Was equipment causing accident properly handled? Yes."

On cross-examination the plaintiff testified, "I didn't expect any permanent disability at that time. I just thought it was a mild back strain that I would get over within a few weeks or a month. When I signed it (the accident report) with the answer to the probable disability, 'None,' I meant it at that time. * * * The accident happened on August 22, 1955. * * * I reported back to work on Tuesday, the 23rd of August, and worked all day that day * * *. On the next day I went to see the doctor * * *."

The plaintiff first went to see Dr. Goodwin in Apex, North Carolina and later to see Dr. Wilson, the company physician at Durham,

as well as other doctors, and took heat therapy treatment at Duke Hospital. None of the doctors prescribed anything for the plaintiff except a brace, which Dr. Wilson prescribed.

Plaintiff's evidence also tends to show that it was the policy of the defendant, when an employee sustained an injury and did not work, when he returned to work he was paid his back wages in full, as though he had put in full time, if he would sign a release.

On Saturday, 17 September 1955, the plaintiff went to Durham, North Carolina, to see Mr. H. A. McAllister, Vice President and General Manager of the defendant company. Mr. McAllister testified that "Mr. Maynard stated that he wanted to know if the company could pay him for the time he was off and if we would he was ready to sign a release. He said he was feeling much better, and thought he was going to be all right." Whereupon, the plaintiff signed the following release:

"KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of One Hundred forty-four dollars and sixty cents — Dollars ($144.60), to me in hand paid by the DURHAM AND SOUTHERN RAILWAY COMPANY, the receipt of which is hereby acknowledged, I, E. E. Maynard, do hereby release and forever discharge the Durham and Southern Railway Company, its successors and assigns, from all claims, demands, actions or rights of action, of every nature whatsoever, now existing, or hereafter to arise, on account of, or in connection with personal injuries received at Dunn, N. C., on Monday, August 22, 1955, while assisting Mr. Parrish's Section force in loading a track motor car on a company road truck at or near Dunn, N. C. on or about the 22nd day of August, 1955, and all results attending or following, or which may hereafter arise therefrom.

"This release is fully understood by me, constitutes the entire agreement between the parties hereto, and is executed solely for the consideration above expressed, without any other representation, promise, or agreement of any kind whatsoever.

"Given under my hand and seal, at Durham, N. C., this the 17th day of September, 1955. /s/ E. E. Maynard (SEAL) WITNESS: /s/ J. Chas. Phelps. WITNESS: /s/ E. Sweaney Jackson. SEAL."

In connection with the above release, the plaintiff testified, "That is my signature on that release to the Durham and Southern Railway Company dated the 17th day of September, 1955. I signed it. Mr. McAllister was very nice all the way through. * * * He didn't tell me at the time that I was signing a release. * * * I did not try to read this release. He didn't give me a chance to read it. I didn't

ask him to let me read it. This wasn't the kind of thing that I would sign for my regular pay check. I didn't know what it was. I just did not give it no (sic) thought. I have a tenth grade education. I would have to say that I was not rational that day. I didn't know what I was doing that day. (He had testified earlier that he had been taking some pills to relieve his pain.) * * * Mr. McAllister didn't tell me anything about it. All he did was ask me how I was. * * * I didn't know what it was that I was signing or I wouldn't have signed it. * * * At that time Mr. McAllister didn't know what my disability might be in the future from my injury. He didn't make * * * any false representations. The only thing he did do there, he just didn't explain the paper to me. He didn't make any deceitful suggestions to me. He didn't make any fraudulent suggestions to me. He just put the paper down there and I signed it and got my check and left. I didn't think I was going to be hurting in the future."

Before signing the release set out hereinabove, the plaintiff returned to work on 12 September 1955 and continued to work for the defendant until 16 May 1956. The only medical testimony offered by the plaintiff was that of a physician who first examined him on 13 September 1956, who testified, among other things: "I think that he probably demonstrates a permanent partial impairment of about 15% of the spine. I cannot say what his future course will be except to say that after this length of time he probably will continue to have back difficulty and leg difficulty."

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

William T. Hatch, Samuel H. Johnson, Wiley F. Mitchell, Jr., for plaintiff.

Charles B. Nye, Clem B. Holding for defendant.

DENNY, J. The defendant concedes that probably the evidence offered by the plaintiff in the trial below was sufficient to take the case to the jury had the plaintiff not signed the release set out herein, which the defendant pleaded in bar of his right to recover. Therefore, the question for determination is whether or not the plaintiff's evidence in support of his allegations that the release was without consideration and wrongfully procured by means of fraud and duress, was sufficient to warrant its submission to the jury.

It was admitted in the trial below that the defendant was en-

gaged in interstate commerce at the time of the alleged injury. Likewise, it is conceded that this case is governed by the Federal Employers' Liability Act, 45 U.S.C.A., section 51, *et seq.*, and by applicable principles of common law as interpreted and applied by the federal courts. *Chesapeake & O. R. Co. v. Kuhn,* 284 U.S. 44, 76 L. Ed. 157; *Ricketts v. Pennsylvania,* R. Co., 153 F. 2d 757, 164 A.L.R. 387.

The appellee contends that the release under consideration cannot be set aside except by evidence which is clear, strong, and convincing, citing *Clements v. Life Ins. Co. of Virginia,* 155 N.C. 57, 70 S.E. 1076; *Callen v. Pennsylvania R. Co.,* 162 F. 2d 832, affirmed 332 U.S. 625, 92 L. Ed. 242, while the appellant contends that only the preponderance or greater weight of the evidence is required, citing *Dice v. Akron C. & Y. R. Co.,* 342 U.S. 359, 96 L. Ed. 398.

We have found nothing in the federal decisions at variance in this respect with our own decisions.

In this jurisdiction, if the action is to set aside an instrument allegedly procured by fraud or undue influence, the burden of proof to establish such allegation is by the preponderence or greater weight of the evidence. On the other hand, if the action is to reform an instrument, the evidence must be clear, strong, cogent, and convincing. *Walters v. Bridgers,* 251 N.C. 289, 111 S.E. 2d 176; *Henley v. Holt,* 221 N.C. 274, 20 S.E. 2d 62; *Ricks v. Brooks,* 179 N.C. 204, 102 S.E. 207; *Bolich v. Insurance Co.,* 206 N.C. 144, 173 S.E. 320.

In *Ricks v. Brooks, supra,* it is said: "In an action for reformation it must be alleged and shown, by evidence clear, strong, and convincing, that the instrument sought to be corrected failed to express the true agreement of the parties, because of a mistake common to both parties, or because of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by reason of ignorance, mistake, fraud, or undue advantage something material has been inserted, or omitted, contrary to such agreement and the intention of the parties. *Ray v. Patterson,* 170 N.C. 226; *Newton v. Clark,* 174 N.C. 393. But this rule does not apply where the purpose is not to reform, but to set aside the instrument for fraud, undue influence, or upon other equitable ground."

The plaintiff alleges lack of consideration in the procurement of the release involved herein. It is generally held in this and other juridictions that the mere inadequacy of consideration alone is insufficient to set aside a release. *Ledford v. Ledford,* 229 N.C. 373, 49 S.E. 2d 794; *Watkins v. Grier,* 224 N.C. 339, 30 S.E. 2d 223; *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5; *McInturff v. Trust Co.,*

201 N.C. 16, 158 S.E. 547; *Aderholt v. R. R.*, 152 N.C. 411, 67 S.E. 978; *Williams v. East St. Louis Junction R. Co.*, 349 Ill. App. 296, 110 N.E. 2d 700; *Kavadas v. St. Louis Southwestern Ry. Co.* (Mo. App.), 263 S.W. 2d 736.

In *Williams v. East St. Louis Junction R. Co., supra,* the case was brought pursuant to the Federal Employers' Liability Act and the evidence raised questions similar to those in the instant case. There, as here, the plaintiff testified he was injured at a particular time, place and manner, but he was the only one who so testified. All other employees who were present at the time and place testified no such injury occurred. The consideration for the release was wages in the sum of $57.38 for six days the plaintiff did not work on account of his alleged injuries. The case was submitted to the jury and the plaintiff obtained a substantial verdict. The court, however, allowed a motion for judgment in favor of the defendant notwithstanding the verdict. There, as here, the plaintiff testified in the trial below that he signed the release but did not know what he was signing and did not know its contents. The Appellate Court said: "Plaintiff very strenuously insists that the validity and effect of this release should be adjudged under federal procedure and that under federal procedure it is required that the question of the validity of a release be submitted to and acted upon by the jury and that the jury's verdict is binding. He relies upon the case of *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398. It is unquestionably true that federal law controls actions under the Federal Employers' Liability Act in federal as well as state courts. The *Dice* case, *supra,* however, is authority only for the proposition that where there is competent evidence to support the claim of fraud in securing a release the question must be submitted to a jury for a determination. It furnishes no authority that the courts may not direct a verdict or grant judgment notwithstanding the verdict where there is no evidence to sustain the allegation of fraud. Furthermore, federal law is settled that in order to avoid the effect of a release the burden is on the one attacking the settlement to show that the contract is tainted with invalidity either by fraud or mutual mistake of fact. *Callen v. Pennsylvania Ry. Co.*, 332 U.S. 625, 68 S. Ct. 296, 92 L. Ed. 242, 247. Therefore, the burden rested upon the plaintiff to produce evidence to show fraud as alleged in his reply to the affirmative matter in defendant's answer." The judgment in favor of the defendant was affirmed.

Likewise, in *Kavadas v. St. Louis Southwestern Ry. Co., supra,* the action was brought under the Federal Employers' Liability Act and

the release was based on one day's wages in the sum of $12.18. The plaintiff alleged the release was procured by fraud and false representations. The case was submitted to the jury and the jury returned a verdict in favor of the plaintiff. On appeal the Court said: "As we have already indicated it is our view that the evidence was not sufficient to make an issue for the jury upon the question of fraud in procuring the release. * * * There is some evidence in the record to indicate that plaintiff sustained substantial injuries and we must therefore confess that we are reluctant to hold that he is barred from recovery because he signed a release upon receipt of $12.18. However, this Court cannot relieve the plaintiff of the consequences of his bargain without a valid legal reason for doing so. Mere inadequacy of consideration is not enough. *Vondera v. Chapman,* 352 Mo. 1034, 180 S.W. 2d 704. To hold otherwise would establish a precedent which would make it difficult to settle controversies and would be contrary to the established policy of the law to encourage peaceful settlements. * * *" The judgment was reversed.

There is no evidence in the record before us to support the contention of plaintiff that he was entitled, as a matter of right, to the $144.60 as wages for the time he did not work because of his alleged injuries. Therefore, unless the release was procured by fraud and duress, as alleged in plaintiff's reply to the affirmative matter pleaded in defendant's answer, the judgment as of nonsuit entered in the court below must be upheld.

As we construe the plaintiff's evidence, he does not show any fraud or duress on the part of the defendant or its agents, but, on the contrary, his own testimony negatives his allegation in that respect.

In our opinion, the plaintiff and the defendant entered into the release in good faith. Neither party at the time of the execution of the release had any idea that the plaintiff had sustained an injury that might or would develop into any permanent disability. There may have been mutual mistake on the part of the plaintiff and the defendant in this respect, as was alleged and relied on in *Callen v. Pennsylvania Ry. Co., supra;* however, in the instant case, the plaintiff's cause of action is not bottomed on mistake but on fraud and duress.

In light of the record before us and applicable decisions bearing thereon, we are constrained to hold that the ruling of the court below must be upheld.

Affirmed.

PARKER, J., dissents.

F. F. SHORES AND WIFE MARY LEE SHORES v. JAMES L. RABON AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY.

(Filed 29 January, 1960.)

1. **Insurance § 72—**

Where husband and wife sell lands held by entireties and take a note secured by a deed of trust in part payment of the purchase price, the wife's interest in the note is personalty and she owns no interest in the dwelling on the land so as to bring her within the purview of G.S. 58-180.1 and, therefore, she is not covered by the mortgage clause in a policy of fire insurance on the premises in which she is not named.

2. **Same—**

The fact that a loss payable clause names the holder of the notes secured by the deed of trust, rather than the trustee, is immaterial, since the holder of the note secured by the deed of trust has an insurable interest that will be recognized under the terms of the standard mortgage clause.

3. **Same—**

A standard mortgage clause in a policy of fire insurance operates as a distinct and independent contract between the insurer and the mortgagee, effecting a separate insurance of the mortgage interest.

4. **Same—**

The mortgagee named in a standard mortgage clause of a fire insurance policy is not under duty to give insurer notice of foreclosure of the property, nor is he under duty to give notice of the change of ownership incident to foreclosure until the moment of delivery of the deed to the purchaser at the sale. If the property is purchased at the foreclosure sale by the mortgagee or the *cestui que trust* named in the loss payable clause there is no change of ownership within the purview of the loss payable clause.

5. **Same—**

Provision in a loss payable clause that the mortgagee should give insurer notice of a change of ownership which has come to his knowledge is not a condition precedent but merely requires the mortgagee to give notice of a change in ownership affecting the risk within a reasonable time.

6. **Same— Where wife purchases property at foreclosure for benefit of herself and husband, the husband named in the mortgage clause may recover on fire insurance policy.**

Husband and wife owning realty by the entireties sold same taking a purchase money deed of trust. The husband was named as beneficiary in the mortgage clause in a fire insurance policy taken out by the mortgagor. The deed of trust was foreclosed and the property bought in by the wife, and deed to her was executed by the trustee pursuant to the foreclosure, but it was admitted by insurer that the wife was acting for herself and as agent for her husband in bidding in the property. The day after the trustee's deed was delivered to the wife the dwelling on the land

was destroyed by fire. *Held*, the husband is entitled to recover on the loss payable clause the amount due him on the note secured by the deed of trust, since even though the purchase by the wife be considered a change in ownership, reasonable time for the husband to give notice to the insurer had not expired at the time of the fire, and insured's admission that the wife purchased the property for the benefit of herself and her husband precludes insurer from asserting that the husband had no interest therein.

7. Same—

The mortgagee in a standard mortgage clause has a reasonable time after knowledge to notify insurer of a change in ownership, and while what is a reasonable time is ordinarily a question for the jury, forfeiture for failure to give notice will be denied as a matter of law when notice is given upon the destruction of the property by fire less than ten days after the change of ownership, since even had notice been given, insurer could not terminate the insurance under the loss payable clause until ten days after change of ownership.

APPEAL by defendant Insurance Company from *Thompson, J.*, August, 1959 Civil Term, of UNION.

This cause was heard upon the admissions in the pleadings and stipulations of the parties. The facts are not in dispute.

Plaintiffs owned a tract of land, situate in Union County, as tenants by the entirety. On 3 September 1953 they conveyed it to C. W. Reece and wife, Pearle W. Reece. On the same date Reece and wife executed and delivered to plaintiffs a promissory note in the amount of $15,000.00 and executed and delivered a deed of trust in favor of plaintiffs, who were named as beneficiaries therein, to secure the payment of the note. Reece and wife defaulted. At the request of plaintiffs and after due advertisement, the trustee sold under the power of sale, at public outcry, the tract of land on 19 December 1957. Mary Lee Shores, feme plaintiff, "for herself and as agent for her husband" became the successful bidder at the price of $15,439.38. The bid remained open for more than 10 days and no upset bid was filed. The clerk of superior court confirmed the sale and ordered the trustee to convey the property to the purchaser. Foreclosure deed to Mary Lee Shores was executed 31 December 1957 and duly recorded 4 January 1958. On 5 January 1958, while Reece and wife were away from home, the dwelling house was destroyed by fire.

Prior to the beginning of foreclosure proceedings defendant insurance company issued to Reece and wife a policy of fire insurance with $8,000.00 coverage on the dwelling house, with standard mortgage clause in favor of F. F. Shores, male plaintiff. Premium had been paid by Reece and wife for the period from 19 July 1957 to

19 July 1958. No notice of foreclosure proceedings and sale and conveyance of the land pursuant thereto had been given insurer prior to the fire loss and the policy of insurance had not been transferred to Mary Lee Shores. The fire loss exceeded $8,000.00. Plaintiffs filed proof of loss and demanded payment of the $8,000.00 coverage. Defendants refused payment and this action was instituted.

The pertinent provisions of the standard mortgage clause in favor of F. F. Shores are as follows:

> "Loss, if any, on building items under this policy, 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, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: . . .
>
> "Provided . . . That the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard, which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void.
>
> "This company reserves the right to cancel this policy at any time as provided by its terms, but, in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee), of such cancellation, and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement."

The action against defendant Rabon, general insurance agent, was dismissed on demurrer *ore tenus*.

The court entered judgment in favor of plaintiffs and against insurer in the amount of $8,000.00 and interest. Insurer appealed and assigned error.

O. L. Richardson and William G. Pittman for plaintiffs.
Smith & Griffin for defendants.

MOORE, J. Insurer insists the court below committed error in overruling its demurrer *ore tenus* and rendering judgment for plaintiffs.

It contends: (1) Feme defendant was not named in the policy and was not insured thereunder. (2) Male defendant's status as mortgagee was extinguished by the foreclosure sale, and the execution and delivery of the foreclosure deed and the change of ownership thereunder. (3) Male defendant violated a condition of the insurance contract by failing to give notice of the change of ownership.

Mary Lee Shores, feme plaintiff, was not a named insured in the mortgage clause. She contends that her interest is protected and she is insured according to the terms of the mortgage clause by virtue of G.S. 58-180.1 which provides as follows: "Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof."

This statute relates to "any policy of fire insurance issued to husband or wife, on buildings and household furniture *owned* by husband and wife, either by entirety, in common, or jointly . . ." (Emphasis ours). The owner is "The person in whom is vested the ownership, dominion, or title of property; proprietor." Black's Law Dictionary. Plaintiffs owned an estate by the entirety in the land, but conveyed the land to Reece and wife and took from them a note secured by a deed of trust. The note and the security therefor are considered personal property, a chose in action, and the husband and wife are tenants in common with respect to the ownership thereof. *Turlington v. Lucas,* 186 N.C. 283, 119 S.E. 366. See also *Bowling v. Bowling,* 243 N.C. 515, 91 S.E. 2d 176; *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468; *Dozier v. Leary,* 196 N.C. 12, 144 S.E. 368. We must conclude that plaintiffs were not *owners* of buildings within the purview of the statute and G.S. 58-180.1 does not apply in this case. There is nothing to indicate that insurer had notice of or was requested to insure the interest of the feme plaintiff. There is nothing in the policy or mortgage clause to indicate an intention to insure her interest or from which such intention may be inferred. Her one-half interest is her sole and separate property and her husband has no ownership, dominion or control with respect thereto and is not her agent in the management thereof, in the absence of positive evidence to the contrary. G.S. 52-1. We conclude that the interest of Mary Lee Shores was not insured under the mortgage clause.

The male plaintiff as beneficiary in the deed of trust had an in-

surable interest. "Any interest is insurable if the peril against which insurance is made would bring loss upon the insured, by its immediate and direct effect, a pecuniary loss." *Bank v. Assurance Co.*, 188 N.C. 747, 751, 125 S.E. 631. Ordinarily the trustee in a deed of trust is named insured in a mortgage clause, for this protects all beneficiaries. And, too, the trustee holds the legal title. *Riddick v. Davis*, 220 N.C. 120, 16 S.E. 2d 662. But where a holder of a note secured by a deed of trust is named insured, he has an insurable interest that will be recognized by the court under the terms of the standard mortgage clause.

Even so, insurer contends that the relationship of mortgagor-mortgagee between the owners and F. F. Shores was extinguished by the foreclosure sale and that the change of ownership and failure to give notice thereof terminated the insurance contract as to the male plaintiff.

"It is the accepted position in North Carolina and most other states that when the standard or union mortgage clause is attached to or inserted in a policy insuring property against loss, it operates as a distinct and independent contract between the insurance company and the mortgagee, effecting a separate insurance of the mortgage interest." *Green v. Insurance Co.*, 233 N.C. 321, 325-6, 64 S.E. 2d 162, and authorities cited. This principle has been so steadfastly adhered to by this Court and for such long duration that it must be assumed that insurance companies contract and fix rates in full contemplation of the risk imposed thereby.

It was alleged by plaintiffs and admitted by insurer that Mrs. Shores purchased at the foreclosure sale "for herself and as agent for her husband." The deed was made to Mrs. Shores. The mortgage clause plainly provides that "Loss . . . shall not be invalidated by . . . any foreclosure or other proceedings or notice of sale relating to the property . . ." Surely the possibility exists in every instance where a standard mortgage clause is attached to a policy that there will be a foreclosure. The contract requires on the part of the mortgagee no notice of a foreclosure. We assume that the risk of foreclosure entered into the calculations of the insurer in issuing the contract. The fact that there was a foreclosure in the instant case did not extinguish mortgagee's insurance. The mortgage clause further provides "that the mortgagee . . . shall notify this Company of any change of ownership . . . which shall come to the knowledge of said mortgagee . . . and, unless permitted by this policy, it shall be noted thereon, . . .; otherwise this policy shall be null and void." Having admitted that Mrs. Shores purchased "for herself and as agent for her husband," insurer is in no position to deny that the male plaintiff acquired un-

der the foreclosure proceedings an estate in the land. It is unnecessary to decide whether a tenancy by the entirety or a tenancy in common was thereby created as between the plaintiffs. A husband has an insurable interest in an estate by the entirety which runs to the whole of the property and covers the entire estate. *Carter v. Insurance Co.*, 242 N.C. 578, 89 S.E. 2d 122. Likewise a tenant in common has an insurable interest in property. *Clapp v. Insurance Co.*, 126 N.C. 388, 35 S.E. 617. If male plaintiff acquired only a one-half undivided interest as tenant in common, this corresponds to his interest as mortgagee in the note and deed of trust.

"Under a policy containing a union or standard mortgage clause, the mortgagee's interest is regarded as separately and independently insured, and his acquisition of title to the insured property is generally regarded as an increase of interest, rather than a change of ownership." 29 Am. Jur., Insurance, sec. 651, p. 515. By the overwhelming weight of authority a "deed to the mortgagee upon foreclosure of the mortgage does not defeat the right of the mortgagee under a standard or union mortgage clause, despite the argument that the word 'mortgagee' in that clause discloses an intention to benefit one in that capacity only, and the contention based on the provisions of that clause requiring the mortgagee to notify the insurer of any change of ownership which shall come to (his) knowledge . . ." 29 Am. Jur., Insurance, sec. 554, p. 451; Anno: 45 A.L.R. 598 *et seq.*

In *Insurance Co. v. Insurance Co.* (S.D. 1939), 287 N.W. 46, 124 A.L.R. 1027, the facts and contentions of insurer were similar to those in the instant case. The Court said: "The response of the courts to these contentions may be thus epitomized: It is concluded that the word 'mortgagee' is a mere matter of convenient description or designation, and was not intended to limit the primary agreement to pay the loss to the beneficiary 'as his interest may appear.' It is held that provisions dealing with 'change of ownership' apply only to strangers to the insurance contract and were inserted to permit the insurer to gauge the moral hazard involved and to select those with whom it will contract. It passed judgment, so they say, upon the mortgagee when it wrote the policy. The transfer, they assert, does not operate to increase the interest of the mortgagee."

In an analogous situation, the Court in *Insurance Co. v. Ritter* (N. J. 1933), 164 A. 426, 428, reasoned: "No new person became a party to the insurance contract at the foreclosure sale, and there was no change of risk except by the withdrawal of the interest of the moragagor and the increase of the amount of interest of the mortgagee. The parties to the contract were the same after the sale. The fore-

closure did not constitute such a change of ownership as would invalidate the policy, though no notice of such foreclosure was given to the company."

With respect to the matter of notice of "change of ownership" in a similar factual situation, it was said: " 'the proviso that the mortgagee should notify the defendant of any change of ownership which should come to its knowledge evidently has reference only to changes resulting from the acts of the mortgagor or owner of the equity of redemption.' The proviso has reference to a change or transfer of title or possession to a third person, not to one from the mortgagor to the mortgagee through a foreclosure." *Loan Co. v. Insurance Co.*, (Minn. 1897), 70 N.W. 979, 980. See also *Mill Co. v. Fire Ass'n.* (Minn. 1895), 61 N.W. 828; *Deposit Co. v. Insurance Co.* (Pa. 1955), 117 A. 2d 824; *Loan Ass'n. v. Insurance Co.* (Kan. 1906), 86 P. 142; *Trust Co. v. Trypuc* (N.Y. 1952), 110 N.Y.S. 2d 368; *Insurance Co. v. Loan Ass'n.* (CCA 8, 1926), 14 F. 2d 524; *Insurance Co. v. Drury* (Md. 1926), 132 A. 635, 45 A.L.R. 582.

Insurer asserts that acquisition of title, in whole or in part, by feme plaintiff constituted a "change in ownership" to a stranger to the contract and the failure of the husband mortgagee to give notice of the change worked a forfeiture of the insurance coverage. The law does not favor forfeitures and a provision in a standard mortgage clause requiring the mortgagee to give insurer notice of a change of ownership which has come to his knowledge is not a condition precedent, but is a covenant and directory only and merely requires the mortgagee to give notice to the insurer within a reasonable time after the knowledge is acquired and failure to give notice will not forfeit rights under the insurance contract unless the prohibited change is such as to increase the risk. 45 C.J.S., Insurance, sec. 563, p. 322; *Loan Ass'n. v. Insurance Co.* (Pa. 1916), 66 Pa. Super. 90; *Insurance Co. v. Bank* (CC4C 1933), 65 F. 2d 738, cert. denied 290 U.S. 679; *Insurance Co. v. Loan Ass'n.* (CC8C 1927), 19 F. 2d 134; *Insurance Co. v. Trust Co.*, (Neb. 1894), 60 N.W. 133; *Insurance Co. v. Insurance Co.* (Texas 1948), 209 S.W. 2d 654. As already indicated, mortgagee was under no duty to give notice of the foreclosure proceedings. The duty to give notice of change of ownership did not arise until the deed was actually delivered. Until moment of delivery of the deed there remained a possibility of redemption by the owners. Ordinarily what is a reasonable time is a question for the jury, but we hold, as a matter of law, that delay of five days in giving notice was not unreasonable under the circumstances here presented. Had notice been given at the very moment of delivery of the deed, mort-

gagee would have been entitled, under the terms of the mortgage clause, to ten days notice of cancellation before termination of the insurance contract by insurer. Furthermore, it is inconceivable that vesting of title in the wife increased the hazard. The change of ownership in this case did not extinguish insurer's liability.

The fact that the purchase might have created a tenancy by the entirety in plaintiffs does not enlarge the rights of either of the plaintiffs under the insurance contract. The contract will be construed as of the time of making.

The judgment below is modified to the extent that no recovery is allowed by the feme plaintiff. The case is remanded that the court may determine the amount of indebtedness, with interest, due the male plaintiff as of 5 January 1958, to wit, one-half of the total indebtedness evidenced by the promissory note from Reece and wife to plaintiffs. This amount (not to exceed $8,000.00) with interest shall be the recovery allowed male plaintiff. In determining this indebtedness, the foreclosure sale shall not be construed to have extinguished the debt.

Modified and remanded.

ROSA LEE JOHNSON v. HAROLD WREY LEWIS
AND
EFIRD JOHNSON, BNF ROSA LEE JOHNSON v. HAROLD WREY LEWIS.

(Filed 29 January, 1960.)

1. Trial § 22—

On motion to nonsuit, plaintiffs' evidence must be considered in the light most favorable to them together with so much of defendant's evidence as tends to support the cause of action, but defendant's evidence in conflict with that of plaintiffs should not be considered.

2. Automobiles § 41b—

Evidence tending to show that defendant could have seen plaintiffs' automobile skidding out of control when plaintiffs' vehicle was some five hundred yards away, that plaintiffs' vehicle skidded around so as to head back in the opposite direction, and was proceeding in that direction when its rear was struck by defendant's vehicle with such force as to knock the front seat of the car loose, *is held* sufficient to be submitted to the jury on the questions of negligence and proximate cause, whether defendant, in the exercise of due care, could and should have stopped before running into the rear of plaintiffs' car being for the jury under the evidence.

8. Automobiles § 49—

Where, in the wife's action to recover for injuries sustained when her husband's vehicle, in which she was riding, skidded out of control and was struck from the rear by defendant's automobile, there is no evidence that she knew the rear tires on his car were slick and no evidence that he was driving at excessive speed under the conditions then existing or careless and reckless insofar as a passenger, who had no knowledge of the condition of the tires, could ascertain, the evidence is insufficient to warrant the submission of the issue of the wife's contributory negligence to the jury.

4. Automobiles § 50—

Evidence tending to show merely that the wife was riding as a passenger in an automobile owned and driven by her husband, without any evidence that she had any control over its operation, is insufficient to be submitted to the jury on the issue of her contributory negligence on the theory of a joint enterprise.

5. Damages § 15—

In an action to recover for negligent injury, an instruction on the issue of damages to the effect that plaintiff would be entitled to recover one compensation in a lump sum for injuries past, present, and prospective, etc., will not be held for error on the ground that the charge failed to limit the recovery of future damages to their present cash value, since the charge is based on the cash settlement rule and it appearing that the verdict was not excessive and that there was no request for further instructions to the jury.

6. Damages § 14—

Evidence tending to show that plaintiff was a married woman who at the time of the injury had a child five years old, that as a result of the collision she received a chest injury, breaking some ribs and necessitating a night in a hospital and three weeks in bed, that she suffered constant pain for three weeks, and that on occasion thereafter, after working with her hands, she suffered pain, *is held* sufficient evidence of age, loss of time, and loss of earning power to support the submission of the issue of damages for her injuries, past, present, and prospective.

7. Husband and Wife § 8—

Under G.S. 52-10 the wife may sue alone to recover any pecuniary loss for personal injury sustained by her, including loss of earning power even though she was not gainfully employed at the time of the injury or was engaged merely in the performance of household duties, since a married woman has the potential capacity of working and earning money, and is entitled to recover for impairment of this capacity.

8. Appeal and Error § 42—

A new trial will not be awarded for mere inadvertence in the charge which could not have prejudiced the appellant, construing the charge contextually.

9. Damages § 15—

Upon evidence that a five-year old child suffered a broken leg in a

collision resulting in one of his legs being one-half inch shorter than the other, an instruction which fails to limit the recovery to the present worth of the impairment of his earning capacity after reaching his majority must be held for error.

10. Appeal and Error § 54—

Where the only error relates solely to the issue of damages and is entirely separable from the other issues, the Supreme Court in the exercise of its discretion will ordinarily limit the new trial to the issue of damages, there being no danger of complication.

APPEAL by defendant from *Hall, J.*, April 1959 Term, of BRUNSWICK.

Separate actions by Rosa Lee Johnson and by Efird Johnson, by his next friend, wife and infant son, respectively, of William King Johnson, to recover damages for personal injuries to each plaintiff, allegedly caused by the actionable negligence of defendant, Harold Wrey Lewis.

The two actions were tried together. In each case an issue of negligence and damages was submitted to the jury, and the jury answered the negligence issue in each case Yes, and the issue of damages in Rosa Lee Johnson's case $2,000.00, and the issue of damages in Efird Johnson's case, by his next friend, $5,000.00.

From judgments entered in each case in accord with the verdicts, defendant appeals.

Louis K. Newton and Herring, Walton & Parker by Ernest E. Parker, Jr., for plaintiffs, appellees.

Robert D. Cronly and Varser, McIntyre, Henry & Hedgpeth for defendant, appellant.

PARKER, J. Plaintiffs and defendant offered evidence. Defendant assigns as error the denial by the court of his motions for judgments of nonsuit renewed at the close of all the evidence. Defendant also assigns as error the refusal of the trial court to submit an issue as to contributory negligence in the case of Rosa Lee Johnson, tendered by him.

Plaintiffs and defendant live in Bolivia, Brunswick County. William King Johnson is the husband of Rosa Lee Johnson, and the father of Efird Johnson. Efird Johnson on 5 June 1957 was five years old.

Plaintiffs' evidence tends to show the following facts: On 5 June 1957, William King Johnson owned a 1953 Pontiac automobile. The tires on the front wheels were new, the tires on the rear wheels were worn down considerably and slick. About 5:00 o'clock p. m. on that day, William King Johnson was driving his automobile to Wilmington,

travelling in a northerly direction on Highway #17. His wife was on the front seat, and his son, Efird, was on the rear seat. It had been raining, and the hard-surfaced road was wet and slick. He was driving on his right hand side, and approached a long gradual curve. As he entered the curve, he slowed his automobile to a speed of about 35 to 40 miles an hour. Just as he began to leave the curve, his automobile began skidding, skidded about 30 feet, turned around, and stopped on the right side of the road going south. He immediately started down the road to turn, and had travelled about 25 feet, when the front part of an automobile driven by defendant ran into the rear end of his automobile. Defendant's automobile stopped at the point of impact, and his automobile travelled about 50 feet before it stopped off the highway.

Defendant's automobile was traveling south on the same highway, and was about 500 yards from William King Johnson's automobile, when the Johnson automobile began to skid. William King Johnson could see north along the highway at the point where he started skidding about three-fourth of a mile, and saw defendant's approaching automobile, but he had no opinion as to its speed at the time. Defendant testified: "I was not going more than 25 to 30 miles at the time he spun out in front of me." Defendant also testified that the Johnson automobile could not have been more than two car lengths in front of him, when it spun out in front of him. During the time William King Johnson's automobile was skidding, and until the collision occurred, there were no other automobiles between his automobile and defendant's automobile.

In the collision the front seat of the Johnson automobile was knocked loose, and pushed around toward the dashboard of the automobile. Immediately after the collision Rosa Lee Johnson was between the front and rear seats, and a seat — the record does not state which seat — was pulled off of Efird Johnson, who was unconscious.

Plaintiffs' evidence, considered in the light most favorable to them, and considering so much of defendant's evidence as is favorable to them, and ignoring defendant's evidence which tends to establish a different state of facts, or which tends to contradict or impeach plaintiffs' evidence, *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307, permits these legitimate inferences to be drawn therefrom, that defendant failed to keep a proper lookout in his direction of travel, that if he had performed this duty the law imposed upon him, he could have seen some 500 yards ahead of him the Johnson automobile skidding on the road and out of control, and could in the exercise of due care have stopped his automobile before running into the rear of the Johnson

automobile with such force as to knock loose the front seat of the Johnson automobile, that defendant was guilty of negligence, which proximately caused plaintiffs' injuries. The trial court properly overruled the motions for judgments of nonsuit. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330; *Taylor v. Rierson,* 210 N.C. 185, 185 S.E. 627; *Daniel v. Packing Co.,* 215 N.C. 762, 3 S.E. 2d 282.

In respect to the tendered issue of contributory negligence in Rosa Lee Johnson's case. William King Johnson had owned the automobile about two years. He worked in Wilmington, and drove his automobile to and from work. Rosa Lee Johnson testified: "If I had paid any attention I reckon I could have seen the automobile or its condition. I have my every day duties to do. My duty in the house hardly ever, at that time, carried me to duties in the yard. I did not know the tires were slick." She did not ride in the automobile every day. There is no evidence in the record in either plaintiffs' or defendant's evidence tending to show that Rosa Lee Johnson knew the tires on the rear wheels of the automobile were worn and slick. There is no evidence of excessive speed under the conditions then existing or of careless and reckless driving of the automobile so far as concerns Rosa Lee Johnson, who did not know the rear tires were slick, of failure of William King Johnson to keep a proper lookout, or to have his automobile under control before it started skidding. There is no evidence that Rosa Lee Johnson in the exercise of due care had reasonable ground to believe that the rear tires were worn and slick. There is no evidence of a joint enterprise, or that Rosa Lee Johnson had any control over the automobile owned by her husband which he was driving. She was a guest in the car. There was no evidence to require the submission of an issue of contributory negligence in her case. *York v. York,* 212 N.C. 695, 194 S.E. 486. In the *York* case there was evidence of excessive speed.

Defendant assigns as error number 22, based on exception 23, the trial court's entire charge on the measure of damages on the second issue in *Rosa Lee Johnson's* case, which reads as follows: "I instruct you, gentlemen, that the rule for the measure of damages in a case of this kind is that if the plaintiff in the *Rosa Lee Johnson* case, if the plaintiff is entitled to recover at all, she is entitled to recover her damages, one compensation in a lump sum for all injuries, past, present and prospective, caused by the defendant's wrongful and negligent act, embracing loss of time, loss from inability to perform labor and capacity to earn money. The plaintiff would be entitled for reasonable satisfaction for mental and physical suffering, if any you find, which were the immediate or necessary result of the consequences of

the defendant's wrongful act. It is for you, the jury, to say under all the circumstances what is a fair compensation which you have paid to the plaintiff now as a cash settlement which would reasonably compensate her for all injuries."

Defendant contends that the charge was error, in that it permitted the jury to award Rosa Lee Johnson damages for loss of time, inability to perform labor and capacity to earn money, when there was no evidence as to her age, no evidence that she had ever earned any money, no evidence she had lost any time, and no evidence of her inability to perform her household duties, or to earn money. Defendant contends another vice of this part of the charge is that it did not limit her recovery for prospective loss to the present worth of such loss.

The substance of Rosa Lee Johnson's testimony as to her injuries is: Immediately prior to the injury, she had good health. She received in the collision a chest injury, and some broken ribs. She spent a night in a hospital. She was bandaged, and given medicine. She wore the bandage steady for three weeks, and off and on after the three weeks. As a result of her chest injuries, she stayed in bed three weeks in the home of a relative in Wilmington, except to go to a doctor. Her chest felt like it was a tension inside, and hurt terribly for three weeks, and now sometimes if she works with her hands, it hurts like that. As to her age, her evidence shows she is the mother of Efird Johnson, who on 5 June 1957 was five years old.

By virtue of N.C.G.S. 52-10 a wife can sue alone, and is entitled to recover any pecuniary loss for personal injuries sustained by her by reason of a defendant's actionable negligence "from inability to perform labor or to carry on her household duties," which recovery "shall be her sole and separate property as fully as if she had remained unmarried." *Helmstetler v. Power Co.*, 224 N.C. 821, 32 S.E. 2d 611.

In an action for damages for wrongful death, we have held that direct evidence of the earnings of the deceased is not essential. *Hicks v. Love*, 201 N.C. 773, 161 S.E. 394. We have also held that more than nominal damages are recoverable for the negligent killing of an infant without direct evidence of the pecuniary damage other than sex, age and health. *Russell v. Steamboat Co.*, 126 N.C. 961, 36 S.E. 191.

In 25 C.J.S., Damages, p. 514, it is said: "A person is not deprived of the right to recover damages because of inability to labor or transact business in the future, because of the fact that at the time of the injury he is not engaged in any particular employment. . . . The fact

that a woman attends merely to household duties will not deprive her of a right to recover for loss of earning capacity."

In *Rodgers v. Boynton,* 315 Mass. 279, 52 N.E. 2d 576, 151 A.L.R. 475, the Court said: "It is to be noted that the plaintiff's wife recovered damages for such diminution in earning power as the auditor found was due to the injury. Her ability to work belonged to her; and if her capacity to work was lessened by her injury, then she alone was entitled to recover the value of that part of her capacity to earn of which she was deprived. Her time was her own. She had a right to work and her earnings belonged to her. Whether she was gainfully employed or not at the time of the injury, she was entitled to damages for any impairment in her capacity to work and earn. Citing cases. She was entitled to have considered in the assessment of her damages her inability, due to the injury, to perform her household duties, just as she would be entitled to have considered any other restriction, due to the injury, of her activities."

Our statute N.C.G.S. 52-10 is in accord with the realistic trend of the modern decisions, which recognize the fact that a wife, as an individual, has a personal right to work and earn money, whether she is gainfully employed at the time or engaged merely in the performance of household duties, and where her capacity to work and earn money is impaired by injury, she has suffered a definite, substantial loss. This is particularly true in view of the fact that married women in increasing numbers are engaging in business pursuits and employments as do men, and like men, whether so employed or not, have a potential capacity to labor and earn money. See Annotation 151 A.L.R., p. 511.

The part of the charge quoted above uses the words "one compensation in a lump sum for all injuries, past, present and prospective," and later the words "paid to the plaintiff now as a cash settlement." This was intended to mean, and did mean, that the award should represent the present worth or the present cash value of plaintiff's injuries, past, present and prospective. In the last sentence of this part of the charge the record shows these words "which you have paid to the plaintiff." It would seem that the correct words would be "which should be paid to the plaintiff," or words of similar import. However that may be, reading this part of the charge assigned as error number 22 as a whole, we think that the jury was not confused or misled, or the defendant prejudiced, by the inept words in the last sentence of this part of the charge, and to award a new trial, or a new trial on the issue of damages alone, because of this last sentence, would be meticulous and finical to an unwarranted degree.

It seems that the essential elements of the measure of damages in *Rosa Lee Johnson's* case were given. Defendant requested no further instructions as to damages in her case, nor any amplification of the charge on the measure of damages in her case. The award of damages in her case does not appear excessive. Following our decisions of *Pascal v. Transit Co.*, and *Lambert v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534, and of *Hill v. R. R.*, 180 N.C. 490, 105 S.E. 184, and by virtue of the authorities set forth above in respect to this part of the charge, defendant's assignment of error number 22 to the charge is overruled.

All the other assignments of error, except formal ones, are to the charge. All of these assignments of error have been carefully examined, and all are overruled, except assignments of error numbered 24, 25 and 26 in respect to the measure of damages on the second issue in the case of the infant Efird Johnson.

The infant Efird Johnson's evidence tends to show that in the collision he sustained a broken leg, and as a result of the fracture one of his legs is now one-half inch shorter than the other. The charge on damages in this case is fatally defective in that nowhere does it limit the infant's recovery to the present worth of a fair and reasonable compensation for his mental and physical pain and suffering, and for his permanent injuries, if any, resulting in the impairment of his power or ability to earn money after reaching his majority. *Shipp v. Stage Lines,* 192 N.C. 475, 479, 135 S.E. 339; *Toler v. Savage,* 226 N.C. 208, 37 S.E. 2d 485.

We perceive no good reason why the infant Efird Johnson should again be put to trial on the first and second issues. The statement of *Walker, J.*, for the Court in *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164, has been quoted many times by us with approval: "It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so 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." This case comes within the rule stated by *Justice Walker* as to when a partial new trial will be ordered, and in awarding a partial new trial upon the issue of damages alone, we find precedents in our following decisions: *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658; *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585; *Journigan v. Ice Co.,* 233 N.C. 180, 63 S.E. 2d 183; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *Jackson v. Parks,* 220 N.C. 680, 18 S.E. 2d 138; *Messick v. Hickory,* 211 N.C. 531, 191 S.E. 43; *Gossett v. Metropolitan Life Ins. Co.,* 208 N.

C. 152, 179 S.E. 438; *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690, Ann. Cas. 1915 B 598; *Rushing v. R. R.*, 149 N.C. 158, 62 S.E. 890, *Pickett v. R. R.*, 117 N.C. 616, 23 S.E. 264; *Tillett v. R. R.*, 115 N.C. 662, 20 S.E. 480. The instant case of Efird Johnson, infant, falls in the same category.

In *Rosa Lee Johnson's* case, we find no error. In the case of the infant Efird Johnson, a new trial is ordered, limited, however, to the issue of damages.

Rosa Lee Johnson's Case — No error.

Efird Johnson's, an infant, case — Partial new trial.

EMMA WALKER v. THE COUNTY OF RANDOLPH.

(Filed 29 January, 1960.)

1. Trial § 22—

On motion to nonsuit the evidence must be considered in the light most favorable to plaintiff.

2. Negligence § 11—

A person will not be held contributorily negligent as a matter of law in failing to see an apparent danger in those instances in which his attention is diverted or when he is naturally giving his undivided attention to other matters, if under the same circumstances an ordinarily prudent person would have been inattentive to the danger.

3. Negligence § 37g—

Evidence tending to show that a bulletin board in the hall of a courthouse extended some nineteen inches over a stairway leading to the basement, that plaintiff had never been in that part of the courthouse before, and that while gazing at the bulletin board, intent on finding a notice of sale of land in which she was interested, she moved sideways to her right and fell down the basement stairs to her injury, *is held* not to disclose contributory negligence on her part as a matter of law in failing to see the stairs, even though they were obvious had she looked, since whether she was negligent in failing to see the stairs while her attention was naturally diverted to the bulletin board is a question for the jury.

4. Negligence § 33—

Evidence that a county maintained a bulletin board in the hall of its courthouse with nineteen inches of the bulletin board extending over an unguarded stairway, resulting in injury to an invitee inadvertently stepping into the stairway while examining notices on the bulletin board, *held* sufficient to be submitted to the jury on the issue of negligence.

5. Negligence § 37b—

A person in going into the county courthouse to search for legal notices required by law to be posted at the courthouse is not a licensee but an invitee.

APPEAL by defendant from *Thompson, Special Judge,* 25 May 1959, of RANDOLPH.

This is a civil action instituted by the plaintiff to recover damages from the defendant for injuries caused by the alleged negligence of the defendant in maintaining a bulletin board in the manner hereinafter set out.

It was stipulated by the parties through counsel of record, "That the defendant on July 17, 1958, and for a number of years prior thereto, provided and maintained for the use of posting public notices, bulletin boards on the inside walls at the front entrance of the main portion of the Randolph County Courthouse; that the bulletin board located to the west of such entrance measures 8 feet and 3 inches in length, 3 feet and 9 inches in width; that the bottom thereof is 45 inches from the floor and the top thereof is 90 inches from the floor; that the west end of said bulletin board extends 19 inches over the stairway leading into the basement of said Courthouse * * *."

The defendant stipulated in the court below, "that on the 17th day of July, 1958, there was in force a policy of liability insurance to indemnify the defendant from liability for negligence or tort in excess of the amount prayed for in the complaint in this action, which had theretofore been secured by the Board of County Commissioners of Randolph County, pursuant to G.S. 153-9.44, and that the defendant's governmental immunity from liability for damages by reason of injury to persons or property caused by the negligence or tort of the defendant was thereby and is now waived in this action."

The plaintiff was allegedly injured by falling down the stairway over which the bulletin board extended, while looking for a notice of sale of property in which she had an interest as a tenant in common, which notice had been posted on said bulletin board.

The plaintiff, who was 77 years of age at the time of the accident, testified: "I entered the Courthouse at the front door, walked about half or a third of the way of the hall and did not see the advertisement, and turned around * * *. When I turned I went to my right and saw a bulletin board. I started to look for the advertisement. The bulletin board was some higher than my head * * *. I had to lean back this way to see up to it. When I got to the bulletin board, I tried to read what was on it. I read one and it wasn't what I wanted. I looked a little further and saw one * * * I thought * * * was about

the right length for the piece I had seen in the paper and I stepped over to see it and, when I did, I landed on the floor at the bottom of the stairs, the landing. * * * I was carried to the Randolph Hospital. My head felt like it was cracked, both arms were broke(n) and I hurt all over. * * * I remained in the hospital from the 17th day of July till the 13th day of September. * * * As I moved along in front of the bulletin board looking for the notice of sale I was moving to my right."

On cross-examination, this witness testified, "I entered the Courthouse * * * with (my niece) Mrs. Buren Lanier. * * * As I approached the bulletin board I walked up sort of to the middle of it and went to the right and she went to the left. It was sometime between 2:30, 3 or 4 o'clock. I think it was sort of sunshiny * * *. Nothing was said between us from the time we walked to the board until I fell downstairs. When I walked up to the board, I walked to my right sideways." Questions were propounded to the witness and answered as follows: "Q. While you were walking sideways, did you at any time turn your head and look to the right? A. I was looking up on the board. Q. Did you ever actually take your eyes off the board and look to the right? A. No. After I looked up there and seen that, I didn't take my eyes off the board. I thought I'd see what it was. Q. During this time did you do anything other than read one notice and found that wasn't the one, and looked at the other notice? A. I just glanced all over the board, looking for what I thought I wanted, and when I spied the one I thought I wanted, from the length of it, that is when I stepped over a little and that is when I hit the landing down there."

Mrs. Buren Lanier testified for the plaintiff as follows: "We walked in the front door (of the Courthouse) and neither one knew where the board was. So we walked straight in the hallway. I didn't see anything on the wall so we turned and looked back toward the front and saw the board on the right and walked immediately to it. The board was full of notices. We each started looking at the board * * *. We did not look but a few minutes until she fell. I knew that there was a tract of land in which Emma Walker had an interest and was up for sale at that time. Miss Emma is very small. The board was up quite a bit for her. Notices were posted to the top of the board and to the extreme western edge of it. * * *"

On cross-examination this witness testified, " * * * there was adequate light for us to read those notices without difficulty. * * * The area was adequately lighted. * * *"

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was overruled. Defendant offered

no evidence, rested, and renewed its motion which was again overruled.

Issues of negligence, contributory negligence and damages were submitted to the jury, each of which was answered in favor of the plaintiff. Judgment was entered on the verdict, and the defendant appeals, assigning error.

Archie L. Smith for plaintiff.
Coltrane & Gavin for defendant.

DENNY, J. The primary question to be determined on this appeal is whether or not the court committed error in overruling the defendant's motion for judgment as of nonsuit.

In our opinion, when plaintiff's evidence is considered in the light most favorable to her, as it must be on motion for judgment as of nonsuit, it is sufficient to take the case to the jury. *Pierce v. Insurance Co.*, 240 N.C. 567, 83 S.E. 2d 493; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251; *Grier v. Phillips*, 230 N.C. 672, 55 S.E. 2d 485.

We concede that this is a borderline case. In principle, however, we think the evidence falls within the category of the factual situations involved in *Dennis v. City of Albemarle*, 242 N.C. 263, 87 S.E. 2d 561 and *Hunt v. Meyers Co.*, 201 N.C. 636, 161 S.E. 74.

In *Dennis v. City of Albemarle, supra*, the evidence tended to show that the plaintiff was aware of the maintenance by defendant of the low wire across the highway near his home; that plaintiff, standing at the rear of a truck loaded with hay, with his head above the main load, was on the lookout for the wire, but that he did not know the exact height of the wire; that the wire was difficult to see because of the trees on either side of the highway, and as the truck was driven under the wire, plaintiff's attention was diverted by a workman calling to him from the steeple of a church along the highway. Instinctively, he looked in that direction and spoke to the workman. When he turned back, the wire struck the plaintiff in the mouth, threw him from the truck and caused him to suffer injuries. *Bobbitt, J.*, speaking for the Court, said: "The general rule, applicable here, is well stated in 65 C.J.S., 726, Negligence sec. 120, as follows: 'When a person has exercised the care and caution which an ordinarily prudent person would have exercised under the same or similar circumstances, he is not negligent merely because he temporarily forgot or was inattentive to a known danger. To forget or to be inattentive is not negligence unless it amounts to a failure to exercise ordinary care for one's safety. Regard must be had to the exigencies of the situation, and the circumstances of the particular occasion. Circumstances may exist un-

der which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care, as where the situation requires one to give undivided attention to other matters, or is such as to produce hurry or confusion, or where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger. In order to excuse forgetfulness of, or inattention to, a known danger, some fact, condition, or circumstance must exist which would divert the mind or attention of an ordinarily prudent person; mere lapse of memory is not sufficient, and, if, under the same or similar circumstances, an ordinarily prudent person would not have forgotten or have been inattentive to the danger, such conduct constitutes negligence."

In the case of *Hunt v. Meyers Co., supra,* the plaintiff's evidence was to the effect that about 12 July 1929 she went to the defendant's store to buy a raincoat and some shoes for her boy; that she was directed to the basement department, which was poorly lighted and dark, where the shoes were kept. That there was an aisle or passageway between the tables on which were shoes, and there was a stool between the tables. The stool could be moved around and was one that the clerk sits on to fit shoes, but was out of place and in the aisle, and in going along the aisle between the two tables to look for the shoes, plaintiff testified in part; "The next step I took, I caught my foot in this stool that was directly in my path. I was looking for shoes on the table, at the time I fell over the stool. * * * The shoe department is dark, it is under the balcony. No electric lights there. * * * Q. It was a movable stool and you were just along there and happened to hit the stool? A. Well, the stool — you didn't usually put stools in the aisle for people to fall over. Q. I didn't ask you that, you just happened to hit the stool; did you step on the stool? A. No, I did not step on it. Q. You stepped against it? A. The stool was directly in the aisle and I hooked my foot in it. * * * Q. Then it was light enough to see the shoes, the stairway, the clerk, that is right, isn't it? A. Yes, and if the stool had been sitting on the table I would have seen the stool. Q. If you had looked for the stool you could have seen it? A. We were not supposed to go along looking for the stool. Q. You did see it after you stepped on it.? A. Yes, I saw the girl pick up the stool and push it under the table. I was looking for that then."

The defendant, at the close of plaintiff's evidence and at the close of all the evidence, interposed motions for judgment as of nonsuit, which motions were overruled. The case was submitted to the jury on the issues of negligence, contributory negligence and damages, which were answered in favor of the plaintiff. The defendant appealed from

the judgment entered on the verdict, and this Court upheld the rulings below.

In order to excuse a person from discovering or seeing what he ordinarily would or should have seen, there must exist some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition.

In the instant case, the plaintiff was intent on finding a notice of sale at the time she fell down the stairway, which she could have seen had she looked. According to the evidence, however, she never realized the stairway was there until she fell down it. She had never been in this part of the Courthouse before. And, like the plaintiff in *Hunt v. Meyers Co., supra,* who was looking for "shoes" and not for "stools" in the aisle, the plaintiff herein was looking for a "notice of sale" and not for a "stairway" underneath a portion of the bulletin board.

It would seem that whether the maintenance of an unguarded stairway underneath a portion of a bulletin board constituted negligence and was a proximate cause of the injury to the plaintiff, an invitee, who inadvertently stepped into the stairway while examining notices on the bulletin board, was a question for the jury. We think the issues of negligence and contributory negligence were properly submitted to the twelve. Among opinions from other jurisdictions supporting the conclusion we have reached are *Cheney v. S. Kann Sons & Co.,* 37 F. Supp. 493; *Marquis v. Goldberg* (1931, Mo. App.), 34 S.W. 2d 549; *Johnson v. Rulon,* 363 Pa. 585, 70 A 2d 325; *Groener v. F. W. Woolworth Co.,* 131 N.J.L. 311, 36 A 2d 398; *Hendricken v. Meadows,* 154 Mass. 599, 28 N.E. 1054; *Burkert v. Smith,* 201 Md. 452, 94 A 2d 460. See also 66 A.L.R. 2d Anno: Open Stairway or Trap Door — Injury, where cases bearing on the subject are collected and discussed, pp. 331 through 432.

It is said in 66 A.L.R. 2d, Anno: Open Stairway or Trap Door — Injury, page 389: "Plaintiff in *Cheney v. S. Kann Sons & Co.* (1941, D.C. Dist. Col.), 37 F. Supp. 493, sought damages for injuries sustained when she fell down a flight of * * * stairs in defendant's store. It appeared that, having examined dresses on a rack, plaintiff selected a dress therefrom, turned to get better light on it, took a step, and fell down the steps. The jury returned a verdict in plaintiff's favor, and defendant moved for judgment notwithstanding the verdict, arguing that plaintiff was contributorily negligent as a matter of law. The court, denying defendant's motion, acknowledged that as plaintiff walked toward the rack before examining the dresses she would have observed the stairs beyond the rack if she had looked,

and would also have observed the stairs if she had looked as she turned to get a better light on the dress she had selected, but, it was said, her failure to do so did not constitute contributory negligence as a matter of law under the circumstances presented, which showed that plaintiff had never been at the place at which she was injured before, that her attention was attracted to dresses as she walked toward the steps down which she fell, and that her attention was attracted to the dress she had selected as she turned to get a better light on it."

Defendant's assignment of error to the failure of the court below to sustain its motion for judgment as of nonsuit is overruled.

The defendant assigns as error the following portion of his Honor's charge to the jury: "And I instruct you further that the maintenance of the County of a board for the posting of public notices required by law constitutes and is an implied invitation on the part of the County to persons having an interest in notices posted upon such board to come there and examine the notices on such board and read and inspect same. And any person entering the courthouse building for the purpose of examining or looking for a notice which the person reasonably anticipates being there advertising some matter which the law requires to be advertised in which the person entering has a personal interest of some sort, is an invitee of the County when such person enters the building of the County courthouse for that purpose."

G.S. 1-339.17 requires that notice of public sale of real property shall be posted at the courthouse in the county in which the property is situated, for thirty days immediately preceding the sale. The fact that such notices are required to be posted, a person interested in such notices and who seeks to find the same on the bulletin board maintained by the county for such purpose, is not a mere licensee but an invitee, and we so hold.

In *Coston v. Skyland Hotel, Inc.*, 231 N.C. 546, 57 S.E. 2d 793, this Court quoted with approval from *Coffer v. Bradshaw*, 46 Ga. App. 143, 167 S.E. 119, as follows: "Where the owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such person for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe. The duty of the owner as occupier of premises to keep the premises safe for invitees extends to all portions thereof which the invitee may use in the course of the business for which the invitation is extended." *Leavister v. Piano Co.*, 185 N.C. 152, 116 S.E. 405.

This assignment of error is overruled.

No prejudicial error is shown by the remaining assignments of error that would justify a disturbance of the verdict in the trial below.

Hence, in law, we find

No error.

H. EMMETT POWELL v. EASTERN CAROLINA REGIONAL HOUSING AUTHORITY, J. D. ANTHONY, J. B. POWELL, W. FRANK TAYLOR, W. R. ALLEN AND RAYMOND BRYAN.

(Filed 29 January, 1960.)

1. Municipal Corporations § 1—

Housing authorities created pursuant to G.S. 157-2, 157-4, 157-33 and 157-35 are public bodies having the power of eminent domain within their respective areas, G.S. 157-12, which, in the case of regional authorities, is not limited to a single county.

2. Venue §§ 1c, 2a—

The venue of an action against a regional housing authority to determine the respective rights of the parties in certain land is properly the county in which the realty is situated and in which the authority has express power to act, notwithstanding that the principal office of the authority is in another county, G.S. 1-76 (1). This result is not in conflict with G.S. 1-77 requiring an action against a public officer to be brought in the county in which he transacts his official business, since a regional housing authority perforce has the power to act in a county in which it is authorized to acquire realty, even though it is not the county of its principal office.

APPEAL by defendant Eastern Carolina Regional Housing Authority (hereafter called Authority) from *Stevens, J.*, September, 1959 Term, of SAMPSON.

Plaintiff, a resident of Sampson County, brings this action to determine the ownership of six tracts of land situate in Wayne County. He alleges he owns 91% of said lands, the individual defendants 6%, and defendant Authority 3%, but asserts it owns the lands in severalty. He seeks to have the respective rights of the parties in the land determined. Appellant is a corporation created pursuant to the provisions of c. 157 of the General Statutes. Its home office is at Clinton in Sampson County.

Defendant in apt time moved for a change of venue removing the action to Wayne County where the land is situate. The court denied the motion. Authority excepted and appealed.

Hubbard & Jones for plaintiff, appellee.
Marshall T. Spears for defendant, appellant.

RODMAN, J. The Legislature authorized the creation of housing authorities as a means of protecting low-income citizens from unsafe or unsanitary conditions in urban or rural areas, G.S. 157-2. To accomplish this purpose it authorized the creation of city housing authorities in cities or a ten-mile area adjacent thereto, G.S. 157-4, county authorities within a particular county, G.S. 157-33, and regional authorities within an area composed of two or more contiguous counties, G.S. 157-35.

Authorities created pursuant to any of these statutory provisions are "public bodies," "exercising public powers." G.S. 157-9. Hence they are sometimes called municipal corporations. *Cox v. Kinston,* 217, N.C. 391, 8 S.E. 2d 252. They are given the power of eminent domain, G.S. 157-11, which may be exercised in the area of the authority, G.S. 157-12.

". . . a regional housing authority and the commissioners thereof shall, within the area of operation of such a regional housing authority, have the same functions, rights, powers, duties and limitations provided for housing authorities created for cities or counties . . ." G.S. 157-37, G.S. 157-35.

Defendant appellant claims the right to have this action tried in Wayne County by virtue of G.S. 1-76(1). The language of the statute is specific and definite. Plaintiff asserts that the action was properly begun in Sampson County where the Authority has its principal office. He bases his asserted right on G.S. 1-77, and the interpretation which he asserts has consistently been given to that statute, insisting if there be conflict between the two statutes, the latter should control.

When the statutes are interpreted in the light of their historic background, we are of the opinion there is no conflict between the two and full effect may be given to each.

At the earliest period in the development of the common law, all actions were local. Courts were without power to determine controversy arising beyond their territorial limits. Expanding commerce and public convenience led to a relaxation of this rigid rule. A distinction developed between transitory actions, actions which might have occurred anywhere, and local actions which could only have occurred in a particular place. *Livingston v. Jefferson, infra.*

To invest courts with jurisdiction in transitory actions, a fictional averment was made that the cause of action arose in the jurisdiction

of the court. Defendants were not permitted to traverse this fictional averment of situs in transitory actions but could do so in local actions.

The historical development of venue and the limitation of jurisdiction of courts in local and transitory actions is traced by Chief Justice Marshall, sitting as a Circuit Judge, and by District Judge Tyler in the case of *Livingston v. Jefferson,* decided in 1811, reported 15 Fed. Cas. 660, No. 8411, 1 Brock 203.

Plaintiff, a citizen of New York, alleged he was the owner of and defendant had in 1808, while President of the United States, trespassed "at the city of New-Orleans, in the district of Orleans, to wit, at Richmond, in the county of Henrico, and district of Virginia" upon a parcel known by the name of the "Batture of the Suburb St. Mary." Defendant answered and denied liability, asserting that he acted in his official capacity as President of the United States and pursuant to an Act of Congress. As an additional defense he asserted the court was without jurisdiction of an action involving a trespass on land in Louisiana.

For plaintiff it was argued that the action was transitory and might be brought in any court where defendant could be found, and the averment that the trespass occurred at Richmond, Henrico County, Va., could not be traversed. Opinions were written by each of the judges. It was held the action was local and for that reason the court was without jurisdiction.

The distinction there drawn between local and transitory actions has been frequently applied. In *Ellenwood v. Marietta Chair Co.,* 158 U.S. 105, 39 L. Ed. 913, the court was called upon to determine the jurisdiction of the Circuit Court of Ohio to try an action involving trespass on land in West Va. Mr. Justice Gray said: "By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or possession of land itself, is a local action, and can only be brought within the State in which the land lies." Hence it was held that the court sitting in Ohio had no jurisdiction. In *Stone v. U. S.,* 167 U.S. 178, 42 L. Ed. 127, an action was brought in the District Court of Washington by the United States against Stone to recover the value of timber cut by Stone from lands in Idaho. Stone asserted that the court was without jurisdiction for that the action was local and could only be tried in courts sitting in Idaho. The court held that the action for conversion was transitory and not local. Similar conclusions were reached in *Ophir Silver Min. Co. v. Superior Court,* 147 Cal. 467, 3 Ann. Cas. 340.

We recognize and give effect to the form in which the trespass is

alleged. *Makely v. Boothe Co.*, 129 N.C. 11; *Cooperage Co. v. Lumber Co.*, 151 N.C. 455, 66 S.E. 434; *Blevens v. Lumber Co.*, 207 N.C. 144, 176 S.E. 262.

In *Phillips v. Mayor, etc. of Baltimore*, 72 A 902, plaintiff charged that defendant had caused water to pond on the lands of her husband creating a cesspool "emitting noxious odors and gases, and causing the drainage of said cesspool to flow into the cellar of said residence, and from thence into a well on said premises, used by her for drinking and other family and domestic purposes, and that the water of said well was thereby contaminated and poisoned, by reason of which plaintiff was made ill and sick, and was rendered unable to perform her household duties . . ." She brought suit to recover damages in the courts of Baltimore County. Defendant city denied the jurisdiction of the courts of Baltimore County, insisting that it could only be sued in the courts of its residence. The defense so asserted was sustained, because the action was transitory, and a municipality could only be sued in the courts of its jurisdiction on such actions. The court adverted to its previous decision in the case of *Mayor, etc., of Baltimore v. Meredith's F & J Turnpike Co.*, 65 A 35, stating that it expressly adhered to the decision in that case. There the Turnpike Co. had sued the city in the courts of Baltimore County for flooding and trespassing on the property of the Turnpike Co. outside the city of Baltimore. Holding the action local, the Court of Appeals denied the plea of the city of Baltimore that its courts and only its courts had jurisdiction.

Public convenience which required a relaxation of the rule of locality so as to permit transitory actions to be maintained in any court had no application to actions against public officers predicated upon the performance of their public duties. They could only act in a specified area. Such actions were necessarily local; hence public policy demanded that such actions be brought in the area in which the official was authorized to act.

Our Legislature, when it adopted the Code of Civil Procedure, provided in sec. 67 (now G.S. 1-77): "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose . . . Against a public officer . . . for an act done by him by virtue of his office." This is a statutory declaration of the common law, which we adopted in 1778, G.S. 4-1, insofar as it fixes the place for trial. The Act was first interpreted in *Johnston v. Commissioners*, 67 N.C. 101. The question for decision was the right to *mandamus* to compel the levy of a tax. The trial court had declined to issue the order. *Pearson, C. J.*, said: "Should the plaintiff be under the neces-

sity of taking other proceedings in order to get his money, it may be well to submit to his counsel this question, Must not a writ of *mandamus* to 'the Board of Commissioners of a County' be made returnable to the Superior Court of that County? The propriety of this, in a general point of view, will occur to every one. Are the Commissioners of Cleveland to be required to make return to writs of *mandamus* in all and every county of the State, wherever a holder of one of the coupons of a county bond happens to reside? C.C.P., sec. 67, seems to apply. 'Against a public officer,' for an act done by him by virtue of his office, the proceeding shall be in the county where the act is done."

The *Johnston* case was followed by *Steele v. Commissioners,* 70 N.C. 137. There plaintiff sued on a note. Defendant demurred to the jurisdiction of the court for that the cause of action was local. The demurrer was sustained and the action dismissed. On appeal, *Reade, J.,* said: "We did not think that the failure to pay the debt was the cause of action spoken of in the statute, but that the debt itself was the cause of action; and that the expression 'where the cause of action *arose*' meant where the debt was contracted or originated. And that view is strengthened by the second clause above, 'against a public officer * * * for an act done by him by virtue of his office.' Now, as an officer's official acts are confined to his county, and as the cause of action is his official act, it follows that the cause of action spoken of '*arose*' in the county in which the commissioners acted, and not out of their county, where they did nothing 'by virtue of his office.' It seemed to us to be the policy to require that all public officers, when sued about their official acts, should be sued in the county where they transact their official business." Interestingly, although the court was dealing with a question of venue and expressly recognized that fact, it applied the common law rule of jurisdiction and dismissed the action. When that opinion was written, county commissioners had no authority to act beyond their county limits. The Authority has express power to act in Wayne County.

Jones v. Statesville, 97 N.C. 86, and *Godfrey v. Power Co.,* 224 N. C. 657, 32 S.E. 2d 27, cited and relied upon by plaintiff, raised questions of liability for personal injuries resulting from a failure to perform official duties. Ordinarily an action for personal injuries for failure to perform a duty is transitory, but when the action involves the performance of an official duty, it becomes a local action. *Light Co. v. Commissioners,* 151 N.C. 558, 66 S.E. 569, likewise involved negligent failure to perform an administrative public duty.

Plaintiff adds to the foregoing list *Cecil v. High Point,* 165 N.C.

431, 81 S.E. 616, which he asserts is determinative of this appeal. There High Point, operating a sewerage plant, discharged within its corporate limits in Guilford, sewerage in a stream which flowed to and on plaintiff's land in Davidson County. Plaintiff brought his action in Davidson. Defendant sought to remove to its home county of Guilford. The motion was allowed. This ruling was affirmed on appeal. As the basis for the decision, *Hoke, J.*, said: "The language of section 420 (now G.S. 1-77) more especially pertinent to the inquiry is that an action against a public officer for an act done by virtue of his office shall be tried in the county where the cause of action or *some part thereof* arose, and our cases just referred to, construing the statute, are in accord with authoritative decisions in other States, in which it is held that where the cause of an alleged grievance is situate or exists in one State or county and the injurious results take effect in another, the courts of the former have jurisdiction."

Concedely, the opinion also contains language supporting plaintiff's position, but the observations with respect to a conflict between G.S. 1-76 and 77 were unnecessary in view of the holding that the wrongful act was done in Guilford and hence the cause of action arose there.

Our interpretation of the basis for the decision conforms with the opinion rendered in the subsequent case of *Murphy v. High Point*, 218 N.C. 597, 12 S.E. 2d 1, holding that High Point could be sued on a cause of action arising in Davidson County because of the discharge of sewerage on land in Davidson County from High Point's plant located in Davidson.

Here the cause of action is the title to the land. The land is situate within the domain of the Authority. If perchance any official act could be claimed as relating to the title to the land, it would be the acquisition of title which could only have occurred in Wayne County where the land is situate. The Authority does not assert any inconvenience by trial in Wayne. To the contrary, it insists that it will be greatly inconvenienced if the cause is not tried where the land is situate and all public records relating to the title are kept.

In our opinion, sound reason and the weight of authority support the position that an action involving the title to real estate is properly triable in the county in which the land is situate. *Mayor, etc., of Baltimore v. Meredith's F & J Turnpike Co., supra; Cooper v. Sanitary Dist. No. 1*, 19 N.W. 2d 619 (Neb.); *Dallas v. Hopkins*, 16 S.W. 2d 852 (Tex.); *Swanson v. City of Sioux Falls*, 266 N.W. 115 (S. Dak.); *Oklahoma City v. District Ct.*, 32 P 2d 318, 93 A.L.R. 489 (Okla.); *Oklahoma City v. Rose*, 56 P 2d 775 (Okla.); *City of Corpus Christi v. McMurrey*, 90 S.W. 2d 868 (Tex.); *Fourth Jefferson D. Dist. v.*

City of New Orleans, 14 So. 2d 482 (La.); *Hjelm v. City of St. Cloud*, 152 N.W. 408 (Minn.); *North Sterling Irr. Dist. v. Dickman*, 178 P 559 (Col.); 38 Am. Jur. 421.

Reversed.

ROY R. McDOWELL (EMPLOYEE) v. TOWN OF KURE BEACH (EMPLOYER); AND TRAVELERS INSURANCE COMPANY (CARRIER).

(Filed 29 January, 1960.)

1. Master and Servant § 82—

Within its statutory limits the jurisdiction of the Industrial Commission is a continuing one, and the Commission has authority to make its records speak the truth or correct an error of law to make its award conform to the mandate of statute, and therefore when a Commissioner's award for permanent partial disability is in an amount less than the statutory minimum then in effect (G.S. 97-29), the Commission has authority to correct the award, even *ex mero motu*.

2. Appeal and Error § 11: Master and Servant § 92—

Whether appellant will be permitted to withdraw his appeal is a matter of discretion and not a matter of right, particularly when the rights of appellee may be adversely affected, and ordinarily appellant may withdraw the appeal only with leave of court upon proper application.

3. Master and Servant § 92: Administrative Law § 4—

The Workmen's Compensation Act provides orderly procedure for appeal, G.S. 97-85, and *certiorari* will not lie as a substitute for an appeal but is proper only when the aggrieved party cannot perfect his appeal within the time limited and such inability is not due to any fault on his own part, and there is merit in his exceptions to the action of the administrative agency.

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

APPEAL by plaintiff, employee, from *Parker, J.*, at June, 1959 Civil Term, of NEW HANOVER.

Civil proceeding before North Carolina Industrial Commission pursuant to provisions of the Workmen's Compensation Act of North Carolina.

The record discloses that the parties are subject to and bound by the provisions of the Workmen's Compensation Act, and that plaintiff contended that he sustained two injuries arising out of and in the course of his employment by defendant Town of Kure Beach— the first incident occurred on or about 17 June, 1957, dealt with in Docket B-4803; and the second occurred on or about 16 September, 1957, dealt

with in Docket B-5586. It appears of record that both were considered by N. F. Ransdell, Commissioner, at hearing on 10 March, 1958, each party appearing through counsel; and that based on the stipulations of the parties and the evidence in the case, Ransdell, the hearing commissioner, filed opinion on 20 March 1958, in respect to each claim.

In Docket B-4803, pertaining to the alleged accident of 17 June 1957, Ransdell, Commissioner, found (1) that in the way and manner set out in the opinion plaintiff sustained an injury by accident arising out of and in the course of his employment on 17 June, 1957; (2) that following his injury on 17 June 1957, plaintiff continued to earn full wages; that on 16 September 1957, while reaching down to get a bucket of paint, plaintiff had a recurrence of his injury of 17 June 1957, by reason of which plaintiff was hospitalized for 23 days and a laminectomy was performed on him; that plaintiff was temporarily totally disabled by reason of his injury of 17 June 1957, from 16 September 1957, to 28 October 1957; returning to his work for defendant employer on 28 October 1957, at same wages, and continued in this employment to the date of the hearing in the case; and that plaintiff reached the end of the healing period on 28 December 1957, and has a 15 per cent permanent partial disability to or loss of use of his back by reason of his injury of 17 June 1957.

And, based upon these findings of fact, the hearing commissioner concluded as matters of law that plaintiff sustained an injury by accident arising out of and in the course of his employment on 17 June, 1957; that he was temporarily totally disabled by reason of his injury from 16 September 1957, to 28 October 1957, and is entitled to compensation at the rate of $32.50 per week during this period for temporary total disability, G.S. 97-29; and that having a 15 per cent permanent partial disability to or loss of use of his back by reason of his injury of 17 June 1957, he is entitled to compensation at the rate of $4.88 per week for 300 weeks from and after 28 December 1957 (the date maximum improvement was reached for this disability), G.S. 97-31 (4), *Watts v. Brewer,* 243 N.C. 422.

And based upon the foregoing findings and conclusions, the hearing commissioner entered the following award, in pertinent part: Defendants shall pay plaintiff (1) compensation at the rate of $32.50 per week from 16 September 1957, to 28 October 1957, for temporary total disability.

(2) * * * compensation for 300 weeks from and after 28 December 1957, at the rate of $4.88 per week for his 15 per cent permanent partial loss of use of his back, formal notice of which was given to the parties by the Industrial Commission.

In Docket B-5586, pertaining to the alleged accident of 16 September 1957, Ransdell, Commissioner, found as facts: That in the way and manner set out in the opinion, plaintiff did not sustain an injury by accident arising out of and in the course of his employment on 16 September 1957, and the only unusual occurrence on this date was a recurrence of his injury of 17 June 1957.

And based upon the foregoing findings and stipulations, the hearing commissioner concluded as a matter of law (1) that the incident complained of on 16 September 1957, was not an accident (citing *Hensley v. Cooperative,* 246 N.C. 274), and (2) that on that date plaintiff sustained a recurrence of his injury of 17 June 1957, and whether such recurrence is compensable will be considered in I.C. Docket B-4803, and will not be discussed here, and (3) that plaintiff's claim for benefits resulting from the alleged accident of 16 September 1957, must be denied; and award, in conformity to the foregoing facts and conclusions, so denying compensation, was ordered— formal notice of which was given by the Commission to the parties.

The record fails to show that plaintiff gave notice of appeal from either award so made by the Industrial Commission. But the record does show that in each case on 26 March 1958, attorneys of record for defendants gave notice to the North Carolina Industrial Commission of their appeal from the opinion and award of N. F. Ransdell, Commissioner. In each case the notice of appeal notes "that said appeal is dated and transmitted on March 26, 1958 * * * within seven days of the receipt of the notice of formal award."

Thereafter in each case on 2 April 1958, the Industrial Commission, in letters addressed to attorneys for defendants, acknowledged receipt of their letters of 26 March 1958, giving notice of defendants' appeal to the Full Commission from the opinion of Ransdell of 20 March 1958; and in each instance the Commission states that "The case has been listed on the review docket, and when it is set for hearing, before the Full Commission, all parties will be given due notice." And in each it is stated "We are enclosing a copy of the Commission's Rule Number 20 (formerly Number 21) relative to appeals to the Full Commission in compensation cases, together with eight copies of Form 44 for 'your' use in complying with same. Please file the form in triplicate."

Thereafter in each case under date of "7-23-58" the N. C. Industrial Commission notified defendants and notified counsel for plaintiff and counsel for defendants that, sitting as the Full Commission, it "will review the above case at its office * * * in Raleigh at ten o'clock A.M.,

on August 19, 1958" granting appearance and privilege of oral argument.

The record in Docket B-4803 shows that in the meantime, to wit: under date of 16 August 1958, attorneys for defendants wrote a letter to the North Carolina Industrial Commission, copy to attorneys for plaintiff, reading as follows: "Our client has complied with the award made in these cases, and we desire now to abandon the appeal, notice heretofore given, and which is set for hearing on Tuesday, August 19. We enclose copy of a letter which we have written plaintiff's attorneys and with which we enclose drafts as set forth in the letter."

And the record discloses that in case Docket B-4803 R. Brookes Peters, Commissioner, entered an order for the Full Commission, examined and approved, by the Chairman, and N. F. Ransdell, Commissioner, in which after reviewing the file substantially as hereinabove set forth this question was asked: "May the appellant by letter, received the day before the hearing date, stating that they desire to abandon their appeal effect a dismissal of their appeal, when the appellee would be prejudiced thereby and without his consent?" To this question the order responded "We think not." And in support of this position it is there stated: "When the appeal from the award of the hearing commissioner was taken the case was carried up to the Full Commission (*Hoke v. Greyhound Corp.*, 227 N.C. 374, 375). The Full Commission has the authority and the duty to review the award and, if proper, amend the award, G.S. 97-85. The Commission may, on its own motion, determine any phase of the controversy. *Lewis v. City of High Point*, 1 I.C. 227 (1930).

"Whether or not an appellant will be permitted to dismiss or withdraw his appeal is a matter within the discretion of the court, and not a matter of right on the part of the appellant. He must, accordingly, make application to the proper court for leave to dismiss, and show that the appellee will not be prejudiced by the dismissal. Inasmuch as leave must be obtained from the court, the mere service of notice that the appeal has been withdrawn does not amount to a dismissal. 3 Am. Jur. pp 322-323, Appeal and Error, Sec. 748. While, generally, an appellant may dismiss his appeal without regard to the consent of appellee, he may not do so, without appellee's consent if appellee will be prejudiced thereby." 3 Am. Jur. 321— Appeal and Error, Sec. 747.

Then the order proceeds to state: "The opinion filed 20 March 1958, awarded plaintiff compensation at the rate of $4.88 per week for 300 weeks for his 15 per cent permanent partial loss of use of his back.

In the case of *Kellams v. Metal Products Co.*, 248 N.C. 199, handed down 9 April 1958, the Supreme Court held that compensation awarded an employee for permanent partial disability in accordance with the provisions of G.S. 97-31 was subject to the maximum and minimum provisions of G.S. 97-29. G.S. 97-29 provides for a minimum compensation of $10.00 a week.

"The date of the accident giving rise to this claim, 17 June 1957, falls within the period of time governed by the Kellams decision. (The amendment to G.S. 97-31 (t) made Section 2, Chapter 1396, Session Laws of 1957, was not in effect until 1 July 1957). Therefore, the award made by Commissioner Ransdell 20 March 1958, does not comply with the law. The plaintiff is entitled, as a matter of right, to have this award amended to comply with the law. This is a substantial right and one which would be prejudiced if defendants were permitted to withdraw their appeal and have the award affirmed as written.

"The Full Commission being of the opinion that the award in this case should be amended to provide for compensation to be paid plaintiff at the rate of $10.00 per week for 300 weeks from and after 28 December 1957, for his 15 per cent permanent partial loss of use of his back."

In accordance therewith order was entered amending the order of Ransdell, Commissioner, of March 20, 1958, and affirming it as so amended. And thereupon, and in accordance therewith, notice of formal award was entered on 29 August 1958.

And the record discloses that on 5 September 1958, the order of the Full Commission, dated 29 August 1958, was amended to note that such action by the Commission was *ex mero motu.*

Thereafter on 16 October 1958, attorneys for defendants gave notice to "North Carolina Industrial Commission" and to attorney for plaintiff that Kure Beach and The Travelers Insurance Company had filed a petition for *certiorari* in this case, a copy of which is attached to and served with the notice—further informing it that on November 17, 1958, in Superior Court of New Hanover County, they will make application to the *Honorable Walter J. Bone,* Judge holding the courts of the Fifth Judicial District, for said writ of *certiorari* to the end that the proceedings in the above entitled action may be brought before the Superior Court for review.

The record shows that at March, 1959, Civil Term, upon factual situation substantially as hereinabove set forth, writ of *certioarari* was signed and entered by *Parker, (Joseph W.) J.*

Thereafter at June, 1959, Civil Term of New Hanover County Su-

perior Court the cause came on to be heard, and the court being of opinion that the Full Commission was without jurisdiction to enter the order prepared by R. Brookes Peters, Commissioner, for the Full North Carolina Industrial Commission, dated 29 August 1958, in said proceeding bearing Docket No. B-4803, and that it was further without jurisdiction to enter an award based upon said order; and the court being of the opinion that the said "order for the Full Commission by R. Brookes Peters, Commissioner" was intended to affect substantially the rights of the defendants herein and was entered without notice to the defendants and without opportunity being given the defendants to be heard; and said order and award were irregular, and the entry thereof was contrary to the course and practice of the courts, and done in the attempted exercise, without notice or opportunity for hearing, of a "discretion" which for want of jurisdiction could not be lawfully exercised by said Full North Carolina Industrial Commission upon the record in this proceeding, entered judgment in pertinent part as follows: "That this cause be and the same is hereby remanded to the North Carolina Industrial Commission with direction to enter an order herein vacating the said 'order for the Full Commission by R. Brookes Peters, Commissioner' filed August 29, 1958 together with the award entered thereon and together with all orders of the Full North Carolina Industrial Commission issued subsequent to the opinion and award of N. F. Ransdell, Commissioner, dated March 20, 1958, in the proceeding entitled as above bearing Docket No. B-4803 * * *."

Plaintiff excepts to the foregoing judgment, and the signing and entering thereof, and appeals to Supreme Court and assigns error.

Wessell & Crossley for plaintiff, appellant.
White & Aycock for defendants, appellees.

Winborne, C. J. At the outset the Workmen's Compensation Act of North Carolina provides orderly procedure after an award is entered upon findings of fact and conclusions of law by the hearing commissioner. It is provided by G.S. 97-85 that "if application is made to the Commission within seven days from the date when notice of the award shall have been given, the Full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties, or their representatives, and, if proper, amend the award." Indeed, an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the

dispute may, within thirty days from the date of such award, • • • but not thereafter, appeal from the decision of said Commission to the Superior Court of the county in which the alleged accident happened, or in which the employer resides or has his principal office.

In *Ruth v. Carolina Cleaners, Inc.*, 206 N.C. 540, 174 S.E. 445, *Brogden, J.*, writing for the Court had this to say: "The Industrial Commission has within the limits prescribed by statute continuing jurisdiction, and hence as an administrative agency, empowered to hear evdence, and render awards thereon affecting the rights of workers, has and ought to have authority to make its own records speak the truth in order to protect its own decrees from mistake of material facts and the blight of fraud"; and the opinion concludes with this application of the principle: "The Full Commission finds and asserts that the award was not made in compliance with the provisions of the statute, and manifestly the Commission is entitled to vacate an award which the Commission itself admits was contrary to law."

Such is the situation in case in hand. It is provided by statute G.S. 97-31(20) that the weekly compensation payments referred to in this Section shall be subject to the same limitations as to maximum and minimum as set out in G.S. 97-29. And the provisions of the statute are applied in *Kellams v. Metal Products*, 248 N.C. 199, 102 S.E. 2d 841. There the Court held that the weekly award should have been $8.00 instead of $2.76. Hence it was held that the Superior Court of Mecklenburg County should remand the case to the Industrial Commission for an amendment to its award striking out $2.76 and substituting $8.00 therefor.

Subsequent to this decision in the *Kellams* case the 1955 Session of the General Assembly passed an act (Session Laws 1955, Chapter 1026) amending G.S. 97-29 by striking the word "eight" and inserting in lieu thereof the word "ten"— effective from and after 1 July 1955. Thus it was patent in instant case that the award of $4.88 as weekly compensation for permanent partial loss of use of back was error which should be corrected by inserting in lieu of that figure the figure "ten." To fail to do so, would work a grave injustice to the claimant. And, as stated in the *Ruth* case, *supra*, the Commission has, and ought to have authority to make its own records comply with the law—as indicated by the General Assembly; and it should do so even *ex mero motu*.

Moreover, defendants have elected not to pursue their right to appeal, but to withdraw their notice of appeal to the Full Commission. In this connection it is noted that the Full Commission in opinion of 29 August 1958, took the position that whether an appellant will be

permitted to withdraw his appeal is a matter addressed to the discretion of the court, and not a matter of right on the part of the appellant. This is accordant with decisions of this Court.

In *S. v. Grundler* and *S. v. Jelly*, 251 N.C. 177, 111 S.E. 2d 1, opinion by *Moore, J.*, it is stated that "An appellant has the right to dismiss his appeal with leave of the court * * * And appeal is under the control of the court for all purposes and appellant does not have absolute right to dismiss it * * * To make the withdrawal effective the court must so order and leave of court is required * * * Application to withdraw appeal is addressed to the sound discretion of the court * * *."

As to *certiorari*— in *Sanford v. Oil Co.*, 244 N.C. 388, 93 S.E. 2d 560, opinion by *Barnhill, C. J.*, it is declared: "When the applicable statute provides an appeal from an administrative agency or an inferior court to the Superior Court, the procedure provided in the Act must be followed. A wit of *certiorari* cannot be used as a substitute for an appeal either before or after the time for appeal has expired. In proper cases an appellant may apply for a writ of *certiorari* when it is impossible for him to perfect his appeal during the time allowed by the statute. But the writ should not be allowed until or unless the application therefor makes it appear that (1) the aggrieved party cannot perfect the appeal within the time provided by the statute, (2) his inability to perfect the appeal within the time allowed is not due to any fault on his part, and (3) there is merit in his exceptions to the action of the administrative agency or inferior court, as the case may be" (citing cases).

Applying these principles to case in hand, it seems clear that the writ of *certiorari* was improvidently issued, and the judge of Superior Court was without authority to enter the judgment from which appeal is taken. Therefore it must be reversed, and the case remanded by Superior Court to North Carolina Industrial Commission for further proceeding in accord with legal procedure.

Reversed and remanded.

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

WHITEVILLE CITY ADMINISTRATIVE UNIT v.
COLUMBUS COUNTY BOARD OF COUNTY COMMISSIONERS.

(Filed 29 January, 1960.)

1. Schools § 6a—

When funds are available, the location of a school site lies exclusively with the board of education or the administrative unit charged with the responsibility of operating the school, but such authority is predicate on the assumption that money is available to pay for the site, and the statute does not touch the question of where the funds shall come from or authorize the school authorities to compel the levying of a tax to provide such funds. G.S. 115-125.

2. Schools § 9a—

It is the duty of a board of education or administrative unit to evaluate the need of funds for the operation of the schools and apply to the board of county commissioners for the necessary funds, and when the funds are appropriated, to expend the same within the designated classifications as will best serve school needs.

3. Same—

It is the duty of the board of county commissioners to study the requests for school funds filed with it by the board of education, and by taxation to provide such funds, and only such funds, as may be needed for the economical administration of the schools. G.S. 115-80.

4. Same—

When disagreement arises between the board of education and the board of county commissioners as to the amount of funds necessary for school purposes, the county commissioners cannot be required to provide funds beyond their estimate of needs unless the controversy is resolved against them in an action in the nature of *mandamus* to compel the levy of the necessary taxes, in which action the issue must be determined by a jury when jury trial is requested by the county commissioners.

5. Same— Verdict of jury is determinative of controversy of whether particular item of expenditure is reasonably necessary to maintenance of schools.

A school administrative unit submitted its request for funds necessary for operation of the schools, which included an item for the purchase of a new school site upon which to reconstruct a school to replace one that had burned, upon its contention that the old site was inadequate. The board of commissioners refused the request for funds for the new site upon its contention that such funds were not reasonably necessary to maintain the schools of the district. In an action instituted by the administrative unit, the county commissioners demanded a jury trial, and the jury found that the funds for the new school site were not necessary to the maintenance of the schools of the district. *Held:* The administrative unit is not entitled to compel the levy of taxes for the purpose of raising the funds for the new school site.

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

ADMINISTRATIVE UNIT v. COMMISSIONERS OF COLUMBUS.

APPEAL by Whiteville City Administrative Unit from *Craven, S. J.*, August, 1959 Special Term, of COLUMBUS.

Appellant is a governmental agency charged with responsibility of operating the public school system in a portion of Columbus County, G.S. 115-4. (The school laws were recodified in 1955. The section references to the General Statutes used in this opinion are those appearing in the 1959 Supplement.)

Appellant operated an elementary and a high school on a site containing 15.5 acres, five acres of which was allocated to the elementary school and 10.5 acres to the high school. The building housing the high school was destroyed by fire 17 December 1958. It was insured. Appellant collected and had available from its insurance carrier for use for a new high school $302,646.24. After due consideration, appellant concluded: the old location was not desirable as a site for a new high school both because of location and area; a new high school to replace the one burned was a necessity; an adequate building properly equipped would cost $391,678.85; a new site containing 22 acres, which appellant had selected, would cost $44,000; in addition to these sums, it needed as a capital outlay $3,800 to repair its other buildings.

Appellant filed with defendant Board of Commissioners a budget showing its needs for: (A) current expenses, (B) capital outlay, and (C) debt service as prescribed by G.S. 115-78 and 80. Defendant Commissioners approved the budget for current expenses and debt service, and obligated the county to provide the amounts requested.

The Commissioners approved each of the items requested in the capital outlay budget except for $44,000 for the proposed new site. It refused to appropriate any money to purchase a new site.

Appellant requested a joint meeting of the two Boards as provided by G.S. 115-87. The joint meeting was held. The parties were unable to agree on the need for a new site. Thereupon the matter was submitted to the clerk of the Superior Court of Columbus County as provided by G.S. 115-87. The clerk, on 31 July, rendered his decision. He found that the Administrative Unit "had the power in their sound discretion to select a new site and to determine the necessity of such new site," and he voted with it. The Commissioners in due time gave notice of appeal, having excepted to the findings and conclusions of the clerk. They demanded a jury trial. The court submitted two issues to the jury as follows:

"Is the sum of $44,000.00 a fair and reasonable amount to be expended for the new school site as contended for by the Whiteville City Schools Administrative Unit?

"ANSWER: Yes, by consent, Craven, J.

"Is the item of $44,000.00 sought to be budgeted for the acquisition of additional lands reasonably necessary to maintain the schools of the Whiteville Administrative District?

ANSWER: No."

The Commissioners have not challenged the value of the property selected. They deny the need for other or additional land for a site. Based on the verdict, the court adjudged "that the said funds for a new site were not reasonably necessary to maintain the schools of the Whiteville Administrative District." The Administrative Unit excepted and appealed.

D. Jack Hooks and Jesse A. Jones for plaintiff, appellant.
E. K. Proctor and Powell & Powell for defendant, appellee.

RODMAN, J. This appeal cannot be determined without an understanding of the questions to be determined. Appellant argues the question is the right of the school authorities to select the site on which a building is to be erected. Appellee argues it has the right to determine what portion of the capital outlay budget is necessary to operate the schools.

The clerk apparently reached the conclusion that both questions were presented. He concluded the Administrative Unit had superior authority in each instance.

When a new school is to be established and monies are available, the location of the site lies exclusively with the board of education or the administrative unit charged with the responsibility of operating the schools. *Parker v. Anson County,* 237 N.C. 78, 74 S.E. 2d 338; *Kistler v. Board of Education,* 233 N.C. 400, 64 S.E. 2d 403; *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484. Arbitration was not necessary to establish that right. Arbitration was necessary because the Commissioners concluded a new site was not necessary for the operation of the public schools and since not necessary, they were not compelled to levy a tax for that purpose.

When the reasons for and the history of the arbitration statutes, G.S. 115-87 and 88, are considered, the answer to the question presented by this appeal becomes apparent.

Art. IX, sec. 2, of the Constitution of 1868 declared a general system of public education should be provided by taxation. Sec. 3 of that article imposed the duty of operating at least one school in each district for a minimum term of four months. The duty rested on the county commissioners to provide the necessary funds.

Art. V, sec. 1, of that Constitution placed a limitation on the rate of taxation which commissioners could fix.

This Court, in 1885, held that county commissioners could not exceed the constitutional rate of taxation even if the excess were necessary to operate the public schools. *Barksdale v. Commissioners,* 93 N.C. 472.

As a climax to Aycock's campaign for better public schools adequately supported by taxation, the Legislature of 1901 enacted c. 4, entitled "An Act to Revise and Consolidate the Public School Law." It provided for a State fund to be distributed among the counties. Sec. 6 provided: "If the tax levied for the State for the support of the public schools shall be insufficient to maintain one or more schools in each school district for a period of four months, then the Board of Commissioners of each county shall levy annually a special tax to supply the deficiency . . ." That Act also required the county board of education to file with the commissioners "an estimate of the amount of money necessary to maintain the schools for four months and submit it to the County Commissioners."

Acting under the authority of the Act of 1901, the county commissioners of Franklin County levied a tax for the support of the four months' term in excess of the rate permitted by Art. V of the Constitution. A taxpayer challenged the tax so levied. This Court overruled the Barksdale decision and held that commissioners were required to levy the taxes requested by the educational authorities and found by the commissioners to be necessary for the operation of the schools for the constitutional term. *Collie v. Commissioners,* 145 N.C. 170.

In the *Collie* case the educational forces and the tax-levying authorities were in agreement as to the amount necessary for the operation of the schools. The Collie decision was followed by *Board of Education v. Commissioners,* 150 N.C. 116, 63 S.E. 724. There the educational authorities, complying with the Act of 1901, had filed with the tax-levying authorities a request for funds for the operation of schools for the term fixed by the Constitution. The county commissioners considered the request, approved it in part but refused to provide all the sums requested by the educational forces. The board of education sought *mandamus* to compel the county commissioners to comply with their request. The commissioners resisted, contending they had the duty of determining what funds were necessary. The Superior Court refused to issue the writ requested by the board of education. This Court affirmed. In effect the decision supported the contention of the commissioners that in the final analysis they had the right

to determine what funds were necessary for the operation of the schools.

The Legislature was in session when *Board of Education v. Commissioners, supra,* was decided. To afford recognition of the responsibilities resting on each board and to avoid dominance by either board, the Legislature provided for a hearing by a disinterested fact finder. It enacted: "In the event of a disagreement between the county board of education and the board of county commissioners as to the rate of tax to be levied, the county board of education may bring an action in the nature of *mandamus* against the board of county commissioners to compel the levy of such special tax . . . and it shall be the duty of the judge hearing the same to find the facts as to the amount needed . . . which finding shall be conclusive . . ." Sec. 1, c. 508, P.L. 1909.

This Act was challengd in *Board of Education v. Board of Commissioners,* 174 N.C. 469, 93 S.E. 1001. This Court held it valid.

When the Constitution was amended in 1919, lengthening the school term, similar legislation was enacted conforming to the constitutional amendment. Sec. 8, c. 102, P.L. 1919, C.S. 5488. This Act was attacked as invalid for failure to provide for jury trial. The Act was held valid, *Board of Education v. Commissioners,* 182 N.C. 571, 109 S.E. 630. The next Legislature provided for trial by jury when the county commissioners so requested. Sec. 188, c. 136, P.L. 1923; *In re Board of Education,* 187 N.C. 710, 122 S.E. 760.

The statutes to which we have referred constitute the framework for what now appears as G.S. 115-87 and 88. Subsequent amendments merely relate to details.

The basic philosophy with respect to the operation of our school system remains. It is the duty of the board of education to evaluate their needs, apply to the board of county commissioners for funds to supply the needs, and when funds are appropriated, to spend the same within the designated classification, current expenses and capital outlay, as will best serve school needs. It is the duty of county commissioners to study the request for funds filed with them by the board of education and to provide by taxation such funds, and only such funds, as may be needed for economical administration of schools. G.S. 115-80.

This Court has consistently recognized the obligations and duties resting on each board. *Denny, J.,* said in *Atkins v. McAden, supra:* "The county board of education and the school commissioners or trustees of an administrative unit, are charged with the responsibility of building all new schoolhouses and repairing the old ones in their

respective administrative units. However, the board of county commissioners is charged with the duty to determine what expenditures shall be made for the erection, repair and equipment of school buildings in the respective administrative units in the county."

Barnhill, J. (later C.J.), said: "The right of the Board of Commissioners to determine what expenditures shall be made arises when a proposal for the expenditure of funds for school facilities is made by the Board of Education. Having determined that question and having provided the funds it deems necessary, its jurisdiction ends and the authority to execute the plan of enlargement or improvement reverts to the Board of Education. It selects and purchases new sites, approves the plans for the erection of new buildings or the remodeling or enlarging of old buildings. It lets the contracts, supervises the construction, and expends the funds." *Parker v. Anson County, supra.*

When disagreement arises, the county commissioners cannot be required to provide funds beyond their estimate of needs until the controversy has been resolved in the manner provided by statute. *Rollins v. Rogers,* 204 N.C. 308, 168 S.E. 206.

There has been no adjudication here which prohibits the school authorities from acquiring the site they desire. What has been determined is that it cannot be acquired with taxes levied on the people of Columbus County. Appellant may acquire it as a gift or with funds coming from sources other than taxes levied by the Commissioners of Columbus County. *Edwards v. Board of Education,* 235 N.C. 345, 70 S.E. 2d 170.

G.S. 115-125, relied upon by appellant, has no application to this case. It merely gives the school authorities the right to acquire school sites. It is predicated on the assumption that school authorities have the money to pay for the site. It does not touch the question of where these funds shall come from or the power of the school authorities to compel the levying of a tax.

The basic fact has been determined adversely to appellant. Our examination of the record and briefs shows

No error.

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

ROY L. JONES, ADMINISTRATOR OF THE ESTATE OF MARVIN COMER JONES, DECEASED v. DOUGLAS AIRCRAFT COMPANY, INC.

(Filed 29 January, 1960.)

1. Master and Servant § 1—

Where a contractor rents a crane together with the crane operator to perform part of the work, the crane operator, for the period so employed, is ordinarily an employee of the contractor.

2. Master and Servant § 18— Evidence of negligence of main contractor resulting in injury to employee of construction contractor held sufficient to be submitted to the jury.

Evidence tending to show that a manufacturer under contract with the Federal Government was given possession and control of a Federal plant for the purpose of manufacturing an article for the Government, that to provide the manufacturer with necessary facilities the Government contracted with a construction company for the erection of a building, that in the performance of the work it was necessary to operate a large crane under high tension wires, that the contractor requested the manufacturer to have the current turned off on a particular day when the crane was to be operated, that the manufacturer assured the contractor this would be done, and that on the day appointed the crane operator was electrocuted when the crane came in contact with the high tension wires, the current not having been turned off as promised, *is held* sufficient to be submitted to the jury in an action against the manufacturer for the wrongful death of the crane operator.

3. Same—

A crane operator will not be held guilty of contributory negligence as a matter of law in operating a crane under high tension wires when he had been given to understand that the current would be turned off during the progress of the work, nor will he be held contributorily negligent if, after learning that the current had not been cut off, he went to the crane while its top was moving toward the wires in the reasonable belief that he could stop the movement of the crane before there was contact with the wires.

4. Evidence § 29—

Evidence that upon learning of the fatal injury of a workman the person whom plaintiff claimed was under duty to have given an order which would have obviated the danger causing the injury, was taken to a hospital, is incompetent as an implied admission of negligence in the absence of any evidence as to the reason for the hospitalization.

5. Evidence § 31—

An admission by an agent in regard to a past occurrence not forming part of the *res gestae* is incompetent against the principal.

6. Master and Servant § 18—

The liability of the principal contractor in control of the premises for the electrocution of an employee of a contractor in construction of a building on the premises is based upon the duty not to render the place

where the employee was working unsafe by continuing to transmit current over the wires after request that the current be turned off during the progress of the work, and an instruction predicating the liability of the principal contractor upon the duty of a power company in the distribution of electricity *is held* for prejudicial error.

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

APPEAL by Douglas Aircraft Company, Inc. from *Froneberger, J.*, March 9, 1959 Regular Term, of Schedule "B" of MECKLENBURG.

This is an action to recover damages on account of the death on 9 April 1957, of plaintiff's intestate (hereafter referred to as Jones) resulting from the asserted negligence of appellant (hereafter referred to as Douglas).

The United States owned a parcel of land in Charlotte known as Charlotte Ordinance Missile Plant. It contracted with Douglas for the construction of Nike missiles. To facilitate production it gave Douglas possession and control of the Missile Plant. The plant was in need of "reactivation and rehabilitation." To fill that need the United States entered into a contract with Boyd & Goforth to make additions to plant buildings. At the time of Jones' death, Boyd & Goforth were performing their contract with the United States, working on what was known as "Building 3." A part of their work was pouring a concrete mixture on steel rods to provide a reinforced section of the addition to the building then under construction. To pour the concrete, Boyd & Goforth rented from Charlotte Equipment Company a mobile crane and its operator, Jones.

Included as a part of the Missile Plant which the United States furnished Douglas was an electric distribution system. The wires of this system, carrying 13,200 volts, passed 40 feet overhead in proximity to the place where Boyd & Goforth were at work. The crane operated by Jones came in contact with these high voltage wires. As a result, Jones was electrocuted.

Plaintiff bases his right to recover on the asserted negligent failure of Douglas to switch the current off of the high potential lines in proximity to the construction work while that work was in progress. He alleges Douglas had knowledge of the work, the manner in which it was being performed, the danger of contact between the crane and the wires, and the promise and assurance on the part of Douglas that the current would be cut off for the pouring of the concrete.

Douglas denied the alleged negligence and as an additional defense pleaded contributory negligence on the part of Jones, an experienced operator, in operating his crane in proximity to these high potential wires and in permitting the crane to come in contact with the wires.

Issues of negligence, contributory negligence, and damages were submitted to and answered by the jury in conformity with plaintiff's contentions. Judgment was entered based on the verdict, and Douglas, having excepted, appealed.

Carswell & Justice, Robinson, Jones & Hewson, Kennedy, Covington, Lobdell & Hickman for plaintiff, appellee.
Carpenter & Webb for defendant, appellant.

RODMAN, J. The assignment of error which requires first consideration is the motion to nonsuit. Appellant argues the motion should have been sustained on either of two theories: (1) the failure of plaintiff to establish the asserted negligence of defendant, and (2) clear and uncontradicted evidence of negligence of Jones proximately causing his death.

Without reciting the evidence, it is, we think, sufficient to permit but not compel a jury to find these facts: Jones, when he left Charlotte Equipment Company with the crane to work for Boyd & Goforth, became, for the period so employed, the servant of Boyd & Goforth. *Jackson v. Joyner*, 236 N.C. 259, 72 S.E. 2d 589. Boyd & Goforth and its employees were rightly on the premises engaged in the construction of a building which Douglas had requested the Government to erect for its, Douglas' convenience. The work which Jones was employed to do was dangerous and the place assigned to do the work unsafe so long as the overhead wires were energized. That fact was known to and recognized by Boyd & Goforth and by Douglas. On 8 April Jones, acting under orders of Byrd, manager of Charlotte Equipment Company, took the identical crane which he used on the 9th when he was electrocuted to the plant to work for Boyd & Goforth. He was permitted by the guard at the gate to enter and proceeded to a place in proximity to the point where the work was to be performed but he was not permitted by Chaney, superintendent for Boyd & Goforth, to go to the scene of work until the electric lines had been de-energized. This resulted in a substantial delay. Jones and the crane which he operated were then used in placing the steel which would reinforce the concrete to be poured the following day. To avoid a similar delay when the concrete was to be poured, Chaney, on the afternoon of the 8th, in accord with designated procedure, called Wilson, of the Corps of Engineers, and requested Wilson to have the lines de-energized by 7:30 on the morning of the 9th. Thereupon Wilson called Bolick, an assistant foreman for Douglas, whose duty it was to throw the necessary switches cutting current from the lines adjacent to the point

where Jones would work. Bolick informed Wilson he would have to obtain permission from his superiors before giving assurances that the current would be off at 7:30 on the following morning. Subsequently Bolick called Wilson, informing him that the necessary authorization had been obtained and the current would be off at 7:30 on the morning of the 9th. Wilson thereupon so informed Chaney. The promise made by Bolick for Douglas to de-energize by 7:30 a.m. on the 9th was communicated to Jones. Wilson testified he had the switch keys before Douglas took possession. He delivered these keys to Douglas and was then directed to contact either Quinn or Bolick whenever it was necessary to de-energize a line. Pursuant to this direction given by Douglas, he communicated with Bolick on the 8th. On the 9th, Byrd, in response to a telephone call from Chaney, sent Jones to pour the concrete. Jones passed through the plant gate at 7:30. He was electrocuted at 8:00 a.m. or shortly thereafter. The line had not been de-energized as Bolick had promised and as Wilson had informed Chaney and as Chaney had informed Byrd.

The crane was mounted on wheels. In placing it in position for work, the driver ran over a piece of 2 x 4 which damaged the hose connecting the radiator and engine. The boom and bucket were elevated. They were held in a horizontal position by means of a brake. This brake was not sufficient to prevent a horizontal movement caused by the slope of the land, the wind, and the vibration of the engine. The boom and bucket began to swing towards the power line while Jones was under the machine attempting to repair the hose to the radiator. In response to a call from a bystander, he came from under the machine, ran a few steps away from it, and then turned and went back to it, apparently in an attempt to check its movement and prevent contact with the wires. When he touched the machine he was electrocuted.

Since the jury might find these facts, we must determine the motion to nonsuit upon the assumption that they have been established.

The relationship of master and servant existing between Boyd & Goforth and Jones imposed on the former the duty of exercising reasonable care to provide a reasonably safe place for its employee to work. *Bemont v. Isenhour,* 249 N.C. 106, 105 S.E. 2d 431; *Baker v. R. R.,* 232 N.C. 523, 61 S.E. 2d 621; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Ainsley v. Lumber Co.,* 165 N.C. 122, 81 S.E. 4.

To discharge this obligation the master secured a promise from Douglas that the danger would be removed and the place made safe. The master attempted to perform its duty, but contrary to the assurance given, Douglas continued to send the invisible current along

the power line, leaving the place where the work was to be performed unsafe and hazardous. Douglas' promise was an invitation to Jones to proceed with his work. A failure to de-energize in this situation was a breach of duty imposing liability for injuries proximately resulting therefrom. *Bemont v. Isenhour, supra; Thompson v. DeVonde,* 235 N.C. 520, 70 S.E. 2d 424; *Coston v. Hotel Co.,* 231 N.C. 546, 57 S.E. 2d 793; *Bell v. Florida Power & Light Co.,* 106 So. 2d 224; *Reboni v. Case Brothers,* 78 A 2d 887; *Brown v. American Steel Foundries,* 116 A 546.

The law is, we think, correctly stated in the notes 44 A.L.R. 982: "Where the premises on which the stipulated work is executed remain under the control of the principal employer while the contract is in the course of performance, a servant of the contractor is in a position of an invitee, and as such entitled to recover for any injury which he may sustain by reason of the abnormally dangerous condition of the premises or the plant thereon, if the evidence shows that the principal employer was, and the servant was not, chargeable with knowledge, actual or constructive, of the existence of that condition." *Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561.

In the absence of information showing a contrary condition, Jones had a right to rely on the assurance given by Douglas to his employer that the current would be off and on the employer's directions to proceed with the work. *Kennedy v. Telegraph Co.,* 201 N.C. 756, 161 S. E. 396; *Overton v. Manufacturing Co.,* 196 N.C. 670, 146 S.E. 706; *Fowler v. Conduit Co.,* 192 N.C. 14, 133 S.E. 188; *Terrell v. Washington,* 158 N.C. 281 73 S.E. 888.

The evidence does not establish as a matter of law negligence on the part of Jones. If Jones went to the crane understanding that the current had been cut off, he anticipated no hazard. If he learned after placing the machine that the current had not been cut off, but reasonably thought that he could stop the crane before there was contact with the wires, his attempt to do so would not be a negligent act.

The court correctly overruled the motion to nonsuit.

The general manager of Douglas was adversely examined by plaintiff. He was asked: "Q. Did you know that Mr. Bolick had to be taken to the hospital shortly after hearing about the accident? A. Yes."

Defendant's witness Quinn testified on cross-examination that he saw Bolick about one-half hour after he learned of Jones' death. He was then asked and replied: "Q. Was he not stricken and taken to the hospital? Soon after Mr. Wilson called him? A. Yes, he was. Q. Did you see the statement that he gave to the hospital as to why he

was stricken? A. I did not see the statement. I know that it was within half an hour after this thing happened or this man was killed before he was stricken.

This testimony was admitted over defendant's objection. Bolick was not a witness. Unless offered for the purpose of establishing liability, this evidence was immaterial and had no place in the case. If offered as an admission by Bolick of a negligent failure to comply with his promise, as plaintiff asserts, relying on *S. v. Lawrence,* 196 N.C. 562, 146 S.E. 395, it was incompetent. This is so for two reasons: (1) without additional evidence the reason for Bolick's hospitalization is purely speculative; it cannot rise to the dignity of an admission of wrongful conduct but could doubtlessly be used effectively on the thesis of guilty conscience; (2) if an admission, it related to a past occurrence. Admissions made by an agent not a part of the *res gestae* are not competent against the principal. *Lee v. R. R.,* 237 N.C. 357; 75 S.E. 2d 143; *Coley v. Phillips,* 224 N.C. 618, 32 S.E. 2d 757; *Salmon v. Pearce,* 223 N.C. 587, 27 S.E. 2d 647; *Batchelor v. R. R.,* 196 N.C. 84, 144 S.E. 542.

The court charged: "It is the duty of the company under such conditions to keep the wires perfectly insulated and it must exercise the utmost care to maintain them in such condition and at such places; a high degree of foresight is required because of the character and behavior of electricity which it generates and sells. The defendant's knowledge of its service is supposedly superior to that of its customers."

"Now, ladies and gentlemen of the jury, this rule is given as though an electrical company was the one that was distributing the power, and this, the Court thinks, is applicable to the company such as the defendant in this case having charge of the distribution of power, there on the premises on which the plaintiff was killed."

The court, in other portions of its charge, dealt with liability of an electric company for injuries resulting from negligent construction or maintenance of its distibution system. Defendant excepted to the quoted and similar portions of the charge.

Plaintiff does not seek to impose liability for failure to insulate the wires. In fact, it is said in his brief: "It was conceded by all parties that the wires were not insulated and that the defendant was not required to have them insulated." If defendant is liable, it is not because plaintiff's intestate was a customer of a public utility company or there was any duty owing to him as such. Liability is established upon proof that defendant, having assented to the performance of work for its benefit, owed plaintiff's intestate a duty not to render the

place in which he was at work unsafe by continuing to transmit a deadly current over its lines in violation of its promise. The court should have so instructed the jury. The instructions given were improper and presented an erroneous statement of the law as applicable to the facts developed in this case. *Lookabill v. Regan,* 245 N.C. 500, 96 S.E. 2d 421; *Harris v. Construction Co.,* 240 N.C. 556, 82 S.E. 2d 689; *Blanton v. Dairy,* 238 N.C. 382, 77 S.E. 2d 922; *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558; *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613. The defendant's assignments of error with respect to the charge are well taken.

New trial.

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

MARY NELL SCHMIDT v. W. W. BRYANT, DOROTHY G. BRYANT, MARION S. TAYLOR AND SYBIL B. TAYLOR.

(Filed 29 January, 1960.)

1. Pleadings § 19c—

A joint demurrer by all of the defendants must be overruled if the complaint states a good cause of action as to any one of them.

2. Frauds, Statute of § 6a—

Parole testimony is competent to contradict a consideration recited in a deed, although such testimony may not be used to alter or contradict the conveyance itself in the absence of fraud, mistake or undue influence.

3. Trusts § 2a—

A grantor may not engraft a parol trust in favor of himself upon his warranty deed.

4. Frauds, Statute of § 6a—

A grantor may not enforce a parol agreement on the part of the grantee to reconvey, nor an agreement by the grantee to sell the property and divide the proceeds of sale.

5. Same—

Where the grantor alleges that the grantee entered a contemporaneous parol agreement to reconvey or to sell the land and divide the profits realized from the sale, and that the grantee had sold the property, the parol agreement as to the division of profits does not involve an interest in land and does not come within the statute of frauds, and, the part of the agreement coming within the statute having been executed, the original grantor may maintain an action for an accounting to determine whether or not any profit was realized from the sale for a division under the agreement.

SCHMIDT *v.* BRYANT.

APPEAL by plaintiff from *Nimocks, J.*, 1 June Civil Term, 1959, of CUMBERLAND.

This is an action instituted for an accounting. The alleged facts are substantially as follows: That plaintiff is a niece of the defendant W. W. Bryant; that the defendants Bryant " * * * were widely experienced in the management, development, purchasing, selling, renting and financing of real estate * * * while plaintiff was relatively inexperienced in the same." That "plaintiff had had prior direct dealings with said defendants W. W. Bryant and wife, Dorothy G. Bryant, in the matters pertaining to real estate, including the purchase of residential lots from said defendants * * *." (The house and lots involved herein were located in a real estate subdivision owned and developed by the defendants Bryant, from whom the lots were purchased.) That, "as a result of (the aforesaid circumstances) * * * plaintiff had come to rely upon and to have confidence in the judgment of said defendants in their mutual dealings * * * which said reliance and confidence were encouraged by said defendants in divers ways."

Prior to 5 June 1954, the plaintiff, Mary Nell Schmidt, niece of the defendant W. W. Bryant, became the sole owner of certain lots upon which she and her husband (before they were divorced) had built a house, which was encumbered only by a deed of trust in favor of the Jefferson Standard Life Insurance Company with a balance due thereon of approximately $7,790.00. The house lacked an estimated $1,200 of being finished. Defendants Bryant, being aware of plaintiff's inability to raise the $1,200 to complete the house, and that by reason of her marital difficulties plaintiff had decided to move to California, where she still resides, informed the plaintiff that if she would convey said house and lots to them that they would " * * * complete the work required to finish the house for the estimate above described, pay all bills and charges relating to the property, and at the end of one year from date of such conveyance to them either reconvey * * * to plaintiff, upon repayment of such amounts so expended, or, at plaintiff's option, instead would sell said property on open market and, after deducting payments and expenses incurred by defendants per the agreement aforesaid and discharging the lien of the deed of trust * * * remit the balance of proceeds from such sale to plaintiff."

Relying on this promise, the plaintiff conveyed said house and lots by warranty deed on 5 June 1954 to Dorothy G. Bryant, one of the defendants.

The defendants Bryant finished the house and proceeded to rent the property at an undisclosed rental. Thereafter, defendants Bryant,

on 14 March 1955, informed the plaintiff that the work required to complete the house cost not $1,200, as allegedly agreed upon, but $5,669.22, and that plaintiff could have the property back upon payment of the last mentioned sum and assumption by her of the debt owed to Jefferson Standard Life Insurance Company in the amount of $7,238.70.

Plaintiff, upon receipt of this proposal " * * * declined to accept the same on the grounds that the unauthorized expenditures by defendants Bryant and wife aforesaid had made it impossible * * * and demanded that the alternative agreed upon be performed by defendants Bryant and wife * * *. Instead, defendants Bryant and wife continued to rent said property and convert the rentals to their own use until, * * * without notice to or leave of plaintiff, they conveyed said property to the defendants Marion S. Taylor and wife, Sybil B. Taylor, their daughter and son-in-law, by warranty deed dated October 28, 1955, and recorded in Book 623, at page 99. Defendants Bryant and wife have never reported the sale to plaintiff, nor accounted to plaintiff for the proceeds of such sale, if proceeds there were."

Plaintiff further alleges that at the time of the conveyance to Marion S. Taylor and wife, the property in question had a reasonable market value of $17,500.00, and that the Taylors were familiar with the terms of the agreement pursuant to which the Bryants held the property. Plaintiff also alleges that she learned for the first time in January 1957 of the conveyance to the defendants Taylor.

When this cause came on to be heard, the defendants demurred *ore tenus* on the ground that the complaint did not state a cause of action. The court below sustained the demurrer, and the plaintiff appeals, assigning error.

Sanford, Phillips, McCoy & Weaver for plaintiff.
Nance, Barrington & Collier for defendants.

DENNY, J. On the record before us we are limited to a determination as to whether or not the court below committed error in sustaining the demurrer *ore tenus* on the ground that the complaint fails to state a cause of action against the defendants.

Where all the defendants join in a demurrer to the complaint on the ground that it does not state a good cause of action, the demurrer will be overruled if the complaint states a good cause of action as to any one of the defendants. *Paul v. Dixon,* 249 N.C. 621, 107 S.E. 2d 141.

Since all the defendants joined in the demurrer interposed in this action, the demurrer must be tested in light of the above rule.

Parol testimony is competent to contradict a consideration recited in a conveyance of land; such testimony may not be used, however, to alter or contradict the conveyance itself, in the absence of fraud, mistake or undue influence. *Walters v. Walters,* 172 N.C. 328, 90 S.E. 304.

Likewise, this Court has repeatedly held that a grantor cannot engraft a parol trust in favor of the grantor when there is a contrary intent clearly expressed in the deed. *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028; *Walters v. Walters, supra; Newton v. Clark,* 174 N.C. 393, 93 S.E. 951; *Penland v. Wells,* 201 N.C. 173, 159 S.E. 423; *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48.

If it be conceded that plaintiff and the defendants Bryant entered into an oral contract, as alleged in her complaint, she could not under our decisions have compelled the defendants Bryant before they sold the property to reconvey it to the plaintiff. Neither could she have compelled them to sell the property. The agreement to reconvey or in lieu thereof, at the option of the plaintiff, to sell, was within the statute of frauds and was not enforceable since the agreement was not in writing. *Walters v. Walters, supra.*

As we interpret the plaintiff's complaint, she does not seek a reconveyance of the property to her or the sale thereof. The defendants Bryant had already sold the property voluntarily. This being so, a parol agreement with respect to the disposition of the proceeds from the sale does not come within the statute of frauds, and an action will lie for the enforcement thereof. *Brown v. Hobbs,* 147 N.C. 73, 60 S.E. 716; *Bourne v. Sherrill,* 143 N.C. 381, 55 S.E. 799, 118 Am. St. Rep. 809; *Sprague v. Bond,* 108 N.C. 382, 13 S.E. 143; *Michael v. Foil,* 100 N.C. 178, 6 S.E. 264; *Brogden v. Gibson,* 165 N.C. 16, 80 S.E. 966; *Sumner v. Lumber Co.,* 175 N.C. 654, 96 S.E. 97; *Pinnix v. Smithdeal,* 182 N.C. 410, 108 S.E. 265. Cf. *Peele v. LeRoy,* 222 N.C. 123, 22 S.E. 2d 244. Under such circumstances, it is not necessary to establish a constructive trust in order to enforce the parol agreement with respect to the disposition of the proceeds derived from the sale of the property involved. *Bourne v. Sherrill, supra.*

In *Brown v. Hobbs, supra,* this Court quoted with approval from *Trowbridge v. Wetherbee,* 93 Mass. 364, as follows: " 'The defendant's promise was a part of the consideration for which he obtained his deed, and it does not follow as a matter of course that an agreement to pay a consideration for a conveyance of land is within the statute. In this case the defendant did not agree to convey any part of the land to the plaintiff, but to sell and convey it to some other person

and pay the plaintiff his share of the net proceeds in money. The first part of this promise, namely, the promise of the defendant to sell the land, was within the statute, and if he had refused to sell, the plaintiff could not have maintained an action to enforce the promise to sell. But the promise to sell has been performed, and when a promise which was within the statute has been performed, the contract is no longer within the statute. If some of the stipulations in a contract are within the statute and others are not, and those which are within it have been performed, an action lies upon the other stipulations, if they are separate.' "

Likewise, in *Bourne v. Sherrill, supra,* Bourne and Sherrill entered into an agreement that if the plaintiff would sell the defendant a certain lot, that in the event the defendant did not build on it but sold it, he would give the plaintiff the profits realized from the sale thereof. The defendant did not build on the lot but sold it for a profit. The action was instituted to recover the profit pursuant to the parol agreement. The defendant objected to the introduction of parol testimony to establish the contract "on the grounds (1) that the agreement was without consideration; (2) that the same contradicted the deed; (3) that the contract was invalid under the statute of frauds, the same being a contract concerning realty, and required to be in writing." The Court said: "The decisions of this State are against the defendant on each of the propositions advanced by him. *Michael v. Foil,* 100 N.C. 178; *Sprague v. Bond,* 108 N.C. 382. The consideration arose at the time of the sale, and is part inducement thereto.

"The conveyance, the purpose of which was to pass title, is allowed its full operation, and is therefore in nowise contradicted. And the agreement enforced by this recovery attached to the proceeds from and after the sale, and was not therefore, concerning land, or any interest therein, within the meaning of the statute of frauds."

In the case of *Sprague v. Bond, supra,* there was a parol agreement with respect to the disposition of proceeds from the sale of property conveyed. The Court said: "The enforcement of the alleged agreement, after the sale of the land, does not in any respect impinge upon the terms of the conveyance, but relates entirely to the payment of the consideration. It is true that the plainiff could not have compelled the defendant to execute her agreement to sell the land as there was no enforceable trust, and the agreement was within the statute of frauds, but this part of the agreement has been voluntarily performed, and the other part, not being within the statute, may now be enforced."

In *Michael v. Foil, supra,* the Court said: "The contract for the sale of the land was in writing — the land itself was sold — but the agree-

ment, that if the mineral interest in the land should be sold during the lifetime of the plaintiff he should have one-half of it, was not put in writing. If the contract of sale was made subject to this agreement, as an inducement to the contract, the agreement, though in parol, may be enforced. The agreement did not pass or purport to pass any interest in land, and does not fall within the statute of frauds."

We express no opinion on the merits of this case. However, if the plaintiff can establish her contract as alleged, to the effect that she was to receive the excess proceeds from the sale of the property, if sold, over and above the balance due Jefferson Standard Life Insurance Company, plus the sums expended on the property by the defendants Bryant, pursuant to the terms of the agreement, the plaintiff is entitled to an accounting to determine whether or not any excess proceeds were realized from the sale of the property.

In view of the conclusion we have reached, the ruling on the demurrer *ore tenus* in the court below is

Reversed.

C. A. BAILEY v. WILLIAM E. WESTMORELAND AND WIFE, HELEN L. WESTMORELAND.

(Filed 29 January, 1960.)

1. Evidence § 27—

The rule that parol evidence is incompetent to vary, add to, or contradict a written instrument, applies only to legally effective instruments and does not preclude parol evidence that a written instrument was inoperative or unenforceable.

2. Same: Bills and Notes § 17—

As between the parties, it is competent for the maker to show that the note sued on was without consideration or that it was executed upon express condition that it should not become effective or operative as a binding obligation until the happening of a stated contingency, in this case the payment of certain other notes executed by third parties as a part of the same transaction.

3. Evidence § 11—

Where a note is executed to two payees jointly and one of them thereafter acquires the interest of the other and sues the makers of the note, after the death of the other payee, testimony of the maker as to a contemporaneous agreement with the deceased payee, acting for himself and as agent of the other, that the note should not become a binding obligation until the happening of a stated contingency, is competent as to

plaintiff payee's original share of the note, even though it is incompetent as to the share acquired by him as assignee of the deceased payee. G.S. 8-51.

4. Trial § 17—

The general admission of evidence competent for a restricted purpose will not be held for error in the absence of a request at the time of its admission that its purpose be restricted. Rule 21, Rules of Practice in the Supreme Court.

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

APPEAL by plaintiff from *Olive, J.*, April 20, 1959, Term, of FORSYTH.

Civil action to recover on $975.00 promissory note dated November 10, 1955, executed by defendants and payable to C. A. Bailey and J. E. Phillips, or order, six months after date.

Defendants admit they signed the $975.00 note and have made no payment thereon. They assert, for reasons stated below, they are not obligated for the payment of the $975.00 note and pray that the court order cancellation thereof.

The court submitted, and the jury answered, these issues:

"1. Was the note sued upon delivered upon the condition that it should not become effective as a binding obligation until the second mortgage had been either paid or sold for as much as $4,000.00? ANSWER: Yes.

"2. What amount, if any, is plaintiff entitled to recover from the defendants? ANSWER: Nothing."

There was evidence tending to show these facts: An exchange of (real) properties was negotiated by J. E. Phillips, acting for Mrs. Emma George, and by plaintiff, acting for defendants. In the trade, a valuation of $6,500.00 was put on the George property and a valuation of $13,000.00 was put on the Westmoreland property. Each property was encumbered by a deed of trust. The difference in equity values was $5,589.25. In acquiring the Westmoreland property, Mrs. George assumed the outstanding building and loan deed of trust; and, as balance purchase price, she executed and delivered to the Westmorelands her note for $5,914.25, secured by a second lien deed of trust, payable $50.00 per month. Mrs. George, who had no money, increased the amount of her note to the Westmorelands by $325.00, the amount of Phillips' commission.

Plaintiff sued as sole owner and holder of the $975.00 note. There was evidence that he had purchased Phillips' interest therein. Phillips died prior to the trial.

Defendants alleged that, in accordance with their prior agreement with plaintiff and Phillips, they signed and delivered the $975.00 note

on the express condition that it was not to be effective as a binding obligation unless and until (1) they sold (as plaintiff represented he could do) the $5,914.25 George note for as much as $4,000.00, or (2) the $5,914.25 George note was paid. Plaintiff, in reply, denied defendants' said allegations, alleging that the $975.00 note was defendants' unconditional obligation, representing the $325.00 commission due Phillips and the $650.00 commission due plaintiff.

The $5,914.25 note was not sold. After making eight payments of $50.00 each thereon, Mrs. George defaulted; and a foreclosure of the second deed of trust was consumated in December, 1956. Westmoreland's bid of $2,700.00 was assigned by him to the Hiatts. The Hiatts paid $1,625.00 to the Trustee. After the deduction of taxes and foreclosure expenses, the Westmorelands received about $1,250.00. The Trustee conveyed the property, subject to the prior building and loan deed of trust, to the Hiatts.

Judgment for defendants, in accordance with the verdict, was entered. Plaintiff excepted and appealed, assigning errors.

Buford T. Henderson and Abner Alexander for plaintiff, appellant.
Clyde C. Randolph, Jr., for defendants, appellees.

BOBBITT, J. Assignments of error directed to the overruling of plaintiff's motion to dismiss defendants' alleged affirmative defense, and to the submission of the first issue, are based on plaintiff's contention that the court erred in permitting defendants to establish their affirmative defense *by parol evidence.*

The parol evidence rule, upon which defendants' contention is based, "prohibits the admission of parol evidence to vary, add to, or contradict a written instrument." Stansbury, North Carolina Evidence, § 251. However, "The parol evidence rule presupposes the existence of a legally effective written instrument. It does not in any way preclude a showing of facts which would render the writing inoperative or unenforceable." Stansbury, *op. cit.*, § 257.

". . . the rule excluding parol evidence has no place in an inquiry unless the court has before it some ascertained paper beyond question binding and of full effect. Hence, parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, as that it shall only become effective on certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed; . . ." 32 C. J. S., Evidence

§ 935. In accord: 20 Am. Jur., Evidence § 1095; 8 Am. Jur., Bills and Notes §§ 1051 and 1052; Wigmore on Evidence, Third Edition, § 2410; Stansbury, *op. cit.*, § 257.

In *Overall Co. v. Hollister Co.*, 186 N.C. 208, 119 S.E. 1, STACY, J. (later C. J.), after stating the parol evidence rule, said: "On the other hand, if defendant's purpose was to show a condition precedent, prior to the happening of which it was agreed the contract should not become effective or operative, the proposed evidence was competent, and it was error to exclude it. *Building Co. v. Sanders*, 185 N.C. 328, and cases there cited. 'The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced.' DEVENS, J., in *Wilson v. Powers*, 131 Mass. 539."

In *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116, where DEVIN, J. (later C. J.), cites numerous prior North Carolina decisions, the rule stated and applied is correctly set forth in the third headnote, *viz.*: "As between the parties, the maker of negotiable notes under seal purporting on their face to be for 'value received' is not precluded from showing that their delivery was conditioned upon a contingency which had not been fulfilled, or that they were given upon a condition which failed, or that there was a failure of consideration."

Parol evidence offered by defendants in support of their alleged affirmative defense, to the effect that they signed and delivered the $975.00 note upon the express condition that it was not to become effective or operative as a binding obligation unless they received $4,000.00 or more from the sale or collection of the $5,914.25 George (second lien) note and that neither of these contingencies occurred, was not incompetent as violative of the parol exidence rule. Hence, the court was corect in overruling plaintiff's said motion to dismiss and in submitting the first issue.

The parol evidence, in large measure, consists of testimony of the defendants as to what was said and done *by plaintiff* in their personal transactions with him. This testimony, properly admitted, was amply sufficient to sustain the verdict.

Even so, plaintiff assigns as error the admission, over his objection, of testimony of the *feme* defendant as to statements made to her by Phillips, in the absence of plaintiff, immediately prior to her signing the $975.00 note and her delivery thereof to Phillips. The statements made by Phillips in said personal transaction with the *feme* defendant, according to her testimony, tend to support the

testimony given by each defendant at the trial and to contradict the testimony given by plaintiff at the trial.

Plaintiff contends that, since Phillips was dead at the time of the trial, the *feme* defendant, an interested party, by reason of G.S. 8-51, was not a competent witness to testify as to such transaction and communication.

The question raised by plaintiff's said contention is complicated by the fact that the $975.00 note was made payable to both plaintiff and Phillips. In respect of Phillips' original ($325.00) interest, plaintiff sues as Phillips' assignee.

"Where the statute (G.S. 8-51) makes express provision for the protection of an assignee of decedent, testimony of an interested witness as against such assignee is excluded." 97 C. J. S., Witnesses § 208(b); Jones on Evidence, Fourth Edition, § 773, p. 1410; Stansbury, *op. cit.*, § 71; *McCanless v. Reynolds*, 74 N.C. 301; *Tobacco Co. v. McElwee*, 100 N.C. 150, 5 S.E. 907; *Poston v. Jones*, 122 N.C. 536, 29 S.E. 951.

If this were an action on a $325.00 note, executed and delivered by defendants to Phillips as sole payee and thereafter assigned by Phillips to plaintiff, said testimony of the *feme* defendant as to what was said and done by Phillips would be incompetent. However, plaintiff's action is to recover the full amount of the $975.00 note; and, in respect of the larger ($650.00) interest, plaintiff was original payee.

According to plaintiff's testimony: The $975.00 note was signed by Mr. Westmoreland in the presence of plaintiff and of Phillips. Phillips then took it to Mrs. Westmoreland and obtained her signature thereon. After Mrs. Westmoreland had signed it, Phillips brought the $975.00 note back to plaintiff.

According to the *feme* defendant's testimony: When Phillips brought the $975.00 note to her, she first telephoned plaintiff; and she did not sign the $975.00 note until she had received assurances from plaintiff (by telephone) and from Phillips in person that defendants would not be obligated thereon except upon the happening of the contingencies heretofore stated.

Thus, the evidence clearly shows that, certainly in respect of plaintiff's original ($650.00) interest, Phillips, on the occasion of his said personal transaction with the *feme* defendant, was acting as plaintiff's agent. G.S. 8-51 does not render an interested witness incompetent to testify "to a transaction between himself and a deceased agent of his opponent." Stansbury, *op. cit.*, § 74; *Sprague v. Bond*, 113 N.C. 551, 18 S.E. 701; *Gwaltney v. Assurance Society*, 132 N.C.

925, 44 S.E. 659; *Walker v. Cooper,* 159 N.C. 536, 75 S.E. 727; *Bank v. Wysong & Miles Co.,* 177 N.C. 284, 98 S.E. 769.

Technically, to the extent ($325.00) plaintiff sues as Phillips' assignee, the *feme* defendant's said testimony would be incompetent. But this testimony would be competent to the extent ($650.00) plaintiff sues as original payee.

Plaintiff elected to sue for the full amount of the $975.00 note. When competent in relation to plaintiff's original ($650.00) interest, the fact that plaintiff seeks also to recover the assigned ($325.00) interest is not deemed sufficient ground for the exclusion of the *feme* defendant's said testimony. Moreover, it is not a "ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted." Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 544, 558.

It is noted: Plaintiff testified that Phillips rented an office from him; and that, when he bought Phillips' interest in the $975.00 note, Phillips gave him "a little discount on it." As stated by plaintiff: "He (Phillips) said he needed some money. I gave him credit on his rent, is what it was; I don't remember just exactly how much credit I gave him."

The admission of said testimony of the *feme* defendant, under the circumstances disclosed by this record, does not constitute prejudicial error for which a new trial should be awarded.

Plaintiff's other assignments of error, each of which has been considered, do not disclose prejudicial error.

No error.

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

MYRTLE CHAVIS v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 29 January, 1960.)

1. Insurance § 26—

Where insurer admits plaintiff beneficiary's allegations of the execution and delivery of the policy, the payment of the premium, and the death of insured within the period of coverage, plaintiff establishes a *prima facie* case precluding nonsuit, the burden being upon insurer to show legal excuse for refusing payment according to the terms of the policy.

2. Insurance §§ 17, 18—

Where the evidence is conflicting as to whether false answers in the application for life insurance were attributable to plaintiff beneficiary or insurer's agent, the beneficiary's evidence being to the effect that she answered truthfully all questions addressed to her by the agent and did not sign the application, and there being neither allegation nor proof of any collusion between the beneficiary and the agent, the question of insurer's right to cancel the policy for material and false misrepresentations in the application as to insured's health, is for the determination of the jury.

3. Evidence § 20—

Plaintiff is entitled to introduce in evidence parts of the answer containing allegations of distinct and separate facts pertinent to the issues, on the ground of judicial admissions as well as admissions against interest.

4. Evidence § 27: Insurance § 26—

Plaintiff is entitled to introduce parol evidence in contradiction of written application for insurance upon plaintiff's contention supported by evidence that she was not responsible for the statements in the application, the parol evidence rule presupposing the existence of a binding and valid instrument.

PARKER, J., dissents.

APPEAL by defendant from *McKinnon, J.*, July "A" Term, 1959, ROBESON Superior Court.

Civil action by plaintiff beneficiary to recover $750 benefits under the defendant's policy insuring the life of Quessie M. Basini, the beneficiary's mother. Application for the policy was dated August 27, 1957, and the policy was issued September 9, 1957, and the premium was paid. The insured died of cancer on February 4, 1958. Proof of death and claim for benefits were duly filed.

The defendant admitted the execution and delivery of the policy, the payment of the premiums, and the death of the insured during the period of coverage. However, it denied liability upon the alleged ground the policy was obtained by false and fraudulent mis-

representations made in the application with respect to the health of the insured. The application contained the statement that the insured did not suffer from cancer, tumor, or any malignant disease, etc.

Mr. Grimes, the agent of the defendant, testified the insured answered the questions in the application as stated therein and after the answers were inserted, signed the application. The application was offered and admitted in evidence. The defendant also offered medical testimony that the insured died on February 4, 1958, of cancer from which she had been suffering for a period of probably three years. The defendant introduced further medical evidence that the insured had been hospitalized and operated on and treated for cancer in May, 1955, in the County of Onslow. At the time of the application and delivery of the policy the insured lived in the County of Robeson.

The plaintiff offered the evidence of the beneficiary and two other women, Carrie Lee Locklear and Janie Jones, who were present at the time Mr. Grimes came to collect insurance premium from the beneficiary on her own policy. They testified the agent asked the beneficiary if she was ready to take out insurance on her mother who was present at the tobacco barn where the three other women were also at work. She replied she was was not ready, that she did not have the money. Janie Jones offered to and did advance the money. The agent asked the name, age, where the insured was born, and "how is her health," and who was to be made the beneficiary. These questions were answered by the beneficiary giving the name, age, place of birth, and stated in her answers to the question, "how is her health," "so far as I know, it is all right," and that no other questions were asked her and none were asked of the insured. The three witnesses testified the insured did not sign any application. The beneficiary testified she knew nothing of her mother's illness, treatment or operation in Onslow County, or of any other illness.

The court submitted to the jury eight issues, as follows:

"1. Did the plaintiff have an insurable interest in the life of Quessie M. Basini?

"2. Did Quessie M. Basini represent in her application for insurance policy sued upon, that she had never been a patient in a hospital?

"3. If so, was such representation false?

"4. Did Quessie M. Basini represent in her application that she then did not have a disease or illness?

"5. If so, was such representation false?

"6. Did Quessie M. Basini represent that she had never had

rheumatism, arthritis, cancer, tumor, or any malignant disease?

"7. If so, was such representation false?

"8. Did Quessie M. Basini make false representation of a material fact in an application for the policy of insurance sued upon?"

The jury answered the first issue, "Yes," and all the others, "No." From a judgment in favor of the plaintiff for $750, the defendant appealed.

Varser, McIntyre, Henry & Hedgpeth, for defendant, appellant.
L. J. Britt & Son, for plaintiff, appellee.

HIGGINS, J. The defendant admitted the execution and delivery of the policy, the payment of the premium, and the death of the insured within the period of coverage. These admissions placed upon the defendant the burden of showing a legal excuse for refusing payment according to the terms of the policy. The plaintiff introduced the policy in evidence. The admissions and the policy made out a case for the jury. *Thomas-Yelverton Co. v. Ins. Co.*, 238 N.C. 278, 77 S.E. 2d 692. Defendant's assignment of error based on the court's refusal to nonsuit cannot be sustained.

The insurer offered as its defense the application for the policy in which appeared above the insured's name the statement she had not suffered from cancer, etc. The agent of the insurer testified the insured answered the questions as recorded in the application and signed it. The defendant offered medical testimony the insured died of cancer within four months of the date of the policy; that she had suffered from the disease for as much as three years prior to the application; that she had been operated on for this malignancy prior to the application. The defendant contended the concealment of this important information induced the defendant to issue the policy.

The plaintiff offered evidence the insured did not sign the application; and that only the questions as to her name, age, residence, the name of the beneficiary, and "how is her health," were asked by the agent; and that no other information was asked for or given. The beneficiary stated, "Her health is good as far as I know"; and that she knew nothing of any disease, treatment or operation her mother had while in Jacksonville or Onslow County. The agent received the premium and submitted to its principal the application upon which the policy was based.

Whether responsibility for the false answers was attributable to the insured or to the agent of the company was in serious dispute. There was neither allegation nor proof of any collusion. The jury re-

solved the disputed issues of fact against the defendant. ". . . the credibility of the evidence to support the defendant's defense was a matter for the jury." *Tolbert v. Ins. Co.*, 236 N.C. 416, 72 S.E. 2d 915. The assignments of error based on the introduction of parts of defendant's answer are without merit. The parts of the answer offered were of distinct and separate facts pertinent to the issues. They were competent as judicial admissions as well as admissions against interest. *Whitson v. Frances*, 240 N.C. 733, 83 S.E. 2d 879; *Winslow v. Jordan*, 236 N.C. 166, 72 S.E. 2d 228.

Likewise without merit is the assignment of error based on the court's admission of plaintiff's evidence contradicting the written application with respect to the insured's health. Without discussing other reasons why the evidence might be admissable, it is enough to say that the execution of, and responsibility for, the written application were in serious dispute. The dispute was resolved by the jury against the defendant. In any event, the exclusion of parol evidence, on the ground it contradicts a written instrument, presupposes the existence of a valid and binding written instrument. The assignment of error based on the admission of testimony cannot be sustained.

The case of *Heilig v. Ins. Co.*, 222 N.C. 231, 22 S.E. 2d 429, settles adversely to the defendant's claims the controlling issues of fact and questions of law involved in this appeal.

No error.

PARKER, J., dissents.

GEROLENE SMITH SORRELL, ADMINISTRATRIX OF THE ESTATE OF FLOYD THOMAS SORRELL, DECEASED v. JO ANN MOORE, ADMINISTRATRIX OF THE ESTATE OF GEORGE W. MOORE, DECEASED.

(Filed 29 January, 1960.)

1. Pleadings §§ 3a, 7—

The function of a pleading is to inform the adversary what facts are claimed to constitute the cause of action or defense. G.S. 1-122, G.S. 1-135.

2. Pleadings § 31—

If a pleading alleges facts pertinent to the cause of action or defense, such allegations may not be stricken on the ground that the facts alleged are incapable of proof, the questions of pertinency of allegations to the cause of action or defense and the competency and credibility of the evidence to prove the allegations being distinct and separate.

3. Automobiles §§ 49, 50—

While the negligence of the driver will not be imputed to the owner-passenger in an action between themselves or their personal representatives, the failure of the owner-passenger, having the power and right to exercise control over the driver, to remonstrate as to the careless and reckless manner in which the driver was operating the vehicle may constitute contributory negligence, as distinguished from imputed negligence, and therefore allegations of fact constituting the basis of such defense are relevant and are improperly stricken on motion, even though the pleading denominates such negligence imputed rather than contributory negligence.

Certiorari on motion of defendant to review an order of *Williams, J.*, at August, 1959 Civil Term, of HARNETT.

Both intestates were killed on the night of 21 February 1959, when an automobile in which they were riding turned over. Negligent operation of the vehicle by the driver is alleged by plaintiff and by defendant. Plaintiff alleged defendant's intestate drove the automobile. Defendant denied the asserted negligence of her intestate. She averred the vehicle was in fact driven by its owner, plaintiff's intestate. Defendant, not content to rely on a mere denial of negligence, pleaded the affirmative defense of contributory negligence. She alleged if her intestate was in fact driving the vehicle, both intestates "were riding in an automobile . . . which . . . was being used by or on behalf of plaintiff's intestate and even if defendant's intestate was operating the automobile in a negligent manner, the negligence of defendant's intestate would be imputed to plaintiff's intestate as contributory negligence . . ." which negligence was asserted as a bar.

To further support her plea of contributory negligence defendant made these additional allegations: "that he (plaintiff's intestate) rode in the automobile referred to when it was driven in the manner referred to in the complaint and in the counterclaim, without remonstrating with the operator of the automobile as to the careless and reckless manner in which it was being driven" and "plaintiff's intestate failed to warn the operator of the automobile of the dangerous condition and likely result of the manner in which the automobile was being operated."

Plaintiff moved to strike the quoted portions of the answer. The motion was allowed. Defendant excepted and applied for *certiorari*, which was allowed.

Wilson & Johnson and Edgar R. Bain for plaintiff, appellee.

Ruark, Young, Moore & Henderson and J. Allen Adams for defendant, appellant.

RODMAN, J. The motion to strike is based on the assertion that the portions objected to are mere conclusions and not statements of facts; that the first quoted portion is insufficient to constitute a defense or a cause of action, and that the last two are mere conclusions "totally incapable of proof under the facts as alleged in the complaint."

The function of a pleading is to inform an adversary what facts are claimed to constitute the cause of action, G.S. 1-122, or defense, G.S. 1-135. If the complaint or answer gives notice of the facts asserted for the cause of action or defense, it has served its purpose. A party is not permitted to show facts constituting a cause of action or defense which he has not pleaded.

How a fact may be established and whether the evidence offered is sufficient are evidentiary questions, for the court on competency, and for the jury on credibility.

The court cannot act on evidentiary questions until the evidence is offered. It has no right to assume that a party will not be able to prove a fact alleged. It follows that facts pleaded should not be stricken upon an assertion that they are incapable of proof.

The two portions of the answer last quoted alleged facts. Defendant may or may not be able to establish the facts alleged. She should not be deprived of the right to offer competent evidence for that purpose. *Weant v. McCanless,* 235 N.C. 384, 70 S.E. 2d 196; *Williams v. Thompson,* 227 N.C. 166, 41 S.E. 2d 359.

The portion of the answer first quoted alleges both facts and a legal result. It alleges, when considered in connection with the remainder of the answer, that plaintiff's intestate was the owner of the car, defendant's intestate was operating it with the assent of and for the owner, the car was being driven at an unlawful rate of speed and without due care and circumspection, with at least the implied approval of the owner then present. It alleges the driver's negligence *would be imputed* to the owner.

A driver's negligence is not *imputed* to an owner-occupant of an automobile, as that word is ordinarily used in the law of negligence, meaning responsible for or chargeable with, when the owner-occupant sues the driver for injuries resulting from the driver's negligence. The negligence of a driver acting for the owner and in the scope of his authority is of course imputed to the owner in actions between the owner and parties other than driver.

While an owner-occupant is not chargeable with the negligence of the driver so as to prevent the owner from recovering from the driver for the driver's negligence, the owner-occupant, like any other

person, must take reasonable precautions to protect himself from injury. What is reasonable care depends on existing conditions. An owner ordinarily has the duty and ability to control and direct the manner in which his vehicle is to be operated. He cannot sit placidly by and, when injured by the negligent operation, escape the consequences of his lack of due care.

The distinction between "imputed negilgence" and contributory negligence has been recognized by us. Contributory negligence is a bar when established. *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108; *Dosher v. Hunt,* 243 N.C. 247, 90 S.E. 2d 374; *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190; *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185; *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162; *Litaker v. Bost,* 247 N.C. 298, 101 S.E. 2d 31; *O'Brien v. Woldson,* 62 A.L.R. 436; *Campbell v. Campbell,* 85 A.L.R. 626; 5 Am. Jur. 769.

The allegations are not sufficient to impute or hold plaintiff responsible for the driver's negligence. They are, however, sufficient to charge the owner with the power and right to exercise control, a failure to act, and knowledge of the probability of injury from the negligent operation. These facts, if established, would constitute contributory negligence and thereby bar recovery. It was necessary to allege the facts to have the right to offer the evidence. It follows that the court erred in allowing the motion.

Reversed.

APPENDIX.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar, October 22, 1959.

Amend Article X, appearing 221 N.C. 606, by striking Canon D as presently written, and inserting in lieu thereof the following:

"It shall be deemed unethical for any District Solicitor, Judge or Solicitor of any criminal court inferior to the Superior Court to appear in any criminal proceeding, whether for the defendant or for the State, in other courts of the State of North Carolina having criminal jurisdiction, whether concurrent with, inferior to or superior to the criminal jurisdiction of the court over which he shall preside, or over which he shall be the prosecuting officer. Provided that nothing in this Canon is intended to preclude the Solicitor of any Recorder's Court or County Court from appearing in the Superior Court upon request of the District Solicitor."

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 10th day of December, 1959.

/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 29th day of January, 1960.

/s/ Moore, J.
For the Court.

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

The following amendment to the Rules and Regulation of The North Carolina State Bar was duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar, October 22, 1959.

Amend Article X, appearing 221 N.C. 598, Paragraph No. 20, by striking the same as presently written and inserting in lieu thereof the following:

"20. Discussion in Newspaper or Other Medium of Communication of Pending Litigation.

Publications, directly or indirectly, by a lawyer in any newspaper, magazine or by television, radio or other mediums of communication, as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement."

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 10th day of December, 1959.

/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 29th day of January, 1960.

/s/ Moore, J.
For the Court.

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

The following amendments to the Rules and Regulations of The North Carolina State Bar were duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar, January 15, 1960.

Amend Article IX, Section 2, appearing 221 N.C. 588 by adding a new paragraph following paragraph numbered (b) under Section 2 of said Article, to be designated as (b-1) to read as follows:

"Where the accused attorney shall request the designation by the Supreme Court of the committee of three members of the Bar to sit and hear the proceedings, as provided in G.S. 84-28, 1959 Supplement, such request shall be made in writing by the accused attorney within thirty (30) days following the service of statement and notice upon the said attorney, and the said request in writing shall be filed with the Secretary of the Council. The Secretary of the Council upon the filing of such request shall advise the Supreme Court through the Chief Justice of such request, and upon receipt from the Court of the designation of the committee, the Secretary of the Council shall notify the accused attorney thereof. The committee, when designated by the Supreme Court, shall proceed in the same manner as the committee of the Council. The accused attorney shall, if answer is filed to the statement and notice served upon him, set forth in such answer whether he has made such request, and if he has failed to make such request within thirty (30) days prescribed herein, he will be deemed to have waived same and the Council shall proceed to name and designate a trial committee of the Council which shall proceed to hear and determine the matter as set forth in this Article. Pending the appointment of a trial committee by the Supreme Court or the Council, the President of The North Carolina State Bar, upon motion of the accused attorney, is hereby authorized to grant such extensions of time to file pleadings as the ends of justice may require."

Amend Article IX, Section 3, appearing 221 N.C. 592 by adding in line two, after the word "council" and before the word "to" the following: "or the Supreme Court."

NORTH CAROLINA—WAKE COUNTY

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar were duly adopted by the North Carolina State Bar in that the said Council did by resolution at a regular quarterly meeting adopt said amendments to said Rules and Regulations.

Given over my hand and the seal of The North Carolina State Bar, this the 18th day of January, 1960.

/s/ Edward L. Cannon
Edward L. Cannon, Secretary
The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar 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 2nd day of February, 1960.

/s/ J. Wallace Winborne
Chief Justice.

Upon the foregoing certificate, it is ordered that the foregoing amendments to 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 2nd day of February, 1960.

/s/ Moore, J.
For the Court.

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Will of Roberts, 708; subscribing witnesses, *In re Will of Roberts*, 708; holographic wills, *In re Will of Roberts*, 708; revocation of will, *In re Will of Shute*, 697; probate and caveat, *Walters v. Children's Home*, 369; *In re Will of Pendergrass*, 737; *In re Will of Roberts*, 708; *In re Will of Shute*, 697; construction of wills, *Moore v. Langston*, 439; *Bullock v. Bullock*, 559; *Walters v. Children's Home*, 369; *Privett v. Jones*, 386.

Withdrawal of Appeal—*McDowell v. Kure Beach*, 818.

Withdrawal of Evidence — Withdrawal of evidence cures error in admission, *S. v. Grundler*, 177.

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL

§ 4. Procedure to Raise Question of Pendency of Prior Action.

Plea in abatement for the pendency of prior actions is properly raised by answer when the pendency of the prior suits between the same parties for the same cause does not appear on the face of the complaint. *Wallace v. Johnson*, 11.

§ 7. Termination of Prior Action.

Plea in abatement for pendency of prior actions cannot be sustained when prior to the hearing on the plea in abatement the other actions have been dismissed by judgments of nonsuit. *Wallace v. Johnson* 11; *Wallace v. Johnson*, 18.

§ 8. Identity of Actions.

Action against administrators for distributive share of rents and timber held not identical with action against one of administrators individually for distributive share of timber sold under power of attorney. *Wallace v. Johnson*, 11.

Where a contract carrier brings an action for damages for the loss of profits resulting from the shippers breach of a contract for carriage of goods by wrongfully seizing plaintiff's vehicle in claim and delivery, nonsuit should be entered upon his counterclaim thereafter filed in the claim and delivery setting up the identical grounds for damage, the pendency of the prior independent action having been pleaded by reply in the claim and delivery proceedings. *Tillis v. Cotton Mills*, 359.

ADMINISTRATIVE LAW

§ 3. Duties, Authority and Proceedings before Administrative Agencies in General.

While administrative bodies are not required to adhere strictly to procedural rules, they cannot make a ruling adversely affecting the rights of a particular person without affording such person notice and an opportunity to be heard as required by due process of law. *Brauff v. Comr. of Revenue*, 452.

§ 4. Appeal, Certiorari and Review.

The Workmen's Compensation Act provides orderly procedure for appeal, G.S. 97-85, and *certiorari* will not lie as a substitute for an appeal but is proper only when the aggrieved party cannot perfect his appeal within the time limited and such inability is not due to any fault on his own part, and there is merit in his exceptions to the action of the administrative agency. *McDowell v. Kure Beach*, 818.

ADVERSE POSSESSION

§ 14. Adverse Possession of Public Ways.

After a municipality has accepted the dedication of a street, subsequent nonuser does not affect the dedication, and title to no part of the street may thereafter be acquired by adverse possession. *Steadman v. Pinetops*, 509.

ADVERSE POSSESSION—*Continued.*

§ 15. What Constitutes Color of Title.

A deed cannot constitute color of title to lands not embraced within its description. *Harris v. Raleigh*, 313.

§ 28. Sufficiency of Evidence and Nonsuit.

Plaintiffs can acquire no title by adverse possession when their own evidence establishes that less than twenty years elapsed between the time they took possession and the institution of the action and that the claim could not be maintained under color of title. *Harris v. Raleigh*, 313.

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction.

An appeal follows the theory of trial in the lower court, and where there are no objections to the issues submitted, the appeal will be determined without reference to a cause of action or a defense not embraced in the issues nor presented by the parties at the trial. *Rhyne v. Mount Holly*, 521.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court may review the merits of a cause and decide the questions sought to be presented by the appeal when the matter is of wide public interest and concern, notwithstanding that the exceptions are insufficient to present the questions. *Cotton Mills v. Local Union*, 218, 335.

The Supreme Court will take cognizance *ex mero motu* of want of jurisdiction in the Superior Court to enter an order. *Walters v. Children's Home*, 369.

§ 3. Right to Appeal and Judgments Appealable.

Denial of motion to quash subpoena duces becum held not to affect substantial right of accountant, and the witness' appeal is dismissed as premature. *Buick Co. v. General Motors Corp.*, 201.

In an action by an administrator to recover the balance of the contract price for the construction of a house by his intestate, an order permitting plaintiff, after notice, to view the premises in order to ascertain the facts in regard to defendants' defense that the work was defective and not in accordance with the plans and specifications, is an interlocutory order and defendants' appeal therefrom will be dismissed as premature. *Sawyer v. Whitfield*, 706.

§ 4. Parties Who May Appeal—Party Aggrieved.

While only a party aggrieved may appeal, G.S. 1-271, the party aggrieved is one whose rights have been directly and injuriously affected by the action of the court. *Buick Co. v. General Motors*, 201.

Accountant held not prejudiced by order requiring him to produce records, and since neither party appeal, they could not object. *Ibid.*

§ 7. Demurrers and Motions in Supreme Court.

Motion to be allowed to amend to make the pleadings conform to proof may be allowed in the Supreme Court, there being no suggestion that the opposing party was taken by surprise. *Stathopoulos v. Shook*, 33.

§ 11. Appeal, Appeal Entries and Withdrawal of Appeal.

Whether appellant will be permitted to withdraw his appeal is a matter

APPEAL AND ERROR—*Continued.*

of discretion and not a matter of right, particularly when the rights of appellee may be adversely affected, and ordinarily appellant may withdraw the appeal only with leave of court upon proper application. *McDowell v. Kure Beach*, 818.

§ 12. Jurisdiction and Powers of Lower Court After Appeal.

The pendency of an appeal from an order allowing petitioner to file an amended complaint does not deprive the Superior Court of jurisdiction to appoint a receiver based on the allegations in the amended complaint. *York v. Cole*, 344.

§ 21. Exceptions and Assignments of Error to Judgment or to Signing of Judgment.

An appeal from the signing of the judgment constitutes an exception to the judgment, but raises only the questions whether the facts found support the judgment and whether error of law appears on the face of the record. *Jarvis v. Souther*, 170; *Long v. Smitherman*, 682.

§ 22. Objections, Exceptions and Assignments of Error to Findings of Fact.

An assignment of error that the court erred in the findings of fact and conclusions of law as contained in the judgment is a broadside assignment and does not bring up for review the findings of fact or the sufficiency of the evidence to support them. *Jarvis v. Souther*, 170.

An exception to the findings of fact and conclusions of law and the judgment of the court is a broadside exception which does not present for review the admissibility of the evidence on which the findings were made or the sufficiency of the evidence to support the findings. *Cotton Mills v. Local Union*, 218, 334, 418, 419.

§ 24. Exceptions and Assignments of Error to Charge.

A misstatement of the contentions of a party should ordinarily be brought to the attention of the trial court in time for correction. *Fisher v. Rogers*, 610.

§ 34. Form and Requisites of Transcript.

Where the evidence is set out in the record in question and answer form and not in narrative form as required by Rule 19 (4), Rules of Practice in the Supreme Court, the appeal will be dismissed in the absence of error appearing on the face of the record proper. *Amusement Co. v. Tarkington*, 461.

§ 38. The Brief.

An assignment of error not supported by reason or argument or authority in the brief is deemed abandoned. *Millas v. Coward*, 88; *Cotton Mills v. Local Union*, 234, 240, 248, 254, 419; *Evans v. Coach Co.*, 324; *Friday v. Adams*, 540.

§ 40. Harmless and Prejudicial Error in General.

A technical error will not justify a new trial when it is apparent that the error could not have materially affected the outcome and did not amount to a denial of any substantial right. *Stathopoulos v. Shook*, 33.

Where, upon the uncontroverted facts, appellant is not entitled to the relief sought by him, the judgment of the lower court reaching the correct result will not be disturbed for mere technicalities of procedure. *In re Will of Pendergrass*, 737.

APPEAL AND ERROR—*Continued.*

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where a fact is established by abundent competent evidence the admission of incompetent evidence tending to prove the same fact may not be held prejudicial. *Stathopoulos v. Shook*, 33.

The overruling of defendant's objection to the testimony of an expert witness relating to "possibilities" of a subsequent deterioration in plaintiff's condition from the injury in suit, *is held*, on the facts of this case, not sufficiently prejudicial to justify a new trial. *Carrigan v. Dover*, 97.

The admission of testimony of a physician that certain consequences were a possibility *held* not sufficiently prejudicial to justify a new trial in the light of the immediately following competent testimony of the surgeon as to the certain or probable consequences of the injury, there being other competent testimony that the injury was permanent in nature. *Fisher v. Rogers*, 610.

The admission of testimony of the injured child's mother and father that they were given instructions as to special care to be given the child *held* not prejudicial in view of the other competent evidence, the witnesses not testifying as to what the instructions of the physician were. *Ibid.*

Error in admission of evidence held not cured by withdrawal under facts of this case. *Driver v. Edwards*, 650.

§ 42. Harmless and Prejudicial Error in Instructions.

Where the charge is free from prejudicial error when read contextually, exceptions thereto will not be sustained. *Carrigan v. Dover*, 97.

Where there is evidence that plaintiff suffered serious, painful and permanent injury in the accident in suit, a statement by the court that defendant contended that his pain and suffering seriously affected his nervous condition will not be held prejudicial for the want of allegation and evidence of injury to plaintiff's nervous condition, it being apparent from a contextual construction of the charge that the court meant merely to call attention to plaintiff's contention that the injuries were permanent and did continue to cause pain. *Rick v. Murphy*, 162.

Conflicting instructions on the burden of proof, one erroneous and the other correct, must be *held* prejudicial, since it cannot be determined which instruction the jury followed. *In re Will of Shute*, 697.

An instruction which presents an incorrect application of the law must be held for prejudicial error even though the instruction is given in stating the contention of the parties. *Shoe v. Hood*, 719.

A new trial will not be awarded for mere inadvertence in the charge which could not have prejudiced the appellant, construing the charge contextually. *Johnson v. Lewis*, 797.

§ 49. Review of Findings or of Judgments on Findings.

The findings of fact of the trial court are conclusive on appeal when supported by competent evidence. *Seminary v. Wake County*, 775.

Where the facts agreed are insufficient to support the judgment in a controversy without action, the cause must be remanded. *New Bern v. White*, 65.

Where the findings of fact by the court are insufficient to support its order, or it is apparent that the facts were found under misapprehension of the pertinent principles of law, the cause must be ramanded for further proceedings. *Owens v. Voncannon*, 351.

Where the evidence is not in the record it will be presumed that the find-

ings of fact of the trial court are supported by competent evidence, and are binding on appeal. *Steadman v. Pinetops*, 509.

§ 51. Review of Judgments on Motions to Nonsuit.

On appeal from judgment of nonsuit, evidence erroneously excluded is to be considered with other evidence offered by plaintiff, *Powell v. Deifells, Inc.*, 596.

§ 53. Petitions to Rehear.

A petition to rehear addressed solely to the question which was argued and fully considered by the court on the former hearing will be dismissed. *Ivey v. Rollins*, 345.

§ 54. Partial New Trial.

Where the only error relates solely to the issue of damages and is entirely separable from the other issues, the Supreme Court in the exercise of its discretion will ordinarily limit the new trial to the issue of damages, there being no danger of complication. *Johnson v. Lewis*, 797.

§ 55. Remand.

Where there are insufficient facts to support the judgment for defendant on his counterclaim it is not necessary to consider defendant's exception to the exclusion of certain elements of damage on the counterclaim, since the entire cause must be remanded on plaintiff's appeal for further proceedings in accordance with the rights of the parties. *New Bern v. White*, 65.

When all necessary parties are not joined, the cause must be remanded. *Oxendine v. Lewis*, 702.

ARBITRATION AND AWARD

§ 7. Award as Bar to Action.

An award of an arbitrator made in conformity with and pursuant to the agreement of the parties is conclusive and binding in the absence of fraud or mutual mistake. *Simmons v. Williams*, 83.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General.

A person who offers or attempts by violence to injure the person of another, or who by a show of violence puts another in fear and thereby forces him to leave a place where he has a right to be, is guilty of an assault. *S. v. Newton*, 151.

§ 11. Indictment and Warrant

A warrant charging that defendant, being a male over eighteen years of age, unlawfully assaulted a named person, without specifying the sex of such person, does not charge an assault upon a female, notwithstanding that the person named is a female. *S. v. Barham*, 207.

§ 12. Presumptions and Burden of Proof.

In a prosecution for assault with a deadly weapon, the admission of defendants that they used a deadly weapon does not place the burden upon them of proving that they acted in self-defense. *S. v. Sandlin*, 81.

ASSAULT AND BATTERY—*Continued.*

§ 13. Competency of Evidence.

Where the evidence shows an assault on prosecuting witnesses as they drove by defendant's house and another assault shortly thereafter when they turned around and came back by defendant's house, *held* the circumstances as to defendant's conduct at the time of the second assault are relevant as to the defendant's attitude and intent with reference to the prior incident. *S. v. Newton*, 151.

§ 14. Sufficiency of Evidence and Nonsuit.

Testimony of the driver of a car that as he was driving through a group on either side of a street his car was hit by several objects, resulting in appreciable damage, together with testimony of an occupant of the car that the car was struck two times on the occasion in question, and testimony of an officer that he recognized defendant and saw the defendant throw a rock when the defendant was about twenty feet from the car, and heard the following thump, although he did not see the rock hit the car, *is held* sufficient to be submitted to the jury on the charge of assault with a deadly weapon and the charge of malicious injury to personal property. *S. v. Parrish*, 274.

§ 15. Instructions.

Instruction on question of assault by pointing and firing rifle held favorable to defendant. *S. v. Newton*, 151.

§ 17. Verdict and Punishment.

In a prosecution upon a warrant charging assault with a deadly weapon the jury may return a verdict of guilty of a simple assault when warranted by the evidence. *S. v. Gooding*, 175.

Where the warrant upon which defendant is tried does not charge assault on a female and the evidence discloses that no serious injuries were inflicted on her, the punishment may not exceed a fine of $50.00 or imprisonment for thirty days, notwithstanding that the person assaulted is a female and the charge of the court on the warrant relates to assault on a female, the verdict of the jury being guilty of assault as charged in the warrant. *S. v. Barham*, 207.

ASSISTANCE, WRIT OF

Writ of assistance is a remedy in the nature of an execution to enforce a decree adjudicating the title or right to possession of realty, and therefore where a petition for partition is dismissed by judgment which does not adjudicate title, the respondent is not entitled to the issuance of the writ upon motion thereafter made, nor may the findings of fact and conclusions of law of the court in dismissing the partition proceedings be considered in determining whether the judgment adjudicated title or the right to possession, the judgment alone being the sole basis for the determination of this question. *Hill v. Development Co.*, 52.

ASSOCIATIONS

§ 5. Right to Sue and Be Sued.

An unincorporated association, at common law, could not sue or be sued as

a legal entity, but the common law in this respect has been modified by G.S. 1-97(6) and G.S. 1-69.1. *Milton v. Hill*, 134.

Service of process on labor unions see Process.

ATTACHMENT

§ 6. Priorities.

Lien of attachment held superior to orders for alimony as to surplus realized in later sale under foreclosure of land held by entrieties. *Porter v. Bank*, 573.

AUTOMOBILES

§ 2. Suspension and Revocation of Driver's License.

The power to revoke or suspend an automobile driver's license rests solely with the Department of Motor Vehicles, and although the Superior Court may, with defendant's consent, express or implied, suspend execution of a judgment in a criminal prosecution upon condition that defendant not operate a vehicle upon the public highways for a stipulated period, the court may not do so over the express objection of the defendant. Chapter 1017, Session Laws 1959, (G.S. 15-180.1) enabling a defendant to appeal from a suspended sentence without waiving his acceptance of the terms of suspension is noted. *S. v. Green*, 141.

Where the Department of Motor Vehicles has in its files certificates showing two separate convictions of a person of operating a motor vehicle in excess of 55 m. p. h., the Department has authority to suspend such person's license, and its act in doing so is not void, G.S. 20-16 (a). If the suspension by the Department was due to a mistake of law or fact such person's remedy is by application for a hearing under G.S. 20-16 (c) or by application to the Superior Court under G.S. 20-25, but he may not contemptuously disregard the order of suspension. *Beaver v. Scheidt*, 671.

Where the Department of Motor Vehicles has notified a driver of the suspension of his license because of two convictions of speeding, G.S. 20-16 (9), the Department properly complies with the statutory mandate by adding an additional period of suspension on notification of the conviction of such person of operating a vehicle without a license during the term of suspension, and properly adds another period of suspension for a second conviction of this offense, notwithstanding any error in the certification of one of the convictions for speeding, such person having failed to follow the statutory procedure to show that the original suspension was erroneous. *Ibid.*

§ 6. Safety Statutes and Ordinances in General.

A municipal ordinance prohibiting parking along a portion of a certain street is an ordinance enacted in the interest of public safety, so as to warrant an instruction that the violation of such ordinance would constitute negligence *per se*, which would warrant recovery if the proximate cause of the injury. *Carrigan v. Dover*, 97.

§ 7. Attention to Road, Look-out and Due Care in General.

The duty to exercise ordinary care for his own safety applies to a nocturnal motorist as well as to every other person, and it is his duty not merely to look but to keep a lookout in the direction of travel, and he is held to the duty of seeing what he ought to have seen. *Carrigan v. Dover*, 97.

A motorist is not required to anticipate negligence on the part of others,

AUTOMOBILES—*Continued.*

but, in the absence of anything which gives or should give notice to the contrary, is entitled to assume and to act upon the assumption that every other person will perform his legal duty and obey the law. *Ibid.*

The driver of a motor vehicle is under the duty not merely to look but to keep a lookout in the direction of travel, and he is negligent in failing to see that which he could have seen and ought to have seen in the exercise of that degree of care required of him by law. *White v. Cason*, 646.

§ 8. Turning and Turning Signals.

Where vehicles approached intersection from opposite directions G.S. 20-154(a) applies to motorist turning left to enter intersecting street and G.S. 21-155(a) has no application. *Shoe v. Hood*, 719.

While a driver entering an intersection faced with a green light is not under duty to anticipate that the driver of a vehicle approaching from the opposite direction will turn left across his path of travel without giving a signal of his intention or that he will neglect to yield the right of way, the fact that he enters the intersection with the green light does not relieve him of the legal duty to maintain a reasonable lookout, keep his vehicle under proper control, and to drive his vehicle at a speed which is reasonable and prudent under the circumstances. *Ibid.*

§ 17. Right of Way at Intersections.

While a person entering an intersection facing a traffic control signal giving him the right of way remains under duty to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner so as not to endanger or be likely to endanger others upon the highway, nevertheless, in the absence of anything which gives or should give him notice to the contrary, he is entitled to assume and act on the assumption that other motorists will observe the rules of the road and yield him the right of way. *Stathopoulos v. Shook*, 33.

The lateral boundary lines of a street intersecting another at a deadend must be extended entirely across the street intersected to determine the area of the intersection. *Shoe v. Hood*, 719.

While the courts will not take judicial notice of a municipal ordinance, the rights of the parties at a street intersection at which traffic control signals are maintained will be determined upon the basis that a motorist must give the lights their well recognized meaning and give that obedience to them which a reasonably prudent operator would give, notwithstanding that the ordinance is not introduced in evidence. *Ibid.*

While a driver entering an intersection faced with a green light is not under duty to anticipate that the driver of a vehicle approaching from the opposite direction will turn left across his path of travel without giving a signal of his intention or that he will neglect to yield the right of way, the fact that he enters the intersection with the green light does not relieve him of the legal duty to maintain a reasonable lookout, keep his vehicle under proper control, and to drive his vehicle at a speed which is reasonable and prudent under the circumstances. *Ibid.*

Where vehicles approached intersection from opposite directions G.S. 20-154(a) applies to motorist turning left to enter intersecting street and G.S. 21-155(a) has no application. *Ibid.*

§ 25. Speed in Vicinity of Schools.

The limitation of speed in the vicinity of a school house during school hours,

affected by the posting of appropriate signs by the Highway Commission, does not affect the speed restrictions outside the time limited. *Clark v. Rucker*, 90.

§ 30. Speed in Residential Districts.

Where there is testimony that the accident in suit occurred along a highway in a thickly populated area with residences and business establishments fronting thereon, at least some residences being side by side, the court is required to submit to the jury the question of whether the area was a residential district as defined by G.S. 20-38 (w)(1), and an instruction to the effect that there was no evidence that the area was a residential district and that the speed limit of 55 m.p.h. applied to automobiles traveling therein, must be *held* for error. *Goddard v. Williams*, 128.

§ 31. Exemptions from Speed Restrictions.

While G.S. 20-145 exempts a police officer from observing the speed limit set out in G.S. 20-141 when such officer is in the performance of his duties in apprehending a violator of the law or a person charged with or suspected of such violation, such police officer is nevertheless required to operate his vehicle with due regard to the safety of others, and must exercise that degree of care which a reasonably prudent man would exercise under like circumstances in the discharge of such duties. *Goddard v. Williams*, 128.

§ 34. Negligence in Hitting Children.

While a driver who sees or by the exercise of due care should see children on or near the traveled portion of the highway is under duty to use due care to control the speed of his vehicle and to keep a vigilant lookout to avoid injury, he is not required to come to a complete stop when children are standing off the hard surface and apparently attentive to traffic conditions, and he may not be held liable for injury to one of them who darts in front of his vehicle when there is nothing to give the driver notice that she might do so until too late for him to take evasive action. *Brinson v. Mabry*, 435.

§ 35. Pleadings in Auto Accident Cases.

Where the complaint in an action to recover damages resulting from a collision alleges a reckless operation of his vehicle by defendant, G.S. 20-140, evidence tending to show that defendant was intoxicated at the time is competent notwithstanding the absence of allegation of defendant's violation of G.S. 20-138, since a physical condition which may cause a person to act in a given manner is merely evidentiary. *Rick v. Murphy*, 162.

Complaint held sufficient to allege concurrent negligence of defendants resulting in death of intestate. *Friday v. Adams*, 540.

§ 41b. Sufficiency of Evidence of Negligence in Failing to Use Due Care in General.

Evidence that defendant could have seen plaintiff's car skidding out of control in time to have avoided hitting it held to take issue to the jury. *Johnson v. Lewis*, 797.

§ 41g. Sufficiency of Evidence of Negligence at Intersection.

Plaintiff's evidence to the effect that he was traveling on a servient street, stopped before entering the intersection with the dominant street, looked

in each direction and, seeing no traffic approaching, proceeded into the intersection, and after he had traveled more than half the intersection was struck by defendant's vehicle which entered the intersection along the dominant street at a speed of 40 to 50 m.p.h. in a 35 m.p.h. zone *held* sufficient to take the issue of negligence to the jury. *Johnson v. Rhodes*, 215.

Evidence tending to show that defendant ran through a stop sign and entered an intersection in the path of plaintiff's car, which was traveling on the dominant highway, forcing plaintiff to take evasive action to avoid a collision and resulting in plaintiff's being forced off the traveled portion of the highway and down an embankment, is sufficient to take the issue of defendant's negligence to the jury. *Lee v. Stevens*, 429.

Defendant's evidence on her counterclaim that she was riding as a passenger in a car turning left at an intersection, that the driver of the car gave a signal of his intention to turn left, and that the car was struck by a car which was proceeding in the opposite direction and entered the intersection at a fast and excessive speed under the circumstances is sufficient to overrule the motion to nonsuit the counterclaim even though the negligence, if any, of the driver of the car in which plaintiff was riding is imputed to plaintiff, and even though defendant entered the intersection with the green light. *Shoe v. Hood*, 719.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children.

Evidence held insufficient to show negligence on the part of motorist in hitting child on highway. *Brinson v. Mabry*, 435.

§ 41n. Sufficiency of Evidence of Negligence in Striking Animals.

Testimony of a passenger to the effect that the driver dimmed his lights in passing another car, and immediately after changing to his bright lights saw a black cow directly in front of the car, was unable to turn to the left because of oncoming traffic, and struck the cow, resulting in the injuries in suit, with further testimony that the driver was going about 45 m. p.h. and that plaintiff passenger did not know any way the driver could have avoided the accident, *is held* insufficient to establish actionable negligence on the part of the driver. *Coker v. Coker*, 91.

§ 42a Nonsuit on Ground of Contributory Negligence in General.

Whether nonsuit on the ground of contributory negligence of plaintiff motorist should be granted or whether the issue should be submitted to the jury must be determined in accordance with the facts of each particular case, and ordinarily consideration must be given to the evidence in regard to the surrounding circumstances such as fog, rain, glaring headlights, etc. *Carrigan v. Dover*, 97.

§ 42d. Contributory Negligence in Hitting Stopped or Parked Vehicle.

The evidence in this case *is held* not to disclose contributory negligence as a matter of law on the part of plaintiff motorist in striking the rear of a truck, parked without lights on the right side of a six lane highway, with its rear protruding some three feet into the center lane for northbound traffic, there being evidence that plaintiff had turned from the left northern lane into the center lane some 40 feet from the trailer when a car preceding him in that lane gave a signal for a left turn, and that plaintiff was some 25 or 30 feet from the trailer when he first saw it, there being further evidence that the night was dark, that the background of the trailer was a vacant house, that the darkness blended together, that the tractor-trailer

was parked on a busy thoroughfare on which parking was prohibited, etc. *Carrigan v. Dover*, 97.

§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersection.

Evidence held insufficient to show contributory negligence as matter of law in failing to see that defendant's vehicle would not stop in observance to traffic signal. *Stathopoulos v. Shook*, 33.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Evidence of concurring negligence of defendants held sufficient to be submitted to the jury. *Friday v. Adams*, 540.

Evidence tending to show that the driver of the car, his attention diverted by the laughing and talking of his passengers, in which he was participating, ran into the abutment of a railroad overpass in the center of the street, that the abutment had black and white stripes painted on it, had reflectors on it, and was readily visible a distance of some two hundred feet etc. *is held* to disclose that the negligence of the driver was the sole proximate cause of the accident, and nonsuit was properly entered as to the defendant municipality and the defendant railroad. *White v. Cason*, 646.

§ 46. Instructions in Auto Accident Cases.

An instruction to the effect that a police officer engaged in the discharge of his duties in an effort to apprehend a person charged with or suspected of violation of law, would not be liable to the fleeing person for injury resulting from a collision unless the conduct of the officer was wilful and wanton or the injuries were intentionally inflicted when they could have been avoided, must be *held* for prejudicial error, even though mere speed alone under such circumstances, unaccompanied by any recklessness or disregard of the rights of others, would not support an allegation of negligence on the part of the officer. *Goddard v. Williams*, 128.

§ 49. Contributory Negligence of Guest or Passenger.

Even though as between driver and owner-passenger imputed negligence does not apply, owner-passenger may nevertheless be guilty of contributory negligence in failing to exercise control over driver. *Sorrell v. Moore*, 852. Where wife-passenger did not know that tires of husband's car were slick, she cannot be contributorily negligent in riding therein when car skidded out of control. *Johnson v. Lewis*, 797.

§ 50. Negligence of Driver Imputed to Guest or Passenger.

Since the owner-passenger ordinarily has the right to control and direct the operation of a vehicle, the negligence of the driver, operating the vehicle with the owner-passenger's permission or at his request, will be imputed to the owner-passenger, nothing else appearing. This rule also applies if the owner-passenger is the wife of the driver. *Shoe v. Hood*, 719.

While the presumption that a driver of a vehicle is the agent of the owner riding therein as a passenger is a rebuttable presumption, the burden is upon the owner-passenger to show a bailment or other circumstances under which the owner-passenger relinquishes the incidents of ownership and the right to control the operation of the vehicle. *Ibid.*

Evidence disclosing that the wife was the owner of an automobile and

that while it was being driven by her husband to his work she was a passenger therein for the purpose of returning the car to their home so that she might use it during the day if she so desired, is sufficient to warrant an instruction that as a matter of law the husband and wife were engaged in a joint venture and the negligence, if any, of the husband was to be imputed to the wife. *Ibid.*

Evidence tending to show merely that the wife was riding as a passenger in an automobile owned and driven by her husband, without any evidence that she had any control over its operation, is insufficient to be submitted to the jury on the issue of her contributory negligence on the theory of a joint enterprise. *Johnson v. Lewis*, 797.

§ 54f. Sufficiency of Evidence on Issue of Respondeat Superior.

Evidence tending to show that the vehicle causing the damage in suit carried the license plates issued to the driver and was registered in his name, and that the driver had employed the owner of a used car lot to construct the vehicle from a body of a car, whose motor had been damaged, and the motor from the vehicle theretofore owned by the driver, the body of which had been damaged beyond repair, *is held* insufficient to be submitted to the jury on the question of the liability of the owner of the used car lot under the doctrine of *respondeat superior*. *Rick v. Murphy*, 162.

§ 65. Prosecutions for Reckless Driving.

Warrants for reckless driving which charged the offense in the language of the statute are sufficient. *S. v. Wallace*, 378.

The fact that warrants charge defendants with reckless driving upon a named road "at" an intersecting road, with evidence that the defendants' vehicle was operated on the named road in a reckless manner but was finally stopped some 250 yards from the named intersecting road, does not justify nonsuit for variance, since word "at" when used to designate a place is less definite than "in" or "on", and often means "near to". *Ibid.*

Evidence held sufficient to support conviction of driver and of owner of vehicle riding therein of reckless driving. *Ibid.*

§ 68a. "Vehicle" within Meaning of G.S. 20-138.

Construing G.S. 20-138 and G.S. 20-38(h) together *in pari materia* it *is held*, a farm tractor, when operated upon a highway is a vehicle within the meaning of G.S. 20-138. *S. v. Green*, 141.

§ 71. Competency of Evidence in Prosecutions for Drunken Driving.

In a prosecution for driving while under the influence of intoxicating liquor, it is competent to show in evidence the injuries resulting from the accident in which defendant's car was involved for the purpose of showing the manner in which defendant was operating the car and his lack of control over it, but such evidence should be limited to this purpose, and evidence of such injuries beyond that having a bearing on this question should be excluded. *S. v. Green*, 40.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for Drunken Driving.

Where witnesses testify to the effect that defendant was under the influence of intoxicants immediately after the accident and that his condition was not caused by his injuries, there being no evidence that defendant

AUTOMOBILES—*Continued.*

received any appreciable injury in the accident, the evidence is sufficient to be submitted to the jury on the question of whether the defendant was intoxicated at the time, notwithstanding the testimony of other witnesses that they could not tell whether defendant's condition was due to intoxication or to shock or injury received in the accident. *S. v. Green*, 40.

The evidence in this case *is held* amply sufficient to take to the jury the question of defendant's guilt of operating a farm tractor upon a public highway of this State while defendant was under the influence of intoxicating liquor. *S. v. Green*, 141.

§ 74. Instructions in Prosecutions for Drunken Driving.

In this prosecution for operating a motor vehicle upon a public highway of this State while under the influence of intoxicating liquor, the court's definition of "under the influence" *held* without error. *S. v. Purifoy*, 82.

§ 82. Failing to Heed Police Siren.

A warrant which fails to charge that defendant was driving a motor vehicle at the time he failed to heed a police siren is fatally defective. *S. v. Wallace*, 378.

Evidence held sufficient to support conviction of driver and of owner of vehicle riding therein of failing to heed police siren. *Ibid.*

BANKS AND BANKING

§ 3. Deposits Generally.

The deposit of money in a bank creates the relationship of debtor and creditor between the bank and the depositor. *Schwabenton v. Bank*, 659.

§ 4. Joint Deposits.

Where two persons *sui juris* enter into a contract that funds on deposit in their joint account should constitute a joint tenancy with right of survivorship, the survivor is entitled to the funds free from the claims of the heirs or the personal representative or creditors of the deceased tenant in the absence of allegation and evidence that the tenancy was established with the intent to defraud the creditors of the deceased tenant. *Wilson v. Wooten*, 667.

§ 10. Liabilities of Bank in Paying Checks on Depositor's Account.

A bank debiting the account of a depositor has the burden of showing the authority for entering such debit. *Schwabenton v. Bank*, 655.

A bank relying upon G.S. 53-52 has the burden of showing delivery of the check to the depositor more than sixty days before claim is made that the check was a forgery. *Ibid.*

Same—

The claim of depositor against the bank for debiting the depositor's account with forged checks is barred as to each individual forgery in sixty days after receipt by the depositor of the cancelled checks from the bank without calling the bank's attention to the fact that the checks were forged. *Ibid.*

Same—

A depositor receives cancelled checks from a bank within the meaning of G.S. 53-52 upon delivery of the vouchers into the depositor's possession,

BANKS AND BANKING—*Continued.*

actual or constructive, and when the bank mails statements and checks to the depositor, the depositor receives such checks as of the time the depositor accepts them from the post office in person or through his authorized agent, and it makes no difference whether the depositor looks at his statement or whether the depositor's agent, authorized to receive mail from the post office, extracts such vouchers from the statement before the depositor has an opportunity to examine them. *Ibid.*

BASTARDS

§ 1. Nature and Elements of Offense of Wilfull Failure to Support.

Failure to support an illegitimate child is a continuing offense, and the date of birth of such child is immaterial if the action is instituted within the time prescribed by statute, G.S. 49-4, and demand for the support of the child is made a reasonable time before the action is instituted. *S. v. Womack*, 342.

BILL OF DISCOVERY

§ 1. Examination of Adverse Party in General.

G.S. 8-71 does not contemplate the taking of a deposition of a person disqualified to give evidence in the case, and confers no right to investigate or inquire into matters which the court could not investigate and inquire into the actual trial. *Buick Co. v. General Motors Corp.*, 201.

Therefore subpoena duces becum did not require accountant to divulge confidential information. *Ibid.*

BILLS AND NOTES

§ 17. Defenses.

Where the answer alleges that the execution of notes was procured by fraud, it is immaterial that the allegations are insufficient to show that plaintiff was not a holder in due course, or defect appearing on face of note, or insufficient to show invalidity because of usury. *Financing Corp. v. Cuthrell*, 75.

As between the parties, it is competent for the maker to show that the note sued on was without consideration or that it was executed upon express condition that it should not become effective or operative as a binding obligation until the happening of a stated contingency, in this case the payment of certain other notes executed by third parties as a part of the same transaction. *Bailey v. Westmoreland*, 843.

BOUNDARIES

§ 3. Reversing Calls.

Where the description in a deed calls for a beginning corner and then only courses and distances from such corner without otherwise pointing out any other corner or referring to any corner of an adjacent tract, the beginning corner may not be established by reversing the call. *Harris v. Raleigh*, 313.

§ 5. Junior and Senior Deeds.

Where the owner of land has subdivided same and prepared and recorded a map showing lots and named streets, the location of a street so shown may not be established by the description in a deed in the chain of title

BOUNDARIES—*Continued.*

executed subsequent to such division by the original owner, since a junior instrument may not be used to establish the location of a boundary fixed by a senior instrument. *Harris v. Raleigh*, 313.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 1. Nature and Essentials of Remedy.

An action to set aside a deed on the ground of fraud and undue influence is an action to cancel and rescind the deed and plaintiff may not assert that the defendants' answer set up a defense to remove cloud from title. *Walters v. Bridgers*, 289.

§ 8. Pleadings and Issues.

Where, in an action on a note by the holder thereof to recover on the note and foreclose the deed of trust securing same, defendants allege that their signatures to the notes and deed of trust were procured by fraud and that plaintiff was not a holder in due course, plaintiff's demurrer to paragraphs of the answer on the ground that they failed to allege actual knowledge on the part of the plaintiff of defect in the title of the payee of the note, on the ground that usury was insufficient basis for the cancellation of the note, and on the ground that the answer did not show vitiating defect in the execution of the deed of trust, is properly overruled, since the failure of the answer to sufficiently allege defenses other than that of fraud is immaterial, and the paragraphs objected to being proper to state the particular facts constituted the alleged fraud and *scienter*. *Financing Corp v. Cuthrell*, 75.

§ 9. Burden of Proof.

In an action to cancel and rescind a deed for fraud, the burden is on plaintiff to prove the cause of action only by the prepounderance of the evidence. *Walters v. Bridgers*, 289; *Maynard v. R. R.*, 783.

§ 10. Sufficiency of Evidence and Nonsuit.

Evidence held insufficient to show that deed was procured by fraud and undue influence. *Walters v. Bridgers*, 289.

CARRIERS

§ 1. State and Federal Regulation and Control.

The Utilities Commission has no jurisdiction over a contract carrier. *Utilities Com. v. Towing Corp.*, 105.

A carrier is a common carrier if it holds itself out to the public as engaged in the public business of transporting persons or property for compensation, and offers such service to all members of the public who desire such service so far as its facilities permit. *Ibid.*

A private or contract carrier of goods is one who transports goods solely upon contract or a series of contracts with each individual shipper, and who does not hold himself out to the general public as ready to accept and carry all goods, but furnishes his services only to those with whom he sees fit to contract. *Ibid.*

CLAIM AND DELIVERY

§ 2. Proceedings in Claim and Delivery.

In plaintiff's action to recover certain goods sold under consignment,

CLAIM AND DELIVERY—*Continued.*

with ancillary proceedings in claim and delivery, defendant may set up as a counterclaim a separate contract existing at the time under which defendant was given exclusive right to act as distributor for the goods of plaintiff until a specified future date, and that plaintiff's seizure of the goods was in violation of the distributor agreement and was wrongful. *Rubber Co. v. Distributors, Inc.*, 406.

§ 5. Liabilities on Plaintiff's Bond.

If the jury should determine that plaintiff's seizure of the chattel in claim and delivery was wrongful, but the return of the chattel is impossible, the deterioration of the chattel while in plaintiff's possession is not an element of damages, but the measure of damages for the wrongful taking is the value of the chattel at the time it was seized by the sheriff, with interest. *Tillis v. Cotton Mills*, 359.

COLLEGES AND UNIVERSITIES

Trustees of school held not authorized to maintain action against Presbyteries to prevent consolidation of colleges, *Adams v. College*, 617.

COMPROMISE AND SETTLEMENT

Judgment sustaining defendant's plea in bar based on a settlement made by plaintiff's insurer with defendant without the knowledge or consent of plaintiff, reversed on authority of *Lampley v. Bell*, 250 N.C. 713. *Campbell v. Brown*, 214.

Plaintiff and the original defendant reached a compromise which was approved by the court by order authorizing and directing the original defendant to pay a stipulated sum to plaintiff in full settlement of her claim but without prejudice to the rights of the original defendant to maintain his cross-action against the additional defendant for contribution, the additional defendant being represented when the order was entered. Thereafter the additional defendant was permitted to file answer alleging the compromise and release of the original defendant and asserting that such release of his joint tortfeasor released him, and later moved that the cross-action of the original defendant against him be dismissed. *Held:* The motion to dismiss was properly denied, since one Superior Court judge is without authority to review and vacate final orders entered in the cause by another Superior Court jurge. *Cuthbertson v. Burton*, 457.

CONSPIRACY

§ 3. Nature and Elements of Criminal Conspiracy.

A conspiracy is an agreement between two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means, and since the agreement itself is the offense it is not necessary that the object of the agreement should be accomplished. *S. v. Walker*, 465.

The fact that an agent of the law pretended to be acting in conjunction with several others in a criminal conspiracy does not absolve the others, since even though he did not join in the conspiracy, the illegal agreement between any two of the others would constitute the offense. *Ibid.*

§ 5. Relevancy and Competency of Evidence.

In a prosecution for conspiracy to bomb a mill and transformers providing power for the operation of the mill in order to stop operations at the mill

CONSPIRACY—*Continued.*

during a strike, testimony of statements made by defendants in regard to their knowledge as to which transformer would have to be destroyed to interrupt power to the mill is competent to show their asserted skill and ability to accomplish the purpose of the conspiracy, and the fact that such testimony may tend to implicate the defendants in other offenses is not ground for its exclusion. *S. v. Walker*, 465.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence of defendants' guilt of conspiracy to dynamite structures at mills under strike held sufficient to overrule nonsuit. *S. v. Walker*, 465.

CONSTITUTIONAL LAW

§ 4. Waiver and Estoppel to Assert Constitutional Questions.

In criminal as well as in civil actions a person may, subject to certain exceptions, waive a constitutional right by express consent, by failure to assert such right in apt time, or by conduct inconsistent with the purpose to insist upon such right. *Cotton Mills v. Local Union*, 218.

§ 7. Delegations of Power by General Assembly.

The General Assembly has the right to determine what portion of its sovereign power of eminent domain it will delegate to public or private corporations to be used for the public benefit. *Morganton v. Hutton & Bourbonnais Co.*, 531.

§ 24. What Constitutes Due Process of Law.

A litigant has the right under the law of the land to confront and cross-examine witnesses. *Cotton Mills v. Local Union*, 218.

§ 25. Impairment of Obligations of Contract.

The statute rendering invalid a prior by-law of a corporation requiring a majority of the privately owned shares of stock to be represented in order to constitute a quorum does not result in the impairment of any contractual right, even in respect to a corporation in which the state owns a majority of the stock. *Webb v. Morehead*, 394.

§ 28. Necessity for and Sufficiency of Indictment.

A defendant may not be tried initially in the Superior Court even for a misdemeanor without an indictment unless he waives the finding and return of an indictment in accordance with the provisions of G.S. 15-240, and where the record fails to show that defendant's counsel, if any he had, consented to the waiver of indictment, the judgment entered in the cause must be arrested. Constitution of North Carolina, Article 1, section 12. *S. v. Searcy*, 320.

Where defendant has been tried in an inferior court for a misdemeanor he may be tried in the Superior Court *de novo* on appeal upon the original warrant. *Ibid.*

§ 30. Due Process in Trial of Criminal Cases in General.

The trial court has the responsibility for enforcing the right of the defendant to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Manning*, 1.

Every person charged with a crime is entitled to a fair and impartial trial. *S. v. Walker*, 465.

CONSTITUTIONAL LAW—*Continued.*

§ 31. Right of Confrontation.

In proceedings under an order to show cause why respondents should not be held in contempt of court for the willful violation of a restraining order, the admission of affidavits tending to establish specific acts done by each respondent in violation of the order will not be *held* for error when respondents do not challenge the admission of the affidavits or indicate any desire to cross-examine any affiant, and when no objection is made until after judgment, since defendants will be held to have waived their rights of confrontation. *Cotton Mills v. Local Union*, 218, 231, 234, 240, 248, 254, 335, 413, 419.

A defendant's right of confrontation includes the right to a fair opportunity to confront the accusers and witnesses with other testimony, which embraces the right to an opportunity to have his witnesses in court, to examine them in his behalf, and to prepare and present his defense, which right of confrontation must be afforded not only in form but in substance. Constitution of N. C., Art. I, sec. 11. *S. v. Graves*, 550.

§ 33. Right Not to Incriminate Self.

When defendant voluntarily testifies in his own behalf he is subject to cross-examination as any other witness. *S. v. Sheffield*, 309.

§ 37. Waiver of Constitutional Guarantees by Person Accused of Crime.

In criminal as well as in civil actions a person may, subject to certain exceptions, waive a constitutional right by express consent, by failure to assert such right in apt time, or by conduct inconsistent with purpose to insist upon such right. *Cotton Mills v. Local Union*, 218, 231, 234, 240, 248, 254, 335, 413, 419.

The right of confrontation may thus be waived. *Ibid.*

CONTEMPT OF COURT

§ 3. Civil Contempt—Refusal to Obey Lawful Order of Court.

Knowledge of a person of the substance and meaning of a restraining order is sufficient knowledge of the order as the basis for a prosecution for contempt, and it is not required that such person have knowledge of the exact words used in the order. *Cotton Mills v. Local Union*, 218, 231.

Service of a restraining order on a defendant is sufficient to fix him with knowledge of its provisions as the basis for a prosecution for contempt. *Cotton Mills v. Local Union*, 218.

§ 6. Hearings on Orders to Show Cause, Findings and Judgment.

A person denying his asserted violation of a restraining order in contempt proceedings has the right under the provisions of Art. I, Section 17 of the Constitution of North Carolina, synonymous with due process of law under the Federal Constitution, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established. *Cotton Mills v. Local Union*, 218, 231, 234, 240, 248, 254, 335, 412, 419.

But such right of confrontation may be waived and respondents held to have waived their right to object to admission of affidavits of witnesses upon restraining of the order to show cause. *Ibid.*

The testimony of respondents, together with the other evidence heard by the court, *held* sufficient to sustain the court's findings that each respondent had knowledge of the substance and meaning of a restraining order there-

tofore issued in the cause and, with such knowledge, willfully and intentionally violated its terms. *Cotton Mills v. Local Union*, 218, 234, 240, 249, 254, 335, 412, 419.

A finding of the court in contempt proceedings that respondents with knowledge of the import of a restraining order willfully participated in a violation of its terms is conclusive when supported by the evidence notwithstanding respondents' contentions that they were mere involuntary witnesses when the restraining order was violated by others. *Cotton Mills v. Local Union*, 231.

As to certain of respondents it *is held* that the evidence, including their own testimony at the hearing upon the order to show cause, was amply sufficient to sustain the finding that they had actual knowledge of the contents of the restraining order they were charged with willfully violating. *Cotton Mills v. Local Union*, 248.

CONTRACTS

§ 12. Construction and Operation of Contracts in General.

When a written contract is free from ambiguity, interpretation is for the court. *Briggs v. Mills, Inc.*, 642.

In interpreting a contract, the court will ascertain the intent from the language used, the situation of the parties, and the objective sought to be accomplished. *Ibid.*

Ordinarily the words employed in a written contract will be given their ordinary significance. *Ibid.*

§ 21. Performance, Substantial Performance and Breach.

Each party to an executory contract impliedly promises not to do anything to prejudice the other in the performance of his part of the agreement, and where one party does an act which makes performance on the part of the other party impossible, such other party may treat such renunciation as a breach and sue for his damages at once, provided the renunciation covers the entire contract. *Tillis v. Cotton Mills*, 359.

§ 27. Actions on Contract—Sufficiency of Evidence and Nonsuit.

Evidence tending to show the existence of a contract between the parties and that defendant performed an act rendering it impossible for plaintiff to perform his part of the agreement repels nonsuit, since such act constitutes a breach of the contract by defendant entitling plaintiff to nominal damages at least. *Tillis v. Cotton Mills*, 359.

Where plaintiff brings action on a contract against two defendants but nonsuit is allowed as to one of them upon plaintiff's evidence tending to show that the agreement was made with the other alone, nonsuit as to such other defendant on the ground of variance is properly denied, since the joinder of the unnecessary party in no way affects the proof of the cause of action against the other. *Ibid.*

Where plaintiff's evidence makes out a *prima facie* case of breach of contract, motion to nonsuit is properly denied irrespective of the evidence of damage, since breach of contract entitles the injured party to nominal damages at least. *Robbins v. Trading Post*, 663.

§ 29. Measure of Damages for Breach.

In order to recover substantial damages for breach of an executory contract,

CONTRACTS—*Continued.*

plaintiff must offer evidence tending to show with reasonable certainty not only the amount of damages but also that the items of damage claimed naturally resulted from the breach of the contract and were within the contemplation of the parties at the time the contract was executed. *Tillis v. Cotton Mills*, 359.

In an action to recover for loss of profits resulting from defendant's breach of an executory contract to ship goods in plaintiff's trucks, plaintiff may not give his estimate of the amount of profits he would have realized without introducing evidence as to items of cost and expenses in performing the contract, and the court may not state merely the general rule for the admeasurement of damages without charging with particularity as to what items should be considered in ascertaining the probable net profit plaintiff would have realized. *Ibid.*

The measure of damages for breach of a contract for the construction of a house in accordance with the plans and specifications is the cost of labor and material required to make the building conform to the contract, provided the defects can be remedied without substantial destruction to any part of the building, but if a substantial part of what has been done must be undone in order to remedy the deficiencies, the measure of damages is the difference in value between the house as constructed and its value had it been constructed in accordance with the agreement. *Robbins v. Trading Post*, 663.

§ 31. Right of Action for Wrongful Interference with Contractual Rights by Third Person.

A third party who, acting without justification and not in the legitimate exercise of his own rights, induces one contracting party not to enter into or renew a contract with the other contracting party, may be held liable by either of the contracting parties for the malicious interference with his contractual rights. *Johnson v. Graye*, 448.

§ 32. Actions for Wrongful Interference with Contractual Rights of Third Person.

Allegations to the effect that by malicious and false representations reflecting on plaintiff's character, defendant procured plaintiff's discharge by a school board, state a cause of action for wrongful interference with plaintiff's contractual rights, and the three year statute applies, and not the one year statute applicable to libel and slander. *Johnson v. Graye*, 448.

CONTROVERSY WITHOUT ACTION

§ 1. Nature and Scope of Remedy.

Where the parties agree that stipulated facts should constitute and be the evidence in the case and waive trial by jury and agree that the judge upon the facts should determine the rights and liabilities of the parties, the cause is not a controversy without action under G.S. 1-250 *et seq.*, and the power of the court to find additional facts must be determined in accordance with the agreement of the parties submitting the controversy to the court. *Credit Asso. v. Whedbee*, 24.

§ 2. Statement of Facts, Hearings and Judgment.

In a controversy without action the court is without authority to find additional facts or draw factual conclusions from the evidentiary facts. *Credit Asso. v. Whedbee*, 24; *New Bern v. White*, 65.

CORPORATIONS

§ 1. Incorporation and Corporate Existence.

Where the term of a corporation is limited in its charter, such corporation ceases to exist at the expiration of such term in the absence of a due extension of its charter. *Steadman v. Pinetops*, 509.

§ 4. Stockholders' Meetings.

G.S. 55-27, (Ch. 2, Public Laws of 1901), prior to the effective date of Ch. 1371, S.L. 1955, prescribed as a matter of public policy that in no case should more than a majority of the shares of stock of a corporation be required to be represented at any meeting in order to constitute a quorum, and this law rendered invalid any by-law of a corporation in conflict therewith, even though such by-law was in effect prior to the passage of the act, since what could be originally prohibited can be subsequently prohibited. *Webb v. Morehead*, 394.

§ 82. Merger and Consolidation.

Upon the filing of a valid consolidation agreement by three educational corporations, the separate existence of each of the three consolidating corporations is terminated. *Adams v. College*, 617.

COURTS

§ 9. Jurisdiction of Superior Court After Orders or Judgments of Another Superior Court Judge.

One Superior Court judge has no authority to review a final order of another. *Cuthbertson v. Burton*, 457.

§ 11. Establishment of Courts Inferior to Superior Court.

The General Assembly has authority to provide for the establishment of courts inferior to the superior court, Constitution of North Carolina, Article IV, Sections 2 and 14, but since the effective date of Article II, Section 29 of the State Constitution, the General Assembly can do so only by general act. *S. v. Clayton*, 261.

CRIMINAL LAW

§ 1. Nature and Elements of Crime in General.

A person may not be punished for an offense he may commit in the future, and a charge of crime must be supported by the facts as they existed at the time the charge is formally laid. *S. v. Hall*, 211.

§ 7. Entrapment.

The mere fact that an agent of the law pretended to be acting in conjunction with several others in a criminal conspiracy does not absolve such others from criminal responsibility, since even though the agent of the law did not join in the conspiracy, the illegal agreement between any two others would constitute the offense. *S. v. Walker*, 465.

§ 9. Aiders and Abettors.

Persons aiding and abetting in commission of misdemeanor are guilty as principals. *S. v. Clayton*, 261; *S. v. Parrish*, 274; *S. v. Wallace*, 379.

§ 13. Jurisdiction in General.

It is an essential of criminal jurisdiction that the warrant or indictment sufficiently charge an offense. *S. v. Wallace*, 378; *S. v. Thornton*, 658.

CRIMINAL LAW—*Continued.*

§ 15. Venue.

A prosecution for conspiracy is properly brought in the county in which the conspiracy was to be consummated and where several of the conspirators had come to consumate it and had been arrested. *S. v. Walker*, 465.

§ 16. Jurisdiction—Degree of Crime.

The Recorder's Court of Vance County and the Superior Court have concurrent jurisdiction of prosecutions for the misdemeanors of assault with a deadly weapon and malicious injury to personal property. G.S. 7-64. *S. v. Clayton*, 261; *S. v. Parrish*, 274.

Where two courts have concurrent jurisdiction of certain offenses the court first exercising jurisdiction of a particular prosecution obtains jurisdiction to the exclusion of the other. *Ibid.*

Where the recorder's court of a county having concurrent jurisdiction with the Superior Court of misdemeanors issues its warrant charging defendant with certain misdemeanors, but a *nolle prosequi* is entered in the recorder's court prior to plea, that court loses jurisdiction and the State may proceed upon an indictment found in the Superior Court subsequent to the date of the date of the entry of the *nolle prosequi* and defendant's motion in the Superior Court to remand to the recorder's court is properly denied. *Ibid; S. v. Rose*, 281; *S. v. Moseley*, 285.

§ 18. Jurisdiction on Appeals to Superior Court.

Where defendant has been tried in an inferior court for a misdemeanor he may be tried in the Superior Court *de novo* on appeal upon the original warrant. *S. v. Searcy*, 320.

Where defendant has not been tried and convicted in the recorder's court, he may not be tried upon the original warrant upon the transfer of the cause to the Superior Court, and the judgment of the Superior Court will be arrested and the appeal therefrom dismissed. *S. v. Johnson*, 339.

The references in the judge's charge to the defendant's trial in and appeal from the Recorder's Court, *held* not to have impaired in any way defendant's right to a trial *de novo* in the Superior Court uninfluenced by the trial in the Recorder's Court. *S. v. Purifoy*, 82.

§ 23. Plea of Guilty.

Defendant's plea of guilty is equivalent to conviction of the offense charged and no other proof of guilt is required, and after judgment has been pronounced thereon, defendant, upon withdrawal of his original counsel from the case, may not contend to the contrary in the absence of a motion for leave to withdraw the plea. *S. v. Wilson*, 174.

§ 24. Plea of Not Guilty.

Defendant's plea of not guilty puts in issue every element of the offense charged. *S. v. Glenn*, 156.

§ 26. Plea of Former Jeopardy.

A *nolle prosequi* entered before plea will not support a plea of former jeopardy. *S. v. Clayton*, 261; *S. v. Parrish*, 274.

§ 31. Judicial Notice.

It is a matter of common knowledge that pregnant women sometimes

miscarry, sometimes have stillbirths, and that a child born alive sometimes dies very shortly after birth. *S. v. Hall*, 211.

§ 32. Burden of Proof and Presumptions.

Defendant's plea of not guilty disputes the credibility of the evidence, even when uncontradicted, and the presumption of innocence can be overcome only by the verdict of a jury. *S. v. Lackey*, 686.

§ 33. Facts in Issue and Relevant to the Issues.

Evidence which is relevant and competent will not be excluded simply because it may prejudice defendant or excite the sympathy of the jury. *S. v. Green*, 40.

§ 34. Evidence of Defendant's Guilt of other Offenses.

In a prosecution for conspiracy to bomb a mill and transformers providing power for the operation of the mill in order to stop operations at the mill during a strike, testimony of statements made by defendants in regard to their knowledge as to which transformer would have to be destroyed to interrupt power to the mill is competent to show their asserted skill and ability to accomplish the purpose of the conspiracy, and the fact that such testimony may tend to implicate the defendants in other offenses is not ground for its exclusion. *S. v. Walker*, 465.

§ 39. Evidence in Rebuttal of Facts Brought Out by Adverse Party.

Where the motives and credibility of a State's witness have been attacked on cross-examination it is competent for such witness upon redirect examination to explain his motives for the purpose of repelling the attack on his credibility. *S. v. Walker*, 465.

§ 46. Flight as Implied Admission of Guilt.

Flight is competent evidence to be considered by the jury in connection with other circumstances in passing upon the question of defendant's guilt. *S. v. Sheffield*, 309.

Where defendants as witnesses in their own behalf have testified on cross-examination as to the fact that they had fled the State, it is proper for the court to charge the jury on the contention of the State based upon such flight without having instructed defendants of their right to offer rebuttal evidence upon this specific aspect, it appearing that the court, when the State rested its case, advised defendants that they could put any witnesses they had on the stand, and there being no intimation by defendants that they had any witnesses to testify upon the matter. *Ibid.*

§ 67. Testimony of Telephone Conversations.

Evidence that a telephone conversation was made to the room of one person, that the superior of such person answered the phone and identified himself, together with the testimony of the person making the call that he recognized the voice as that of the person who had identified himself, is sufficient to take the question of the identity of the antiphonal speaker to the jury. *S. v. Walker*, 465.

§ 67½. Tape Recordings.

Incriminating conversations between defendants recorded by a tape recorder placed in a room with the consent of the person renting and occupying the room are competent. *S. v. Walker*, 465.

CRIMINAL LAW—*Continued.*

§ 75. Books, Records and Private Writings.

Original or duplicate original deposit slips, prepared in the ordinary course of business, typewritten by defendant or by someone under her direction and found in the company's files of which she was the authorized custodian, are competent in evidence. *S. v. Shumaker*, 678.

§ 76. Best and Secondary Evidence of Writings.

Photostatic copies of deposit slips and checks made by an employee of a bank in the usual course of business and identified by such employee are competent as primary evidence without proof of the loss or destruction of the originals. *S. v. Shumaker*, 678.

§ 79. Evidence Obtained by Unlawful Means.

Evidence discovered in the course of a search under a duly issued search warrant is competent, G.S. 15-27, notwithstanding the contention that the officers conducted the search in an unreasonable manner in entering the premises forcibly without first giving notice of their identity or authority to make the search, the common law rule except as modified by statute, being applicable. *S. v. Smith*, 328.

§ 80. Evidence of Character of Defendant.

Where a defendant testifies in his own behalf it is competent for the solicitor on the cross-examination to ask him if he had not theretofore been convicted and sentenced to imprisonment for another crime, and the affirmative answer of the defendant to such question is competent as affecting his credibility as a witness, and in its charge the court may state what each defendant admitted as a fact on such cross-examination. *S. v. Sheffield*, 309.

§ 84. Credibility of Witnesses, Corroboration and Impeachment.

The state is entitled to prove only the general character of its witness, and testimony of officers that they had never seen prosecutrix in establishments where beer was sold is incompetent. *S. v. Grundler*, 177.

Testimony of officers as to statements witnesses had made to them is competent even though such statements were not made in the presence of defendants, when the testimony of the officers tends to corroborate the testimony of the witnesses upon the trial, and the admission of such testimony cannot be held for error when the court specifically restricts it to the purpose of corroboration. *Ibid.*

The affidavits of officers testifying for the State are competent for the purpose of corroborating the testimony of the officers, and the action of the court in admitting such affidavits for the restricted purpose of corroboration if the jury should find that the affidavits did in fact corroborate the witnesses cannot be held for error. *S. v. Rose*, 281; *S. v. Moseley*, 285.

Where the motives and credibility of a State's witness have been attacked on cross-examination it is competent for such witness upon redirect examination to explain his motives for the purpose of repelling the attack on his credibility. *S. v. Walker*, 465.

§ 87. Consolidation and Severance of Counts for Trial.

The separate indictments of defendants for rape of the same prosecutrix on the same evening, defendants being in company with each other, *held* properly consolidated for trial, G.S. 15-152, the material evidence being equally pertinent to both indictments. *S. v. Grundler*, 177.

CRIMINAL LAW—*Continued.*

§ 91. Withdrawal of Evidence.

Ordinarily error in the admission of evidence is cured when the court withdraws such evidence and instructs the jury not to consider it, and it is only in exceptional instances when because of the serious character and gravity of the incompetent evidence that the difficulty of erasing it from the minds of the jurors is obvious, that its admission cannot be cured by action of the court. *S. v. Green*, 40.

In this prosecution for driving while under the influence of intoxicating liquor any error in the extent of the admission of evidence of injuries to a child injured in the accident in which defendant's car was involved *held* cured by the instruction of the court that the sole question was whether the defendant was operating his vehicle while under the influence of intoxicating beverages and that the jury should not consider the fact that the accident caused injury to another person. *Ibid.*

Where the court properly withdraws incompetent evidence from the consideration of the jury and instructs the jury not to consider it, error in its admission is cured in all but exceptional circumstances. *S. v. Grundler*, 177.

§ 94. Conduct and Action of Court and Expression of Opinion on Evidence During Course of Trial.

The trial court has the responsibility for enforcing the right of the defendant to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Manning*, 1.

Questions asked a witness by the court *held* merely of a clarifying nature and not to constitute an expression of opinion by the court on the weight or credibility of the testimony. G.S. 1-180. *S. v. Davis*, 93; *S. v. Grundler*, 177.

§ 97. Argument and Conduct of Counsel and Solicitor.

Where it appears that persons other than defendants were present at the time referred to in the testimony of the State's witness and could have contradicted the State's witness if the facts related by him were untrue, the prosecution may argue to the jury that no one had testified in contradiction of the State's witness, and such argument will not be held improper as a comment upon defendant's failure to testify. *S. v. Walker*, 465.

Action of solicitor held not to amount to the taking of unfair advantage of defendants. *Ibid.*

§ 99. Consideration of Evidence on Motion to Nonsuit.

Only the evidence favorable to the State need be considered on defendant's motion to nonsuit. *S. v. Gay*, 78.

Matters of defense are not to be considered on motion to nonsuit. *S. v. Moseley*, 285.

On motion for judgment as of nonsuit the evidence is to be taken in the light most favorable to the State. G.S. 15-173. *S. v. Glenn*, 156; *S. v. Moseley*, 286.

Discrepancies in the State's evidence do not justify nonsuit. *S. v. Moseley*, 285.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

The function of motion to nonsuit is to test the sufficiency of the evidence to be submitted to the jury, and it is not the proper procedure to raise the objection that defendant was arrested for a misdemeanor prior to the issuance of warrant. *S. v. Green*, 40.

CRIMINAL LAW—*Continued.*

On motion to nonsuit the court is required to determine only the sufficiency of the evidence to be submitted to the jury, the weight of the evidence, the reconciliation of conflicts and the credibility of the witnesses being for the jury. *S. v. Gay*, 78.

Where some of the State's evidence tends to incriminate the defendant and some to exculpate him, the incriminating evidence requires the submission of the question of guilt to the jury. *S. v. Green*, 40; *S. v. Gay*, 78.

Evidence which merely shows that a criminal offense was committed and that it was possible that defendant committed the offense, but which raises a mere conjecture or speculation of the identity of defendant as the offender, is insufficient to be submitted to the jury. *S. v. Glenn*, 156.

§ 104. Directed Verdict and Peremptory Instructions.

It is only in rare instances that a verdict may be directed for the State in a criminal prosecution, and in the absence of an admission or presumption calling for an explanation on the part of a defendant it is error for the court to direct a verdict of guilty even though guilty may be inferred from defendant's own testimony. *S. v. Lackey*, 686.

§ 107. Instructions—Statement of Evidence and Application of Law Thereto.

The court is required to apply the law arising on the evidence in the particular case and not upon a set of hypothetical facts. *S. v. Campbell*, 317.

§ 108. Expression of Opinion by Court on Evidence in the Charge.

Defendants' contentions that the judge failed to give equal stress to their contentions as compared with those of the State *held* to be without substance, the charge of the court fully complying with the provisions of G.S. 1-180. *S. v. Gooding*, 175; *S. v. Barham*, 207.

An instruction to the effect that the evidence conclusively established all the elements of the offense charged but that the jury must be satisfied beyond a reasonable doubt that defendant was the culprit must be held for error, since the court may not intimate whether a material fact has been fully or sufficiently established. *S. v. Wallace*, 378.

A statement of the court that the case had been ably argued by both sides and that the jury should take into consideration all the contentions advanced in the respective arguments and any other contentions which may reasonably arise from a consideration of all the evidence, cannot be prejudicial as unduly emphasizing the contentions of the State. *S. v. Shumaker*, 678.

§ 109. Instructions on Less Degrees of the Crime.

It is error for the court to fail to charge the jury on the question of defendant's guilt of less degrees of the crime when there is evidence to support the milder verdicts. *S. v. Wenrich*, 460.

§ 121. Arrest of Judgment.

The arrest of judgments vacates the virdicts and judgments, but the State may thereafter proceed against defendants upon sufficient warrants or indictments. *S. v. Wallace*, 378; *S. v. Thornton*, 658.

Motion in arrest of judgment may be made at any time, even in the Supreme Court on appeal. *S. v. Thornton*, 658.

CRIMINAL LAW—*Continued.*

§ 120. Judgment and Sentence in Capital Cases.

In a prosecution for murder in the first degree the solicitor may not, in the selection of the jury, state to prospective jurors that the sole purpose of the trial is to obtain the death penalty. *S. v. Manning*, 1.

§ 135. Suspended Sentences and Judgments.

Notwithstanding Ch. 1017, Session Laws 1959, the court may not suspend sentence over express objection of defendant. *S. v. Green*, 141.

§ 136. Revocation of Suspension of Judgment or Sentence.

When an order putting into effect a suspended sentence is based upon a conviction of defendant which is reversed on appeal to the Supreme Court for insufficiency of the evidence of guilt, the order putting into effect the suspended sentence must be reversed on defendant's appeal from such order. *S. v. Glenn*, 160.

§ 138. Costs and Fines.

Where judgment upon conviction of a defendant imposes a prison sentence and also directs that defendant pay a fine in a stipulated sum and the costs, but the judgment does not direct that defendant be imprisoned until the fine and costs are paid or until defendant is discharged according to law, such judgment is not in compliance with G.S. 6-46, and G.S. 6-48 is not applicable. Therefore, after defendant has served the sentence and been discharged, the Superior Court has no authority at a later term to order that the defendant be imprisoned until the fines and costs should be paid. *S. v. Bryant*, 423.

§ 139. Nature and Grounds of Appellate Jurisdiction.

Where defendants base their right to reinstatement of their appeals solely on the ground that order theretofore entered vacating their appeal entries should be set aside for surprise and excusable neglect under G.S. 1-220, their appeals from the denial of their motion will be determined in accordance with the theory advanced in the court below. *S. v. Grunther*, 178.

Ordinarily constitutional questions which are not raised and passed upon in the trial court will not be considered on appeal. *Ibid.*

The Supreme Court will take notice *ex mero motu* of want of jurisdiction in the court entering the judgment appealed from. *S. v. Johnson*, 339.

It is an essential of criminal jurisdiction that the warrant or indictment sufficiently charge an offense, and the Supreme Court will take notice *ex mero motu* of the insufficiency of the warrant or indictment, even in the absence of a motion in arrest of judgment. *S. v. Wallace*, 378.

§ 140. Motions in the Supreme Court.

Defendant may file in Supreme Court on appeal a written motion in arrest of judgment for insufficiency of the indictment. *S. v. Thornton*, 658.

§ 143. Right of Defendant to Appeal.

A person convicted of any criminal offense has the right to appeal. G.S. 15-180. *S. v. Grunther*, 177.

A defendant has the right to the dismissal of his appeal only upon application addressed to the sound discretion of the court having jurisdiction and further, in capital cases and in all other serious felonies, it must affirma-

CRIMINAL LAW—*Continued.*

tively appear that defendant advisedly assented to and directed that his appeal be withdrawn or dismissed. *Ibid.*

Findings, supported by evidence, that order allowing defendants to withdraw appeal was not entered through mistake, surprise or excusable neglect held binding. *Ibid.*

§ 146. Jurisdiction of Lower Court After Appeal.

An appeal becomes effective *eo instanti* the appeal entries are noted and thereafter the Superior Court is *functus officio* to make orders affecting the merits of the case, however, jurisdiction of all matters pertaining to the settlement of the case on appeal remains in the trial court and it has jurisdiction, even at a later term after notice and a proper showing, to adjudge that the appeal had been abandoned and to proceed in the cause as if no appeal had been taken. *S. v. Grundler*, 177.

The Superior Court having jurisdiction of a motion of a defendant to set aside an order vacating the appeal also has jurisdiction to reinstate the appeal in the exercise of its sound discretion for good cause shown. *Ibid.*

§ 147. Case on Appeal.

Where defendant's statement of case on appeal is accepted by counsel for the State and no objections or exceptions or countercase are filed, defendant's statement of case on appeal becomes and constitutes the case on appeal to the Supreme Court. *S. v. Clayton*, 261.

§ 149. Certiorari.

Certiorari is a discretionary writ, and petitioner must show merit or that error was probably committed in the lower court, since the writ will issue only for good and sufficient cause. *S. v. Grundler*, 177.

Certiorari is granted in this case for the purpose of considering petitioners' contentions of deprivation of constitutional rights in the trial. *Ibid.*

§ 154. Necessity for, Form and Requisites of Exceptions and Assignments of Error in General.

In a criminal case as well as in a civil case an appeal is an exception to the judgment and in a criminal case presents the question whether the verdict is sufficient to support the judgment. *S. v. Barham*, 207.

An appeal itself constitutes an exception to the judgment and raises the question of whether error of law appears upon the face of the record. *S. v. Wallace*, 378.

§ 156. Exceptions and Assignments of Error to Charge.

An assignment of error to the charge for failure of the Court "to declare and explain the law arising on the evidence in the case" and the failure of the Court "to apply the law to the evidence" is a broadside assignment and is ineffectual. *S. v. Newton*, 151.

Minor errors and discrepancies in stating the contentions of the parties must be brought to the attention of the trial court at the time in order for exceptions based thereon to be considered. *S. v. Grundler*, 177.

Objection to the charge for failure of the court to elaborate on the facts or to its failure to properly state the contentions must be brought to the court's attention in apt time. *S. v. Shumaker*, 678.

CRIMINAL LAW—*Continued.*

§ 159. The Brief.

Assignments of error in support of which no reason or argument is given or authority cited in the brief are deemed abandoned. *S. v. Newton*, 151; *S. v. Clayton*, 261; *S. v. Parrish*, 274; *S. v. Rose*, 281; *S. v. Wallace*, 378.

The filing of brief by appellant after the expiration of the time allowed results in an abandonment of the assignments of error except those appearing on the face of the record which are cognizable *ex mero motu*. *S. v. Lynn*, 703.

§ 160. Presumptions and Burden of Showing Error.

The burden is upon defendant to show prejudicial error. *S. v. Purifoy*, 82.

§ 161. Harmless and Prejudicial Error in Charge.

Exceptions to the charge cannot be sustained when the charge considered contextually is without prejudicial error. *S. v. Grundler*, 177.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where competent evidence has been excluded there can be no prejudicial error arising from the fact that it was heard by the jury before the court instructed them not to consider it, or that after the jury had returned into the courtroom the transcript of such evidence was again read them upon the request of the solicitor. *S. v. Walker*, 465.

§ 163. Harmless and Prejudicial Error in Remarks of Court, Argument of Solicitor, and Incidents During Trial.

The prejudicial effect of a statement of the solicitor, in selecting the jury, that the sole purpose of the trial is to obtain the death penalty against defendant, cannot be cured by a statement of the court that all prospective jurors should disabuse their minds in regard to the solicitor's remark, and certainly such error is not cured when the court thereafter overrules the objection to later statements to prospective jurors that the State is seeking the death penalty without recommendation of life imprisonment. *S. v. Manning*, 1.

§ 164. Harmless and Prejudicial Error—Error Relating to One Count Only.

Where the sentences on each of three indictments are concurrent and identical as to each defendant, error would have to relate to all three indictments in order to be prejudicial. *S. v. Walker*, 465.

§ 168. Review of Judgments on Motions to Nonsuit.

Where defendant introduces evidence he waives his motion to nonsuit made at the close of the State's evidence, and his motion to nonsuit at the close of all the evidence challenges the sufficiency of the entire evidence to be submitted to the jury. *S. v. Gay*, 78.

Where no error appears on the face of the record and the judgment is supported by the verdict an appeal upon the sole exception to the denial of defendant's motion to nonsuit will be dismissed when the evidence produced at the trial is not contained in the record. *S. v. Womack*, 342.

§ 169. Determination and Disposition of Cause.

Where sentences for misdemeanors are made to run consecutively and the

CRIMINAL LAW—*Continued.*

judgment upon which the first sentence is based is arrested, the cause must be remanded for proper sentence for the other offenses. *S. v. Searcy*, 320.

§ 173. Post Conviction Hearing Act.

The Post Conviction Hearing Act may not be used as a substitute for appeal but its purpose is to provide procedure under which a petitioner may initiate an inquiry as to whether there was a substantial denial of his constitutional rights in the original criminal action in which he was convicted and whether a different result would likely ensue had he not been denied such rights, the burden of showing the affirmative of both these propositions being upon petitioner. *S. v. Graves*, 550.

The findings of fact of the trial court in a post conviction hearing are binding upon petitioner if they are supported by evidence. *Ibid.*

Upon review by *certiorari* of the judgment entered upon proceedings under the Post Conviction Hearing Act, the Supreme Court is not limited to the facts found by the trial judge but may consider as well undisputed facts disclosed by the evidence. *Ibid.*

Evidence in Post Conviction Hearing held to show deprivation of constitutional rights, and conviction should have been set aside. *Ibid.*

DAMAGES

§ 3. Compensatory Damages for Injury to Persons.

The fact that plaintiff suffers a cerebral hemorrhage after the accident does not warrant recovery therefor in the absence of evidence that the hemorrhage was proximately produced by the injury. *Lee v. Stevens*, 429.

Where ordinary negligence produces some actual physical impact or genuine physical injury, damages may be recovered for mental or emotional disturbance naturally and proximately resulting therefrom. *Williamson v. Bennett*, 498.

Damages for neurasthenia which is not the natural and direct result of the negligent act may not be recovered. *Ibid.*

§ 12. Competency and Relevancy of Evidence on Issue of Compensatory Damages.

Expert may testify as to certain or probable results of injury. *Fisher v. Rogers*, 610.

In an action to recover damages for breach of a contract for the construction of a dwelling in accordance with specifications that it should be exactly like another dwelling, with minor differences, and should be constructed with the same kind of materials used in such other dwelling, a witness who had never seen the house referred to in the specifications is not competent to testify as to the difference in value of the house as constructed and its value had it been constructed in accordance with the specifications. *Robbins v. Trading Post*, 663.

§ 14. Sufficiency of Evidence of Damages.

Proof of negligence and subsequent injury is insufficient alone to charge the defendant with liability for such injury, but plaintiff has the burden of introducing evidence sufficient to warrant the inference of fact that the injury was the proximate result of the negligence, and evidence which leaves the matter in mere speculation or conjecture is insufficient. *Lee v. Stevens*, 429.

Evidence tending to show that plaintiff was a married woman who at

the time of the injury had a child five years old, that as a result of the collision she received a chest injury, breaking some ribs and necessitating a night in a hospital and three weeks in bed, that she suffered constant pain for three weeks, and on occasion thereafter, after working with her hands, she suffered pain, *is held* sufficient evidence of age, loss of time, and loss of earning power to support the submission of the issue of damages for her injuries, past, present, and prospective. *Johnson v. Lewis*, 797.

§ 15. Instructions on Measure of Damages.

Where the evidence discloses that a two and one-half year old child received injuries which depressed the bones of his nose as a unit, and also sustained a linear skull fracture, that the child had begun to talk prior to the injury and did not again talk until about eight months thereafter, and that the injury to the nose would result in the nose being smaller upon the child's maturity than it would otherwise have been, which would tend to reduce the breathing capacity, together with other expert testimony to the effect that persons who developed epileptic seizures from trauma to the head developed them within a year, although a small percentage of others will develope them later, *is held* sufficient to warrant the jury in finding that the child was permanently injured and that the injuries were of such nature that they might not manifest themselves until later in the child's life, and instructions to this effect are not prejudicial. *Fisher v. Rogers*, 610.

In an action to recover for negligent injury, an instruction on the issue of damages to the effect that plaintiff would be entitled to recover one compensation in a lump sum for injuries past, present, and prospective, etc., will not be held for error on the ground that the charge failed to limit the recovery of future damages to their present cash value, since the charge is based on the cash settlement rule and it appearing that the verdict was not excessive and that there was no request for further instructions to the jury. *Johnson v. Lewis*, 797.

But charge that fails to limit future recovery to present worth is error. *Ibid.*

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Proceeding.

The Superior Court has jurisdiction of a proceeding under the Declaratory Judgment Act to construe a duly probated will but the validity of the probated instruments as constituting a will may not be collaterally raised therein, and the Superior Court is without jurisdiction to permit a party to amend his pleadings in the action under the Declaratory Judgment Act for the purpose of bringing in issue the validity of the probate of one of the instruments. *Walters v. Children's Home*, 369.

DEDICATION

§ 1. Acts Constituting Dedication.

While the registration of map showing a subdivision of land within a municipality into streets and lots constitutes a dedication of such streets to the municipality as far as the general public is concerned, regardless of whether the streets are actually opened or not, the municipality has the right to accept or reject such offer of dedication, and when such streets

DEDICATION—*Continued.*

are not opened or used by the public for fifteen years thereafter, such offer of dedication is revocable under G.S. 136-96. *Steadman v. Pinetops*, 509.

§ 2. Acceptance of Dedication.

Where a municipality opens, maintains and improves a street dedicated to the public by the registration of a map showing such street, there is an acceptance of the street by the municipality. *Steadman v. Pinetops*, 509.

After a municipality has accepted the dedication of a street by opening such street for public use, such dedication is not affected by subsequent non-user, and title to such street cannot be thereafter obtained against the municipality by adverse possession. *Ibid.*

§ 3. Revocation of Dedication.

Where a municipality has accepted the dedication of a street to the public by opening and maintaining the street, the right to revoke the dedication is gone except with the consent of the municipality and those owning lots purchased with reference to the map who thus have vested rights in the dedication. *Steadman v. Pinetops*, 509.

Where a corporation, which had dedicated streets to the public by the registration of a map showing such streets, ceases to exist, the right to revoke such dedication is vested in the owner of the land abutting the streets, and such right is not affected by the fact that a receivership of the corporation is still extant. G.S. 136-96. *Ibid.*

Where only a portion of a street is described in the instrument withdrawing such street from a previous dedication to the public, such revocation of the dedication cannot affect the street outside the portion thus described. *Ibid.*

Where streets have been dedicated to the public by registration of a map showing such streets, that portion of the streets necessary to afford convenient ingress and egress to lots sold with reference to such map are not subject to revocation of the dedication except by agreement. *Ibid.*

Revocation of dedication is effective as to streets not accepted for use in fifteen years and which are not necessary for access to lots purchased by others. *Ibid.*

DIVORCE AND ALIMONY

§ 21. Enforcing Payment of Alimony.

Lien of attachment held superior to orders for alimony as to surplus from foreclosure of land held by entirety. *Porter v. Bank*, 573.

§ 24. Custody of Children of Marriage.

In this proceeding for modification of an order for the custody of the minor child of the parties the court found upon supporting evidence that at the time the decree was rendered awarding custody of the child to its mother, the child was in the actual, if not the nominal, custody of a married couple, that the misconduct of the wife, asserted as a change of condition, did not affect the interest of the child upon the mother's visits to the child in the home of such couple, and that the best interest of the child demanded that she remain in the home of such couple. *Held* the findings support the order denying modification of the decree. *Fearington v. Fearington*, 694.

EASEMENTS

§ 3. Easements by Implication and Necessity.

Where the owner of a tract of land conveys a portion thereof, the grantee takes the portion conveyed with the benefits or burdens of all those apparent and visible easements which thus constitute easements appurtenant. *Potter v. Potter*, 760.

While unity of title in the entire tract and a severance of such title is prerequisite to the creation of an easement by implication, ownership of the entire tract by tenants in common is sufficient unity of title to support an implied grant of easement upon the subsequent division of the land between them. *Ibid.*

While the location of a cartway must be definite to support an easement by implication, and a substantial deviation may be deemed an abandonment of such easement, the question of whether there has been such deviation as to work an abandonment is for the determination of the jury. *Ibid.*

An easement by implication must be appurtenant to a specific parcel of land. *Ibid.*

Evidence that two tenants in common divided the land between them, that at the time of the division there existed a cartway from the highway across the lands of one to the lands of the other, that such cartway was reasonably necessary for access to the lands of such other, that plaintiffs acquired by *mesne* conveyances the title to the dominant tenement, but with further evidence that each plaintiff owned separate parcels of the dominant tenement conveyed to them by separate deeds, is insufficient to establish plaintiffs' right to an easement appurtenant in the absence of evidence that such cartway was necessary for access to both tracts, or, if to only one, which one, since the evidence must show the specific parcel of land to which the easement is appurtenant. *Ibid.*

ELECTIONS

§ 8. Procedure to Contest Election.

Findings that the summons and complaint in an action to try title to public office were not served on the defendant within ninety days after his induction into the office supports judgment dismissing the action. *Long v. Smitherman*, 682.

EMBEZZLEMENT

§ 1. Nature and Elements of the Offense in General.

The offense of embezzlement is entirely statutory. *S. v. Thornton*, 658.

§ 4. Indictment.

An indictment for embezzlement must aver the name of the owner or owners of the property embezzled or, if the owner is a corporation, the name of the corporation should be given, and the fact that it is a corporation stated unless the name itself imports a corporation. *S. v. Thornton*, 658.

An indictment for embezzlement of the property of "The Chuck Wagon" is fatally defective in the absence of allegation that the owner of the property was a corporation, since such name does not import a corporation. *Ibid.*

EMINENT DOMAIN

§ 1. Nature and Extent of Power.

The power to take private property for a public purpose by eminent do-

EMINENT DOMAIN—*Continued.*

main is limited only by the requirement that fair compensation be paid. Constitution of N. C. Article I, sec. 17, and in the exercise of its power the sovereign determines the nature and extent of the property required, whether an easement or a fee, whether for a limited period of time or in perpetuity. *Morganton v. Hutton & Bourbonnais Co.*, 531.

The General Assembly has the right to determine what portion of its sovereign power of eminent domain it will delegate to public or private corporations to be used for the public benefit. *Ibid.*

§ 4. Delegation of Power.

The power of a municipal corporation to condemn land for its water shed in order to protect from contamination its water supply is not limited to an easement, but it has been given power to condemn the fee for that purpose, G.S. 130-162, G.S. 160-205, and the reference in G.S. 40-19 to an easement relates to procedure and is not a limitation upon the power of the municipality. *Morganton v. Hutton & Bourbonnais Co.*, 531.

§ 12. Nature and Extent of Right Acquired.

Where a municipality in its petition in condemnation seeks to acquire "lands" embraced in its water shed to protect its water from contamination, and the answer alleges that the "property" was of great value and requests "all elements of damage" to be considered, and it is apparent from the commissioner's report and the proceedings after exception and appeal from the report that the value of the timber and mineral interest was included in ascertaining the amount of compensation, and the judgment provides that it should operate as a conveyance of the "lands", the condemnation is of the fee and not a mere easement. *Morganton v. Hutton & Bourbonnais Co.*, 531.

Everything connected with the proceedings which will throw light on the intent of the condemnor is relevant in determining whether the condemnor obtained the fee or a mere easement, and while averments in a subsequent action by the condemnor and the condemnee against a stranger, which averments describe the estate of the condemnor as an easement, may be considered upon the question of intent, such circumstance is not conclusive, and where the entire condemnation proceedings disclose that the intent was to condemn the fee and that the value of the entire land, including timber and minerals was included in the compensation paid, the condemnor will be held to have acquired the fee. *Ibid.*

The intent of the condemnor, and whether the compensation paid is ascertained on the basis of the value of the entire land or merely an easement therein, is determinative of whether the condemnor acquired the fee or a mere easement, and when such intent is manifest and the language is broad enough to include the fee simple title to the lands the condemnor acquires the fee even though the exact technical words describing the fee simple are not used. *Ibid.*

EQUITY

§ 1. Nature of Equity and Maxims.

Equity regards the substance and not the form, and is not bound by the names parties give their transactions. *In re Will of Pendergrass*, 737.

§ 2. Laches.

Laches may not be taken advantage of by demurrer. *Harrell v. Powell*, 636.

ESTATES

§ 9. Joint Estates and Survivorship in Personalty.

While survivorship by operation of law in joint tenancies in personalty has been abolished, G.S. 41-2, joint tenancies with right of survivorship may be created by contract. *Wilson v. Wooten*, 667.

ESTOPPEL

§ 1. By Deed.

Whether a quit claim deed constitutes an estoppel depends upon its language. *Harrell v. Powell*, 636.

§ 4. Equitable Estoppel.

Conduct of a party cannot constitute the basis for an estoppel in *pais* when such conduct does not cause the other party to change his position or in any manner prejudice his rights. *Morganton v. Hutton & Bourbonnais Co.*, 531.

§ 5. Parties Estoppel—Married Women.

While a deed or contract to convey executed by a feme covert without the joinder of her husband cannot estop her during coverture, the sole remedy against her during coverture being an action for damages, after the death of the husband the legal restrictions are removed and she is subject to be estopped to the same extent as any other person. *Harrell v. Powell*, 636.

The rule that a married woman may be estopped by her separate deed or contract to convey realty after the death of the husband applies to a conveyance of lands held by them by the entireties, and she will be estopped by a warranty deed to lands held by the entireties notwithstanding that the husband at the time of the conveyance was mentally incompetent. *Ibid.*

§ 6. Necessity for Pleading of Estoppel.

Bar of estoppel cannot be raised by demurrer unless pleading discloses full ground of estoppel. *Harrell v. Powell*, 636.

EVIDENCE

§ 1. Judicial Notice.

The courts will not take judicial notice of municipal ordinances. *Stathopoulos v. Shook*, 33.

§ 11. Transactions and Communications with Decedent or Lunatic.

In an action by the person substituted as beneficiary in a policy of life insurance to recover the policy and proceeds as against the original beneficiary after the death of the insured, the original beneficiary is precluded by G.S. 8-51 from testifying to the effect that she had the policy in her possession and was holding same as security for a loan to insured and for premiums paid by her on the policy, since such testimony tends to establish an oral assignment of the policy to her as security, she being a party to the action and having a direct pecuniary interest in the outcome. *Harrison v. Winstead*, 113.

Where a note is executed to two payees jointly and one of them thereafter acquires the interest of the other and sues the makers of the note, after the death of the other payee, testimony of the maker as to a contemporaneous agreement with the deceased payee, acting for himself and as agent of the other, that the note should not become a binding obligation

EVIDENCE—*Continued.*

until the happening of a stated contingency, is competent as to plaintiff payee's original share of the note, even though it is incompetent as to the share acquired by him as assignee of the deceased payee. *Bailey v. Westmoreland*, 843.

§ 155. Relevancy and Competency of Evidence in General; Res Inter Alios Acta.

Evidence having sole purpose of inciting prejudice or sympathy is incompetent. *Tillis v. Cotton Mills*, 359.

In an action by a passenger against the driver of the other car involved in the collision, the admission of evidence in regard to the intoxication of the driver of the car in which plaintiff was riding and that he had pleaded guilty to a violation of traffic laws and had paid the damage to the car of defendant driver is prejudicial error. *Driver v. Edwards*, 650.

§ 16. Similar Facts and Transactions.

When it is material to the issue whether the aisle of a store was wet or dry at the time of the accident, testimony of a witness as to the condition of the floor some fifteen to twenty minutes after the accident is competent in the absence of a showing of change of condition during the interval. *Powell v. Deifells, Inc.*, 596.

§ 20. Competency of Pleadings in Evidence.

Plaintiff is entitled to introduce in evidence parts of the answer containing allegations of distinct and separate facts pertinent to the issues, on the ground of judicial admissions as well as admissions against interest. *Chavis v. Ins. Co.*, 849.

§ 25. Accounts, Ledgers and Private Writings.

Original or duplicate original deposit slips, prepared in the ordinary course of business, typewritten by defendant or by someone under her direction and found in the company's files of which she was the authorized custodian, are competent in evidence. *S. v. Shumaker*, 678.

§ 26. Best and Secondary Evidence Relating to Writings—Photostatic Copies.

Photostatic copies of deposit slips and checks made by an employee of a bank in the usual course of business and identified by such employee are competent as primary evidence without proof of the loss or destruction of the originals. *S. v. Shumaker*, 678.

§ 27. Parol or Extrinsic Evidence Affecting Writings.

The rule that parol evidence is incompetent to vary, add to, or contradict a written instrument, applies only to legally effective instruments and does not preclude parol evidence that a written instrument was inoperative or unenforceable. *Bailey v. Westmoreland*, 843; *Chavis v. Ins. Co.*, 849.

§ 29. Admissions and Declarations Against Interest by Parties to the Action or those in Privity.

Evidence that upon learning of the fatal injury of a workman the person whom plaintiff claimed was under duty to have given an order which would have obviated the danger causing the injury, was taken to a hospital, is incompetent as an implied admission of negligence in the absence of any evidence as to the reason for the hospitalization. *Jones v. Aircraft Co.*, 832.

EVIDENCE—*Continued.*

§ 31. Admissions or Declarations of Agents.

An admission by an agent in regard to a past occurrence not forming part of the *res gestae* is incompetent against the principal. *Jones v. Aircraft Co.*, 832.

§ 35. Opinion Evidence in General.

In an action by a contract carrier to recover for the breach by the shipper of an executory contract for the carriage of goods, it is error to permit the plaintiff to testify as to what net profit he would have realized from the contract in the absence of evidence as to the cost and expenses involved in the hauling of goods, including wages, repair costs, fuel, taxes, insurance, etc., since in the absence of evidence of the predicate facts plaintiff's testimony as to the amount of profits of which he was deprived amounts to no more than a mere guess or opinion. *Tillis v. Cotton Mills*, 360.

A witness is not competent to testify to a fact beyond his personal knowledge or to base an opinion upon facts of which he has no knowledge. *Robbins v. Trading Post*, 663.

§ 36. Opinion Evidence—Shorthand Statement of Fact.

Testimony of a witness to the effect that the condition of the floor of a store was wet is competent when it is obvious that the response was instantaneous and a shorthand statement of fact. *Powell v. Deifells, Inc.*, 596.

§ 44. Medical Expert Testimony.

A surgeon who has treated and operated upon a two and one-half year old child to rectify an injury to the child's nose, which depressed all the bones of the nose as a unit, is competent to testify that such injury would result in the nose being smaller in adulthood than it naturally would have been, since such testimony relates to an ultimate and certain effect of the injuries and not merely a probable or possible effect. *Fisher v. Rogers*, 610.

The general rule is that a physician testifying as an expert as to the consequences of a personal injury should be confined to certain or probable consequences, and should not be permitted to testify as to possible consequences. *Ibid.*

It is competent for a physician, qualified as an expert witness, to testify to the effect that most persons who develop epileptic seizures as a result of trauma to the head do so within a year of the time of injury although a small percent of others will develop such seizures in later years. *Ibid.*

§ 56. Evidence Competent to Impeach or Discredit Witness.

Where a witness for plaintiff has testified to the effect that defendant drove his automobile into the rear of the automobile driven by plaintiff, causing it to turn over, testimony of a previous statement made by the witness to the effect that the accident resulted from the bad driving of plaintiff and that it would have been worse if the witness had not grabbed the wheel, *is held* competent in contradicting the witness on the subject matter about which he had been examined and not objectionable as being in contradiction of the witness on a collateral matter. *Greer v. Whittington*, 630.

§ 58. Cross-Examination.

Where the court has permitted the cross-examination for the purpose of showing the bias of the witness, it is error for the court to permit counsel to continue the cross-examination in regard to extraneous and irrelevant

EVIDENCE—*Continued.*

matters solely for the purpose of inciting prejudice against defendant or sympathy for plaintiff. *Tillis v. Cotton Mills*, 359.

Remarks of the court during cross-examination of a witness to the effect that the cross-examination was not pertinent and that the court would say to the jury that the matter was immaterial, *held* not prejudicial in the absence of a showing that the tenor of the cross-examination was competent, material or relevant for any purpose, since the court, *ex mero motu*, has authority to control the cross-examination and to exclude or strike evidence which is wholly incompetent or inadmissible. *Greer v. Whittington*, 630.

EXECUTION

§ 7. Claims of Third Persons.

The owner of property may bring an independent action to prevent the sale of his property under execution issuing on a judgment to which he is not a party and for which he is not responsible. *Brinson v. Kirby*, 73.

In the wife's suit to restrain sale of crops grown on lands purportedly held by the entireties to satisfy a judgment against the husband alone, it is error for the court to exclude evidence tending to show that she owned the lands as her separate estate and that she conveyed the lands to a third person who reconveyed to herself and her husband solely for the purpose of creating an estate by the entireties, and that the deeds to effectuate this agreement were void for failure to comply with G.S. 52-12. *Ibid.*

EXECUTORS AND ADMINISTRATORS

§ 3. Ancillary Administrators.

A foreign executor or administrator has no authority to act for the estate in North Carolina, but all actions and proceedings must be brought against and can be defended only by an ancillary administrator appointed here. *Brauff v. Comr. of Revenue*, 452.

§ 24a. Right of Action for Personal Services Rendered Decedent.

An action to recover for services rendered decedent in reliance on a parol contract to convey is not based on breach of the contract to convey but upon breach of an implied promise to pay the reasonable value of the services, and the court should be careful not to leave the impression with the jury that they may award damages for breach of the unenforceable contract. *Gales v. Smith*, 692.

§ 24d. Amount of Recovery for Personal Services Rendered Decedent.

In assessing damages in an action in *quantum meruit* for services rendered decedent under an implied contract to pay for them, the benefits received by plaintiffs and their children from the deceased, including the use of the home and farm while performing the services, should be deducted from the value of the services rendered. *Gales v. Smith*, 692.

§ 31. Family Settlements.

Consent judgment in action to set aside deed to son held to constitute in effect family settlement precluding parties from asserting rights under will. *In re Will of Pendergrass*, 737.

The mutual promises of the parties to a family settlement made for the sake of family harmony, the settlement of controversies and the avoidance

EXECUTORS AND ADMINISTRATORS—*Continued.*

of further litigation, constitutes sufficient consideration to support the agreement. *Ibid.*

FOOD

§ 2. Liability of Retailer to Consumer.

A retail merchant who sells food in a sealed package to a customer impliedly warrants that the food is fit for human consumption. *Adams v. Tea Co.*, 565.

Even though there is no direct evidence of the composition of the cereal purchased by plaintiff, which he alleged breached the seller's implied warranty of fitness for human consumption, plaintiff's introduction in evidence of the container designating the product as corn flakes is sufficient to show that the product was manufactured from corn. *Ibid.*

In an action for breach of implied warranty by the retailer that the corn flakes sold in a sealed container were fit for human consumption, nonsuit is properly entered upon plaintiff's evidence disclosing that he was injured while eating the cereal by breaking a tooth when he bit down on a part of a grain of corn which had crystalized into a state as hard as quartz, since such particle is not a foreign substance but is a natural part of the original food not removed in processing and its presence might have been anticipated by the consumer, there being no evidence that the corn flakes themselves were decayed or spoiled or unwholesome. *Ibid.*

FRAUD

§ 1. Nature and Elements of Fraud in General.

The essential elements of actionable fraud are a definite and specific representation which is materially false, which is made with knowledge of its falsity or in culpable ignorance of its truth and with fraudulent intent, which representation is reasonably relied on by the other party to his deception and damage. *New Bern v. White*, 65.

§ 2. Constructive or Legal Fraud.

The mere relationship of parent and child does not raise the presumtion of undue influence. *Walters v. Bridgers.* 289.

§ 11. Sufficiency of Evidence and Nonsuit.

In this controversy without action, the facts agreed *are held* insufficient predicate for the adjudication of fraud, the facts being insufficient to show some of the essential elements of fraud, particularly that of fraudulent intent. *New Bern v. White*, 65.

FRAUDS, STATUTE OF

§ 5. Contracts to Answer for Debt or Default of Another.

Where an incorporator and owner of almost all of the capital stock of a corporation, in hiring a new manager after the company was in serious financial difficulties and the original capital lost, promises that he would personally pay to the manager any sums the manager advanced in the company's behalf, the promise is an original promise not coming within the purview of the statute of frauds, G. S. 22.1, since the promisor has a personal, immediate and pecuniary interest in the matter as distinguished

FRAUDS, STATUTE OF—*Continued.*

from an indirect benefit which would accrue to him by virtue of his position as stockholder, officer or director of the corporation. *Warren v. White*, 729.

Where there is no conflict in the evidence as to the situation of the parties and that defendant promised to pay plaintiff for any sums advanced by plaintiff in behalf of defendant's corporation, the main controversy being whether such promise was conditional or unconditional, the court may submit the case to the jury upon instructions to answer the issue of whether defendant promised to pay plaintiff any sums so advanced in the negative if the jury were not satisfied from the greater weight of the evidence that the promise was unconditional and that defendant made the promise, and the refusal to submit an issue tendered as to whether the promise was an original promise will not be held for error. *Ibid.*

§ 6a. Contracts Affecting Realty.

While a grantor may not enforce a parol agreement on the part of the grantee to recovery, nor an agreement by the grantee to sell the property and divide the proceeds of sale, after the sale by the grantee has been consummated the agreement to divide the property is no longer precluded by the statute of frauds, and the grantor may maintain an action for an accounting of the profits. *Schmidt v. Bryant*, 838.

GAMES AND EXHIBITIONS

§ 2. Liability of Proprietor to Patrons.

A person purchasing an admission ticket and entering on a race tract conducted for profit is an invitee. *Williams v. Strickland*, 767.

As a general rule the owner or operator of an automobile race track is charged with the duty of exercising care commensurate with the known or reasonably foreseeable dangers to prevent injury to patrons. *Ibid.*

Complaint held to state cause of action for negligence in failing to provide reasonably safe place for patrons of auto race. *Ibid.*

GAS

§ 1. Degree of Care Required in General.

Complaint held sufficient to state cause of action against manufacturer for defect in water heater resulting in explosion injuring plaintiff. *Shepard v. Manufacturing Co.*, 746. Complaint held sufficient to state cause of action against the construction company for negligence in installing gas water heater. *Shepard v. Manufacturing Co.*, 751.

§ 2. Servicing and Delivery of Gas.

Complaint held sufficient to state cause of action for negligence of gas company in continuing to furnish gas after knowledge of dangerous conditions. *Shepard v. Manufacturing Co.*, 746.

HOMICIDE

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence in this case held sufficient to be submitted to the jury on the question of defendant's guilt of second degree murder and manslaughter, defendant's contention that the State's evidence made out a complete defense being untenable. *S. v. Gay*, 78.

HOMICIDE—*Continued.*

§ 27. Instructions on Defenses.

A charge on the question of self-defense which includes therein a statement of the law applicable when a defendant wrongfully assaults his adversary or provokes the difficulty or commits a breach of the peace and engages in the affray willingly, is prejudicial when there is no evidence in the case upon which to predicate such statement of the law, since the court is required to apply the law arising on the evidence in the particular case and not upon a set of hypothetical facts. *S. v. Campbell*, 317.

§ 28. Submission of Question of Guilt of Less Degrees of the Crime.

Where any view of the evidence would justify a verdict of guilty of manslaughter it is incumbent upon the court to submit to the jury the question of defendant's guilt of this lesser degree of the crime. *S. v. Manning*, 1.

§ 30. Verdict and Sentence.

Since it lies within the unbridled discretion of the jury to recommend life imprisonment upon conviction of defendant of first degree murder, it is error for the solicitor in the action of the jury to state that the sole purpose of the trial is to obtain the death penalty. *S. v. Manning*, 1.

HUSBAND AND WIFE

§ 3. One Spouse as Agent for the Other.

A husband is not the agent of his wife merely because of the marital relationship and neither a husband nor wife is ordinarily responsible for the torts of the other. G.S. 52-15. However, the negligence of the husband in operating a vehicle may be imputed to the wife when she is the owner thereof and a passenger therein, since such imputed negligence is not based strictly on the law of agency. *Shoe v. Hood*, 719.

§ 4. Wife's Separate Estate, Contracts and Conveyances.

A married woman has the right to deal with her separate property to the same extent as if she were unmarried subject to the exceptions that she must comply with the provisions of G.S. 52-12 in contracting with her husband affecting the corpus or income of her estate and that she may not convey her real estate except with the written consent of her husband. *Harrell v. Powell*, 636.

A married woman executing deed to lands held by entireties may be estopped thereby after death of husband. *Ibid.*

§ 5. Contracts and Conveyances Between Husband and Wife.

Where the parties agree that the wife should convey her separate lands to a third person who should reconvey to the husband and wife for the purpose of creating an estate by the entireties, the deeds executed to effectuate the agreement are void when they contained no finding that the conveyance was not unreasonable or injurious to the wife as required by G.S. 52-12, since the statutory requisites for a conveyance by the wife to the husband may not be circumvented either directly or indirectly. *Brinson v. Kirby*, 73.

§ 8. Liability of Third Person for Injury to Wife.

Under G.S. 52-10 the wife may sue alone to recover any pecuniary loss

HUSBAND AND WIFE—*Continued.*

for personal injury sustained by her, including loss of earning power even though she was not gainfully employed at the time of the injury or was engaged merely in the performance of household duties, since a married woman has the potential capacity of working and earning money, and is entitled to recover for impairment of this capacity. *Johnson v. Lewis*, 797.

§ 15. Nature and Incidents of Estates by Entireties.

During coverture the husband has the right to the full control of the property held by the entireties and to the income therefrom, to the exclusion of the wife. *Porter v. Bank*, 573.

INDICTMENT AND WARRANT

§ 1. Preliminary Proceedings.

While a preliminary hearing is not an essential prerequisite to a finding of an indictment and while the failure to observe the provisions of G.S. 15-46 and G.S. 15-47 in regard to preliminary hearings, allowance of bail, informing the person arrested of the exact charge against him and permitting him to communicate with counsel and friends, may not under all circumstances result in a denial of constitutional rights, the failure to follow the provisions of the statutes must be given great weight in a hearing under the Post Conviction Hearing Act. *S. v. Graves*, 550.

§ 4. Evidence and Proceedings before the Grand Jury.

Defendants are not entitled to examine members of the grand jury to support their contention that the finding of a true bill was based solely on incompetent evidence or that one of the two bills was not based on any evidence given in connection therewith. *S. v. Walker*, 465.

§ 7. Nature, Sufficiency and Requisites of Indictment and Warrant in General.

Where the warrant upon which defendant was tried is regular on its face and charges each and every essential element of the alleged offense, the fact that the warrant was issued after defendant's arrest for the misdemeanor does not entitle defendant to his discharge, subject to the sole exception when the offense charged arises out of the wrongful arrest. *S. v. Green*, 40.

§ 9. Charge of Crime.

The words "in violation of city ordinance, chapter ....., section ....." added to a warrant after the offense against the General Statutes of this State are surplusage and should be stricken. *S. v. Wallace*, 378.

Warrant held sufficient to charge reckless driving, but insufficient to charge failing to heed police siren. *Ibid.*

A bill of particulars cannot supply any matter which the indictment must contain in order to charge a criminal offense. *S. v. Thornton*, 658.

§ 14. Motions to Quash.

If the warrant is regular and valid on its face objection thereto must be raised by motion to quash made prior to plea, and where defendant makes a general appearance and enters plea without objecting to the warrant he waives any objection to the regularity of the warrant. *S. v. Green*, 40.

Motion to quash after the introduction of the evidence is not made in apt time. *S. v. Walker*, 465.

INFANTS

§ 4. Right of Infant to Recover for Torts.

Where a judgment for personal injuries in an action prosecuted by the father as next friend for his minor son is paid only in part, it is error for the court to order the clerk to pay the father out of the recovery the entire amount expended by the father for necessary medical treatment of the minor when the minor is not represented by a disinterested guardian *ad litem*, since the interests of the father and the minor in the fund are antagonistic. *White v. Osborne*, 56.

INSANE PERSONS

§ 3. Effect of Adjudication.

Notwithstanding that an adjudication of incompetency raises only a rebuttable presumption of mental incapacity and does not ordinarily constitute *res judicata* of the matter, such adjudication in proper instances, may operate as an estoppel. *In re Will of Pendergass*, 737.

§ 10. Actions Against Insane Persons and Validity of Judgments Against Them.

A judgment obtained against a person who is *non compos mentis* at the time of the trial, but who has not been previously so adjudged, is not void but voidable. *Moore v. Stone Co.*, 69.

INSURANCE

§ 2. Insurance Agents and Brokers.

Insurance companies may authorize agents to carry out cancellation provisions of a policy so long as the acts of the agents are not in conflict with the terms of the policy contract. *Engelberg v. Ins. Co.*, 166.

§ 3. Construction and Operation of Policies in General.

Unless payment of premium is waived it is a condition precedent to insurance coverage. *Engelberg v. Ins. Co.*, 166.

§ 14. Life Insurance—Waiver of Prompt Payment of Premiums.

Provision in a certificate under a group policy for waiver of premiums due after receipt by the insurer at its home office of written notice of disability cannot entitle the beneficiary to recover upon the death of insured, even though insured may have become disabled prior to the termination of his membership in the association holding the group policy, when notice of such disability is not communicated to the insurer until after insured's death some five months after the termination of his membership. *Love v. Ins. Co.*, 85.

§ 21. Cancellation of Certificates Under Group Policy.

A certificate under a group policy terminates upon the termination of insured's membership in the association holding the group policy, and insured's liability is terminated when insured does not avail himself of the conversion privilege provided in the policy, there being no contention that the termination of the insured's membership was wrongful or fraudulent. *Love v. Assurance Co.*, 85.

§ 24a. Persons Entitled to Payment—Beneficiaries and Assignees.

In an action by the person substituted as beneficiary in a policy of life

insurance to recover the policy and proceeds as against the original beneficiary after the death of the insured the original beneficiary is precluded by G.S. 8-51 from testifying to the effect that she had the policy in her possession and was holding same as security for a loan to insured and for premiums paid by her on the policy, since such testimony tends to establish an oral assignment of the policy to her as security, she being a party to the action and having a direct pecuniary interest in the outcome. *Harrison v. Ins. Co.*, 113.

In the absence of the establishment of an enforceable contract between claimant and insured assigning the policy as security, the payment of premiums by claimant is alone insufficient to create a lien on the policy or its proceeds. *Ibid.*

Where a policy of insurance provides that insured has a right to change the beneficiary without the consent of the beneficiary, beneficiary has no interest in the contract during the life of the insured, but a mere expectancy. *Ibid.*

§ 26. Actions on Life Policies.

Where insurer admits plaintiff beneficiary's allegations of the execution and delivery of the policy, the payment of the premium, and the death of insured within the period of coverage, plaintiff establishes a *prima facie* case precluding nonsuit, the burden being upon insurer to show legal excuse for refusing payment according to the terms of the policy. *Chavis v. Ins. Co.*, 849.

Plaintiff is entitled to introduce parol evidence in contradiction of written application for insurance upon plaintiff's contention supported by evidence that she was not responsible for the statements in the application, the parol evidence rule presupposing the existence of a binding and valid instrument. *Ibid.*

Where claimant's evidence is that she answered truthfully all questions asked by agent, and there is conflict in evidence as to whether false answers were attributable to plaintiff or to insurance agent, issue of fraud is for jury. *Ibid.*

§ 47. Automobiles Personal Injury Policies.

A three-wheeled motor scooter known as a "mailster" is an automobile within the meaning of a policy insuring insured and his family against injuries resulting from being struck by an automobile. *LeCroy v. Ins. Co.*, 19.

§ 61. Whether Policy is in Force at Time of Accident.

Where an insurance agent mails notice of cancellation of the policy for nonpayment of premiums after default in payment by insured, in accordance with the terms of the policy, which notice is received by insured, the policy contract is terminated ten days after notice, and this result is not affected by the fact that the agent himself may have paid the premium to the insurance company. In this case insurer had refunded to the agent the unearned portion of the premium and the agent had recovered judgment against the insured for the earned portion thereof prior to the occurrence of the accident in suit. *Engelberg v. Ins. Co.*, 166.

§ 72. Fire Insurance—Loss Payable Clause.

A standard mortgage clause in a policy of fire insurance operates as a distinct and independent contract between the insurer and the mortgagee, effecting a separate insurance of the mortgage interest. *Shores v. Ins. Co.*, 790.

INSURANCE—*Continued.*

The mortgagee named in a standard mortgage clause of a fire insurance policy is not under duty to give insurer notice of foreclosure of the property, nor is he under duty to give notice of the change of ownership incident to foreclosure until the moment of delivery of the deed to the purchaser at the sale. If the property is purchased at the foreclosure sale by the mortgagee or the *cestui que trust* named in the loss payable clause there is no change of ownership within the purview of the loss payable clause. *Ibid.*

Provision in a loss payable clause that the mortgagee should give insurer notice of a change of ownership which has come to his knowledge is not a condition precedent but merely requires the mortgagee to give notice of a change in ownership affecting the risk within a reasonable time. *Ibid.*

Where wife purchases property at foreclosure for benefit of herself and husband, the husband named in the moragage clause may recover on fire insurance policy. *Ibid.*

§ 95. Construction of Property Damage Insurance.

The word "explosion" as used in a property damage policy must be given its ordinary meaning, which imports a violent expansion, incident to internal pressure, resulting in bursting or disruption. *Peterson v. Ins. Co.*, 61.

§ 96. Actions on Property Damage Policies.

Proof of damage from concussion, without any evidence tending to explain the cause of the concussion, is insufficient to establish loss from explosion within the meaning of that term as used in a policy of property damage insurance which excludes liability for damage from concussion unless caused by an explosion, the words "concussion" and "explosion" not being synonymous. *Peterson v. Ins. Co.*, 61.

INTOXICATING LIQUOR

§ 5. Possession and Possession for Sale.

It is unlawful in this State for any person to possess any intoxicating liquor for the purpose of sale, G.S. 18-2, and possession within the meaning of the statute may be either actual or constructive. *S. v. Glenn*, 156.

§ 13c. Sufficiency of Evidence of Illegal Possession.

Evidence tending to show merely that non-taxpaid liquor was found buried in the ground on lands adjacent to defendant's residence near a hog pen which defendant was permitted by the owner of the lands to maintain thereon, with further evidence that there were houses around the locus and that the locus was crisscrossed by many paths, *is held* insufficient to be submitted to the jury on the question of defendant's constructive possession of the liquor. *S. v. Glenn*, 156.

JUDGMENTS

§ 5. Interlocutory and Final Judgments.

A judgment is on the merits when it is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form. *Hayes v. Ricard*, 485.

§ 8. Nature and Essentials of Judgments by Consent and Retraxit.

A judgment by consent is the agreement of the parties entered upon the record with the sanction of the court, and the power of the court to sign

JUDGMENTS *Continued.*

such judgment depends upon the unqualified consent of the parties thereto at that time. *Owens v. Voncannon*, 351.

§ 19. Attack of Judgments—Void Judgments.

Where a judgment is regular upon its face the procedure to attack it on the ground that it is in fact void is by motion in the cause. *Brown v. Owens*, 348.

§ 20. Attack of Judgments—Erroneous Judgments.

The sole remedy against an erroneous judgment entered in a cause in which the court has jurisdiction of the parties in the subject matter is by appeal, and a party may not thereafter attack such judgment for errors therein or in the proceedings culminating in the entry thereof. *Hill v. Development Co.*, 52.

§ 22. Attack of Judgments—Suspense and Excusable Neglect.

If a consent judgment is set aside as to one of the defendants as being void as to her for want of authority of the attorney representing the other defendants to represent movant and file answer and consent to the judgment in her behalf, whether the court should permit such party to file answer after the expiration of the time prescribed is addressed to the discretion of the court, and it may properly consider whether such party's failure to file answer may be properly attributed to excusable neglect and whether she has a meritorious defense. *Owens v. Voncannon*, 351.

§ 25. Attack of Judgments—Consent Judgments.

The procedure to attack a consent judgment on the ground that a party thereto did not in fact consent to the judgment as entered is by motion in the cause. *Brown v. Owens*, 348.

Where the agreement of the parties to a consent judgment is signed by the attorneys of record it is presumed valid and is not void upon its face, and the burden is upon the party attacking its validity to prove want of consent and that the attorney signing it for her had no authority to consent thereto in her behalf. *Owens v. Voncannon*, 351.

A party is bound by a consent judgment assented to by her duly authorized attorney, but if such party did not assent to the judgment and did not authorize the attorney either directly or through her agent to assent to the judgment in her behalf, the consent judgment is void as to her and she is entitled to have it set aside without showing a meritorious defense. *Ibid.*

A consent judgment is a contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and a consent judgment is binding and may not be set aside without the consent of all the parties thereto except for fraud or mistake in an independent action. *In re Will of Pendergrass*, 737.

§ 28. Conclusiveness of Judgment and Bar in General.

The plea of *res judicata* must be founded upon an adjudication on the merits. *Pack v. McCoy*, 590.

The plea of estoppel by judgment presents whether the former adjudication was on the merits and whether there is an identity of the parties, subject matter and the merits in the two actions within the purview of the doctrine of *res judicata*. *Lumber Co. v. Hunt*, 624.

JUDGMENTS—*Continued.*

§ 29. Parties Concluded.

A judgment operates as a bar to a subsequent action only as to the parties to the prior action and those in privity. *Hayes v. Ricard*, 485.

A grandchild born after judgment of nonsuit in a prior action is represented by an older grandchild who was a party and represented the class in the prior action, and is in privity with him. *Ibid.*

Purchasers with notice from a party in the prior action are in privity with such party in a subsequent action involving the title to land. *Ibid.*

A corporation is not barred from maintaining an action for damages to its vehicle by reason of a prior judgment in an action by its president against the same defendant to recover for personal injuries arising out of the same accident, even though the president of the corporation is its controlling shareholder, and chairman of its board of directors, and has control of its action, since there is no identity or privity of parties within the purview of the doctrine of *res judicata*. *Lumber Co. v. Hunt*, 624.

The fact that the president and controlling stockholder of a corporation exercises complete control of an action by the corporation to recover for damages to its vehicle resulting from a collision is not sufficient predicate for the plea of *res judicata* on the ground of a prior judgment in an action in which the president sued the same defendant individually to recover for his personal injuries in the same accident, there being other stockholders of the corporation and the corporation being a distinct entity from that of its shareholders. *Ibid.*

An adjudication on the merits in plaintiff's action against an employee or agent individually is *res judicata* on the issue of negligence and bars a subsequent action by the plaintiff against the employer or principal sought to be held liable solely upon the doctrine of *respondeat superior*. *Taylor v. Hatchery*, 689.

§ 30. Matters Concluded in General.

A judgment on the merits is conclusive not only as to matters actually litigated and determined but also as to all matters properly within the scope of the pleadings which could and should have been brought forward, since a party will not be allowed to split up his claim or divide the grounds of recovery. *Hayes v. Ricard*, 485.

Judgment for plaintiffs in an action by condemnor and condemnee against a third person for trespass does not involve title of the condemnor and condemnee as between themselves, and therefore such title not being in issue the judgment does not estop condemnor from thereafter asserting the ownership of the fee as against the condemnee, notwithstanding averments in the action in trespass that the condemnor owned a mere easement. *Morganton v. Hutton & Bourbonnais Co.*, 531.

A suit by the president of the corporation to recover for personal injuries received in a collision and a suit by the corporation owning the vehicle which was being driven by its president to recover for damages to its vehicle in the same collision, do not involve the same subject matter within the purview of the doctrine of *res judicata*. *Lumber Co. v. Hunt*, 624.

§ 33. Bar of Judgments of Nonsuit.

A judgment as of nonsuit is a bar to a subsequent action only when it is made to appear that the former adjudication was on the merits and it is found by the trial court that the second action is between the same parties

and those in privity with them, is based upon substantially identical allegations and substantially identical evidence, and that the merits of the second action are identical with those of the first. *Hayes v. Ricard*, 485.

Judgment of nonsuit on merits held to bar subsequent action upon substantially identical evidence. *Ibid.*

§ 34. Consent Judgments as Bar to Subsequent Action.

A consent judgment, as well as a judgment upon a verdict of a jury, is a bar to a subsequent action between the parties or their privies as to all questions and facts in issue therein. *Park v. McCoy*, 590.

A minor instituted action by her next friend against the drivers of the two vehicles involved in a collision, alleging that plaintiff was injured by the joint and concurrent negligence of defendants, and defendants respectively filed answers denying liability. Consent judgment was entered that plaintiff recover of the defendants a stipulated sum. *Held:* The issues of the joint and concurrent negligence was raised by the pleadings and the consent judgment constitutes an adjudication thereof so that in a subsequent action by one of the drivers against the other the consent judgment may be properly pleaded as a bar. *Ibid.*

§ 38. Plea of Bar, Hearing and Determination.

Ordinarily it is within the discretion of the trial court to determine whether in the circumstances of a particular case a plea in bar is to be disposed of prior to trial on the merits. *Hayes v. Ricard*, 485.

Where the record discloses that at the pretrial hearing motion for continuance was denied, and that motion that defendants' plea in bar be heard prior to trial on the merits was granted and the hearing thereon set for a term of court, and that the plea in bar was heard in open court at such term, the record discloses that the plea in bar was determined at a regular term of court and not in a pretrial conference. *Ibid.*

A plea in bar cannot ordinarily be determined from the pleadings alone. *Ibid.*

The findings of fact of the court in regard to the identity of the action will not be reviewed on appeal, if the findings are supported by the evidence. *Ibid.*

Where, upon the plea of the bar of a prior action of nonsuit on the merits, the proof admits of only one conclusion, the plea in bar is properly heard and determined by the court without a jury. *Ibid.*

Generally, the plea of *res judicata* cannot be determined from the pleadings alone, but when the facts constituting the basis of the plea in bar appear on the face of the pleadings, the sufficiency of such plea may be tested by demurrer or motion to strike. *Lumber Co. v. Hunt*, 624.

§ 41. Lands to Which Lien Attaches.

A judgment in favor of one spouse against the other cannot constitute a lien on property held by them as tenants by the entireties. *Porter v. Bank*, 573.

Decree directing that if land held by entireties should be sold under foreclosure, the husband's share in the surplus should be secured for the payment of alimony, does not give wife right superior to attacking creditor of husband. *Ibid.*

JURY

§ 3. Selection, Examination and Personal Disqualifications.

It is error for the solicitor in the selection of the jury to state to prospective jurors that the sole purpose of the trial is to obtain the death penalty. *S. v. Manning*, 1.

LARCENY

§ 1. Elements of the Offense.

The wrongful asportation of the goods of another must be done with the felonious intent to appropriate the goods to the taker's own use in order to constitute larceny, and an instruction which omits the element of *animo furandi* must be *held* prejudicial. *S. v. Jacobs*, 705.

LIBEL AND SLANDER

§ 1. Nature and Essentials of Cause of Actions in General.

Allegations to the effect that defendant by false and malicious charges reflecting on plaintiff's character procured plaintiff's discharge by a school board, state a cause of action for wrongful interference with plaintiff's contractual rights and not on action for slander. *Johnson v. Graye*, 448.

LIMITATIONS OF ACTIONS

§ 16. Pleading Limitation.

Neither a statute of limitations nor laches may be taken advantage of by demurrer. *Harrell v. Powell*, 636.

MASTER AND SERVANT

§ 7. Dual Employments.

Where a contractor rents a crane together with the crane operator to perform part of the work, the crane operator, for the period so employed is ordinarily an employee of the contractor. *Jones v. Aircraft Co.*, 832.

§ 10. Duration of Employment and Wrongful Discharge.

Facts alleged in the complaint held insufficient to show breach of contract of employment by employer. *Briggs v. Mills, Inc.*, 642.

§ 13. Interferences with Contract of Employment by Third Person.

Allegations to the effect that defendant by false and malicious charges reflecting on plaintiff's character procured plaintiff's discharge by a school board, state a cause of action for wrongful interference with plaintiff's contractual rights and not an action for slander. *Johnson v. Graye*, 448.

§ 14. State and Federal Regulations.

Judgment sustaining demurrer to the complaint in an action to recover damages on account of plaintiff's being denied employment because of membership in a labor union, reversed on authority of *Willard v. Huffman*, 250 N.C. 396. *Keller v. Mills*, 92.

§ 18. Liability of Contractor for Injuries to Employee of Independent Contractor.

The liability of the principal contractor in control of the premises for the

MASTER AND SERVANT—*Continued.*

electrocution of an employee of a contractor in construction of a building on the premises is based upon the duty not to render the place where the employee was working unsafe by continuing to transmit current over the wires after request that the current be turned off during the progress of the work, and an instruction predicating the liability of the principal contractor upon the duty of a power company in the distribution of electricity *is held* for prejudicial error. *Jones v. Aircraft Co.*, 832.

But the evidence in this case is held sufficient to be submitted to the jury on the issue of the negligence of the principal contractor and not to show contributory negligence as a matter of law on the part of the injured employee. *Ibid.*

§ 39½. Release from Liability Under Federal Employers' Liability Act.

Payment of wages to employee during time he did not work because of injury is sufficient consideration to support release under Federal Employers' Liability Act. *Maynard v. R. R.*, 783.

Evidence held insufficient to show that release from liability was obtained by fraud. *Ibid.*

§ 58. Unauthorized Acts of Employee and Personal Missions.

Where an employee is employed solely for a particular job, such as operating a chain saw, and is positively forbidden to perform another job connected with the work, such as operating a tractor, an injury received while performing the forbidden task does not arise out of a hazard of the employment and is not compensable. *Taylor v. Dixon*, 304.

§ 60. Injuries Received While on the Way to or From Work.

Ordinarily, an injury suffered by an employee while going to or returning from the place where he is employed, does not arise out of and in the course of his employment. *Humphrey v. Laundry*, 47.

Evidence held sufficient to support finding that injury to the employee while on his way to work did not arise in the course of his employment. *Ibid.*

§ 63. Compensation Act—Hernia and Back Injuries.

Injury resulting in a hernia is compensable only if it is definitely proven that the hernia was the result of an injury arising out of and in the course of employment, that it occurred suddenly, that it was accompanied by pain, that the hernia immediately following an accident, and that the hernia did not exist prior to the accident. G.S. 97-2(r). *Faires v. McDevitt*, 194.

Where an injury resulting in hernia is suffered by employee while performing his usual duties in the regular and customary manner, such injury is not caused by accident, but if the employee's routine is interrupted in such manner as to introduce unusual conditions likely to result in unexpected consequences, and hernia results therefrom, the injury causing the hernia is the result of an accident within the meaning of the Compensation Act. *Ibid.*

Decision denying compensation for injury to claimant's back while doing repetitive work of the same type he had been doing theretofore affirmed on the authority of *Hensley v. Cooperative*, 246 N.C. 274. *Turner v. Hosiery Mills*, 325.

§ 66. Occupational Diseases.

An employee is capable of further injury from exposure to silica dust so long as he lives and breathes. *Fetner v. Granite Works*, 296.

MASTER AND SERVANT—*Continued.*

G.S. 97-57 creates an irrebuttable legal presumption that the last thirty days of work within seven consecutive calendar months in an occupation subjecting an employee to the hazards of silica dust, is the period of last injurious exposure. Therefore, the Industrial Commission may not select any other thirty days of employment within the seven months' period as the last period of exposure even though there be testimony that the employee was incapacitated from performing any normal labor in such employment prior thereto. *Ibid.*

§ 69a. Compensation for Occupational Diseases.

Under G.S. 97-61, prior to the 1955 and 1957 amendments, an employee does not forfeit his right to compensation for silicosis unless he has received temporary compensation under the provisions of that section. *Fetner v. Granite Works*, 297.

A waiver of an employee's right to compensation for silicosis signed by the employee upon his employment by one employer does not apply to or waive the employee's right to compensation for silicosis upon his subsequent employment by an entirely separate employer. *Ibid.*

Whether compensation for death from silicosis should be reduced when the death is complicated by tuberculosis rests in the sound discretion of the Industrial Commission. *Ibid.*

§ 79. Determination of Liability of Insurer.

Where an employee works in his occupation subjecting him to the hazards of silica dust for fifty-two days during the two months thirteen days after the termination of the policy of compensation insurance of the employer, the insurer in such policy is not on the risk during the last thirty days of exposure, and therefore is not liable for compensation. *Fetner v. Granite Works*, 296.

§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.

Within its statutory limits the jurisdiction of the Industrial Commission is a continuing one, and the Commission has authority to make its records speak the truth or correct an error of law to make its award conform to the mandate of statute, and therefore when a Commissioner's award for permanent partial disability is in an amount less than the statutory minimum then in effect the Commission has authority to correct the award, even *ex mero motu*. *McDowell v. Kure Beach*, 818.

§ 90. Prosecution of Claim and Proceedings Before Commission.

An employee is *sui juris* for the purpose of prosecuting a claim under the Compensation Act when he has attained the age of 18. *Moore v. Stone Co.*, 69.

§ 92. Right of Appeal and Prosecution of Appeal.

Whether appellant will be permitted to withdraw his appeal is a matter of discretion and not a matter of right, particularly when the rights of appelle may be adversely affected, and ordinarily appellant may withdraw the appeal only with leave of court upon proper application. *McDowell v. Kure Beach*, 818.

The Workmen's Compensation Act provides orderly procedure for appeal, G.S. 97-85, and *certiorari* will not lie as a substitute for an appeal but is proper only when the aggrieved party cannot perfect his appeal within the

MASTER AND SERVANT—*Continued.*

time limited and such inability is not due to any fault on his own part, and there is merit in his exceptions to the action of the administrative agency. *Ibid.*

§ 93. Review in Superior Court.

The findings of fact of the Industrial Commission are conclusive on appeal if supported by any competent evidence. *Humphrey v. Laundry*, 47.

The Superior Court on appeal has the discretionary power to grant an appellant's motion to remand the cause to the Industrial Commission for rehearing on the ground of newly discovered evidence. *Moore v. Stone Co.*, 69.

Motion for new trial for alleged mental incapacity of movant held properly denied on facts of this case. *Ibid.*

The jurisdiction of the Superior Court on appeal from the Industrial Commission is limited to matters of law, and the Superior Court may not find additional facts or make an award. *Fetner v. Granit Works*, 296.

It is error for the Industrial Commission to fail or refuse to make specific findings of fact in respect to a specific defense set up by the employer, and where it fails to make such findings and it is apparent that the findings made were made under a misapprehension of the applicable law, the findings must be set aside and the cause remanded for findings from the evidence considered in its true legal light. *Taylor v. Dixon*, 304.

§ 94. Appeals to Supreme Court.

Where there are no exceptions in the record on appeal to the Supreme Court to the failure of the Superior Court to pass upon certain objections and exceptions taken by the party in the hearing before the Industrial Commission, the matter is not before the Supreme Court on the appeal taken by the adverse party. *Faires v. McDevitt*, 194.

MORTGAGES

§ 32. Deficiency and Personal Liability.

G.S. 45-21.38 has no application to a note executed to a third person for money borrowed to obtain the cash payment required by the seller in addition to money borrowed from a mortgage company on a deed of trust. *Brown v. Owens*, 348.

MUNICIPAL CORPORATIONS

§ 1. Definition and Creation of Municipal Corporations.

Housing authorities created pursuant to G.S. 157.2, 157-4, 157-33 and 157-35 are public bodies having the power of eminent domain within their respective areas, G.S. 157-12, which, in the case of regional authorities, is not limited to a single county. *Powell v. Housing Authority*, 812.

§ 4. Legislative Control and Supervision and Powers of Municipal Corporations in General.

A municipal corporation has such sovereign power as has been delegated to it by its charter or by general statute. *Morganton v. Hutton & Bourbonnais Co.*, 531.

§ 10. Liability for Torts in General.

Where a municipal corporation, in the exercise of its governmental power to abate nuisances, enters upon a lot which had been permitted by the owner

to grow up in weeds but upon which were a number of oak saplings 12 to 15 feet high, and cuts not only the weeds but also the young oaks, the municipality may be held liable in damages for the differences in the market value of the lot immediately before and after the cutting on the theory of a "taking" of private property, unless the cutting of the trees was in fact necessary to remove or abate the nuisance. *Rhyne v. Mount Holly*, 521.

§ 12. Injuries from Defects or Obstructions in Streets or Sidewalks.

Negligence of driver held to insulate any negligence of city and railroad company in maintenance of pillar for overpass in center of street. White v. *Cason*, 646.

§ 19. Power to Make Improvements and Levy Assessments Therefor.

A municipality does not have to pave the entire area owned by it for street purposes in order to assess land abutting the street for improvements. *Harris v. Raleigh*, 313.

§ 20. Validity and Attack of Assessments.

In an action to establish plaintiffs' title to certain land and to have assessments for public improvements made by defendant municipality declared invalid on the ground that the paved area was not a street but plaintiffs' property, the burden is upon plaintiffs to establish their cause of action. *Harris v. Raleigh*, 313.

§ 32. Regulations Relating to Health.

An ordinance giving the municipality authority to cut weeds, grass or other noxious growth on vacant lots does not justify the municipality, in clearing a vacant lot, to cut down oak saplings 12 to 15 feet high. Oak trees of such size are not "weeds, grass or other noxious growth." *Rhyne v. Mount Holly*, 521.

NEGLIGENCE

§ 1. Actions and Omissions Constituting Negligence in General.

Mere fright caused by ordinary negligence is not ground for an action or the recovery of damages. *Williamson v. Bennett*, 498.

Fright resulting from ordinary negligence may be ground for an action and the recovery of damages if actual physical injury immediately, naturally and proximately results from the fright, as when fright causes plaintiff to faint and fall to his injury. *Ibid.*

Neurasthenia resulting from fear or anxiety for the life, safety or well being of a person other than plaintiff himself is not ordinarily ground for the recovery of damages. *Ibid.*

§ 7. Proximate Cause and Foreseeability of Injury.

A person is under duty to anticipate only those consequences which in the ordinary course of human experience may reasonably be expected to result in injury to others. *Lemon v. Lumber Co.*, 675.

§ 8. Concurring and Intervening Negligence.

Insulating negligence relates to proximate cause, and is an intervening act which could not have been reasonably foreseen and which becomes the sufficient cause of the injury, and thus breakes the causal connection of the primary negligence. *Shepard v. Mfg. Co.*, 751.

NEGLIGENCE—*Continued.*

§ 11. Contributory Negligence of Persons Injured in General.

A person will not be held contributorily negligent as a matter of law in failing to see an apparent danger in those instances in which his attention is diverted or when he is naturally giving his undivided attention to other matters, if under the same circumstances an ordinarily prudent person would have been inattentive to the danger. *Walker v. Randolph County*, 805.

§ 20. Pleadings.

In this action against a corporation and against individuals who were the stockholders and officers of the corporation, to recover for injuries received at an auto race track, the complaint alleged that the four individual defendants were operating the track as their own business individually and as a partnership and that "if . . . the individual defendants were attempting to operate" the race track "as a corporation . . ." and further alleged that "defendants" were negligent in specified aspects. *Held:* Construing the complaint liberally it sufficiently alleged negligence on the part of the individual defendants. *Williams v. Strickland*, 767.

§ 24a. Sufficiency of Evidence of Negligence and Nonsuit.

Evidence sufficient to make out a case of actionable negligence resulting in damage in any amount precludes nonsuit. *Lee v. Stevens*, 429.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence may be granted only when the evidence taken in the light most favorable to plaintiff establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Stathopoulos v. Shook*, 33; *Millas v. Coward*, 88; *Carrigan v. Dover*, 97; *Shoe v. Hood*, 719.

Where reasonable minds might arrive at conflicting conclusions as to whether plaintiff was guilty of contributory negligence under the circumstances adduced by the evidence nonsuit for contributory negligence is properly denied. *Powell v. Deifells, Inc.*, 596.

§ 36. Attractive Nuisances and Injuries to Children.

Construction company held not liable for death of 14 year old boy killed as result of operating crane left unattended after working hours. *Dean v. Construction Co.*, 581.

§ 37a. Definition of Invitee.

A person in going into the county courthouse to search for legal notices required by law to be posted at the courthouse is not a licensee but an invitee. *Walker v. Randolph County*, 805.

§ 37b. Duties to Invitees.

While a proprietor is under duty to protect his patrons against foreseeable assaults by others, a patron is also under duty not to needlessly expose himself to danger, and nonsuit was properly entered in this action by a patron against the proprietor of a restaurant for injuries from an assault by another patron, if not on the ground that the proprietor could not have foreseen the assault, then on the ground that plaintiff attempted to pass the other patron who was belligerent and attempting to block the stairs, and that plaintiff had equal notice with the proprietor if the conditions were such as to give warning of probable assault. *Witherspoon v. Owen*, 169.

NEGLIGENCE—*Continued.*

Store owners are not insurers of the safety of customers on their premises. *Powell v. Deifells, Inc.*, 596.

The proprietor of a store is under duty to exercise ordinary care to keep the isles and passageways intended for use by customers in a reasonably safe condition so as not unnecessarily to expose a customer to danger, and to give warning of unsafe conditions, of which the proprietor knows or in the exercise of reasonable supervision and inspection, should know. *Ibid.*

Where an unsafe condition is created by third parties or an independent agency, it must be shown that such condition had existed for such a length of time that the proprietor knew, or by the exercise of reasonable care should have known, of its existence in time to have removed the danger or to have given proper warning of its presence in order for the proprietor to be liable to a customer injured by such condition. *Ibid.*

§ 37f. Sufficiency of Evidence of Negligence and Nonsuit in Actions by Invitees.

The doctrine of *res ipsa loquitur* does not apply to a fall of a customer on the aisle of a store. *Powell v. Deifells, Inc.* 596.

Evidence of negligence of store proprietor resulting in fall of customer on aisle held sufficient for jury. *Ibid.*

Evidence that a county maintained a bulletin board in the hall of its courthouse with nineteen inches of the bulletin board extending over an unguarded stairway, resulting in injury to an invitee inadvertently stepping into the stairway while examining notices on the bulletin board, *held* sufficient to be submitted to the jury on the issue of negligence. *Walker v. Randolph County*, 805.

§ 37g. Contributory Negligence of Invitee.

Invitee held not contributorily negligent as matter of law in falling down stair-well while her attention was focused on bulletin board. *Walker v. Randolph County*, 805.

§ 39. Duties and Liabilities to Trespassers.

A fourteen-year old boy who enters upon a road construction site and opens a sliding door to the cab of a large crane used in excavation work, and undertakes to operate the crane, is a trespasser, certainly when he had theretofore been warned by a neighbor to keep off the machinery. *Dean v. Construction Co.*, 581.

The duty owed by the owner or occupant of land to trespassers is not to wilfully or wantonly injure them. *Ibid.*

PARENT AND CHILD

§ 4. Liability of Third Persons to Parent for Injury to Child.

Where the father brings an action as next friend and recovers judgment for personal injuries sustained by the child, including damages to which the father would otherwise be entitled, the father waives his right to recover separately from the tort feasor. *White v. Osborne*, 56.

But clerk should not order father to be paid out of the recovery to reimburse him for medical expenses unless the child is represented by disinterested guardian *ad litem*. *Ibid.*

§ 7. Liability of Parent for Torts of Child.

The common law rule that the mere relation of parent and child imposes

no liability on the part of the parent for the torts of the child is recognized in this State. *Love v. Chatham*, 400.

An air rifle is not a dangerous instrumentality *per se* and the mere fact that parents give their nine-year old son an air rifle, and permit him to use it, is insufficient to impose liability on the parents for a negligent or willful injury inflicted by the son in the use of the air rifle. *Ibid.*

Parents may be held liable for an injury negligently or willfully inflicted by their minor son with an air rifle given the son by the parents if under the circumstances the parents could or should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof, the basis of liability being the parents' independent negligence. *Ibid.*

Evidence tending to show that a nine-year old boy intentionally shot his playmate in the eye with an air rifle given him by his parents and that on three prior occasions the boy had intentionally inflicted injury on persons with the air rifle, with further evidence that the boy's mother had been informed or had knowledge thereof but without evidence that the boy's father had knowledge thereof, *is held* sufficient to be submitted to the jury as to the negligence of the mother but is insufficient to be submitted to the jury as to the father's negligence. *Ibid.*

§ 8. Prosecutions for Abandonment and Nonsupport.

In order for a father to be guilty under G.S. 14-322 for failure to support his child, such failure must be willful, that is, intentionally and without just cause or excuse. *S. Hall*, 212.

A warrant charging a father with willful failure to support his child must be supported by the facts as they existed at the time the warrant was drawn and cannot be supported by evidence of willful failure supervening between the time the charge was made and the time of the trial. *Ibid.*

Where the sole evidence that a father knew, prior to the time the warrant was issued, that a child had been born to his wife is testimony that the wife advised him almost nine months before the birth of the child that she was pregnant, the evidence does not permit the fair inference that he knew or had notice of the child on the date of the issuance of the warrant, and therefore nonsuit should have been allowed for the insufficiency of the evidence to show that his failure to support the child was willful. *Ibid.*

PARTIES

§ 1. Necessary Parties in General.

Where the interest of a minor is antagonistic to those of the parent, the clerk may not enter an order in regard thereto unless the minor is represented by a disinterested guardian *ad litem*. *White v. Osborne*, 56.

The heirs of the deceased grantee in a deed are necessary parties to an action to determine whether the grantee took a life estate or the fee simple, and where the action is solely between the person owning the asserted reversion and his vendee, the cause must be remanded for necessary parties. *Oxendine v. Lewis*, 702.

PARTNERSHIP

§ 7. Actions by Partners against Third Persons.

One partner may not sue in his own name upon a cause of action in favor

PARTNERSHIP—*Continued.*

of the partnership, and where the evidence discloses that the action by a single individual was on a partnership claim nonsuit is properly entered. *Godwin v. Vinson*, 326.

PAYMENT

§ 4. Evidence and Proof of Payment.

The burden is upon the debtor to establish his plea of payment. *Schwabenton v. Bank*, 655.

PLEADINGS

§ 2. Statement of Cause of Action.

The complaint must contain a plain and concise statement of the facts constituting the cause of action. *Shepard v. Mfg. Co.*, 751.

Plaintiff is not required to allege evidential facts, but only the ultimate facts constituting his cause of action. *Rick v. Murphy*, 162.

The function of a pleading is to inform the adversary what facts are claimed to constitute the cause of action. *Sorrell v. Moore*, 852.

§ 7. Form and Contents of Answer.

The function of a pleading is to inform the adversary what facts are claimed to constitute the cause of action or defense. *Sorrell v. Moore*, 852.

§ 8. Counterclaims and Cross-Actions.

In an action on contract, the defendant may, under G.S. 1-137(1), set up as a counterclaim a cause of action arising out of the contract sued on and may, under G.S. 1-137(2), also set up the breach of an entirely different and distinct contract existing at the commencement of the action. *Rubber Co. v. Distributors*, 406.

In plaintiff's action to recover certain goods sold under consignment, with ancillary proceedings in claim and delivery, defendant may set up as a counterclaim a separate contract existing at the time under which defendant was given exclusive right to act as distributor for the goods of plaintiff until a specified future date, and that plaintiff's seizure of the goods was in violation of the distributor agreement and was wrongful. *Ibid.*

§ 10. Office of and Necessity for Reply.

Where an answer setting up a counterclaim is served on plaintiff, plaintiff must reply thereto. G.S. 1-140. *Rubber Co. v. Distributors, Inc.*, 406.

§ 12. Office and Effect of Demurrer.

Upon demurrer, the allegations of the pleading are to be taken as true and liberally construed with a view to substantial justice between the parties. G.S. 1-151. *Rubber Co. v. Distributors, Inc.*, 406; *Friday v. Adams*, 540; *Shepard v Mfg Co*, 751; *Williams v. Strickland*, 767.

A pleading will not be rejected upon demurrer unless it is wholly insufficient and if the pleading in any part alleges facts sufficient to constitute a maintainable action the demurrer must be overruled, nor does a demurrer present whether a particular allegation should be stricken. *Rubber Co. v. Distributors, Inc.*, 406.

A demurrer admits for its purpose the truth of the factual averments well stated and relevant inferences of fact deducible therefrom, but it does

PLEADINGS—*Continued.*

not admit inferences or conclusions of law. *Lumber Co. v. Hunt*, 624; *Harrell v. Powell*, 636.

§ 13. Time of Filing Demurrer and Waiver of Right to Demur.

A demurrer to a defective statement of a good cause of action comes too late after answer. *Johnson v. Graye*, 448.

A demurrer *ore tenus* to the jurisdiction of the court or for failure of the complaint with its amendments to state a cause of action may be interposed after the jury has been impaneled. *Williams v. Strickland*, 767.

§ 14. Statement of Grounds, Form and Requisites of Demurrer.

A demurrer which fails to distinctly specify the grounds of objection may be disregarded. G.S. 1-128. *Johnson v. Graye*, 448; *Williams v. Strickland*, 767.

§ 19. Demurrer for Failure to State Cause of Action or Defense.

A plaintiff may demur to one or more defenses pleaded in an answer, but he may not divide a single affirmative defense and demur to only a part of the paragraphs setting forth such defense. *Financing Corp. v. Cuthrell*, 75.

When a demurrer is sustained the action should be dismissed only if the allegations in the complaint affirmatively show that plaintiff has no cause of action against defendant. *Johnson v. Graye*, 448.

A joint demurrer by all of the defendants must be overruled if the complaint states a good cause of action as to any one of them, the court having jurisdiction of the parties and the cause. *Williams v. Strickland*, 767; *Schmidt v. Bryant*, 838.

§ 25. Amendment by Permission of Court.

Where a pertinent municipal ordinance is not pleaded but is introduced in evidence over defendant's objection, the Supreme Court may in its discretion allow plaintiff to allege the ordinance by amendment, so as to obviate the objection to the admission of the ordinance in evidence, there being no suggestion that defendant was taken by surprise and there being no substantial change in plaintiff's claim by reason of the amendment. *Stathopoulos v. Shook*, 33.

§ 28. Variance.

The courts will not take judicial notice of a municipal ordinance, and ordinarily an ordinance must be properly pleaded before it may be introduced in evidence. *Stathopoulos v. Shook*, 33.

§ 30. Motions for Judgment on the Pleadings.

Motion for judgment on the pleadings is in the nature of a demurrer and raises the question of law whether the uncontroverted facts alleged in the pleadings entitle plaintiff to judgment. *Distributors v. Currie*, 120.

Where it is determined that plaintiff's motion for judgment on the pleadings should have been denied, but the action is not dismissed because the defective statement of a good cause of action might be aided by amendment, *held* defendant is entitled to a dismissal if plaintiff fails to amend, since the prior judgment determines that upon the facts alleged plaintiff is not entitled to recover, and evidence of additional facts could avail plaintiff nothing if such evidence be not supported by allegation. *Ibid.*

PLEADINGS—*Continued.*

§ 34. Motions to Strike.

Where it is determined that the allegations of an answer objected to are competent and relevant in alleging the defense of fraud and that demurrer thereto was properly overruled, it also follows that plaintiff's motion to strike such allegations is properly overruled. *Financing Corp. v. Cuthrell*, 75.

For the purposes of a motion to strike, the allegations of the pleading must be taken as true. *Pack v. McCoy*, 590; *Lumber Co. v. Hunt*, 624.

If a pleading alleges facts pertinent to the cause of action or defense, such allegations may not be stricken on the ground that the facts alleged are incapable of proof, the questions of pertinency of allegations to the cause of action or defense and the competency and credibility of the evidence to prove the allegations being distinct and separate. *Sorrell v. Moore*, 852.

PROCESS

§ 10. Service on Associations and Unions.

G.S. 1-97(1) applies exclusively to service of process in actions against corporations, and service of process on a nonresident labor union by service in this State upon an individual not appointed a process agent of the union is ineffectual. *Melton v. Hill*, 134.

G.S. 1-69.1 makes no provision for the service of process on an unincorporated association but provides solely that such association may sue or be sued in its common name and that execution against it should bind its real and personal property in like manner as if it were incorporated, and the provisions of G.S. 1-97(6) as to service on unincorporated associations applies alike to resident and nonresident associations. *Ibid.*

G.S. 1-97(6) authorizes service of process on the Secretary of State only if defendant unincorporated association fails to appoint a process agent and fails to certify the name and address of such process agent as prescribed therein, but the statute does not require that such association file with the Secretary of State the name and address of its process agent in this State, and, therefore, a ruling based on the assumption that the statute requires such association to file such information with the Secretary of State is made upon a misapprehension of the applicable law, necessitating a remand of the cause. *Ibid.*

PROPERTY

§ 4. Malicious Injury to Property.

Where the evidence is to the effect that defendant was acting in concert with others, that the others blocked with their cars the car of the prosecuting witness, and that defendant then threw a brick through the windshield of the car of the prosecuting witness, an instruction of the court that the offense of wanton and willful injury to personal property might be committed by one person acting alone, or might be jointly committed by two or more persons aiding each other and acting together, cannot be held for error. G.S. 14-160. *S. v. Clayton*, 261; *S. v. Parrish*, 274

Testimony of the driver of a car that as he was driving through a group on either side of a street his car was hit by several objects, resulting in appreciable damage, together with testimony of an occupant of the car that the car was struck two times on the occasion in question, and testimony of an officer that he recognized defendant and saw the defendant throw a rock

PROPERTY—*Continued.*

when the defendant was about twenty feet from the car, and heard the following thump, although he did not see the rock hit the car, *is held* sufficient to be submitted to the jury on the charge of assault with a deadly weapon and the charge of malicious injury to personal property *S. v. Parrish*, 274.

RAILROADS

§ 6. Accidents at Underpasses.

Negligence of driver held to insulate any negligence of city and railroad company in maintenance of pillar for overpass in center of street. *White v. Cason*, 646.

RAPE

§ 3. Competency and Relevancy of Evidence.

In a prosecution for rape, the general character of the prosecutrix for unchastity may be shown both to attack the credibility of her testimony and as bearing upon the likelihood of consent, but testimony of specific acts of unchastity with a person other than defendant is properly excluded. *S. v. Grunther*, 177.

In a prosecution for rape, the State is entitled to prove only the general character of the prosecutrix, and testimony of officers that they had never seen the prosecutrix in establishments where beer was sold is incompetent. *Ibid.*

RECEIVERS

§ 7. Nature and Grounds of Receivership.

Allegations to the effect that plaintiff was induced by fraud to convey certain property to defendants, supplemented by plaintiffs affidavit that defendants were insolvent, is sufficient to support the appointment of a receiver upon motion and notice, upon the court's findings that plaintiff had established an apparent right to the property and was in danger of losing rents and profits if the property were left in defendants' possession. G.S. 1-502. *York v. Cole*, 344.

§ 8. Proceedings for Appointment of Receiver.

The pendency of an appeal from an order allowing petitioner to file an amended complaint does not deprive the Superior Court of jurisdiction to appoint a receiver based on the allegations in the amended complaint. *York v. Cole*, 344.

RIOT

§ 1. Nature and Elements of the Offense.

The elements of riot are unlawful assembly, intent to mutually assist against lawful authority, and acts of violence. *S. v. Moseley*, 285.

§ 2. Prosecutions for Riot.

An indictment charging that defendants did unlawfully assemble on a public street, bearing weapons, with the mutual intent to aid and assist each other against lawful authority and others who opposed them, etc., sufficiently charges an unlawful assembly constituting an essential of the offense of riot. *S. v. Rose*, 281; *S. v. Moseley*, 285.

Evidence tending to show that defendants were members of a large group

which gathered outside the gates of a mill at which a strike had been called, that members of the group threw a number of rocks, bottles and other missiles at cars carring workers from the mill and cursed and threatened the officers when they arrived on the scene, *is held* sufficient to be submitted to the jury on a charge of riot as to those defendants arrested from the group by the officers. *S. v. Moseley*, 285.

Evidence tending to show that defendants were members and leaders of a large group which gathered outside the gates of a mill during the progress of a strike, that both defendants had rocks in their hand and that rocks and missiles were thrown at cars carrying workers from the mill, etc. *is held* sufficient as to each defendant to be submitted to the jury on the charge of riot. *S. v. Caulder*, 444.

An indictment charging that defendants did unlawfully assemble on a public street, bearing weapons, with the mutual intent to aid and assist each other against lawful authority and others who opposed them, etc., sufficiently charges an unlawful assembly constituting an essential of the offense of riot. *Ibid.*

ROBBERY

§ 3. Prosecutions and Punishment.

In a prosecution for robbery with firearms or other dangerous weapon it is error for the court to fail to submit to the jury the question of defendant's guilt of the lesser offenses of common law robbery, assault with a deadly weapon or simple assault when there is testimony tending to show defendant's guilt of these lesser offenses. *S. v. Wenrich*, 460.

SALES

§ 30. Actions to Recover for Injuries from Defects.

The manufacturer may be liable to the purchaser for an injury resulting from some latent defect in the article sold or from a danger inherent in its use for the purpose for which the manufacturer knew the article would be put, but in the purchaser's action to recover for such injuries he must allege the facts supporting the conclusion that the article was dangerous in one of these respects. *Lemon v. Lumber Co.*, 675.

Lumber manufacturer held not liable for injuries when board, with knots and of different wood from that ordered, broke while being used as scaffold, since manufacturer could not reasonably anticipate to what use a particular board would be put. *Ibid.*

Allegations to the effect that defendant manufactured a gas water heater without an automatic safety device to shut off the gas in the event the pilot light was extinguished or the main burner failed to ignite, that the heater was defectively constructed so that water leaked from the coils down the flue and extinguished the pilot light, and that plaintiff was injured in an explosion resulting when the accumulation of gas was ignited by a spark from her washing machine, *are held* to state a cause of action against the manufacturer. *Shepard v. Mfg. Co.*, 751.

SCHOOLS

§ 6a. Selection of School Sites.

When funds are available, the location of a school site lies exclusively with the board of education or the administrative unit charged with the

SCHOOLS—*Continued.*

responsibility of operating the school, but such authority is predicate on the assumption that money is available to pay for the site, and the statute does not touch the question of where the funds shall come from or authorize the school authorities to compel the levying of a tax to provide such funds. *Administrative Unit v. Comr.*, 826.

§ 7½. Liability for Negligent Injuring.

Demurrer is properly sustained in an action by a pupil against a city board of education to recover for an injury resulting from alleged negligence when the complaint contains no allegations to the effect that the defendant had procured liability insurance or had waived its immunity as authorized by G.S. 115-53, since except for such liability as may be established under the State Tort Claims Act a county or city board of education is immune from tort liability unless its immunity is waived by statute. *Fields v. Board of Education*, 699.

§ 9a. School Budgets.

It is the duty of a board of education or administrative unit to evaluate the need of funds for the operation of the schools and apply to the board of county commissioners for the necessary funds, and when the funds are appropriated, to expend the same within the designated classifications as will best serve school needs. *Administrative Unit v. Comrs.*, 826.

It is the duty of the board of county commissioners to study the requests for school funds filed with it by the board of education, and by taxation to provide such funds, and only such funds, as may be needed for the economical administration of the schools. *Ibid.*

When disagreement arises between the board of education and the board of county commissioners as to the amount of funds necessary for school purposes, the county commissioners cannot be required to provide funds beyond their estimate of needs unless the controversy is resolved against them in an action in the nature of *mandamus* to compel the levy of the necessary taxes, in which action the issue must be determined by a jury when jury trial is requested by the county commissioners. *Ibid.*

Verdict of jury is determinative of controversy of whether particular item of expenditure is reasonably necessary to maintenance of schools. *Ibid.*

STATE

§ 3b. Tort Claims Act—Negligence of State Employee.

Liability under the State Tort Claims Act arises if the negligence of a State employee is a proximate cause or one of the proximate causes of injury, and it is not required that the negligence of the State employee be the sole proximate cause thereof. *Trust Co. v. Board of Education*, 603.

A county board of education or a city board of education is liable for injuries resulting from either negligence of commission or negligence of omission on the part of a driver of one of its school buses. *Ibid.*

§ 3c. Hearings under Tort Claims Act.

Formal pleadings are not required in a proceeding under the State Tort Claims Act but it is required only, insofar as the statement of the basis of the claim is concerned, that an affidavit in duplicate stating the facts and circumstances surrounding the injury and giving rise to the claim be filed. *Trust Co. v. Board of Education*, 603.

Ordinarily, a proceeding under the State Tort Claims Act should not be

STATE—*Continued.*

dismissed as upon demurrer upon the facts stated in the affidavit and the stipulation of the parties unless such facts disclose that recovery can not be had regardless of the evidence, as on the ground of governmental immunity or on the ground that such facts failed to present a claim cognizable under the Act. *Ibid.*

STATUTES

§ 5a. General Rules of Construction.

Where the language of a statute expresses the legislative intent in clear, positive and understandable language, it must be given its express effect and there is no room for construction. *Long v. Smitherman*, 682.

The words of a statute must be given their natural and ordinary meaning. *Seminary v. Wake County*, 775.

TAXATION

§ 19. Property Exempt from Taxation in General.

Statutes enacted by the General Assembly in the exercise of the authority granted by the Constitution to exempt certain classes of properties from taxation, Constitution of N. C., Article V, Section 5, are to be strictly construed, when there is room for construction, against exemption and in favor of taxation, but this rule of strict construction does not require that the statute be narrowly construed but only that its application should be restricted to those classifications coming clearly within its terms. *Seminary v. Wake County*, 775.

§ 20. Exemptions of Property of Religious or Educational Institutions from Taxation.

Dwellings rented by a nonprofit educational institution to married students and instructors, and its registrar, which properties are near to and used in connection with its main plant, the dormitory accommodations on the campus being inadequate to its needs, are exempt from taxation under the provisions of G.S. 105-296(4), and the fact that there was no adjustment in the salaries of the instructors and the registrar predicated upon the amount of rents paid for their respective premises does not alter this result. *Seminary v. Wake County*, 775.

§ 23½. Construction of Taxing Statutes in General.

G.S. 105-262 empowers the Commissioner of Revenue to classify and determine by administrative regulation that sales of articles of tangible personal property used in direct production or extractive processes inside a mine should be considered as sales of mill machinery, mill machinery parts and accessories within the purview of G.S. 105-164.13(12) and subject to the wholesale rather than retail sales tax, such regulation not being in conflict with the statute. *Campbell v. Currie*, 329.

While a decision or regulation of the Commissioner of Revenue interpreting a taxing statute is not controlling, the Commissioner of Revenue is authorized by G.S. 105-262 to implement taxing statutes, with certain specific exceptions, and his interpretation is made *prima facie* correct, G.S. 105-264, and such interpretive regulation will ordinarily be upheld when it is not in conflict with the statute and is within the authority of the Commissioner to promulgate. *Ibid.*

A person paying a tax computed in accordance with a regulation of the

TAXATION—*Continued.*

Commissioner of Revenue in effect for more than fifteen years without change or modification by statute or otherwise, will ordinarily be protected against an additional assessment regardless of whether the 1957 amendment to G.S. 105-262 has retroactive effect or not, since the amendment expressly shows the legislative intent to protect a taxpayer from additional assessment where he has paid his tax in accordance with and in reliance upon the terms of a regulation duly promulgated. *Ibid.*

§ 29. Assessment of Income Taxes.

In cases involving carry-forward loss deductions on the part of a corporation resulting from a merger, the courts will look beyond the corporate facade and to substance rather than form. *Distributors v. Currie*, 120.

A corporation resulting from a merger is not entitled to deduct from its taxable income loss carry-over of one or more of its constituent corporations unless there is a continuity of the business enterprise which has not been altered, enlarged, or materially affected by the merger. *Ibid.*

The statutory provision for a loss carry-over is purely a matter of legislative grace, and such provision will not be construed so as to give a "windfall" to a taxpayer who happens to have merged with other corporations and thus give it a tax advantage over other corporations which have not merged. *Ibid.*

Merged corporation held not entitled to loss carry-over of constituent corporation under facts of this case. *Ibid.*

Before an assessment of additional income tax by the Commissioner of Revenue can become final it is required that notice be given to the taxpayer and that he have an opportunity to be heard on the validity of the additional assessment. *Brauff v. Comr. of Revenue*, 452.

The Commissioner of Revenue was a party to proceedings in which letters testamentary to the nonresident widow of the deceased taxpayer were revoked and an ancillary administrator c.t.a. was appointed. Thereafter notice additional assessment of income tax for a particular year against the estate was sent to the widow as executrix. *Held:* The Commissioner of Revenue was charged with notice that the widow had no authority to act for the estate in North Carolina and, therefore, the notice to the widow is insufficient to support the additional assessment against the estate. *Ibid.*

§ 30. Levy and Assessment of Sales Taxes.

Lumber used in constructing vertical shafts and horizontal tunnels for mining operations, which lumber is either splintered by blasting or abandoned in the shaft after the vein of minerals is exhausted, is used in the direct production or extractive processes inside a mine and is not housing placed under ground within the purview of Sales and Use Tax Regulation No. 4 of the Commissioner of Revenue, and therefore the sale of such lumber to the mining company is subject to the wholesale and not the retail sales tax rate. *Campbell v. Currie*, 329.

TORTS

§ 8a. Release from Liability for Tort.

The payment to an employee of his wages for the period of time he did not work because of injury is sufficient consideration to support the employee's execution of a release from liability, the employee not being entitled as a matter of law to such wages. *Maynard v. R. R.*, 783.

Testimony of an employee that he signed the release in question without

TORTS—*Continued.*

reading it or understanding its contents, that the employer's agent did not make any false representations or do anything to induce the employee not to read the instrument, but merely failed to explain the paper to the employee, and that neither at that time thought that the injury would develop into any permanent disability, *is held* insufficient to set aside the release for fraud or duress. *Ibid.*

TRIAL

§ 4. Time of Trial and Continuance.

The granting or denying of a motion for a continuance rests in the sound discretion of the presiding judge, and his decision will not be disturbed except for abuse of discretion. *Hayes v. Ricard*, 485.

§ 5½. Pre-trial Stipulations.

Where the record contains a statement of the trial court that the authenticity of the records offered in evidence by both parties was admitted by both parties a party may not thereafter object that the records were admitted without proof of authenticity. *Hayes v. Ricard*, 485.

§ 6. Expression of Opinion on Evidence by Court During Trial.

G.S. 1-180 applies not only to the charge but prohibits a trial judge from expressing an opinion on the evidence at any time during the trial as to what has or has not been shown by the testimony of a witness, and precludes the court from asking a witness questions for the purpose of impeaching or casting doubt on his testimony. *Greer v. Whittington*, 630.

It is not improper for the trial court to ask a witness questions for the purpose of clarification of the witness' testimony, but in doing so the court should be careful not to express an opinion on the facts either directly or indirectly. *Ibid.*

The questions asked a witness by the court in this case *are held*, in the light of all the facts and attendant circumstances, to constitute interrogation for the purpose of clarifying the witness' testimony, and not to amount to a cross-examination of the witness, although prolonged interrogation of a witness is not approved. *Ibid.*

§ 16. Withdrawal of Evidence.

Ordinarily, error in the admission of incompetent evidence may be cured by the withdrawal of the evidence from the consideration of the jury by the court, but such error may not be cured when the admission of the incompetent evidence is protracted or a great length of time intervenes between the admission of the evidence and its withdrawal, so that it is apparent from the entire, record that the prejudicial effect was not removed from the minds of the jury, and each case must be determined in the light of its particular facts. *Driver v. Edwards*, 650.

§ 17. Admission of Evidence for Restricted Purpose.

The general admission of evidence competent for a restricted purpose will not be held for error in the absence of a request at the time of its admission that its purpose be restricted. *Bailey v. Westmoreland*, 843.

§ 19. Province of Court and Jury in Regard to Evidence.

As a general rule, the court, in the exercise of its right to regulate and control the conduct of a trial, has the power of its own motion to strike

evidence which is wholly incompetent or inadmissible for any purpose even though no objection is interposed to such evidence. *Greer v. Whittington*, 630.

§ 22a Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit the evidence should be taken in the light most favorable to plaintiff and she is entitled to the benefit of every intendment upon the evidence and every reasonable inference of fact to be drawn therefrom. *Williamson v. Bennett*, 498; *Friday v. Adams*, 540; *Powell v. Deifells, Inc.*, 596.

On motion to nonsuit, plaintiffs' evidence must be considered in the light most favorable to them together with so much of defendant's evidence as tends to support the cause of action, but defendant's evidence in conflict with that of plaintiffs should not be considered. *Johnson v. Lewis*, 797.

§ 22c. Contradictions and Discrepancies in Plaintiff's Evidence.

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit, since discrepancies and contradictions in the evidence are to be resolved by the jury. *Stathopoulos v. Shook*, 33.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

Evidence which shows it merely possible for the fact in issue to be as alleged or which raises a mere conjecture to that effect is insufficient foundation for a verdict and should not be submitted to the jury. *Lee v. Stevens*, 429.

§ 29. Directed Verdict.

When all the evidence justifies but a single inference in favor of the party having the burden of proof, an instruction to find the issue in the affirmative if the jury finds the evidence to be true will be upheld. The distinction is noted between a directed verdict and a peremptory instruction. *In re Will of Roberts*, 708.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

It is not sufficient for the court to state merely the general law applicable to the controversy but it is required that the court apply the law to the various facual situations adduced by the evidence. *Tillis v. Cotton Mills*, 359.

§ 47. Motions for New Trial for Newly Discovered Evidence.

In the absence of fraud, movant for a new trial on the ground of newly discovered evidence must make his motion in apt time and must show that a different result would probably be reached if a new trial were granted. *Moore v. Stone Co.*, 69.

§ 49½. New Trial for Inadequacy on Excessiveness of Award.

A motion for a new trial for inadequacy or excessiveness of the award is addressed to the discretion of the trial court, and is not reviewable in the absence of abuse of discretion. *Millas v. Coward*, 88; *Evans v. Coach Co.*, 324.

§ 55. Trial by Court—Findings and Judgment.

Where the parties agree that the stipulated facts should constitute and be the evidence in the case and agree that the court should determine the rights and liabilities of the parties upon said facts, and the facts agreed are insufficient predicate for a judgment, but, considered as evidentiary

facts, are sufficient to support diverse inference as to the determinative inference of fact, the court has authority to draw the inference of fact in the same manner as would a jury. *Credit Asso. v. Whedbee*, 24.

TRUSTS

§ 2a. Parol Trusts.

A grantor may not engraft a parol trust in favor of himself upon his warranty deed. *Schmidt v. Bryant*, 838.

§ 10. Construction and Operation of Trusts in General.

The courts will construe a trust agreement to ascertain the intent of the parties from the language used in the agreement, the purposes sought to be accomplished, and the situation of the several parties to or benefited by the trust, and will give effect to such intent unless forbidden by law. *Callaham v. Newsom*, 146.

§ 15. Investment of Funds.

The delegation of power to a trustee to withhold and accumulate the income from the trust property necessarily implies the power and duty to invest such accumulations. *Callaham v. Newsom*, 146.

§ 20a. Power of Trustee to Sell under the Trust Agreement.

Trust held to empower trustee to sell for reinvestment after death of trustor. *Callaham v. Newsom*, 146.

Where the trust conveys the entire capital stock of a corporation to a trustee with power to sell the corpus of the estate for reinvestment, the power to sell for reinvestment is not terminated by the dissolution of the corporation and transfer of the legal title to the real estate to the trustee as a liquidated dividend for the stock. *Callaham v. Newsom*, 146.

UTILITIES COMMISSION

§ 2. Jurisdiction.

Whether a carrier is a contract carrier or a common carrier is a question of law, but whether a particular carrier is acting as a common carrier or as a contract carrier is a question of fact, which, in proceedings before the Utilities Commission, is to be determined by the Commission. *Utilities Com. v. Towing Co.*, 105.

The evidence upon the entire record in this case is held to show that respondent transported petroleum products in bulk by tank barge solely by contract specifically negotiated with each particular shipper by competitive bids, that it exercised some discretion as to whom it would do business with and would not enter into any contract that would jeopardize its other contracts, with no evidence that it held itself out as willing to transport goods for all who might apply, or that it transported goods for anyone without first voluntarily entering into a specific contract for such carriage. *Held:* The finding of fact of the Utilities Commission that respondent's course of dealing was that of a common carrier is not supported by competent, material, and substantive evidence, and the judgment of the Superior Court is reversed with direction that the cause be remanded for dismissal by the Utilities Commission for want of jurisdiction. *Ibid.*

UTILITIES COMMISSION—*Continued.*

§ 5. Appeal and Review.

On appeal from the Utilities Commission the Superior Court and the Supreme Court may not retry questions of fact, but the facts found by the Commission are conclusive unless they are not supported by competent, material, and substantive evidence in view of the entire record. G.S. 62-26.10(e). *Utilities Com. Towing Co.*, 105.

VENUE

§ 1c. Venue of Actions Against Public Officials, Agencies and Administrative Boards.

The venue of an action against a regional housing authority to determine the respective rights of the parties in certain land is properly the county in which the realty is situated and in which the authority has express power to act, notwithstanding that the principal office of the authority is in another county, G.S. 1-76(1). This result is not in conflict with G.S. 1-77 requiring an action against a public officer to be brought in the county in which he transacts his official business, since a regional housing authority perforce has the power to act in a county in which it is authorized to acquire realty, even though it is not the county of its principal office. *Powell v. Housing Authority*, 812.

§ 4b. Change of Venue for Convenience of Parties or Witnesses.

The court has the discretionary power to remove a cause to another county for the convenience of witnesses, and action of the court in doing so in this case after a mistrial for inability of the jury to reach a verdict is affirmed, the order being based on the evidence taken at the trial, and there being nothing in the record to show that the opposing parties were denied an opportunity to present evidence in opposition to the motion or that they requested a continuance of the hearing of the motion for an opportunity to present evidence. *Moody v. Warren-Robbins*, 172.

WAIVER

§ 2. Acts Constituting Waiver.

The essentials of a waiver are the existence at the time of the alleged waiver of a right, advantage or benefit, and an intention to relinquish such right, advantage or benefit. *Fetner v. Granite Works*, 296.

WAREHOUSEMEN

§ 3a. Issuance of Receipts.

The duty of a local manager of a warehouse accepting cotton for storage to satisfy himself that the depositor of the commodity has good title thereto before issuing negotiable warehouse receipts therefor, G.S. 106-442, places the burden upon the local manager to exercise that degree of diligence which an ordinarily prudent person, under the same circumstances and charged with like duty, would exercise. *Credit Asso. v. Whedbee*, 24.

Facts held sufficient to support inference that warehouseman exercise due diligence in issuing negotiable receipts. *Ibid.*

§ 3d Warehouse Insurance Funds.

The depositor of a commodity is primarily liable for loss sustained by reason of the issuance of negotiable receipts for the commodity upon the

depositor's representations and warranties that the commodity was free and clear of all liens and encumbrances, and the liability of the guaranty fund, G.S. 106-435, is secondary. *Credit Asso. v. Whedbee*, 24.

WILLS

§ 6. Signature of Testator.

It is not required that will be on a single sheet or that testator sign each sheet. *In re Will of Roberts*, 708.

§ 7. Attestation and Subscribing Witnesses.

A dispositive paper writing signed by testator and witnessed at his request and in his presence by two witnesses, although they signed it on separate occassions, is sufficient to constitute the instrument and attested will, it not being required that the witnesses sign in the presence of each other. *In re Will of Roberts*, 708.

§ 8. Requisites of Holograph Will.

An instrument in the handwriting of testator, disclosing dispositive intent, and found after his death in his safe, is sufficient to constitute the instrument a holographic will, and the presence of a printed letterhead at the top of the page is immaterial. *In re Will of Roberts*, 708.

While the provisions of the statute in regard to the execution of a will are mandatory and not directory and must be strictly complied with the statutory provisions must at the same time be reasonably construed so as to effectuate the intent of the statute and not to defeat it. *Ibid.*

It is not required that a will be on a single sheet of paper or that the sheets constituting the instrument be physically attached, or that the signature of the testator appear on each sheet, but it is sufficient if the evidence discloses that the separate sheets constitute but a single instrument. In a holographic will sequence of the language is of less significance than in an attested will since proof of the handwriting of the testator, and his signature establishes the dispositive provisions as a will. *Ibid.*

§ 12. Revocation of Will by Testator.

In order to make or revoke a will the testator must have mental capacity to comprehend the natural objects of his bounty, to understand the kind, nature and extent of his property, to know the manner in which he desires his act to take effect, and to realize the effect his act would have upon his estate, and the lack of any one of these elements of testamentary capacity renders the testator incapable of making or revoking his will. *In re Will of Shute*, 697.

§ 15. Proof of Will and Probate in Common Form.

Exclusive original jurisdiction of proceedings for probate of wills is in the Clerk of the Superior Court and the probate of instruments in common form by the clerk is conclusive evidence of the validity thereof as a will until vacated on appeal or declared void by a competent tribunal in a proceeding instituted for that purpose. *Walters v. Children's Home*, 369.

It is the public policy of this State that wills should be probated, but this rule does not preclude the beneficiaries of an estate from agreeing among themselves to a disposition of the property different from that directed in the will and they may enter into a consent judgment embodying their agreement even prior to the death of testator which will estop them from claiming under the will, such agreement not being contrary to public policy but

being a family settlement favored by the law which will be upheld when the rights of creditors are not impaired and when fairly made by all the interested parties. *In re Will of Pendergrass*, 737.

§ 17. Nature of Caveat Proceedings.

The validity of a will cannot be collaterally attacked in proceedings under the Declaratory Judgment Act. *Walters v. Children's Home*, 369.

§ 17½. Jurisdiction of Probate Court.

All matters pertaining to the probate of a will in solemn form and to the distribution of the decedent's estate are matters for the probate court, and it is proper to plead in such proceedings a consent judgment constituting a family settlement. *In re Will of Pendergrass*, 737.

§ 22. Burden of Proof in Caveat Proceedings.

The burden is upon propounder to establish by the greater weight of the evidence that the paper offered for probate was executed in compliance with statutory requirements. *In re Will of Roberts*, 708.

§ 24. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Evidence held sufficient to warrant peremptory instruction as to validity of holographic will. *In re Will of Roberts*, 708.

§ 25. Instructions in Caveat Proceedings.

An instruction which, by the use of the conjunctive "and," has the effect of placing the burden upon propounders to prove that at the time testatrix tore the paper writings she did not possess each and every one of the essential elements of mental capacity to revoke the instrument, must be *held* for prejudicial error. *In re Will of Shute*, 697.

§ 31. General Rules of Construction.

The dominant purpose of the testatrix as gathered from the entire instrument, irrespective of the use of any particular words, is to be ascertained and given effect, and, when necessary, attendant circumstances surrounding the testatrix at the time of the execution of the instrument may be resorted to in ascertaining such intent. *Moore v. Langston*, 439.

The intent of testator is ordinarily to be ascertained from an examination of his will from its four corners but, when necessary in order to ascertain such intent, the court may consider the will in the light of testator's knowledge of certain facts and circumstances existing at the time of or after execution of the will. *Bullock v. Bullock*, 559.

§ 33a. Estates and Interests Created in General.

The will in question devised and bequeathed all of testatrix's property to testatrix's sister. By codicil testatrix expressed her desire that particular beneficiaries should have particular items of personalty but added that she wanted her sister to do as she wished with everything as long as she lived, and by a second codicil stated that she was leaving all of her property to her sister "to do as you please with it". *Held:* The general bequest of the personalty with power of disposition transfers the property absolutely, and any contrary provisions will be disregarded as repugnant to the absolute bequest. *Walters v. Children's Home*, 369.

Testatrix devised and bequeathed all of her property to her two daughters. Thereafter she executed a codicil "this is my wish to be carried out in my

will" that her sister receive two hundred dollars a month for life from rentals, and stating that she wanted her two daughters to see that this was done. *Held:* The words of the codicil are not merely precatory but constitute a testamentary disposition of the property. *Moore v. Langston*, 439.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

Testator devised his lands for life to his widow then to his daughters for life with remainder in fee to their children, with further provision that if any daughter died without children her surviving her share should go to her brothers and sisters. At the time of testator's death each daughter had living children, but one daughter died prior to the death of the widow, leaving her surviving one child. *Held:* The grandchildren of testator took a vested remainder as purchasers under the will, subject to be opened up to let in any afterborn children, and therefore the son of the deceased daughter takes the fee in that part of the land in which his mother's life estate would have been alloted. *Privett v. Jones*, 386.

§ 34b. Designation of Beneficiaries—Adopted Children.

As a general rule, in the absence of language showing an intent to the contrary, a child adopted to the knowledge of the testator in ample time for testator to have changed his will so as to exclude such child if he had so desired, will be included in the word "children" when used to designate a class which is to take under the will. *Bullock v. Bullock*, 559.

Where the language of the will expresses the intent of the testator that his land should go to his named children for life and then to testator's grandchildren "from my said sons," the adopted children of a child of testator does not take in the absence of an expression of intent to the contrary, since an adopted child of a child of testator is not a grandchild of testator. Further, in this case, it did not appear that testator knew of the adoptions, or if he did have knowledge thereof that his mental and physical capacities were such that he could have changed his will after the adoptions, had he so desired. *Ibid.*

§ 36. General and Specific Legacies.

A bequest will be construed as a demonstrative rather than a specific bequest unless the intent to the contrary clearly appears in the will, and the mere designation of a fund out of which a legacy is to be satisfied is not enough to make the bequest specific. *Moore v. Langston*, 439.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.
1-52(5); 1-54; 1-55. Action held for wrongful interference with contractual rights and not for libel and slander, and three year statute applied. *Johnson v. Graye*, 448.

1-69.1; 1-97(6). Labor union is not required to file name and address of process agent; but common law rule that labor union may not sue or be sued in own name has been modified. *Melton v. Hill*, 134.

1-76(1); 1-77. Venue of action against regional housing authority is county in which land in controversy lies, even though its principal place of business is in another county. *Powell v. Housing Authority*, 812.

1-97(1). Does not apply to unincorporated labor unions. *Melton v. Hill*, 134.

1-122. Complaint must contain plain and concise statement of facts constituting cause of action. *Shepard v. Mfg. Co.*, 751.

1-122; 1-135. Function of pleading is to inform adversary what facts are claimed to constitute cause of action or defense. *Sorrell v. Moore*, 852.

1-128. Demurrer which fails to specify ground of objection may be disregarded. *Johnson v. Graye*, 448; *Williams v. Strickland*, 767.

1-133. When pendency of prior action does not appear on face of complaint, abatement is properly raised by answer. *Wallace v. Johnson*, 11.

1-134. Demurrer for failure of complaint to state cause or for want of jurisdiction, may be made at any time. *Williams v. Strickland*, 767.

1-137(1); 1-137(2). In action on contract, defendant may set up counterclaim arising out of contract sued on and also breach of distinct contract existing at commencement of action. *Rubber Co. v. Distributors*, 406.

1-140. Where counterclaim is served on plaintiff, plaintiff must file reply. *Rubber Co. v. Distributors*, 406.

1-141; 1-126. When facts constituting basis of plea of *res judicata* appear on face of pleading, question may be raised by demurrer. *Lumber Co. v. Hunt*, 624.

1-151. Upon demurrer allegations are to be taken as true and liberally construed. *Rubber Co. v. Distributors*, 406; *Friday v. Adams*, 540; *Williams v. Strickland*, 767.

1-163; 7-13. Supreme Court may allow amendment to allege municipal ordinance introduced in evidence. *Stathopoulos v. Shook*, 33.

1-180. Court may ask witness questions of clarifying nature. *S. v. Davis*, 93.

Instruction that evidence conclusively established all elements of the offense held erroneous. *S. v. Wallace*, 378.
Charge held without error when construed as whole. *S. v. Grundler*, 177.

Contention that court failed to give equal stress to contentions held without merit. *S. v. Gooding*, 175.

1-220. Evidence held insufficient to show that order withdrawing appeal was entered through surprise or excusable neglect. *S. v. Grundler*, 177.

1-230; 1-475. Where return of chattel is impossible, measure of damages for

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

wrongful taking is value of the chattel at time it was seized. *Tillis v. Cotton Mills*, 359.

1-250. Where parties agree on facts and that court should determine their rights thereon, court has no authority to find additional facts. *Credit Corp. v. Whedbee*, 24.

1-253; 1-254. While action to construe will may be maintained under the statute, the validity of paper as will may not be collaterally attacked therein. *Walters v. Children's Home*, 369.

1-271. Witness held party aggrieved by refusal to quash subpoena *duces tecum*. *Buick Co. v. General Motors Corp.*, 201.

1-502. Findings held sufficient to support order appointing receiver. *York v. Cole*, 344.

1-522. Summons in action to try title to office must be served within ninety days after induction into office. *Long v. Smitherman*, 682.

6-46; 6-48. Where defendant has served sentence, he may not be imprisoned until he also pays fine when judgment does not so provide. *S. v. Bryant*, 423.

7-64. Recorder's Court of Vance County and the Superior Court have concurrent jurisdiction of prosecutions for misdemeanors. *S. v. Clayton*, 261; *S. v. Parrish*, 274.

8-45.1. Photostatic copies of deposit slips competent as originals. *S. v. Shumaker*, 678.

8-51. Beneficiary of life policy is precluded from testifying that insured assigned policy to her by parol. *Harrison v. Winstead*, 113.

8-71. Statute does not contemplate taking deposition of party disqualified to give evidence in the case. *Buick Co. v. General Motors Corp.*, 201.

14-17. Solicitor may not, in selecting jury, state that sole purpose of trial is to obtain death penalty. *S. v. Manning*, 1.

14-160. Aiders and abettors in commission of misdemeanor are guilty as principals. *S. v. Clayton*, 261; *S. v. Parrish*, 274.

14-322. Failure to support illegitimate child must be wilfull, and therefore notice of birth of living child in prerequisite. *S. v. Hall*, 211.

15-27. Evidence discovered by search under duly issued warrant is competent notwithstanding search may have been conducted in unreasonable manner. *S. v. Smith*, 328.

15-46; 15-47. Failure to follow statutory provisions will be given weight in hearing under Post Conviction Act. *S. v. Graves*, 550.

15-140. Where record fails to show waiver, defendant may not be tried initially in Superior Court on warrant. *S. v. Searcy*, 320.

15-152. Indictments charging defendants with rape held properly consolidated for trial. *S. v. Grundler*, 177.

15-170. In prosecution for assault with deadly weapon, jury may return verdict of simple assault when warranted by evidence. *S. v. Gooding*, 175.

15-173. On motion to nonsuit, evidence must be taken in light most favorable to State. *S. v. Glenn*, 156.

15-180.1. Superior Court may not suspend driver's license over defendant's objection. *S. v. Green*, 141.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

18-2. Evidence held insufficient to show even constructive possession of liquor by defendant. *S. v. Glenn*, 156.

20-16(a); 20-16(c); 20-16(9); 20-25. Where Department has certificates showing two separate convictions of operating a motor vehicle in excess of 55 miles per hour, its suspension of license is not void and driver may not disregard such suspension even though erroneous, his remedy being by statutory procedure. *Beaver v. Scheidt*, 671.

20-71.1. Evidence in this case held insufficient to be submitted to jury on question of respondeat superior. *Rick v. Murphy*, 162.

20-138; 20-38(h). Farm tractor operated on highway is motor vehicle within meaning of statute. *S. v. Green*, 141.

20-138; 20-140. Evidence that defendant was intoxicated is competent under general allegation of reckless driving. *Rick v. Murphy*, 162.

20-140(a)(b). Warrants charging offense in language of statute held sufficient. *S. v. Wallace*, 378.

20-145; 20-141. Police officer is required not within standing exemption to operate vehicle with due regard to safety of others. *Goddard v. Williams*, 128.

20-154(a); 20-155(a). Where vehicles approach intersection from opposite directions G.S. 20-154(a) applies to motorist turning left to enter intersecting street, and G.S. 20-155(a) has no application. *Shoe v. Hood*, 719.

20-157(a). Warrant held insufficient. *S. v. Wallace*, 278.

22-1. Promise held original promise not coming within statute of frauds. *Warren v. White*, 729.

31-3. While burden is on propounders to prove paper writing, evidence in this case held to warrant peremptory instruction in their favor. *In re Will of Roberts*, 708.

31-32. Clerk has exclusive jurisdiction to probate will in common form, and such probate is conclusive until set aside by proper procedure. *Walters v. Children's Home*, 269.

31-38. General bequest with power of disposition transfers title, and any repugnant provisions will be disregarded. *Walters v. Children's Home*, 369.

41-2. Depositors may contract for survivorship in joint account. *Wilson v. Wooten*, 667.

45-21.38. Has no application to note executed to a third party. *Brown v. Owens*, 348.

49-4. Date of birth of child is immaterial if demand for support is made a reasonable time before prosecution is instituted and action is not barred. *S. v. Womack*, 342.

50-16; 50-17. Order that upon sale of land held by entireties, husband's share should be liable for alimony held not to create lien on fund. *Porter v. Bank*, 573.

52-2; 52-12; 39-7. Married woman may be estopped by her quitclaim deed to land held by entireties. *Harrell v. Powell*, 636.

52-10. Wife may sue alone to recover for personal injury, and loss of earning power is element of damage even though she was not employed at time. *Johnson v. Lewis*, 797.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.
52-12. Conveyance of lands by wife to third person, who conveys to husband and wife in order to create estate by entireties, is void when statute is not complied with. *Brinson v. Kirby*, 73.

52-15. Negligence of husband in operating wife's car in which she was riding as passenger may be imputed to wife. *Shoe v. Hood*, 719.

53-52. Bank relying on statute has burden of showing delivery of check to depositor more than sixty days before claim is filed; but mailing of statement to depositor is sufficient proof. *Schwabenton v. Bank*, 655.

55-12. Indictment charging embezzlement of property of "The Chuck Wagon" held fatally defective. *S. v. Thornton*, 658.

55-27. Fact that statute renders invalid prior by-law of corporation as to quorum does not impair obligations of contract. *Webb v. Morehead*, 394.

55A-42. Upon filing of valid consolidation agreement, separate existence of consolidating corporations is terminated. *Adams v. College*, 617.

62-26.10(e). Findings of Utilities Commission are conclusive unless not supported by competent, material and substantive evidence. *Utilities Commission v. Towing Co.*, 105.

97-2(r). Evidence held sufficient to support finding that hernia resulted from accident. *Faires v. McDevitt*, 194.

97-29. Commission may correct award for less than statutory minimum. *McDowell v. Kure Beach*, 818.

97-57. Creates irrebutable presumption that last thirty days of work within seven consecutive months is period of last injurious exposure, and Industrial Commission may not select any other period. *Fetner v. Granite Works*, 296.

97-61. Prior to amendment, employee does not forfeit his right to compensation unless he receives temporary compensation under this section. *Fetner v. Granite Works*, 296.

97-85. Compensation Act provides orderly procedure for appeal, and *certiorari* will not lie as substitute for appeal. *McDowell v. Kure Beach*, 818.

105-147(9)(d). Corporation resulting from merger is not entitled to deduct from taxable income loss carry-over of constituent corporations unless there is continuity of the business. *Distributors v. Currie*, 120.

105-262; 105-264. Interpretative regulation promulgated by Commissioner of Revenue will ordinarily be upheld when not in conflict with statute and within authority of Commissioner. *Campbell v. Currie*, 329.

105-296(4). Property of seminary held exempt from taxation. *Seminary v. Wake County*, 775.

106-442. Local manager of warehouse is under duty to exercise due care to ascertain that commodity is free from liens before issuing warehouse receipt. *Credit Asso. v. Whedbee*, 24.

106-435. The depositor of commodity is primarily liable for loss occasioned by lien, and liability of guaranty of warehouse fund is secondary. *Credit Asso. v. Whedbee*, 24.

115-53. Board of education cannot be sued at common law for negligent injury to pupil in absence of waiver of immunity by procuring liability insurance. *Field v. Board of Education*, 699.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

115-125; 115-80. Verdict of jury is determinative of whether new school site is necessary to maintenance of schools. *Administrative Unit v. Comrs. of Columbus*, 826.

130-162; 160-205. Municipality, under delegated power of eminent domain, may condemn fee for water shed. *Morganton v. Hutton & Bourbonnais Co.*, 531.

136-96. Dedication of streets not opened for fifteen years may be revoked; where corporation making dedication has ceased to exist, revocation may be made by owner of land abutting streets. *Steadman v. Pinetops*, 509.

143-300.1. Board of education is liable for injuries resulting either from negligence of commission or omission on part of driver of school bus. *Trust Co. v. Board of Education*, 603.

157-2; 157-4; 157-33; 157-35. Housing authorities are public bodies, and power of eminent domain of regional authority is not limited to single county. *Powell v. Housing Authority*, 812.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, sec. 11. Right of confrontation includes right to opportunity to have witnesses in court and prepare defense. *S. v. Graves*, 550.

I, sec. 11. Where a defendant voluntarily testifies in own behalf he is subject to cross-examination. *S. v. Sheffield*, 309.

I, sec. 12. Where record fails to show waiver, defendant may not be tried initially in Superior Court on warrant. *S. v. Searcy*, 320.

I, sec. 17. Right of confrontation may be waived. *Cotton Mills v. Local Union*, 218.

I, sec. 17. Power to take private property for public purpose is limited only by requirement that just compensation be paid. *Morganton v. Hutton & Bourbonnais Co.*, 531.

IV, sec. 2, 14. General Assembly has authority to provide for establishment of courts inferior to Superior Court. *S. v. Clayton*, 261.

V, sec. 5. Property of seminary held exempt from taxation. *Seminary v. Wake County*, 775.