NORTH CAROLINA REPORTS

Vol. 252

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1960.

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:

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1960

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[1].

ASSISTANT ATTORNEYS-GENERAL:

THOMAS WADE BRUTON,
RALPH MOODY,
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KENNETH WOOTEN, JR.,
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LUCIUS W. PULLEN,
H. HORTON ROUNTREE,
GLENN L. HOOPER, JR.,
THOMAS L. YOUNG[2].

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF SUPREME COURT:

ADRIAN J. NEWTON.

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DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

BERT M. MONTAGUE.

[1]Resigned 1 March 1960. Succeeded by Thomas Wade Bruton.
[2]Appointed 1 April 1960.

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.

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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

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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. JACK HOOKS	Kenly

EMERGENCY JUDGES.

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

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.
MAURICE BRASSWELL	Ninth	Fayetteville.
JOHN B. REGAN	Ninth-A	St. Pauls.
WILLIAM H. MURDOCK	Tenth	Durham.

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HORACE R. KORNEGAY	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
GRADY B. STOTT	Fourteenth	Gastonia.
KENNETH R. DOWNS	Fourteenth-A	Charlotte.
ZEB. A. MORRIS	Fifteenth	Concord.
B. T. FALLS, JR.	Sixteenth	Shelby.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
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ROBERT S. SWAIN	Nineteenth	Asheville.
GLENN W. BROWN	Twentieth	Waynesville.
CHARLES M. NEAVES	Twenty-first	Elkin.

SUPERIOR COURTS, SPRING TERM, 1960.

FIRST DIVISION

FIRST DISTRICT
Judge Frizzelle

Camden—Apr. 11.
Chowan—Apr. 4; May 2†.
Currituck—Jan. 25†; Mar. 7.
Dare—Jan. 18†; May 30.
Gates—Mar. 28; May 23†.
Pasquotank—Jan. 11†; Feb. 22*(2); Mar. 21†; May 9†(2); June 6*; June 13†.
Perquimans—Feb. 1†; Mar. 14†; Apr. 18.

SECOND DISTRICT
Judge Morris

Beaufort—Jan. 25*; Feb. 1; Feb. 22†(2); Mar. 14*; May 9†(2); June 13†; June 27.
Hyde—May 23.
Martin—Jan. 11†; Mar. 21; Apr. 11†(2); May 30†(2); June 20.
Tyrrell—Apr. 25.
Washington—Jan. 18*; Feb. 15†; Apr. 4†; May 2*.

THIRD DISTRICT
Judge Paul

Carteret—Mar. 14†; Apr. 4; May 2†; June 13(2).
Craven—Jan. 11(2); Feb. 8†(3); Mar. 14(A); Apr. 11; May 9†(2); May 30(2).
Pamlico—Jan 25(A)(2).
Pitt—Jan. 25†; Feb. 1; Feb. 29†(2); Mar. 21(2); Apr. 18†; Apr. 25; May 23; May 30†(A); June 27.

FOURTH DISTRICT
Judge Bundy

Duplin—Jan. 25*; Feb. 15†(2); Mar 14†(2); Apr. 4*; Apr. 25†.
Jones—Mar. 7; May 16†.
Onslow—Jan. 11(2); Feb. 29; Mar. 28†; May 23(2).
Sampson—Feb. 1(2); Apr. 11†(2); May 2*; May 9†; June 6†(2).

FIFTH DISTRICT
Judge Stevens

New Hanover—Jan.18*; Jan. 25†(2); Feb. 15†(2); Feb. 29*(2); Mar. 14†(2); Apr. 11*; Apr. 18†(2); May 9†(2); May 23*; May 30†(2); June 13*; June 20†(2).
Pender—Jan. 11; Feb. 8†; Mar. 28, May 2†.

SIXTH DISTRICT
Judge Mintz

Bertie—Feb. 15(2); May 16(2).
Halifax—Feb. 1(2); Mar. 7†(2); May 2; May 30†(2); Halifax June 13*.
Hertford—Feb. 29; Apr. 18(2).
Northhampton—Apr. 4(2).

SEVENTH DISTRICT
Judge Parker

Edgecombe—Jan. 25*; Feb. 29*(2); Mar. 28†(A)(2); Apr. 25*; June 6(2).
Nash — Jan. 11* (A); Feb. 1†; Feb. 8*; Mar. 14†(2); Apr. 11*(2); May 23†(2).
Wilson—Jan. 11†;(2); Feb. 15*(2); Mar. 14†(A)(2); Mar. 28*(2); May 9*(2); June 20†(2).

EIGHTH DISTRICT
Judge Bone

Greene—Jan. 11†; Feb. 29; May 2.
Lenoir—Jan. 18*; Feb. 15†(2); Mar. 21(2); Apr. 18†(2); May 23†(2); June 20*(2).
Wayne—Jan. 25*; Feb. 1†(2); Mar. 7†(2); Apr. 4*(2); May 9†(2); June 6†(2).

SECOND DIVISION

NINTH DISTRICT
Judge McKinnon

Franklin—Feb. 8*; Feb. 22†(2); Apr. 25†(2); May 16*.
Granville—Jan. 25; Apr. 11(2); Apr. 25†(2); May 16*.
Person—Feb. 15; Mar. 28†(2); May 30†.
Vance—Jan. 18*; Mar. 7*; Mar. 21†; June 20*; June 27†.
Warren—Jan. 11*; Feb. 1†; Mar. 14†; May 9†; June 6*.

TENTH DISTRICT
Judge Hobgood

Wake—Jan. 11†(2); Jan. 11*(A); Jan. 18†(A)(2); Jan. 25*(2); Feb. 8†(2); Feb. 15†(A)(2); Feb. 22*(2); Mar. 7†(2); Mar. 21*(2); Mar. 28†(A)(2); Apr. 4†(2); Apr. 18*(A)(2); Apr. 18†(2); May 9*(A); May 9†(2); May 23†(2); June 6†(A)(2); June 6*(2); June 20†(2); June 27*(A).

ELEVENTH DISTRICT
Judge Bickett

Harnett—Jan. 11*; Jan. 18†(A)(2); Feb. 22†(2); Mar. 21*; Apr. 25†(2); May 23*; May 30†; June 13†(2).
Johnston—Jan. 18†(2); Feb. 1†(A)(2); Feb. 15; Feb 22(A); Mar. 7†(2); Apr. 4†(2); Apr. 18*; May 9†(2); June 6; June 27*.
Lee—Feb. 1*; Feb. 8†; Mar. 28*; May 9†(A)(2); May 30*(A).

TWELFTH DISTRICT
Judge Williams

Cumberland—Jan. 11*(2); Jan. 25†(2); Feb. 8*(2); Feb. 22†(2); Mar. 7†(A); Mar. 14*; Mar. 28*; Apr. 4†(2); Apr. 18*(2); May 2†(A); May 9†(2); May 23*(2); June 6†(2); June 20*(2).
Hoke—Jan. 11(A); Mar. 7†; May 2.

THIRTEENTH DISTRICT
Judge Clark

Bladen—Feb. 22; Mar. 21†; Apr. 25; May 23†.
Brunswick—Jan. 25; Feb. 29†; May 2†; May 16.
Columbus—Jan. 11†(2); Feb. 1*(2); Mar. 7†(2); May 9*; June 20.

FOURTEENTH DISTRICT
Judge Mallard

Durham—Jan. 11*; Jan. 18†(2); Feb. 1*; Feb. 8†(2); Feb. 22*(2); Mar. 7†(2); Mar. 21*; Mar. 28*(2); Apr. 11†(2); Apr. 25*; May 2†(2); May 16*(2); May 30†(2); June 13*; June 20*(2).

FIFTEENTH DISTRICT
Judge Hall

Alamance—Jan. 11†(2); Feb. 8†(2); Mar. 7*(2); Apr. 4†; Apr. 18†(2); May 9*; May 23†(2); June 13*(2).
Chatham—Feb. 1†; Feb. 29(A); Mar. 21†; May 16; June 6†.
Orange—Jan. 25†; Feb. 29*; Mar. 28†; May 2*; June 27†.

SIXTEENTH DISTRICT
Judge Carr

Robeson—Jan. 11†(2); Jan. 25*(2); Feb. 29†(2); Mar. 14*; Mar. 28†(2); Apr. 11*(2); Apr. 25†; May 9*(2); May 23†(2); June 13*(2).
Scotland—Feb. 8†; Mar. 21· May 2†; June 27.

THIRD DIVISION

SEVENTEENTH DIVISION
Judge Gambill

Caswell—Feb. 29†; Mar. 28*(A).
Rockingham—Jan. 25*(2); Mar. 7†(2); Mar. 21*; Apr. 18†(2); May 16†; June 13*(2).
Stokes—Feb. 8*; Apr. 4*; Apr. 11†; June 27.
Surry—Jan. 11*(2); Feb. 15†(2); Mar. 28; May 2*(2); June 6.

EIGHTEENTH DISTRICT
Schedule A—Judge Gwyn

Guil. Gr.—Jan 11†(2); Jan. 25†(2); Feb. 8*(2); Feb. 29†(2); Apr. 18†(2); May 16*(2); June 13†(2).
Guil. H. P.—Feb. 15*(A); Feb. 22†; Mar. 14*; Mar. 21†(2); Apr. 4*; May 2†; May 9*; May 30*.

Schedule B—Judge Preyer

Guil. Gr.—Jan. 11*(2); Feb. 8†(2); Feb. 22†; Feb. 29*(2); Mar. 14†(2); Mar. 28*; Apr. 4†(2); Apr. 18*(2); May 2†(2); May 30†(2); June 13*(2).
Guil. H. P.—Jan. 11†(A); Jan. 25*; Feb. 1†; May 23†; June 27†.

NINETEENTH DISTRICT
Judge Crissman

Cabarrus—Jan. 11*; Jan. 18†; Mar. 7†(2); Apr. 25(2); June 13†(2).
Montgomery—Jan. 25*; May 23†(2).
Randolph—Feb. 1*; Feb. 8†(2); Apr. 4*, Apr. 11†(2); May 30†(A)(2); June 27*.
Rowan—Feb. 22(2); Mar. 21†(2); May 9(2).

TWENTIETH DISTRICT
Judge Armstrong

Anson—Jan. 18*; Mar. 7†; Apr. 18(2); June 13*; June 20†.
Moore—Jan. 25†; Feb. 1*; Mar. 14†; May 2*; May 23†.
Richmond—Jan. 11*; Feb. 15†; Mar. 21†(2); Apr. 11*; May 30†(2).
Stanly—Feb. 8†; Apr. 4; May 16†.
Union—Feb. 22(2); May 9.

TWENTY-FIRST DISTRICT
Judge Phillips

Forsyth—Jan. 11(2); Jan. 25†(3); Feb. 8(A)(2); Feb. 15†(3); Mar. 7(2); Mar. 21†(3); Apr. 11(2); Apr. 25†(3); May 16†(A)(2); May 16(2); May 30†(2); June 13(2); June 20†(A)(2).

TWENTY-SECOND DISTRICT
Judge Johnston

Alexander—Mar. 14; Apr. 18.
Davidson—Jan. 25†(A); Feb. 1; Feb. 22†(2); Mar. 21 (A); Apr. 4†(2); May 2; June 6†(2); June 27.
Davie—Jan. 25*; Mar. 7†; Apr. 25.
Iredell—Feb. 8(2); Mar. 21†; May 23(2).

TWENTY-THIRD DISTRICT
Judge Olive

Alleghany—Feb. 1; Apr. 25.
Ashe—Apr. 4*; May 30†.
Wilkes—Jan. 18†(2); Feb. 1(A); Feb. 22†(2); Mar. 14*(2); May 2†(2); June 6(2); June 20†(2).
Yadkin—Jan. 11; Feb. 8(2); May 16.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT
Judge Patton

Avery—May 2(2).
Madison—Feb. 8†; Feb. 29; Mar. 28†(2); May 30*(2); June 27†.
Mitchell—Apr. 11(2).
Watauga—Jan. 25*; Apr. 25*; June 13†(2).
Yancey—Mar. 7(2).

TWENTY-FIFTH DISTRICT
Judge Huskins

Burke—Feb. 22; Mar. 14(2); June 6(2).
Caldwell—Jan. 25†(2); Feb. 29(2); Mar. 28†(2); May 23(2); June 20†(A)(2).
Catawba—Jan. 11†(2); Feb. 8(2); Apr. 11(2); Apr. 25†(2); June 20†(2).

TWENTY-SIXTH DISTRICT
Schedule A—Judge Farthing

Mecklenburg—Jan. 11*(2); Jan. 25†(2); Feb. 8†(3); Feb. 29†(2); Mar. 14*(2); Mar. 28†(2); Apr. 11*(2); Apr. 25†(2); May 9†(2); May 23†(2); June 6†(2); June 20*(2).

Schedule B—Judge Campbell

Mecklenburg—Jan. 11†(2); Jan. 25†(2); Feb. 8†; Feb. 15*(2); Feb. 29†(2); Mar. 14†(2); Mar. 28†(2); Apr. 11†(2); Apr. 25†(2); May 9*(2); May 23†(2); June 6†(2); June 20†(2).

TWENTY-SEVENTH DISTRICT
Judge Clarkson

Cleveland—Feb. 1; Mar. 28†(2); May 2(2).
Gaston—Feb. 8†(2); Feb. 29*(2); Mar. 14†(2); Apr. 11†(A)(2); Apr. 25*; May 30†(2); June 13*.
Lincoln—Jan. 18(2); May 16(2).

TWENTY-EIGHTH DISTRICT
Judge Froneberger

Buncombe—Jan. 11*(2); Jan. 25†(3); Feb. 15*(2); Feb. 29†(3); Mar. 21*(A)(2); Mar. 21†(A); Mar. 28†(3); Apr. 18*(2); May 2†(3); May 16*(A)(2); May 23†(A)(2); June 6†(3); June 13*(A).

TWENTY-NINTH DISTRICT
Judge McLean

Henderson—Feb. 15(2); Mar. 21†(2); May 9*; May 30†(2).
McDowell—Jan. 11*; Feb. 29†(2); Apr. 18*; June 13(2).
Polk—Feb. 1; Feb. 8†(A); June 27.
Rutherford—Jan. 18†*(2); Mar. 14*†; Apr. 25†*(2); May 16*†(2).
Transylvania—Feb. 1†(A); Feb. 8*; Apr. 4(2).

THIRTIETH DISTRICT
Judge Pless

Cherokee—Apr. 4(2);June 27.
Clay—May 2.
Graham—Mar. 21; June 6†(2).
Haywood—Jan. 11†(2); Feb. 8(2); May 9†(2).
Jackson—Feb. 22(2); May 23.
Macon—Apr. 18(2).
Swain—Mar. 7(2).

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* Indicates criminal term.
† Indicates civil term.

No designation indicates mixed term.
(A) Indicates judge to be assigned.
No number indicates one week 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. SALLIE B. EDWARDS:, Deputy Clerk, Washington.

Wilson, eighth Monday after the second Monday in March and September. MRS. EVA L. YOUNG, Deputy Clerk, Wilson.

Wilmington, tenth Monday after the second Monday in March and ninth Monday after second Monday in September. 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.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1960

CLYDE O'NEAL GILLIKIN, BY HIS NEXT FRIEND, LOLA GILLIKIN
v. RICHARD GILLIKIN.

(Filed 24 February, 1960.)

1. Compromise and Settlement—

The execution of a compromise and settlement by payment in accordance with a valid judgment entered in an *ex parte* proceeding, G.S. 1-400, G.S. 1-402, of the sum stipulated for the benefit of a minor, represented in the proceeding by a duly appointed next friend, is valid and binding, and precludes the minor from thereafter maintaining an action based upon the same cause of action.

2. Pleadings § 5a—

It is not required that a petition in an *ex parte* proceeding be verified.

3. Infants § 5: Judgments § 25—

A judgment entered in an *ex parte* proceeding authorizing the next friend of a minor to accept on behalf of the minor a sum offered by insurer in settlement of a claim, which judgment is approved by the resident judge, is not void for mere irregularities, and it being found that the interest of the minor was duly represented by the next friend of the minor and the attorney employed by him, and that the settlement constituted a good and substantial recovery on behalf of the minor, so that there is no *indicia* of fraud, the judgment is not subject to collateral attack, and precludes an action by the minor or his next friend to recover on the same cause of action.

APPEAL by plaintiff from *Bundy, J.*, October Term, 1959, of CARTERET.

This is a civil action instituted by the plaintiff, by his duly appointed next friend, his father, Lola Gillikin, on 21 January 1956, to recover damages for personal injuries sustained 18 April 1954, when the plaintiff was 17 years old, allegedly caused by the negligence of the defendant.

The defendant in his answer denied negligence and pleaded plaintiff's contributory negligence; and as a plea in bar alleged that all matters in controversy had been compromised and settled by the defendant's payment of $7,000 which had been authorized and directed by a judgment entered 27 January 1955, signed by the Clerk of the Superior Court of Carteret County and approved by the Resident Superior Court Judge of the District.

At the June Term, 1958, of Carteret Superior Court the court held that this action "was an attempt to collaterally attack said judgment of January 27, 1955" and dismissed the action. On appeal to this Court we vacated the order dismissing the action and remanded for the purpose of having the court below determine whether or not the compromise and settlement purportedly authorized by the judgment entered on 27 January 1955, had been consummated. Our opinion is reported in 248 N.C. 710, 104 S.E. 2d 861.

When this cause came on for hearing at the October Term, 1959, it was stipulated that the parties waived a jury trial and agreed that the court should find the facts pertaining to the plea in bar and should enter judgment in accordance with its findings. The court below found the facts and entered judgment as follows:

"1. That Clyde O'Neal Gillikin was an infant without general or testamentary guardian when injured in the automobile accident referred to in the pleadings.

"2. That shortly thereafter and after treatment at the hospital in Morehead City and in Memorial Hospital in Chapel Hill by Dr. Way and others, the father of Clyde O'Neal Gillikin, Lola Gillikin, engaged * * * the services of Hon. Luther Hamilton, a practicing attorney at law, to represent the said Clyde O'Neal Gillikin in obtaining damages for the injuries suffered by Clyde O'Neal Gillikin in the accident referred to above.

"3. That pursuant to said engagement, the said Luther Hamilton, Esq., under negotiations looking to a settlement contacted and negotiated with a representative of the United States Fidelity & Guaranty Company, the insurance carrier for Richard Gillikin, the defendant, and as a result of the said negotiations, it was agreed between the said Lola Gillikin, acting for and on behalf of Clyde O'Neal Gillikin through his attorney Luther Hamilton, Esq., on the one part,

and the United States Fidelity & Guaranty Company on the other part, that a payment of $7,000 would be made in full settlement of the damages suffered by Clyde O'Neal Gillikin by reason of the accident referred to, said amount to include the doctors' services, the hospital and medical bills and an amount for loss of the services of the said Clyde O'Neal Gillikin by Lola Gillikin.

"4. That pursuant to said agreement, the said Luther Hamilton, Esq., caused to be prepared a complaint entitled 'Clyde O'Neal Gillikin by his Next Friend, Lola Gillikin, v. Richard Gillikin,' and the said Lola Gillikin applied to the Clerk of the Superior Court of Carteret County, Hon. A. H. James, for an appointment as Next Friend, and he, the said Lola Gillikin, accepted said appointment made by the Clerk and agreed to act in said capacity.

"5. That before the summons was issued or the prepared complaint filed, the said Luther Hamilton, Esq., contacted the attorney representing Richard Gillikin and discussed with him the question of the said Richard Gillikin filing an answer to the proposed complaint, thereby planning to institute a so-called 'friendly suit' for the purpose of having the court sanction said settlement, but the said attorney for Richard Gillikin informed the said Luther Hamilton, Esq., attorney for Lola Gillikin, Next Friend of Clyde O'Neal Gillikin, that he could not get the consent of Richard Gillikin to file such an answer because Richard Gillikin contended that he had not been guilty of any negligence and would not participate in any agreement to pay Clyde O'Neal Gillikin, or his next friend, any sum of money by reason of his, Richard Gillikin's, act or failure to act.

"6. That in consequence of the above, the said Luther Hamilton, Esq., attorney as aforesaid, for and on behalf of the said Lola Gillikin, next friend of Clyde O'Neal Gillikin, began a special proceeding before the Clerk of the Superior Court of Carteret County, in which he filed an *ex parte* petition in the name of Lola Gillikin, next friend, setting forth the desirability of a settlement as had been agreed upon, the same being presented to the court on or about the 27th day of January 1955; the petition was not signed by Lola Gillikin, next friend, for the reason that the said Lola Gillikin at said time was confined to the hospital with a heart attack and the said Luther Hamilton, Esq., was not prepared to discuss any business with him although he attempted to do so.

"7. That during all the matters above set forth, the said Lola Gillikin in the presence of his ward, Clyde O'Neal Gillikin, who is now of age, was often in the office of Luther Hamilton, Esq., and as testified to from the stand by both father and son, they arranged to bor-

row $350.00 from the bank upon the endorsement of the said Luther Hamilton, Esq., for the necessities of Lola Gillikin and his family, the reason given being that Lola Gillikin had lost the services of Clyde O'Neal Gillikin and was out of work himself and that money would be coming from the settlement to the extent that the same could be claimed by Lola Gillikin and be used to discharge said note, and during said time and upon said visits, both the said Lola Gillikin and Clyde O'Neal Gillikin being present, money was advanced by the said Luther Hamilton, Esq., in respective sums of twenty- five dollars and fifty dollars, for a total of $150.00, several of the checks therefor being marked 'for adv.,' each check being payable to Lola Gillikin and endorsed by him, to which fact he testified from the stand. The said Luther Hamilton, Esq., in regard to the checks testified that 'adv.' on the checks was to indicate advancements, and that it was agreed and understood between the parties that he would be reimbursed out of moneys derived from the settlement which had been agreed upon.

"8. The said Lola Gillikin admitted endorsing said checks and using the same, but denied signing the acceptance to serve as next friend and denied signing the verification to the complaint which was prepared but not filed.

"9. The court finds as a fact from the examination of the handwriting on the checks and the acceptance of the appointment as next friend and the verification of the complaint, that the same were in the same and identical handwriting, and the court further finds that the said Lola Gillikin did sign the acceptance of the appointment as next friend and the verification of the complaint.

"10. The court further finds from the evidence and the pleadings and the order of the Clerk, that the settlement for Seven Thousand Dollars constitutes a good and substantial recovery on behalf of the plaintiff, and that in the court's opinion it is equal to or more than would have been awarded by a jury under the facts disclosed to the court.

(Nos. 11 and 12 not necessary to decision herein.)

"13. Upon all the evidence and the above findings, the court finds that there is no irregularity in the proceedings which has prejudiced the said Clyde O'Neal Gillikin, and that his rights have been protected fully by the proceedings had and that the compromise settlement was fully authorized by the said Lola Gillikin, next friend of Clyde O'Neal Gillikin, and that the said Clyde O'Neal Gillikin, while under age was old enough to understand the negotiations and the con-

ferences referred to in the above findings and that he concurred therein.

"14. The court finds that the failure of the petition in the *ex parte* proceedings to be signed by Lola Gillikin as next friend is not such an irregularity as to make said proceedings void.

"15. The court further finds that the failure of Lola Gillikin to sign the same was not the cause of any objection to said settlement but because of his illness, and that upon all the facts disclosed herein, the court is of the opinion that had said petition been presented to the said Lola Gillikin at the time of his illness and before the settlement was fully consummated, that the said Lola Gillikin would have signed the same.

"16. The court finds that it would be inequitable to permit the plaintiff, Lola Gillikin or Clyde O'Neal Gillikin, who has now become of age, to upset and disturb said settlement.

"Upon the foregoing findings of fact, it is considered, ordered and adjudged by the court that the plaintiff's action is barred by reason of the consummated compromise and settlement of the matters in controversy growing out of said automobile accident, and that the defendant has sustained the burden of establishing the same by the evidence offered to the court.

"It is further considered, ordered and adjudged that the action of the plaintiff be and the same is hereby dismissed without prejudice to the right of the plaintiff to petition the Clerk of the Superior Court of Carteret County for distribution of the funds remaining in the Clerk's hands at this time, and that the plaintiff will pay the costs of the proceedings to be taxed by the Clerk."

The plaintiff appeals, assigning error.

Jones, Reed & Griffin for plaintiff.

Claud R. Wheatly, R. E. Whitehurst, David S. Henderson for defendant.

DENNY, J. On the former appeal, *Bobbitt, J.*, speaking for the Court, said: "The judgment of January 27, 1955, purports to confer authority for the proposed settlement. But, until it is first established that a compromise and settlement has been consummated in accordance with the provisions of the judgment of January 27, 1955, we do not reach questions relating to the validity of the judgment or to the legal procedure by which it may be attacked.

"It follows that the judgment, standing alone, whatever its validity and however it may be attacked, does not constitute an estoppel. To

establish his plea in bar, defendant must show a legally authorized and consummated compromise and settlement. Defendant's plea in bar, whether considered as a plea of estoppel by compromise and settlement, *Winkler v. Amusement Co.*, 238 N.C. 589, 598, 79 S.E. 2d 185, or as a plea of *res judicata, Reid v. Holden,* 242 N.C. 408, 411, 88 S.E. 2d 125, or a combination of both, is an affirmative defense. Hence, it is incumbent upon defendant to establish all facts necessary to support such plea."

The evidence adduced in the hearing below was sufficient to sustain the findings of the court, and the findings are sufficient to support the judgment to the effect that there was a compromise and settlement of the matters in controversy growing out of the automobile accident involved, and that such compromise and settlement was consummated by the payment of $7,000 into the office of the Clerk of the Superior Court of Carteret County by the insurance carrier of the defendant, all in accordance with the judgment entered on 27 January 1955.

As we interpret the record, the only additional question to be determined is whether or not the judgment entered on 27 January 1955, authorized such settlement.

The *ex parte* proceeding was brought pursuant to the provisions of G.S. 1-400, and the petition filed therein by the attorney for Clyde O'Neal Gillikin and his next friend, Lola Gillikin, set out the facts with respect to the alleged injuries, the doubtfulness of the ability of Clyde O'Neal Gillikin to recover from Richard Gillikin in an action, and further set out that the insurance carrier of Richard Gillikin, the defendant in the action now on appeal, had offered the sum of $7,000 in full settlement of any and all claims arising out of the automobile collision.

The Clerk of the Superior Court of Carteret County, in a hearing on 27 January 1955, after hearing the testimony of the attending physician of Clyde O'Neal Gillikin, and with the approval of counsel for Clyde O'Neal Gillikin and his next friend, found as a fact that the interest of the minor, Clyde O'Neal Gillikin, would be promoted by authorizing the proposed compromise and settlement and entered judgment accordingly, and the settlement was approved by the Resident Judge of the District as provided in G.S. 1-402.

There is evidence sufficient to establish the fact that Clyde O'Neal Gillikin and his next friend knew and approved of the proposed compromise and settlement. Of course, the minor could not be bound thereby except in a manner provided by law. It is not necessary, however, for such minor to know that an action or special proceeding is brought

in his behalf. *Credle v. Baugham,* 152 N.C. 18, 67 S.E. 46, 136 Am. St. Rep. 787; *Tate v. Mott,* 96 N.C. 19, 2 S.E. 176.

In the last cited case, Samuel J. Doughit, a citizen and resident of South Carolina, was appointed guardian in that State of certain minor children of William S. Tate. Tate had died intestate in Iredell County, North Carolina. The widow, after the death of her husband, took said children to South Carolina to live. The guardian came to North Carolina and instituted an *ex parte* proceeding to sell certain lands in which his wards had an interest. He had no right, as a South Carolina guardian, to institute the proceeding in North Carolina, but should have applied to the court for appointment as next friend. This he did not do. Later, it was contended that the judgment under which the land was sold was void. This Court said: "The infants appeared by a person undertaking to represent and acting for them, not altogether officiously, but who had not been appointed by the court for that purpose. He did irregularly what was necessary and proper to be done by a next friend. It must be so taken, because, as we have said, the Court recognized him as serving a proper purpose—that of a next friend—and acted upon the appearance of the infants by him. Otherwise, it would not have granted the prayer of the petition. *White v. Albertson, supra* (14 N.C. 241). It was essential that there should be an appearance by a next friend, who ought to have been regularly appointed, but as one appeared in fact, and the court so treated him, that was sufficient for the purpose of acquiring complete jurisdiction. So far as appears from the record, the infants appeared advisedly in court in their own special proceeding and obtained relief for their benefit.

"The court therefore erred in deciding that the proceeding in question, including the orders, judgments and the sale of the land complained of, was void. They were not void, and nothing is alleged or proven, that would warrant the Court in setting them aside."

The petition in the *ex parte* proceeding pleaded as a bar to this action, was not verified due to the illness of the next friend. Even so, it was not necessary for it to be so verified.

In the case of *Lindsay v. Beaman,* 128 N.C. 189, 38 S.E. 811, which involved an *ex parte* proceeding for the partition of land, the petition was not verified, and this Court said: "We know of no statute which requires the petition in a special proceeding to be verified." The judgment, however, had not been approved by the judge. The Court said: "As to the infant petitioner, *it is invalid only in so far as it may be prejudicial to her interest.* Code, sec. 286 (now G.S. 1-402). It is good so long as it remains unchallenged, which she may do by motion in

the cause, and for proper cause shown have it set aside." (Emphasis added)

In the case of *Tyson v. Belcher,* 102 N.C. 112, 9 S.E. 634, there was an *ex parte* proceeding to sell certain land. The land was sold in accordance with the judgment entered in the special proceeding and approved by the Judge. In an action attacking the proceeding, on the trial, the defendant offered in evidence a transcript of the record of the *ex parte* proceeding. The plaintiff objected and excepted to its admission on the ground that such record was void on its face for irregularities, and because the order of sale therein set forth, and the sale of the land in pursuance of it, were contrary to the provisions of the will devising said land. The Court, in approving the admission in evidence of the transcript of the record of the *ex parte* proceeding, among other things, said: "From an examination of the transcript of the record of the *ex parte* proceeding, objected to as evidence, it appears that the court could have, and did take, in an orderly way, jurisdiction of the parties to and the subject-matter of, the proceeding. The petitioners were represented by counsel and the petition was filed as allowed by the statute (The Code, sec. 286). If there were irregularities at all in the course of the proceeding they certainly were not such as rendered it, or the orders and judgment therein entered, absolutely void; at most they were only voidable, and could not, therefore, be attacked collaterally. In such case the remedy would be by a proper motion in the proceeding itself. If it were affected by fraud, then * * * the remedy would be by an independent action for the purpose of having the judgment, or the whole proceeding, accordingly as the case might be, adjudged void for fraud." *Coffin v. Cook,* 106 N.C. 376, 11 S.E. 371; *Rackley v. Roberts,* 147 N.C. 201, 60 S.E. 975.

This Court, in *Starnes v. Thompson,* 173 N.C. 466, 92 S.E. 259, quoted with approval from the case of *Sheldon v. Newton,* 3 Ohio St. 498, the following: "If the court had jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached."

No fraud is alleged in connection with the *ex parte* proceeding brought for the purpose of obtaining the approval of the court of the compromise and settlement for the injuries involved in this case. The petitioner and his next friend were represented by able counsel. "A judgment for or against an infant when he appears by attorney, and without guardian or next friend, is not void. It is only voidable * * *." *Tate v. Mott, supra.* Therefore, any irregularities in the *ex parte* pro-

ceeding under consideration were not sufficient to make the judgment entered therein void. At most, it could be no more than voidable and, therefore, binding until set aside by motion in the cause and is not subject to collateral attack. *Tyson v. Belcher, supra.* Moreover, nothing appears in this record that would justify the setting aside of the judgment for irregularities or otherwise. *Tate v. Mott, supra.*

The plaintiff sets out 24 assignments of error purporting to preserve 226 exceptions, and these assignments of error cover more than 22 pages of the record. We have carefully examined these exceptions and assignments of error but have not attempted to discuss them *seriatim.* In our opinion, however, they present no prejudicial error that would justify a modification or reversal of the judgment entered below.

Affirmed.

H. FIELDS YOUNG, JR., PARIS L. YELTON, LAMAR L. YOUNG AND C. FRANKLIN HARRY, JR. v. BENJAMIN R. ROBERTS, AS COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA; J. CLINT NEWTON AND SAM M. SCHENCK.

(Filed 24 February, 1960.)

1. Banks and Banking § 1—

Where there is nothing in the written report of the Commissioner of Banks or the resolution of the State Banking Commission disclosing that their approvals of a proposed banking corporation were conditional, the findings of the trial court to the effect that such approvals were unconditional will not be disturbed.

2. Same—

A banking corporation is solely a creature of statute, and the statutory prerequisites for the incorporation of a bank must be followed. G.S. 53-2 through G.S. 53-5.

3. Same—

The authority of the Commissioner of Banks to refuse to issue his certificate of approval of a certificate of incorporation of a banking institution, which is in all respects regular and in compliance with statute, is a limited, discretionary authority and must be based on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in G.S. 53-4.

4. Same—

Construing G.S. 53-4 and G.S. 53-92 *in pari materia* any decision made by the Commissioner of Banks upon application for approval of a certificate of incorporation is subject to review by the State Banking Commission upon application of any adversely affected interested person,

but the Commission has no authority to direct the Commissioner to refuse to issue a certificate of approval except on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in G.S. 53-4, and the Commission must act in good faith and not capriciously or arbitrarily.

5. Same—

Neither the Commissioner of Banks nor the State Banking Commission is authorized to require, as a prerequisite for the issuance of a certificate of approval, that a proposed banking corporation should obtain insurance of its deposits with the Federal Deposit Insurance Corporation, although its inability to obtain such insurance may be considered with other relevant facts and circumstances in determining whether a proposed banking corporation meets the statutory standards.

6. Same—

Where the approval of a certificate for a proposed bank by the Commissioner of Banks and the State Banking Commission is not consummated by the filing of the certificate in the Office of the Secretary of State, the persons seeking to incorporate the bank have no vested right in the approvals and such approvals do not preclude the Commissioner of Banks or the State Banking Commission, upon demand for the approval of the certificate some three years later, from determining whether the proposed banking corporation then meets the statutory requirements.

7. Same: Mandamus § 1—

Where the Commissioner of Banks has refused a demand upon him that he certify his approval of a certificate of incorporation of a proposed banking institution, the remedy of the incorporators is by application for review by the State Banking Commission, G.S. 53-92, and where this procedure has not been followed *mandamus* will not lie to compel the Commissioner of Banks to certify his approval.

8. Mandamus § 1—

Mandamus may not be used as a substitute for an appeal but may be issued only in the exercise of an original jurisdiction.

9. Same—

Mandamus lies to enforce a clear legal right only when there is no other adequate remedy available.

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

APPEAL by defendant Commissioner of Banks from *Williams, J.*, second week of June 15, 1959 Regular Civil Term, of WAKE, docketed and argued as No. 461 at Fall Term, 1959.

Plaintiffs' action is for a writ of *mandamus* to compel defendant Benjamin R. Roberts, as Commissioner of Banks, to certify to the Secretary of State that a proposed new banking corporation, if formed, will be lawfully entitled to commence the business of banking.

Plaintiffs and defendants J. Clint Newton and Sam M. Schenck are the six named incorporators and subscribers to stock of a banking corporation proposed to be formed in Shelby, North Carolina, under the name "The Commercial Bank and Trust Company," as set forth in a certificate of incorporation executed and acknowledged by plaintiffs and by J. Clint Newton on March 17, 1955, which, on March 18, 1955, was delivered to the Secretary of State and by him transmitted forthwith to the then Commissioner of Banks, W. W. Jones.

On March 17, 1955, plaintiff Young, as requested and instructed by Jones, made application on behalf of the proposed banking corporation, for insurance of its deposits, to the Federal Deposit Insurance Corporation.

Jones submitted to the State Banking Commission at its meeting on June 9, 1955, a written report dated June 4, 1955, which, after setting forth factual data disclosed by his investigation, concludes: "I hereby certify my approval of the charter of this proposed new bank to the Secretary of State, subject to the approval or disapproval of such action by the State Banking Commission."

The Commission took no action at its meeting on June 9, 1955; but at its meeting on July 20, 1955, after hearing arguments in behalf of both applicants and opponents, the Commission adopted a resolution "that the recommendation of the Commissioner of Banks, certifying his approval to the charter of The Commercial Bank and Trust Company, Shelby, North Carolina, to the Secretary of State" be approved.

Plaintiffs, with the assistance and cooperation of Jones, endeavored to obtain insurance of deposits of the proposed bank with the Federal Deposit Insurance Corporation. Applications for such insurance, on each of three occasions, were disapproved. In each new application, plaintiffs undertook to overcome the objections indicated as grounds for disapproval of the preceding application.

Jones advised plaintiffs that, if they requested, he would certify his approval of the proposed banking corporation to the Secretary of State so that, upon issuance of the charter, the corporation could institute legal action against the Federal Deposit Insurance Corporation to compel the approval of their said application for insurance. He did not so certify and nothing in the record indicates he was requested to do so. The reason for holding the certification of his approval in suspense was to postpone the commencement of the six months period, prescribed by G.S. 53-5, within which a *chartered* banking corporation is required to organize and commence business.

W. W. Jones died. Benjamin R. Roberts became Commissioner of Banks on November 12, 1957.

On or about October 27, 1958, plaintiffs made demand on defendant Commissioner of Banks that he certify to the Secretary of State that the proposed banking corporation, if formed, will be lawfully entitled to commence the business of banking. Their said demand was made shortly after they were advised by the Federal Deposit Insurance Corporation that their present application for insurance of deposits would not be further processed or considered unless and until the State of North Carolina issued a charter for the proposed banking corporation. Plaintiffs, upon the refusal of defendant Commissioner of Banks to comply with their said demand, instituted the present action.

Plaintiffs, based on the approval of W. W. Jones, former Commissioner of Banks, as stated in his said report of June 4, 1955, and the approval of the State Banking Commission, as stated in its said resolution of July 20, 1955, alleged they have a clear legal right to have the defendant Commisioner of Banks issue such certificate of approval to the Secretary of State, and that they "are without an adequate remedy at law."

Defendant Commissioner of Banks, answering, denied that plaintiffs were entitled to such writ of *mandamus*. With reference to plaintiffs' factual allegations, he denied that said approvals by the Commissioner of Banks and the State Banking Commission in 1955 were unconditional, asserting that they were conditioned on approval by the Federal Deposit Insurance Corporation of plaintiffs' application for insurance of the deposits of the proposed banking corporation. He asserted further that the group now seeking certification of the charter "is not the same group as originally sought approval of an application to form a new bank."

The parties waived jury trial; and the court, based upon findings of fact and conclusions of law set forth therein, entered judgment providing:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant Benjamin R. Roberts be, and he hereby is ordered and directed as Commissioner of Banks to forthwith certify to the Secretary of State of North Carolina that the proposed banking corporation, the Commercial Bank and Trust Company, Shelby, North Carolina, if formed, will be lawfully entitled to commence the business of banking and to return to the Secretary of State, with such certification, the cer-

tificate of incorporation of said proposed banking corporation, together with any amendments thereto."

Defendant Commissioner of Banks excepted and appealed.

Poyner, Geraghty, Hartsfield & Townsend and Arch. E. Lynch, Jr., for plaintiffs, appellees.

Attorney General Seawell and Assistant Attorney General McGalliard for defendant, Commissioner of Banks, appellant.

BOBBITT, J. While it appears plainly that plaintiffs and W. W. Jones, former Commissioner of Banks, contemplated that the proposed banking corporation would obtain insurance of its deposits with the Federal Deposit Insurance Corporation before it commenced business, nothing in Jones' report of June 4, 1955, or in the Commission's resolution of July 20, 1955, states that the approvals *then given* were otherwise than unconditional. Hence, without reviewing the evidence, the assignments of error directed to the court's findings of fact to the effect that such approvals were unconditional are overruled.

The judgment contains no findings of fact bearing upon whether plaintiffs constitute "the same group as originally sought approval of an application to form a new bank." Pertinent to this subject, the record shows: 1. Plaintiffs alleged that J. Clint Newton and Sam M. Schenck, two of the six persons named as incorporators, "declined to join and unite herein as parties plaintiff," and were joined as defendants "to the end that all matters in controversy may be fully and finally determined." (The record does not show that defendants Newton and Schenck, or either of them, were served with process; nor does it show that any appearance was made or pleading filed in behalf of either of them.) 2. Sam M. Schenck died on February 10, 1959. 3. A reapplication on July 30, 1958, for Federal Deposit Insurance Corporation approval was signed *only* by the present plaintiffs.

Uncontradicted evidence is to the effect that substantial changes in economic conditions in Cleveland County have occurred since 1955 on account of the location therein of new industries.

"A banking corporation is wholly a creature of statute, doing business by legislative grace, and the right to carry on a banking business through the agency of a corporation is a franchise which is dependent on a grant of corporate powers by the state, . . ." 9 C.J.S., Banks and Banking § 4; *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896.

The prerequisites *for the incorporation* of a banking corporation

are set forth in G.S. 53-2 through G.S. 53-5, as amended. Five or more persons are required as incorporators. G.S. 53-2.

If and when the Commissioner of Banks certifies that the proposed corporation, if formed, will be lawfully entitled to commence the business of banking, the Secretary of State, upon receipt of such certificate, shall record the certificate of incorporation in his office, and thereupon "*the said persons* shall be a body politic and corporate under the name stated in such certificate." (Our italics) G.S. 53-5, G.S. 53-4.

G.S. 53-5 contains this provision: "The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the Secretary of State shall be void: Provided, however, the Commissioner of Banks may for cause extend the limitation herein imposed." This limitation, in our opinion, applies only in the event "the said persons" have become "a body politic and corporate" and the certificate of incorporation has been recorded and issued. It is noted that appellees so contend.

G.S. 53-4 requires that the Commissioner of Banks, before issuing such certificate to the Secretary of State, "shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, . . ." In so doing, the Commissioner of Banks is to determine whether the proposed bank complies with legislative standards. *Pue v. Hood, Comr. of Banks, supra.*

G.S. 53-4 contains this provision: "But the Commissioner of Banks may refuse to so certify to the Secretary of State, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any other than legitimate banking business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said bank is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment, or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted, or appropriated by an existing bank in this State, or so similar thereto as to be likely to mislead the public."

Thus, if the certificate of incorporation complies with statutory requirements in all other respects, the authority of the Commissioner of Banks to refuse to issue such certificate to the Secretary of State must be based on a finding adverse to the proposed banking corpora-

tion in respect of one or more of the legislative standards defined in the quoted portion of G.S. 53-4. ". . . the discretion vested in the Commissioner of Banks bears only upon the question whether certain conditions exist justifying the creation of the proposed bank under the terms and procedure laid down in the statute." *Pue v. Hood, Comr. of Banks, supra.*

G.S. 53-92, as amended by Chapter 1209, Session Laws of 1953, in pertinent part, provides:

"The Commissioner of Banks shall act as the executive officer of the Banking Commission, but the Commission shall provide, by rules and regulations, for hearings before the Commission upon any matter or thing which may arise in connection with the banking laws of this State upon the request of any person interested therein, and review any action taken or done by the Commissioner of Banks.

"The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner of Banks under the banking laws of this State; any party to a proceeding before the Banking Commission may, within twenty days after a final order of said Commission and by written notice to the Commissioner of Banks, appeal to the Superior Court of Wake County for a final determination of any question of law which may be involved. The cause shall be entitled 'State of North Carolina on Relation of the Banking Commission against (here insert name of appellant)'. It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. In event of an appeal the Commissioner shall certify the record to the clerk of Superior Court of Wake County within fifteen days thereafter."

Under G.S. 53-4 and G.S. 53-92, construed *in pari materia*, any decision made by the Commissioner of Banks in the exercise of the responsibility and authority conferred upon him by G.S. 53-4 is subject to review by the Commission upon application by any adversely affected interested person. However, upon review of a decision of the Commissioner of Banks, with reference to a certificate of incorporation of a proposed banking corporation otherwise in compliance with statutory requirements, the Commission has no authority to direct the Commissioner of Banks to refuse to issue a certificate of approval except on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in the quoted portion of G.S. 53-4. Needless to say, such finding or determination must be made in good faith, not capriciously or arbitrarily. *Pue*

v. Hood, Comr. of Banks, supra; Bank of Italy v. Johnson (Cal.), 251 P. 784; *S. v. Morehead* (Neb.), 155 N.W. 879; *Leuhrs v. Spaulding* (Idaho), 328 P. 2d 582; *Wall v. Fenner* (S.D.), 76 N.W. 2d 722; *Dakota Nat. Ins. Co. v. Commissioner of Insurance* (N.D.), 54 N.W. 2d 745; *Vale v. Messenger* (Iowa), 168 N.W. 281.

Appellees contend, and rightly so, that neither the Commissioner of Banks nor the Commission is authorized to require, as a prerequisite for the issuance of a certificate of approval, that the proposed banking corporation shall obtain insurance of its deposits with the Federal Deposit Insurance Corporation. *Verhelle v. Eveland* (Mich.), 81 N.W. 2d 397. However, inability to obtain such insurance, together with all circumstances relating to the disapproval of an application therefor, may be considered by the Commissioner of Banks and by the Commission, along with all other relevant facts and circumstances, in determining whether the proposed banking corporation meets the legislative standards defined in the quoted portion of G.S. 53-4.

Neither W. W. Jones, former Commissioner of Banks, nor Benjamin R. Roberts, present Commissioner of Banks, has certified to the Secretary of State that the proposed corporation, if formed, will be lawfully entitled to commence the business of banking. Plaintiffs' action is for a writ of *mandamus* requiring the present Commissioner of Banks to so certify.

Approval or disapproval of a certificate of incorporation of a proposed banking corporation by the Commissioner of Banks and the Commission is necessarily based on the facts existent as of the time such determinations are made. If approved, the statutes contemplate that the Commisioner of Banks will *then* certify his approval to the Secretary of State. It may be conceded that, upon the facts established by the court's findings, the persons named as incorporators were then entitled to such certificate of approval. In the view most favorable to plaintiffs, the former Commissioner of Banks did not so certify at that time because, in his desire to cooperate with plaintiffs, he deferred certification to avoid application of the said six months limitation in G.S. 53-5. Suffice to say, it does not appear that plaintiffs ever requested the former Commissioner of Banks to so certify; and their demand that the present Commissioner of Banks so certify was not made until October 27, 1958.

Plaintiffs seek to compel the defendant Commissioner of Banks to certify *his* approval of a certificate of incorporation dated March 17, 1955, not on the basis of any investigation and determinations made by him in the light of present conditions but solely on the basis of

an investigation and determination made by the former Commissioner of Banks and the Commission in 1955 in the light of conditions then existing. Their position assumes that they acquired a vested right in the determinations made in 1955 and that neither the present Commissioner of Banks nor the Commission may now determine whether under present conditions the proposed banking corporation meets the legislative standards prescribed in G.S. 53-4. We are of opinion, and so hold, that plaintiffs did not acquire such vested right in the determinations made in 1955. Rather, pending actual certification by the Commissioner of Banks, the matter remained *in fieri;* and the Commissioner of Banks and the Commission were and are now at liberty to determine whether in the light of existing conditions such certification should be made.

The refusal of defendant Commissioner of Banks to certify approval of the certificate of incorporation of March 17, 1955, was and is subject to review by the Commission as provided in G.S. 53-92. Plaintiffs seek a determination of their legal right in this original action rather than upon appeal from such decision as the Commission might make. If permitted, they would by-pass the Commission, notwithstanding G.S. 53-92 confers upon the Commission full authority "to supervise, direct and review" the actions of the Commissioner of Banks.

". . . the issuance of a writ of *mandamus* is an exercise of original and not appellate jurisdiction . . . and is never used as a substitute for an appeal." *Pue v. Hood, Comr. of Banks, supra; Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; *Realty Co. v. Planning Board,* 243 N.C. 648, 92 S.E. 2d 82.

"*Mandamus* lies only to enforce a clear legal right and will be issued only where there is no other legal remedy." *Hospital v. Wilmington, supra,* and cases cited; 34 Am. Jur., Mandamus § 42; 55 C.J.S., Mandamus § 17.

"Mandamus is very generally described as an extraordinary remedy in the sense . . . that it can be used only in cases of necessity where the usual forms of procedure are powerless to afford relief; where there is no other clear, adequate, efficient, and speedy remedy." 55 C.J.S., Mandamus § 2(c); *Edgerton v. Kirby,* 156 N.C. 347, 72 S.E. 365.

In our view, the remedy provided by G.S. 53-92 afforded plaintiffs a clear and adequate procedure for the full determination of their legal rights. Absent an attempt to avail themselves of the procedure so provided, they are not entitled in this original action to the extraordinary writ (of *mandamus*) sought herein. Their clear legal

right is to have the Commission review the decision of defendant Commissioner of Banks as provided in G.S. 53-92.

For the reasons stated, the judgment of the court below is reversed. Reversed.

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

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. ATLANTIC GREYHOUND CORPORATION, A CORPORATION.

(Filed 24 February, 1960.)

1. **Carriers § 1: Constitutional Law § 27—**

A State regulation which prohibits the free exercise of a carrier's franchise to engage in interstate commerce is void.

2. **Same: Constitutional Law § 11—**

The State in the exercise of its police power may require common carriers to provide services reasonably necessary for public convenience provided its regulations do not unduly burden interstate commerce.

3. **Same—**

The Utilities Commission has authority to require bus companies to maintain a union bus station in municipalities served by more than one carrier and may require all such carriers, both interstate and intrastate, to use such union stations and sell tickets thereat through an agent acting impartially for all such carriers, and prescribe the manner of apportioning the cost of operation among the several bus lines using the facilities.

4. **Same: Constitutional Law § 12—**

A rule of the Utilities Commission proscribing an interstate carrier from maintaining an office for the sale of interstate tickets separate and apart from the ticket office at the union station, at which such carrier's tickets, as well as all other carriers using the station, are sold, is void as imposing an undue burden upon interstate commerce and also as violating the constitutional right guaranteed to every person to contract and utilize his properties to the fullest extent in a lawful manner to earn a living.

APPEAL by Queen City Coach Company, Carolina Coach Company, Seashore Transportation Company, Smokey Mountain Stages, Inc., and Carolina Scenic Stages, and the State of North Carolina, from *Clark, J.*, November, 1958 Civil Term, of WAKE. The appeal was docketed here at the Fall Term 1959 as No. 457.

In 1950 the Utilities Commission, hereafter called Commission, acting pursuant to the 1949 Bus Act (Art. 6C of the General Statutes),

promulgated rules and regulations covering the operation of motor buses. These rules became effective 1 October 1950. Rule 11, entitled "Union Passenger Bus Stations," in subsection 1 requires motor carriers to maintain a union station in those towns served by more than one bus company. Subsection 3 provides: "No carrier or carriers shall sell nor cause to be sold tickets in any city or town in which a Union Station is located in any place other than the Union Bus Station except by and with the consent of the Commission, and then such sales shall be under the direction of the Union Bus Station Manager, and both the expense and revenue of such sales shall be taken into the monthly account of the Union Station." Subsection 11 provides for the election or appointment of a station manager by the bus companies using the station. The rule requires impartiality by the station manager in offering the services of the several bus companies to prospective customers.

Rule 32 provides: "All facilities, services and accommodations provided by these rules for intrastate passengers at bus stations and on buses shall apply in like manner to interstate passengers of carriers authorized to operate in both intrastate and interstate commerce in North Carolina."

Charlotte, N. C., is served by the following bus companies: Queen City Coach Company, Carolina Coach Company, Seashore Transportation Company, Smokey Mountain Stages, Inc., and Carolina Scenic Stages, all hereafter referred to as complainants, and Atlantic Greyhound Corporation, hereafter referred to as respondent. Complainants and respondent, acting in conformity with the rules of the Commission, established and operate a union station in Charlotte. They provide for the sale of tickets there for both intrastate and interstate transportation over their respective lines by the union bus station manager.

Respondent holds a certificate of convenience and necessity issued by the Interstate Commerce Commission pursuant to the provisions of Part II of the Interstate Commerce Act (49 USCA 301 *et seq.*).

On 15 November 1956 respondent opened an office in Charlotte for the sale of interstate tickets over its lines. This office provided additional place at which prospective customers might purchase transportation beyond the borders of the State of North Carolina. Sales of tickets and information with respect to schedules and services are limited to those offered by respondent. Tickets for intrastate transportation are not offered for sale at this office; such sales are only made by the union bus station manager.

Within a few days after respondent opened its own ticket office,

complainants filed a petition with the Commission charging respondent with violating the provisions of rules 11 and 32 promulgated by the Commission. They sought an order from the Commission prohibiting respondent from selling interstate tickets at any point in Charlotte other than the union bus station or by anyone other than the union station manager.

Respondent answered and admitted it had opened and was operating an office, outside of the bus station, by agents selected by it for the sale of tickets in interstate commerce. It challenged the interpretation which complainants had given to the rules promulgated by the Commission and the validity of those rules if interpreted as complainants contended, as a burden on interstate commerce and a violation of respondent's right to exercise without impairment the certificate of convenience and necessity issued to it by the Interstate Commerce Commission.

The Commission heard evidence and made findings of fact and conclusions of law. It found that the sale of tickets by an agent of respondent in a place other than the union station was a violation of the rules. It interpreted the rules to apply to the sale of interstate as well as intrastate tickets. The Commission thereupon ordered respondent to cease selling tickets except in the union station until otherwise authorized by the Commission.

Respondent appealed to the Superior Court. Its appeal was heard at the November Term 1958. The parties agreed that *Judge Clark* might take the matter under advisement and render judgment out of term. His judgment was rendered 3 February 1959. He held the rule, as applied by the Commission, was invalid as asserted by respondent and sustained its exceptions. Complainants and the Commission appealed.

Attorney General Seawell and Assistant Attorney General Burns for the State of North Carolina.

Shearon Harris and Samuel Behrends, Jr., for Queen City Coach Company, Carolina Scenic Stages, and Smoky Mountain Stages.

Arch T. Allen for Carolina Coach Company.

D. L. Ward for Seashore Transportation Company.

Reade, Fuller, Newsom & Graham and Joyner & Howison for Atlantic Greyhound Corporation.

RODMAN, J. The Commission in its order said: "For all practical purposes the material facts are not in dispute. The matter resolves itself into a question of law as to the validity of the rule in question

with respect to the operation of a ticket office in Charlotte, separate and apart from the Union Bus Station."

For the purposes of this appeal we accept the Commission's interpretation of the rules promulgated by it as applicable to both interstate and intrastate commerce. Accepting that interpretation, the Commission correctly concluded that the question presented was its power to prohibit a duly licensed interstate carrier from selling its services in a place other than the market house used by all carriers and by an agent other than the agent serving all carriers.

Appellants concede that a regulation which prohibits the free exercise of the respondent's franchise to engage in interstate commerce is void. *S. v. Mobley,* 234 N.C. 55, 66 S.E. 2d 12; *Castle v. Hayes Freight Lines,* 348 U.S. 61, 99 L. ed. 68; *Buck v. Kuykendall,* 267 U.S. 307, 69 L. ed. 623; *Shafer v. Farmers Grain Co.,* 268 U.S. 189, 69 L. ed. 909; *Lemke v. Farmers' Grain Co.,* 258 U.S. 50, 66 L. ed. 458; *Hannibal and St. Joseph R.R. Co. v. Husen,* 95 U.S. 465, 24 L. ed. 527. While recognizing the supreme power of Congress and the agencies created by it over interstate commerce, appellants assert there is another equally well-settled rule which they say is applicable to this case. That rule is stated by Johnson, J., in *S. v. Mobley, supra:* "The states in the exercise of the reserved police power may enact statutes in furtherance of the public health, the public morals, the public safety, and the public convenience, which may burden and bear upon interstate commerce,—provided such statutes are local in character and bear upon interstate commerce incidentally only. (Citations) . . . While it may be conceded that regulations designed to prevent frauds are embraced within the scope of the police power (citations), nevertheless an express purpose to prevent possible frauds does not justify state legislation which really goes beyond the legitimate pale of regulation and interferes with the free flow of interstate commerce."

The State has the right to exercise its police power to require common carriers to provide services reasonably necessary for public convenience which do not unduly burden interstate commerce. *Corp. Comm. v. Railroad,* 137 N.C. 1, affirmed; *Atlantic C. L. R. Co. v. North Carolina Corp. Com.,* 206 U.S. 1, 51 L. ed. 933; *Minneapolis & St. D. R. Co. v. Minnesota,* 193 U.S. 53, 48 L. ed. 614.

The Commission has statutory authority, G.S. 62-121.70, to require bus companies to establish union stations. Such stations are unquestionably convenient to passengers who have to change from one bus line to another. They impose no undue burden on interstate commerce. The State may lawfully require all bus companies, both interstate and intrastate, to use such union stations. *Atchison, T, & S. F.*

R. Co., v. Railroad Com., 283 U.S. 380, 75 L. Ed. 1129; *S. v. Atlantic Coast Line R. Co.*, 72 S.E. 2d 438. The State may, as it has here, require each bus company to provide for the sale of its tickets at the union station. As an incident to the use of the station, the Commission may prescribe the manner of apportioning the cost of operation among the several bus lines which use its facilities.

Respondent does not here challenge the right of the Commission to promulgate such rules, and, in recognition of the Commission's authority to apportion costs, is paying for the maintenance and operation of the union station the same percentage of receipts from tickets sold at its office which it pays on tickets sold in the union station. The challenge is limited to that portion of the rule which denies respondent the right to select the place or places where it will offer for sale transportation over its lines and which denies to respondent the right to select its agent to promote the sale of its services and the right to limit such agent's authority to act for and only for respondent.

The rule promulgated by the Commission properly requires impartiality by the Station manager in the sale of tickets. When he offers for sale, he is the agent for all carriers. But that very requirement effectively stifles competition among the carriers when coupled with the further provision that a carrier may not sell at a place and by an agent of its own selection. The prohibition against proclaiming superior service for the purpose of attracting passengers will, if carried to its logical conclusion, destroy initiative resulting in a uniformly mediocre service to the detriment of the industry, and a resultant reduction in interstate bus transportation.

To limit respondent's right of exercising its franchise as directed by the Commission would not only unduly burden interstate commerce, *Chicago v. Atchison, Topeka & Santa Fe R. Co.*, 357 U.S. 77, 2 L. ed. 1174; *Castle v. Hayes Freight Lines, supra; Nippert v. Richmond*, 327 U.S. 416, 90 L. ed. 760; *Texas Transport & T. Co. v. New Orleans*, 264 U.S. 150, 68 L. ed. 611; *Real Silk Hosiery Mills v. Portland*, 268 U.S. 325, 69 L. ed. 982; *Michigan Public Utilities Com. v. Duke*, 266 U.S. 570, 69 L. ed. 445; *Davis v. Farmers' Co-op Equity Co.*, 262 U.S. 312, 67 L. ed. 996, but would violate the fundamental and constitutional rights guaranteed to every citizen to contract and to utilize to the fullest extent in a lawful manner one's properties to earn a living. *Alford v. Ins. Co.*, 248 N.C. 224, 103 S.E. 2d 8; *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313; *S. v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731; *Com. v. Boston Transcript Co.*, 35 A.L.R. 1; *Chicago v. Atchison, Topeka & Santa Fe R. Co., supra; Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851; *Hudson v. R.R.*, 242 N.C. 650, 89 S.E. 2d 441;

Lawton v. Steele, 152 U.S. 133, 38 L. Ed. 385, as quoted in *S. v. Biggs,* 133 N.C. at p. 738, 739; *Allgeyer v. State of Louisiana,* 165 U.S. 578, 41 L. ed. 832.

Certainly the public health, morals, and safety are not affected by respondent's opening an office where it offers for sale its services and only its services. It declines to furnish information with respect to services provided by the other companies. It cannot be said that this additional office inconveniences the public. The public can, by contacting the union station, still get all of the information with respect to services provided by all of the carriers which it could obtain prior to the opening of respondent's office. This office provides an additional convenience. It is an effort on the part of respondent by its own activities to increase the flow of commerce over its lines, thereby exercising to the full extent the franchise which has been issued to it.

We concur with the conclusion reached by Judge Clark that the rule as applied by the Commission unduly restricts respondent in the exercise of its rights.

Affirmed.

F. JUANITA PAGE v. ROBERT BAKER MILLER

AND

F. JUANITA PAGE v. HAROLD D. HYNDS AND GRACE D. HYNDS.

(Filed 24 February, 1960.)

1. Judicial Sales §§ 3, 4—

In the sale of land by a commissioner pursuant to judgment in a tax foreclosure proceeding, the last and highest bidder is but a proposed purchaser and acquires no interest in the land prior to confirmation, but after due confirmation he is the equitable owner of the land and his interest can be set aside only upon motion in the cause for mistake, fraud, or collusion, and the mere fact that the amount of the bid is not promptly paid does not destroy his equitable estate. Upon confirmation the title of the judgment debtor is divested and his heirs or devisees can acquire no estate in the land.

2. Judicial Sales § 5: Corporations § 27—

The fact that a corporation purchasing property at a judicial sale, duly confirmed, has its charter revoked under G.S. 105-230 prior to its assignment of its bid to the judgment creditor does not deprive the assignee of its rights in the land, since G.S. 105-231 does not have the effect of depriving the corporation of its properties or penalizing innocent parties.

3. Judicial Sales § 4—

Confirmation of a judicial sale more than twenty years after the entry of the judgment directing the sale, is a nullity and neither vests title in the highest bidder nor divests the title of the judgment debtor.

4. Taxation § 40c—

In an action to enforce the lien for taxes under G.S. 105-414, each person having an estate in the land is a necessary party if his equity of redemption is to be barred, and where at the time of the institution of the proceeding the persons named in the summons and complaint as owners of the land are dead, and their heirs or devisees are not made parties, judgment of foreclosure and sale of the land thereunder cannot divest the title of the heirs or devisees.

5. Judgments § 19—

A judgment rendered against a party who is dead at the time of the institution of the action is void and may be collaterally attacked by his heirs or devisees.

6. Same—

Laches cannot estop a party from attacking a void judgment.

APPEAL by plaintiff from *Pless, J.*, August 17, 1959 Civil Term, of HENDERSON.

These actions were instituted for the purpose of determining ownership of three lots in the Town of Laurel Park, all claimed by plaintiff, one claimed by defendant Miller and the other two by defendants Hynds.

Because of sustantially similar factual and legal questions, the causes were consolidated. A jury was waived. Judge Pless found the facts with respect to which there seems to be no substantial controversy. He adjudged defendant Miller was the owner of one lot and defendants Hynds the owners of the other two. The additional facts necessary to an understanding of the questions presented appear in the opinion.

W. Y. Wilkins, Jr., for plaintiff, appellant.
Crowell & Crowell for defendant, appellees.

RODMAN, J. Harriet M. Rodman purchased lots 32 and 38 in 1926. Her residuary legatee conveyed these lots to plaintiff in 1958. Plaintiff is the owner unless good title was acquired by the purchaser at a sale made by a commissioner appointed in the tax foreclosure proceeding referred to in the next paragraph.

In 1937 Henderson County instituted an action in the Superior Court of that county against Harriet M. Rodman for the purpose of

foreclosing the lien of county taxes assessed for 1934 against lots 32 and 38. Summons was served on defendant, a nonresident, by publication. Judgment was entered for the taxes and the sum so adjudged was declared to be a first lien on said lots. M. F. Toms was appointed commissioner with authority to sell for the purpose of satisfying the judgment lien. The commissioner, acting in conformity with the judgment, made a sale to Rhododendron Corporation on 7 March 1938. This sale was reported to the court and, on 28 March 1938, the sale so made was confirmed and the commissioner directed to execute a deed to the purchaser. The decree of confirmation contained a provision for the issuance of a writ of possession.

On 2 December 1946 M. F. Toms executed a deed to Henderson County for lots 32 and 38. The deed recites the sale and confirmation and "Rhododendron Corporation, having assigned its bids to Henderson County and joins in this deed for the purpose of acknowledging said assignments, and Henderson County having complied with the bids. . ."

In 1944 the Secretary of State suspended the articles of incorporation of Rhododendron Corporation pursuant to the provisions of G.S. 105-230. They have not been reinstated. Defendants trace their titles to lots 32 and 38 to Henderson County.

To defeat defendants' titles and to establish plaintiff's asserted prior right to these lots, she contends the judgment debtor's title was not divested by the commissioner's sale because the bidder, Rhododendron Corporation, failed to pay the amount of its bid or assign its bid prior to the suspension of its charter; hence the commissioner was without authority to convey to Henderson County in 1946, and more than ten years having elapsed since the judgment of foreclosure was rendered, her title cannot be divested by the judgment. To support her contention she relies on G.S. 105-231 and G.S. 1-234, *Cheshire v. Drake,* 223 N.C. 577, 27 S.E. 2d 627; *Lupton v. Edmundson,* 220 N.C. 188, 16 S.E. 2d 840.

Plaintiff's contention is lacking in substance due to her failure to recognize the distinction between the rights of a bidder at a judicial sale before and after confirmation. The distinction is clearly drawn into focus by many decisions of this Court and is aptly illustrated in the following quotations: "The commissioner acts as agent of the Court, and must report to it all his doings in execution of its order. The bid is but a proposition to buy, and until accepted and sanctioned by the Court, confers no right whatever upon the purchaser." *Smith, C. J.,* in *Mebane v. Mebane,* 80 N.C. 34.

"After confirmation, the power of the court is much more restrict-

ed. The purchaser is then regarded as the equitable owner, and the sale, as it affects him or his interests, can only be set aside for 'mistake, fraud, or collusion' established on petitions regularly filed in the cause." *Hoke, J.*, in *Upchurch v. Upchurch,* 173 N.C. 88, 91 S.E. 702; *Beaufort County v. Bishop,* 216 N.C. 211, 4 S.E. 2d 525; *Joyner v. Futrell,* 136 N.C. 301; *McLaurin v. McLaurin,* 106 N.C. 331; *Evans v. Singletary,* 63 N.C. 205.

The mere fact that the amount bid was not promptly paid following confirmation did not release the bidder nor destroy his equitable estate. *Burgin v. Burgin,* 82 N.C. 196; *Evans v. Singletary, supra.*

The judgment debtor could not again be called upon to pay the amount for which the land was sold. True, if the purchase price was not paid, the bidder's equitable estate could, upon notice, be sold and judgment entered against it for the deficiency. *Byerly v. Delk,* 248 N.C. 553, 103 S.E. 2d 812. It follows that Harriet M. Rodman, the judgment debtor, was effectively divested of all title and interest in the lots when the decree of confirmation was entered, and the deed from her legatee conveyed no title.

It is not necessary to determine whether a mere acknowledgment of its financial inability to comply with its bid and the assignment to the judgment creditor is the exercise of a power which has terminated by G.S. 105-230, and if so, whether the exercise of such power does more than create liability for the statutory penalty provided by G.S. 105-231. The statute was not intended to deprive a corporation of its properties nor to penalize innocent parties.

The court correctly concluded that defendant Miller was the owner of lot 32 and the defendants Hynds were the owners of lot 38.

Lot 36, the remaining lot in controversy, was acquired by I. H. Thurman in April 1926. On 30 July 1926 he and his wife executed a written instrument purporting to convey this lot to his children L. R. Thurman of Springfield, Kentucky, and Rodman Thurman Barber of Louisville, Kentucky. The concluding portion of the deed reads: "IN TESTIMONY WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year above written." Then follow signatures without anything on record to indicate a seal. The instrument was duly acknowledged as a deed on 2 August 1926 and recorded in Henderson County on 9 October 1926. The grantees in that instrument conveyed lot 36 to plaintiff in 1958.

I. H. Thurman died in 1930.

In 1935 the Town of Laurel Park began tax foreclosure proceedings against Mrs. J. H. Thurman and J. H. Thurman for the purpose of collecting the 1932 taxes assessed by the town against the lot. Based

on an affidavit that defendants were nonresidents, an order was entered directing service of summons by publication. A notice was published directed to Mrs. J. H. Thurman and husband J. H. Thurman. Default judgment was entered and a commissioner appointed with authority to sell. The commissioner, on 2 March 1936, reported that he had sold the land to F. C. Shelton. On 21 January 1956 the court entered an order purporting to confirm the sale made in 1936. Defendants Hynds base their claim to lot 36 in part on this foreclosure proceeding. If the action were otherwise valid, it is apparent from what has been previously said that confirmation in fact made more than twenty years after the rendition of the judgment vested no title in the high bidder nor did it divest the title of the owner. *Cheshire v. Drake, supra; Lupton v. Edmundson, supra.* As hereafter pointed out, there are other reasons why rights could not be acquired pursuant to this foreclosure action.

In 1937 Henderson County instituted tax foreclosure proceeding against I. H. Thurman and Mrs. I. H. Thurman to recover the 1934 taxes assessed by it on lot 36. An affidavit was filed stating that defendants were nonresidents. Based on this affidavit, an order was entered directing service of summons by publication. Notice was published. A default judgment was entered and a commissioner was appointed to sell. He reported that he sold the lot on 7 March 1938 to Rhododendron Corporation. This sale was confirmed by decree dated 28 March 1938. In 1946 the commissioner, with the assent of Rhododendron Corporation, executed a deed to Henderson County for this lot. Defendants Hynds trace their title to a deed executed by Henderson County.

If the court, when it entered its decree of foreclosure, had jurisdiction of the parties necessary to convey a good title, defendants are the owners by virtue of the deed from Henderson County; but that judgment cannot bind those not parties unless they acquired from a party subsequent to the institution of the action.

The action under which defendants Hynds assert title was based on C.S. 7990, now in substance the first paragraph of G.S. 105-414. It was "an action in the nature of an action to foreclose a mortgage." It has always been held by us that a person having an estate in mortgaged property is a necessary party if his equity of redemption is to be barred. *Stancill v. Spain,* 133 N.C. 76; *Cotton Mills v. Maslin,* 195 N.C. 12, 141 S.E. 348; *Grady v. Parker,* 228 N.C. 54, 44 S.E. 2d 449; *Baker v. Murphrey,* 250 N.C. 346, 108 S.E. 2d 644, and authorities cited.

This rule as to necessary parties has naturally and logically been

applied to actions instituted to foreclose a tax lien. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717; *Wilmington v. Merrick,* 231 N.C. 297, 56 S.E. 2d 643; *Johnston County v. Stewart,* 217 N.C. 334, 7 S.E. 2d 708; *Wendell v. Scarboro,* 213 N.C. 540, 196 S.E. 818; *Beaufort County v. Mayo,* 207 N.C. 211, 176 S.E. 753; *Orange County v. Atkinson,* 207 N.C. 593, 178 S.E. 91; *Guy v. Harmon,* 204 N.C. 226, 167 S.E. 796. Cf. *Franklin County v. Jones,* 245 N.C. 272, 95 S.E. 2d 863; *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94, where the true owners were parties to the tax foreclosure proceeding.

It is immaterial whether the instrument dated in July 1926 purporting to be a deed from I. H. Thurman and his wife to L. R. Thurman and Rodman T. Barber was in fact a deed, G.S. 47-108.11, or a mere contract to convey. It is conceded that I. H. Thurman was dead when the tax foreclosure action was instituted in 1937, and his two children, L. H. Thurman and Mrs. Barber, acquired such rights as he had by the written instrument of 1926 or by descent upon his death in 1930.

A valid judgment may be rendered in favor of a party who is dead when the judgment is entered. A judgment against a party rendered after his death is, unless saved by the statute (G.S. 1-225) irregular and may be vacated by motion. *Wood v. Watson,* 107 N.C. 52. But a judgment against one dead when the original process issued is a mere nullity. It can bind no one.

As said in the headnotes to *Greenstreet v. Thornton,* 27 L.R.A. 735 (Ark.): "A decree based on a summons against a dead man who is named as the owner of property, the sale of which is sought for an assessment for an improvement, is of no validity whatever, no matter how the summons was posted or published, although such notice in case of unknown owners might be sufficient."

"A judgment rendered against a party, who died before the action is commenced, is void and may be collaterally attacked." *Garrison v. Blanchard,* 16 P. 2d 273; *Richards v. Thompson,* 23 P. 106; *Bragg v. Thompson,* 19 S.C. 572; *Shea v. Shea,* 77 Am. St. Rep. 779. Numerous other cases are to be found in the notes to *Wardrobe v. Leonard,* 126 Am. St. Rep. 631-636, and notes to *Kager v. Vickery,* 49 L.R.A. 153.

Since L. R. Thurman and Mrs. Barber were necessary parties either as grantees or heirs, they could not be deprived of their property rights by an action instituted against their father after his death. To do so, it was necessary that process be served on them. *Quevedo v. Deans,* 234 N.C. 618, 68 S.E. 2d 275; *Comrs. of Roxboro v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144; *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26; *Crandall v. Clemmons,* 222 N.C. 225, 22 S.E. 2d 448.

The foreclosure action does not purport to show that L. R. Thurman and Mrs. Barber, owners of the lot when the foreclosure action was instituted, were parties. It was competent for them or their grantee to collaterally attack the judgment. *Quevedo v. Deans, supra; Eason v. Spence, supra.*

One is not guilty of laches divesting him of his property by mere failure to take action to have a judgment void as to him so declared. Nor is he estopped from asserting his right to his property by failure to act with respect to such void judgment. *Comrs. of Roxboro v. Bumpass, supra; Powell v. Turpin, supra; Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311.

Since the foreclosure action is a nullity, the question of the lien of Henderson County for taxes chargeable to the lot is not presented or considered.

The judgment as to defendant Miller is affirmed; as to defendants Hynds, affirmed as to lot 38 and reversed as to lot 36.

As to Miller—affirmed.

As to Hynds—affirmed in part and reversed in part.

MRS. MARGARET H. McDONALD v. W. H. CARPER, INDIVIDUALLY AND AS CITY MANAGER OF THE CITY OF RALEIGH, AND THE CITY OF RALEIGH, A MUNICIPAL CORPORATION.

(Filed 24 February, 1960.)

1. Pleadings § 12—

The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader.

2. Municipal Corporations § 7—

Nothing else appearing, it will be assumed that the powers and duties of the city manager of a municipal corporation are those conferred and defined by the General Statutes. G.S. 160-349.

3. Municipal Corporations §§ 5, 10—

Action of the city manager of a municipal corporation in instigating the arrest and prosecution of a municipal employee for embezzlement is done in the performance of a governmental function imposed upon the city manager by statute, and therefore the city may not be held liable in tort by such employee in an action for malicious prosecution.

PARKER, J., concurs in result.

APPEAL by plaintiff from *Williams, J.*, May Regular Civil Term, 1959, of WAKE, docketed and argued as No. 459 at Fall Term, 1959.

Civil action to recover actual and punitive damages for alleged malicious prosecution, heard on defendant City of Raleigh's demurrer to complaint.

Plaintiff's allegations, summarized, are as follows:

Plaintiff was employed by the City of Raleigh as a bookkeeper and secretary to Mr. Howard White, supervisor of the Tax Department. On September 10, 1957, defendant Carper, individually and in his capacity as City Manager of the City of Raleigh, maliciously and falsely accused plaintiff "with embezzling approximately $10,000.00 of the Tax Funds belonging to the City of Raleigh." Plaintiff was so shocked and unnerved by said accusation, which she emphatically denied, that she left her duties in the Tax Department and went home, "verging on nervous prostration."

The following morning an attorney was employed to represent plaintiff in connection with the said malicious and false accusation. Carper refused to discuss with plaintiff's attorney the details of the charges he had made. Upon Carper's refusal to grant plaintiff a leave of absence of one week, plaintiff's attorney "then resigned her position with the Tax Department."

By publication in The News and Observer, a Raleigh newspaper, plaintiff presented "questionnaires" to Carper and the governing body of the City of Raleigh giving information tending to show that plaintiff was "NOT GUILTY" and that "other employees probably were." Carper and the Raleigh City Council "blinded themselves to the real facts" as set forth in said "questionnaires" and investigated no one for the alleged embezzlement other than plaintiff.

Several weeks later, plaintiff's counsel publicly demanded of the Raleigh City Council and of Carper, individually and as City Manager, that Carper swear out a warrant against plaintiff "charging her with the embezzlement to the end that she might have a preliminary hearing" and thereby "discover in detail the evidence, if any, that the said W. H. Carper had in connection with his accusation of embezzlement on her part." Carper refused to sign such warrant, and on October 12, 1957, plaintiff's counsel, by letter, notified the Mayor and all members of the City Council of Carper's said refusal.

Carper, "in a further effort to dodge his responsibility in connection with his malicious and false accusations against the plaintiff," sent "all of his pet underlings before three different Wake County Grand Juries" between September 11, 1957, and July 8, 1958, but said three Grand Juries refused to issue a presentment or indictment against

plaintiff. Even so, Carper "still continued to send the same horde of his pet underlings and many members of the Raleigh Police Department and S. B. I. before the Fourth Grand Jury which had been harassed by Carper and his underlings already for a period of approximately 10 months and as the plaintiff verily believes finally issued a presentment and an indictment against the plaintiff on or about July 8, 1958." Plaintiff was then arrested under said bill of indictment and released on bond.

On or about July 10, 1958, upon consideration of plaintiff's motion for a bill of particulars, the court "issued an order granting counsel for the plaintiff an adverse examination of all the witnesses sent by W. H. Carper to the Grand Jury." Upon such adverse examination, "all testified that they knew nothing which would tend to incriminate" plaintiff. Upon trial on said bill of indictment, the jury, on November 29, 1958, returned a verdict of "NOT GUILTY."

This prosecution of plaintiff was "instigated and relentlessly pursued by the said W. H. Carper, individually and in his capacity as City Manager, agent and employee of the City of Raleigh, acting within the scope of his employment and with the full knowledge and consent of the City Council, the governing body of the City of Raleigh," without probable cause, maliciously, and "with several ulterior motives," to wit: (1) "to cover up for some of his pet employees, the real culprits involved in this alleged embezzlement," and "to keep the prosecution from turning on these pets, . . . kept the evidence involving the real culprits from the various Grand Juries of Wake County and presented false and fraudulent evidence pointing the finger of suspicion against this plaintiff, . . ." (2) to frighten "the Bonding Company on the bond of Mrs. McDonald and Mr. Howard White, supervisor of the Tax Department, into paying the alleged losses allegedly embezzled, and thus collecting said alleged losses through the threat of a criminal prosecution" of plaintiff; (3) "to save his own face on account of his absolute carelessness and negligence in the matters of the Tax Department."

Plaintiff's claim, presented on February 5, 1959, was denied by the City of Raleigh on or about February 18, 1959; and on March 11, 1959, this action was instituted.

The court, being of the opinion that the complaint did not state facts sufficient to constitute a cause of action against the City of Raleigh, sustained said demurrer and dismissed plaintiff's action against the City of Raleigh.

Plaintiff excepted and appealed.

Thomas W. Ruffin for plaintiff, appellant.
Paul F. Smith for defendant City of Raleigh, appellee.

BOBBITT, J "The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader." *McKinney v. High Point,* 237 N.C. 66, 70, 74 S.E. 2d 440; *Board of Health v. Commissioners,* 173 N.C. 250 91 S.E. 1019, and cases cited.

On this appeal, upon the facts alleged, we must determine whether the City of Raleigh is liable for the alleged tortious acts of its City Manager.

It is first noted that the alleged ulterior motives are primarily, if not wholly, Carper's personal motives. Indeed, the allegation that Carper's motive was to frighten the Bonding Company on the bonds of plaintiff and of the supervisor of the Tax Department, when read in context, implies that he thereby sought either to avoid liability for his own neglect or to protect "his pet employees" from involvement or liability for the alleged losses. The allegation is that Carper's motive in frightening the Bonding Company was to collect "said alleged losses through *the threat* of a criminal prosecution of the plaintiff." (Our italics) In an action for malicious prosecution, the court is concerned only with such ulterior motives as may have prompted the actual commencement of the criminal prosecution, not with threats that a criminal prosecution might be commenced. Be that as it may, decision on this appeal is based on a different ground as set out below.

In *Munick v. Durham,* 181 N.C. 188, 106 S.E. 665, the evidence was held sufficient for submission to the jury as to the liability of the city for an alleged assault by the superintendent of its water works on a customer then engaged in paying his bill. The basis of decision was that the city, in the operation of its water plant, was acting in a business capacity and not in the exercise of its governmental or police power. The court fully recognized the rule, quoting from *McIlhenney v. Wilmington,* 127 N.C. 146, 37 S.E. 187, that, in the absence of statute, a city is not liable for the torts of its officers and agents when they are engaged in the performance of a governmental function, a rule applied in the many cases referred to in *Rhyne v. Mount Holly,* 251 N.C. 521, 526, ... S.E. 2d .....

It was held in *McIlhenney v. Wilmington, supra,* a leading case, that the city was not liable for an arrest made in a brutal manner

by a policeman known by city officials to be cruel in making arrests. *Clark, J.* (later C.J.), said: "The non-liability of municipalities in such cases is based upon the ground that they are subdivisions of the State, created in part for convenience in enabling the State to enforce its laws in each locality with promptness, and simultaneously, when occasion requires it, in the different subdivisions within its boundaries; and that while enforcing those laws which pertain to the general welfare of the State, and to the people generally in all its subdivisions, the State acts through these subdivisions, and uses them and their officers as its agents for the purposes for which a State government is instituted and granted sovereign power for State purposes; and, further, that the State has not made them the insurers of public or private interests, or liable for any careless or wilful acts of its officers." Decisions in other jurisdictions are in accord: *McIntosh v. City and County of Denver (Colo.)*, 55 P. 2d 1337, 103 A.L.R. 1509; *Swanson v. City of Fort Lauderdale (Fla.)*, 21 So. 2d 217; *Combs v. City of Elizabethton (Tenn.)*, 31 S.W. 2d 691; *McCarter v. City of Florence (Ala.)*, 112 So. 335; *Calwell v. City of Boone (Iowa)*, 2 N.W. 614.

In the annotation, "Liability of municipality or other political unit for malicious prosecution," 103 A.L.R. 1512, this statement appears: "It has generally been held that a municipality is not liable for malicious prosecution of criminal actions by its officers." Examination of the decisions, including those discussed in said annotation, discloses variant factual situations. Too, there is a lack of uniformity as to the ground on which decision is based. Thus, it has been held that where the officers of a city act maliciously and without probable cause in the institution of a criminal prosecution, such acts are beyond the scope of their authority and constitute their personal and individual acts. *Doyle v. City of Sandpoint (Idaho)*, 112 P. 204, 32 L.R.A. (N.S.) 34, Ann. Cas. 1912A, 210; *Town of Eagle Point v. Hanscom (Oregon)*, 252 P. 399. In *Taulli v. Gregory (La.)*, 65 So. 2d 312, the action was to recover for alleged malicious prosecution on the ground that the Mayor and a Councilman of the City of Westwego had instituted with malice and without probable cause, a criminal prosecution against plaintiff for destroying public proberty. The action as to (defendant) City of Westwego was dismissed. The basis of decision is stated in these words: "It is well settled that a municipality is not liable for the tortious acts of its officers or employees, even when committed in connection with their duties, as such duties are necessarily incident to the exercise of governmental functions by the municipality." The ground of decision in *Taulli v. Gregory, supra,* seems more nearly in

accord with the law in this jurisdiction as declared in *McIlhenney v. Wilmington, supra,* and like cases.

Nothing else appearing, we must assume that the powers and duties of the City Manager of Raleigh are those conferred and defined by our General Statutes.

The method of city government known as Plan "D" (G.S. 160-338 *et seq.*) provides for a city council, which shall elect the mayor from among its own members, in which the government of the city and the general management and the control of all its affairs shall be vested; and the city council "shall exercise its powers in the manner herein and in article 21 set forth, except that the city manager shall have the authority hereinafter specified." G.S. 160-339.

G.S. 160-349 provides: "The city manager shall (1) be the administrative head of the city government; (2) see that within the city the laws of the State and the ordinances, resolutions, and regulations of the council are faithfully executed; (3) attend all meetings of the council, and recommend for adoption such measures as he shall deem expedient; (4) make reports to the council from time to time upon the affairs of the city, keep the council fully advised of the city's financial condition and its future financial needs; (5) appoint and remove all heads of departments, superintendents, and other employees of the city."

Thus, the General Assembly imposed upon the City Manager of Raleigh, the positive duty to see that, within the city, the laws of the State are faithfully executed. If, in fact, Carper had knowledge or information affording reasonable ground for the belief that plaintiff was guilty of embezzlement of tax funds of the City of Raleigh, a violation of the criminal law of the State, it was his statutory duty to take appropriate action for the arrest and prosecution of plaintiff for such crime. We are of the opinion, and so hold, that such action would be in the performance of a governmental function. Under the law as declared in *McIlhenney v. Wilmington, supra,* and similar cases, the City of Raleigh is not liable for tortious acts, if any, committed by Carper, in connection with the exercise of such governmental function. Since it appears, upon the facts alleged, that Carper's tortious acts, if any, were committed by him in the exercise of a governmental function and statutory duty under the laws of the State, it follows that plaintiff's allegation to the effect that the City of Raleigh is liable on the theory that Carper was acting as agent of the City of Raleigh, within the scope of his agency, is an erroneous legal conclusion.

While there are allegations that plaintiff's counsel by "question-

naires" and by letter notified the Mayor and members of the City Council of plaintiff's contentions, there is no allegation that the City Council or any of its members took action either to direct or to restrain Carper's actions. Upon the facts alleged, it appears that the matter was left to, and handled solely by, the City Manager in the course of his duty as "the administrative head of the city government."

The present appeal requires no discussion as to the sufficiency or significance of the allegations of the complaint in relation to defendant Carper. He is not a party to this appeal.

Since it appears, upon the facts alleged, that plaintiff has no cause of action against the City of Raleigh, the judgment of the court below is affirmed.

Affirmed.

PARKER, J., concurs in result.

STATE v. JAMES HENRY FRANKLIN BROWDER.

(Filed 24 February, 1960.)

1. Rape § 8—

The act of carnally knowing and abusing a female child under the age of 12 years is rape irrespective of force, intent, or her consent. G.S. 14-21.

2. Rape § 10: Criminal Law § 34—

In a prosecution for carnal knowledge of a female under 12 years of age, her testimony to the effect that defendant had repeatedly had intercourse with her during the prior several years is competent in corroboration of the offense charged, and the first such occasions will not be held too remote when the evidence discloses that such acts were repeated with regularity up to the date specified in the indictment.

3. Criminal Law § 84—

Testimony of statements made by prosecutrix which corroborate her incriminating testimony upon the trial is properly admitted for the restricted purpose of corroboration.

4. Rape § 11—

The evidence in this prosecution for carnal knowledge of a female under the age of 12 years *held* amply sufficient to carry the case to the jury.

5. Criminal Law § 106—

Where the court correctly places the burden upon the State to prove defendant's guilt beyond a reasonable doubt and charges upon the pre-

sumption of innocence, the failure of the court to define the term "reasonable doubt" will not be held for error in the absence of a request for special instructions.

APPEAL by defendant from *Bundy, J.*, November Term, 1959, of PITT.

Criminal prosecution upon an indictment charging defendant on 6 May 1959 with felonious ravishing and carnally knowing a female child eleven years of age. G.S. 14-21.

Plea: Not Guilty. Verdict: Guilty of rape, with a recommendation for life imprisonment.

From a judgment of imprisonment for life in the State's prison, defendant appeals.

Malcolm B. Seawell, Attorney General, and T. W. Bruton Assistant Attorney General for the State.

Claude W. Harris and Willis A. Talton for defendant.

PARKER, J. The act of "carnally knowing and abusing any female child under the age of twelve years" is rape, even though she consents. G.S. 14-21; *S. v. Storkey,* 63 N.C. 7; *S. v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113. Neither force, nor intent are elements of the offense. *S. v. Jones,* 249 N.C. 134, 105 S.E. 2d 513.

The State's evidence presents these facts: On 6 May 1959 the female child named in the warrant was eleven years old. She is a stepdaughter of the defendant. On that day in their home the defendant had sexual intercourse with her. On 29 May 1959 this little girl was examined by Dr. Malene G. Irons, who was admittedly, and found by the trial court to be, a medical expert in children's diseases. The little girl had a great deal of pain around her genital organs, there was a heavy bloody discharge with a foul odor from her vagina, the cervix uteri was inflamed and a heavy discharge was coming from it. Dr. Irons made smears of this discharge, studied them under the microscope, and found this infection was due to a gram negative germ, which is the germ that is present in gonorrhea. Her vagina had a large opening and there was no hymeneal ring at all.

Defendant stated on cross-examination that he had been treated for gonorrhea by the Public Health Department in Florence, South Carolina, while he was in jail. On redirect-examination he testified he contracted gonorrhea in 1950, that he was cured of that disease by the Health Department, and had not had that disease since then.

Defendant assigns as errors that the trial court, over his objections and exceptions, permitted the little girl to testify that defendant had had sexual intercourse with her from the time she was five, six or

seven years old, that the first time he made her do it she was five years old, and he did it once or twice a week. The trial court instructed the jury that this evidence was admitted solely for the purpose of showing intent, design or guilt on the part of the defendant, if it does so show.

In *S. v. Parish,* 104 N.C. 679, 10 S.E. 457, the defendant was convicted of the common law offense of rape of his eleven-year-old daughter. At that time the age limitation for statutory rape of a female child was under the age of ten years. Code of N. C., 1883, Vol. I, Sec. 1101. The age limitation was changed to under the age of twelve years during the 1917 Session of the General Assembly. Public Laws of North Carolina, Session 1917, Chapter 29. Over defendant's objection, his daughter was permitted to testify that at various other times and places her father had violated her person. This Court said: "It would be unreasonable to deny to the State the right to show repeated acts, and that all were committed against her will in order to explain her conduct on the particular occasion to which the attention of the jury is directed, and to throw light upon the question whether she yielded willingly to his embraces. . . . The rule is, that testimony as to other similar offenses may be admissible as evidence to establish a particular charge, where the intent is of the essence of the offense, and such testimony tends to show the intent or guilty knowledge."

In *S. v. Leak,* 156 N.C. 643, 72 S.E. 567, the indictment charged defendant with assaulting a twelve-year-old girl with intent to commit rape. This Court said: "It was competent for the State to prove that the defendant placed his hands on the prosecutrix at another time on the day of the assault, as evidence of another assault of which the defendant could have been convicted under the indictment, and as tending to prove the animus and intent of the defendant."

S. v. Broadway, 157 N.C. 598, 72 S.E. 987, was a prosecution for incest. The record on file in the office of the Clerk of the Supreme Court shows that defendant was charged with committing the crime of incest with his daughter of the whole blood, Mary Broadway. The record shows that the court, over defendant's objection, permitted Mary Broadway to testify that "within the past three or four years he (her father) had to do with me every time he got a chance," to testify as to the first time it occurred, and the last time it occurred, and to testify as to other acts of intercourse with her father. The record also shows that the court, over defendant's objection, permitted Mary C. Morgan, grandmother of Mary Broadway, to testify Mary Broadway told her the first time her father had intercourse with her,

and that thereafter he had to do with her every time he got a chance, and permitted her brother, George Broadway, to testify that he saw Mary Broadway "come from a room crying, saying her father had had to do with her." In respect to this evidence, which is not in the decision, but is in the record on file in the office of the Clerk of the Supreme Court, this Court said: "The exception to proof of other acts of the same nature cannot be sustained. They are competent in corroboration, (citing authority), as was also evidence of cruel treatment of the daughter offered to show compulsion, 22 Cyc., 53. The evidence of similar statements made by the witness before the trial was also competent as corroborative evidence, and this may be shown by the witness himself."

In most jurisdictions it is held or recognized that in prosecutions for statutory rape, or rape of a female under the age of consent, or otherwise unable to consent, evidence is admissible which tends to show prior offenses of the same kind committed by the defendant with the prosecuting witness, provided they are not too remote in point of time, such evidence being admitted in corroboration of the offenses charged, or to prove identity, and not to prove a separate offense. 44 Am. Jur., Rape, Sec. 80; Wharton's Criminal Evidence, 12th Ed., Vol. I, p. 547; 22 C.J.S., Criminal Law, p. 1165; Annotation, 167 A.L.R. p. 574, *et seq.;* Underhill's Criminal Evidence, 5th Ed., Vol. I, Sec. 211; Wigmore on Evidence, 3rd Ed., Vol. II, Sec. 398. The above works cite in support of their statements a multitude of cases, and the Annotation in 167 A.L.R., and Wharton's Criminal Evidence cite cases from 36 states including our case of *S. v. Parish, supra,* which recognizes the rule, and the District of Columbia.

While the State's evidence shows that defendant first had carnal knowledge of prosecutrix several years prior to the date specified in the indictment, such acts were continuous to the date specified in the indictment, and under such circumstances the first acts and the other acts are not too remote. The prior acts of intercourse between the defendant and the prosecutrix were properly admitted in evidence in corroboration of the offense charged, and defendant's assignments of error in respect to their admission are overruled.

Defendant assigns as errors the admissions in evidence for the purpose of corroborating the prosecutrix the testimony of a deputy sheriff that prosecutrix told him that the first time defendant made her do it, she was five years old, and the testimony of a case worker in the County Welfare Department of a substantially similar statement for the same purpose. The trial court at the time of the admissions of this evidence, and also in its charge carefully restricted this

testimony as corroborative evidence only. These assignments of error are overruled. *S. v. Broadway, supra; S. v. Tate,* 210 N.C. 613, 188 S.E. 91; *S. v. Davis,* 229 N.C. 386, 50 S.E. 2d 37. There are no other assignments of error to the evidence.

A study of the evidence shows that the State presented ample evidence to carry the case to the jury, and the trial court properly denied the motion for judgment of nonsuit made at the close of the State's evidence, and renewed at the close of all the evidence. Defendant's brief states that the exceptions to the denial of the motions for nonsuit "are formal, but since this is a capital case, we feel they should be reviewed."

Defendant assigns as error the failure of the trial court in its charge to define the term "reasonable doubt." The trial court did not define the term "reasonable doubt," or attempt to define it, but numerous times in its charge it stated that the burden of proof was on the State to prove the defendant guilty beyond a reasonable doubt; that there was no burden on the defendant to establish his innocence, for the law says he is not guilty until the State has proven his guilt beyond a reasonable doubt; that if the jury had a reasonable doubt of his guilt, they should acquit him. The trial court charged on the presumption of innocence. Defendant made no request of the court to define the term "reasonable doubt." This assignment of error is overruled. *S. v. Lee,* 248 N.C. 327, 103 S.E. 2d 295; *S. v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133.

The only other assignments of error to the charge are to the trial court's statements of the evidence of prosecutrix as to prior acts of intercourse, and of the testimony of the deputy sheriff and of the case worker in the County Welfare Department as to prior consistent statements of prosecutrix, as above set forth These assignments of error are overruled.

We have examined the charge of the court with care. The court instructed the jury that they could return any one of four verdicts: one, guilty of rape; two, guilty of assault with intent to commit rape; three, guilty of an assault upon a female, the defendant being a male person over 18 years of age; and four, not guilty, according to the jury's findings of the facts. He carefully instructed the jury that if they returned a verdict of guilty of rape, they had absolute discretion at the time of rendering their verdict to recommend imprisonment for life in the State's prison, and if the jury did so recommend, such would be the punishment inflicted by the court.

The trial court, at the request of the defendant, charged the jury as follows: "Now, gentlemen, evidence has been offered here with re-

spects to other acts of sexual intercourse between the defendant and the prosecuting witness, Irene Browder, than that of which he is accused in the bill of indictment, being May the 6, 1959 and the defendant requests me to charge you and I so charge you with respects thereto that the defendant must be tried by you only on the specific charge specified in the indictment. He must be convicted of no other crime nor upon any other charge. You must confine your deliberations upon the whole evidence to the particular crime charged in the indictment and if that crime has not been proved beyond a reasonable doubt, you must acquit the defendant. The prosecuting witness gave evidence of other assaults upon her by the defendant in addition to the one charged in the indictment. You're not to consider such evidence for any purpose except as to what bearing it may have upon the truthfulness of the particular charge in this case."

The court gave the defendant great latitude in the introduction of evidence. The charge is free from prejudicial error. In the trial below, we find

No error.

MRS. PHEREBA ABBITT v. CHARLES H. BARTLETT, JR.

(Filed 24 February, 1960.)

1. Malicious Prosecution § 1—

If a prosecution is wrongfully, knowingly and intentionally maintained without just cause or excuse, there is legal malice which alone is sufficient to support an action for malicious prosecution, and plaintiff must show actual malice only if he seeks to recover punitive damages.

2. Malicious Prosecution § 12—

Where the court has correctly instructed the jury that legal malice alone is sufficient predicate for malicious prosecution and that actual malice is not necessary, a further instruction in response to a request by a juror that the court again define malice, that, in addition to ill-will, anger, resentment and a revengeful spirit, malice means a wrongful act knowingly and intentionally done, without just cause and excuse, will not be held for error, since construing the charge contextually the charge does not require the jury to find both legal and actual malice to warrant recovery.

3. Appeal and Error § 42—

The charge of the court will be construed contextually, and an exception thereto will not be sustained when upon such construction the jury could not have been misled.

4. Malicious Prosecution § 10b—

The acquittal of defendant by a court of competent jurisdiction, while necessary to show a termination of the prosecution, is not evidence one way or the other as to want of probable cause, and an instruction to this effect is not error.

5. Appeal and Error § 45 —

Where the answer of the jury to an issue precludes recovery, error relating to a subsequent issue cannot be prejudicial to plaintiff.

6. Malicious Prosecution § 12—

While ordinarily it is better practice for the court to submit the issue of probable cause before the issue of malice, the submission of the issues in inverse order will not be held prejudicial where the court has correctly instructed the jury that legal malice may be inferred from want of probable cause and has correctly expressed the rules of law in regard thereto.

7. Appeal and Error § 41—

Where the testimony which a witness would have given if he had been permitted to answer is not in the record it cannot be ascertained on appeal that the exclusion of the evidence was prejudicial.

8. Same—

Where a witness had theretofore been permitted to testify in regard to the matter, the exclusion of subsequent testimony of the same witness of the same import is not ordinarily prejudicial, and certainly its exclusion will not be held for error when the subsequent question is objectionable as a leading question.

9. Appeal and Error § 23—

Where the record fails to show any objection or exception to the admission of certain testimony a contention of error in the admission of such testimony is not presented.

10. Malicious Prosecution §§ 10a, 10b—

Where upon the hearing of a prosecution for maintaining a public nuisance, the court directs the prosecuting witness and the defendant and her attorney to go into an ante-room and discuss the matter, in a subsequent action for malicious prosecution the prosecuting witness, as defendant in the civil action, may testify, as bearing upon the questions of probable cause and malice, that during the conference the attorney told defendant in the criminal prosecution that she would have to abide by the court's direction and clean up her premises.

11. Evidence § 15—

Ordinarily, testimony of any fact or circumstance connected with the matter in issue, or from which any inference of the disputed fact can reasonably be drawn, ought not to be excluded from the consideration of the jury.

12. Trial § 49—

A motion to set aside the verdict is addressed to the discretion of the

trial court, and a contention based on a question of law is not presented by an exception to the refusal of the court to set aside the verdict.

APPEAL by plaintiff from *McLean, J.*, October 1959 Civil Term, of BUNCOMBE.

This is an action for damages for malicious prosecution.

Plaintiff, Mrs. Phereba Abbitt, purchased a house and lot in the city of Asheville in 1944. She divided the house into three apartments, two downstairs and one upstairs. She occupied the front apartment downstairs and rented the other two. Defendant, Charles H. Bartlett, Jr., owned adjoining property and resided thereon.

On 27 August 1958 defendant caused a warrant to issue charging that Mrs. Abbitt "did unlawfully and wilfully and feloniously create and maintain a public nuisance by allowing women and men of bad character and drunks to assemble together in her residence, and scandalize the neighborhood or passerby . . ."

Plaintiff was arrested and tried in the Police Court of the city of Asheville, a court of competent jurisdiction. Evidence was heard on 28 August 1958 but verdict and judgment were continued from time to time until 25 October 1958 when the court entered a verdict of "not guilty."

This action for malicious prosecution was instituted 16 March 1959. It came on for trial at the term above indicated. Issues were submitted to the jury and answered as follows:

"1. Did the defendant cause the arrest of the plaintiff under the warrant issued by the Police Court of the City of Asheville, as alleged in the complaint? Answer: Yes.

"2. If so, was said warrant issued wrongfully and maliciously, as alleged in the complaint? Answer: No.

"3. Was said warrant issued without probable cause, as alleged in the complaint? Answer .....

"4. What damages, if any, is plaintiff entitled to recover? Answer ....."

From judgment in favor of defendant, plaintiff appealed and assigned errors.

M. John DuBose and Melvin K. Elias for plaintiff, appellant.

Richard Griffin and Guy Weaver for defendant, appellee.

MOORE, J. After the jurors had begun their deliberations they returned to the courtroom for further instructions. The following transpired:

"JUROR: Would you define malicious for us again, please?

"THE COURT: Now, Ladies and Gentlemen of the Jury, malice does not necessarily mean ill-will, anger, resentment or a revengeful spirit. To be sure those things are malice, but simply it means a wrongful act knowingly and intentionaly done, without just cause or excuse or justification.

"JUROR: Answer that second question again, please, that second paragraph.

"THE COURT: It means in addition to ill-will, anger, resentment and a revengeful spirit, a wrongful act knowingly and intentionally done, without just cause, excuse or justification."

Plaintiff assigns as error the instruction given in the second response by the court. Plaintiff insists this instruction places upon her too great a burden. She contends that the court, in substance, instructed the jury that, in order for plaintiff to prevail upon the second issue, she was required to prove both actual and legal malice, when, as a matter of law, proof of either would suffice.

Where punitive damages are claimed it must be shown that plaintiff was wrongfully prosecuted from actual malice in the sense of personal ill-will, spite or desire for revenge, or under circumstances of insult, rudeness or oppression, or in a manner evincing a reckless and wanton disregard of plaintiff's rights. Where only compensatory damages are sought, plaintiff *may* show actual malice, but it is sufficient if plaintiff proves legal malice alone, that is, that the prosecution was wrongfully, knowingly and intentionally maintained without just cause or excuse. *Mitchem v. Weaving Co.*, 210 N.C. 732, 734, 188 S.E. 329; *Downing v. Stone,* 152 N.C. 525, 529, 68 S.E. 9; *Stanford v. Grocery Co.*, 143 N.C. 419, 428, 55 S.E. 815.

The legal proposition propounded by plaintiff is correct, but we do not agree with the construction she places on the challenged instruction. It must be construed in connection with the preceding response. The juror had asked the court to define "malicious" again. The court, in effect, stated that actual malice need not be shown and that it would suffice if plaintiff had proven "a wrongful act knowingly and intentionally done, without just cause or excuse or justification." When the juror asked the next question the court interpreted it, and correctly so, as a request to repeat the definition of *legal* malice. This the court did. Taken alone and out of context, this latter instruction is erroneous, but when considered contextually with the former instruction it is correct and could not have misled the jury. Consecutive instructions *pari materia* must be construed in connec-

tion with each other. *Taylor Co. v. Highway Commission,* 250 N.C. 533, 539, 109 S.E. 2d 243.

Plaintiff noted an exception to the instruction of the court in response to a further inquiry by the juror:

"JUROR: What consideration or weight should we take that she was acquitted in Police Court. You read that to us once.

"THE COURT: Now, Ladies and Gentlemen of the Jury, of course in any action such as this, it is necessary that they show that the action terminated in her favor; however, that is admitted, but it comes down then to the question of probable cause, which you must decide. The fact that a verdict of not guilty was entered over there creates no evidence one way or the other as to whether or not there was probable cause at the time."

This instruction is correct. "It is well established with us that when a committing magistrate, as such, examines a criminal case and discharges the accused, his action makes out a *prima facie* case of want of probable cause, that is the issue directly made in the investigation; but no such effect is allowed to a verdict and judgment of acquittal by a court having jurisdiction to try and determine the question of defendant's guilt or innocence; and the weight of authority is to the effect that such action of the trial court should not be considered as evidence on the issue as to probable cause or malice. In this case the justice had final jurisdiction to try and determine the question. The judgment is necessarily admitted, because the plaintiff is required to show that the action has terminated; but it should be restricted to that purpose, and the failure to do this constituted reversible error. (citing authorities)." *Downing v. Stone, supra,* at page 530. The holding in the *Downing* case is in accord with the weight of authority in other jurisdictions. Annotation: 57 A.L.R. 2d, Malicious Prosecution — Evidence, sec. 4, pp. 1094 *et seq.*

Appellant also excepts to a portion of the charge relating only to the "probable cause" issue, third issue. The jury did not answer this issue. It reached a verdict adverse to the plaintiff before coming to the third issue. Having answered the "malice" issue against the plaintiff, it was unnecessary that the third issue be answered, and error in the instruction with respect thereto is not prejudicial. *Williams v. Cody,* 236 N.C. 425, 426, 72 S.E. 2d 867.

Inasmuch as want of probable cause is related to malice, as those terms are applied in malicious prosecution cases, it is the better practice to have the "probable cause" issue precede the "malice" issue. But here the court had correctly instructed the jury that legal malice *may* be inferred from want of probable cause and had explained the

rules of law with respect to this principle as laid down in decided cases. *Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708; *Mitchem v. Weaving Co., supra; Wright v. Harris,* 160 N.C. 542, 76 S.E. 489. Furthermore, appellant made no exception to the issues submitted. *Walker v. Walker,* 238 N.C. 299, 300, 77 S.E. 2d 715.

There are exceptions to the rulings of the court in sustaining objections to four questions propounded to plaintiff's witness, Mrs. Sarah Allison, by plaintiff's attorney. As to three of these questions, the record does not disclose what the answers of the witness would have been had she been permitted to testify with respect thereto. Therefore, we have no way of determining whether the rulings were prejudicial. *Board of Education v. Mann,* 250 N.C. 493, 497, 109 S.E. 2d 175. Mrs. Allison, an occupant of one of plaintiff's apartments, was testifying concerning noises, or absence of noises, in the house. She was asked, "The children didn't have any trouble sleeping, did they?" If permitted to testify, the witness would have answered "No." The question was clearly objectionable as leading. Furthermore, the witness had already testified, without objection, that she had heard no noises "objectionable to her or anyone else." Error, if any, is harmless.

Plaintiff contends that the court erred in permitting defendant to testify that he "didn't have any malice against Mrs. Abbitt." Plaintiff's brief refers to a portion of defendant's testimony appearing on page 23 of the record. The record does not disclose any objection made or exception taken to this testimony. Objections must be made in apt time and assignments of error must be based upon exceptions set out in the record. *Jones v. Jones,* 235 N.C. 390, 391, 70 S.E. 2d 13; *Steelman v. Benfield,* 228 N.C. 651, 654, 46 S.E. 2d 829.

Plaintiff objected to and moved to strike the following testimony of defendant: "Mr. Regan told Mrs. Abbitt she would have to abide by what Judge Cathey had just told her and clean her apartments up and make what changes would be necessary to do so." At a hearing of the criminal action against Mrs. Abbitt in Police Court the judge directed Mr. Bartlett, Mrs. Abbitt and her attorney, Mr. Regan, to go to an ante-room and discuss matters pertaining to the apartment house. The challenged testimony is defendant's version of a portion of that discussion. Bartlett was not eavesdropping. This testimony has a direct bearing upon the issues of "probable cause" and "malice." "No fact or circumstances in any way connected with the matter in issue or from which any inference of the disputed fact can reasonably be drawn, ought to be excluded from the consideration of the jury." *Pettiford v. Mayo,* 117 N.C. 27, 28, 23 S.E. 252.

Plaintiff very earnestly insists that the criminal warrant which de-

fendant caused to be issued and under which she was arrested and tried did not charge a criminal offense and, further, that the evidence in the record is insufficient to show that she committed the acts alleged in the purported warrant. These contentions are made in connection with the refusal of the court to set aside the verdict and to the signing of the judgment. The connection is not apparent. "The refusal to set aside the verdict as being contrary to the weight of the evidence was a matter within the discretion of the court and no appeal lies therefrom." *Nance v. Long,* 250 N.C. 96, 97, 107 S.E. 2d 926. The judgment was in accordance with the verdict. *Bourne v. Edwards,* 238 N.C. 261, 262, 77 S.E. 2d 616. The sufficiency of the warrant and evidence in the criminal action is not a proper inquiry on this appeal under the assignments of error brought forward and discussed in appellant's brief.

No error.

STATE v. LEE EDWARD GASKINS.

(Filed 24 February, 1960.)

1. Criminal Law §§ 49, 84—

Where there is no direct evidence that the defendant gave a prospective witness money or attempted to bribe her, but the evidence discloses at most a possibility that he did so and an opportunity for so doing, the State may not attempt to prejudice defendant by inferring an attempt at bribery on his part by asking another witness questions on cross-examination in regard to money in the possession of the prospective witness and the turning over of the money to the police, the testimony having no tendency to contradict any testimony given by the witness on direct examination.

2. Criminal Law § 33—

Evidence which merely discloses the possibility of the existence of a collateral incriminating circumstance should be excluded, since the attention of the jury should not be distracted from the material matters by evidence raising only a conjecture or suspicion in regard to incriminating circumstances.

3. Same—

The admission of irrelevant evidence having the sole effect of exciting the prejudice or sympathy of the jury may be held prejudicial.

4. Criminal Law § 162—

The admission of irrelevant evidence having a tendency to prejudice defendant in the eyes of the jury cannot be held harmless even though

there is ample competent evidence to sustain a conviction, since it cannot be determined on appeal whether or not the verdict was influenced by the incompetent evidence.

APPEAL by defendant from *Bundy, J.*, November 1959 Term, of PITT.

Defendant was tried upon a bill of indictment in which he was charged with the operation of a motor vehicle on the public highways while under the influence of intoxicating liquor.

Plea: Not guilty. Verdict: Guilty.

Judgment: Prison sentence, suspended on condition defendant pay a fine of $250.00 and costs and deliver his operator's license to the clerk.

Defendant appealed and assigned errors.

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

Albion Dunn for defendant, appellant.

MOORE, J. A narrative of a portion of the evidence is necessary to an understanding of the assignments of error upon which defendant relies. The events herein recounted took place in the town of Ayden.

Defendant and a friend, Alton Worthington, were together during the evening of 18 July 1958. They were riding in defendant's Ford pickup. They visited three service stations and had several drinks of whiskey. Near midnight they went to the home of Mrs. Johnny Williams. Mrs. Williams had retired. About the time her daughter, LuNell Williams, returned from a movie, Mrs. Williams heard "some confusion" in front of her house and went out to investigate. She saw Alton Worthington and told him to leave. He said he would leave "when he got good and ready," that Lee Edward Gaskins was drunk and couldn't drive. Defendant was in the pickup; she tried to arouse him but couldn't. She told LuNell to go to the police station and get an officer to come and get them out of the yard. The pickup drove off. It arrived at the police station about the same time LuNell got there. Mr. Sutton, the police officer on duty, arrested defendant and charged him with drunken driving. The chief point in controversy at the trial was whether or not defendant was driving the pickup on the occasion in question.

Over the repeated objections of defendant the court admitted in evidence a course of testimony summarized as follows:

Clifton Dennis, a policeman, testifying for the State in rebuttal, stated that sometime after 18 July 1958 he instructed LuNell Williams "that if (defendant) came back to her any more to offer her

any money for her to take it and try to take it with her mother or some good witness" and as soon as she got the money to carry it to the police, Mr. Sutton; that "within about two hours the money was to the police station."

Mrs. Johnny Williams, witness for defendant, testified, on cross-examination in response to questions by the solicitor, in substance as follows: Defendant and Alton Worthington came to her home while LuNell was there. They were on the porch. LuNell was on the porch with them. They left and LuNell came into the house. LuNell had three one-hundred-dollar bills. She and LuNell immediately took this money to the police station and gave it to Mr. Sutton.

Mrs. Williams did not hear the conversation, if any, that took place on the porch and did not see the defendant give LuNell any money. LuNell was in Newport News, Virginia, at the time of the trial and did not testify.

Mr. Sutton, the arresting officer, testified that LuNell, in the presence of her mother, gave him three one-hundred-dollar bills sometime in September 1958. The bills were admitted in evidence.

The defendant in apt time moved to strike all testimony relating to the money transaction. He testified that he did not give LuNell the money and knew nothing about it.

The gist of the State's argument in support of the competency of this evidence is succinctly stated in its brief as follows: "Evidence of an attempt to bribe a witness to alter the facts being relevant and material, the trial court allowed such evidence to be considered by the jury. The trial court exercised its discretion in allowing the method and duration of the cross examination when the purpose of the cross examination was to determine the interest or bias of the witness and to impeach her credibility."

This cross-examination of Mrs. Williams was most certainly not for the purpose of impeaching her. She did not profess to know and gave no testimony as to whether or not defendant drove the pickup on the night of his arrest. It is clear that the State desired the jury to infer from her testimony and that of the officers that defendant had attempted to bribe LuNell Williams to alter her testimony. Therein lies the error of its admission. There is no evidence in the record that defendant gave LuNell Williams the money or attempted to bribe her. At most the evidence discloses a possibility that he did so and an opportunity for so doing. Perhaps, had LuNell testified, the deficiency in the evidence would have been supplied and the testimony rendered competent. But this is only conjecture.

". . . (E)vidence 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." *State v. Vinson,* 63 N.C. 335, 338. ". . . (S)uch facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters . . ." *Pettiford v. Mayo,* 117 N.C. 27, 28, 23 S.E. 252.

State v. Freeman, 183 N.C. 743, 111 S.E. 6, presents an analogous situation. Defendant was charged with the larceny of tobacco. It was shown that he was without money on the day preceding the sale by him at the warehouse and had funds on the day following. A cancelled check, drawn by the warehouse and payable to another named person, was admitted in evidence without explanation. Defendant had not endorsed it and there was no evidence connecting him with it. The Court said: "It does not appear to us that it was harmless or did not prejudice the defendant. . . . There is nothing more in the proof than the bare check itself, without the least explanatory evidence, and it should have been excluded by the court as prejudicial to the defendant. It cannot be said that irrelevant evidence, though generally so, is always harmless. We have held otherwise. . . . There is evidence upon which the jury could have convicted the defendant apart from the check, but they should have been confined to the competent and relevant proof in considering the case." ". . . (I)f the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial although ordinarily the reception of irrelevant evidence is considered harmless error." North Carolina Evidence: Stansbury, sec. 80, pp. 143-4; *State v. Page,* 215 N.C. 333, 1 S.E. 2d 887; *State v. Strickland,* 208 N.C. 770, 182 S.E. 490; *State v. Jones,* 93 N.C. 611; *State v. Mikle,* 81 N.C. 552.

In the case *sub judice* there was ample evidence to sustain a conviction other than that drawn in question on this appeal. But we have no way of determining what evidence influenced the jury. It may well be that the evidence in question was the deciding factor.

New trial.

EARL FINCH, TRADING AS ACE ELECTRICAL COMPANY v. SMALL BUSINESS ADMINISTRATION, OF RICHMOND, VIRGINIA, CLARENCE P. MOORE AND JOHN A. WILKINSON, TRUSTEES, AND CLARA M. WHORTON AND JULIUS WHORTON.

(Filed 24 February, 1960.)

1. Appearance § 2—

Under the provisions of G.S. 1-134.1 the fact that a motion to dismiss for want of jurisdiction of the person of defendant contains matter relating to other defenses does not waive the objection as to the lack of jurisdiction.

2. Process § 15½—

The United States or an agency of the Federal Government cannot be sued except in accordance with its consent, and the statutes relating to the maintenance of such suits and the service of process therein must be strictly construed.

3. Same—

The Small Business Administration is not a corporate entity but is an agency of the United States, and while the statute provides that its administrator may sue and be sued, there is no statutory provision for it to sue or be sued in its own name, and therefore where service of process is directed to the administration, its motion to dismiss for want of jurisdiction is properly allowed. Rules 4(d)(4) and 4(d)(5) of the Rules of Civil Procedure, U.S.C.A., Title 28, Section 2410.

APPEAL by plaintiff from *Bundy, J.*, October Term, 1959, of CRAVEN.

Civil action instituted May 29, 1959, against Small Business Administration of Richmond, Virginia, *et al.*, wherein plaintiff, in substance, alleges:

On March 5, 1956, defendants Whorton executed and delivered to defendants Moore and Wilkinson, as trustees, a deed of trust on the Whorton real property in Craven County, as security for the payment of a loan the Whortons had obtained from Small Business Administration of Richmond, Virginia. Beginning March 10, 1956, and extending through August 28, 1958, plaintiff furnished material and services to the Whortons in connection with wiring and general repair work at the Whorton Crab Factory on said property, the amount due and owing therefor being $1,732.55, for which plaintiff filed a notice of claim of lien on December 6, 1958. The said material and services were so furnished "with the knowledge and acquiescence" of Small Business Administration and placed upon the property with its "tacit approval, knowledge and consent." The said deed of trust was foreclosed; and, pursuant to foreclosure, the property was con-

veyed by deed of May 20, 1959, to Small Business Administration of Richmond, Virginia.

Plaintiff asserts that he acquired a lien on said property for $1,732.55 and that his lien was prior to the lien of the (foreclosed) deed of trust. Plaintiff prays that he recover of the Small Business Administration of Richmond, Virginia, the sum of $1,732.55, with interest, or, "as an alternative remedy that the Court direct the said trustee to amend his accounting to include a full payment and settlement of this claim."

The court below, granting a motion made by the United States District Attorney for the Eastern District of North Carolina in behalf of Small Business Administration of Richmond, Virginia, vacated the purported service of process on said defendant and dismissed the action as to it on the ground that the court had not acquired jurisdiction of the person of said defendant.

Plaintiff excepted and appealed.

Charles L. Abernethy, Jr., for plaintiff, appellant.

Julian T. Gaskill, United States Attorney, and Samuel A. Howard, Assistant United States Attorney, for the Eastern District of North Carolina, for defendant, appellee.

BOBBITT, J. No reference is made in the District Attorney's motion to the merits of plaintiff's alleged cause of action. He asserts that a special appearance is entered solely for the purpose of moving to dismiss for lack of jurisdiction of the person. If, as plaintiff contends, the motion alleged simultaneously matters pertaining to other defenses, this, under Session Laws of 1951, Chapter 245, now G.S. 1-134.1, would not waive the objection as to lack of jurisdiction.

The only purported service of process was as follows: According to the affidavit of a deputy sheriff of Henrico County, Virginia, a copy of the "attached process" was delivered "to Small Business Administration of Richmond, Virginia." For the reasons stated below, we do not consider whether, if G.S. 1-98.4 and G.S. 1-104 were applicable, there was a sufficient affidavit and order to meet the requirements thereof.

Plaintiff alleged that "the Small Business Administration is an agency of the Federal Government duly created under and by virtue of an Act of Congress with its principal office in Washington, D. C., and with a branch office in Richmond, Virginia."

Congress "created an agency under the name 'Small Business Administration' (herein referred to as the Administration), which Ad-

ministration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the Federal Government. The principal office of the Administration shall be located in the District of Columbia. The Administration may establish such branch and regional offices in other places in the United States as may be determined by the Administrator of the Administration." U.S.C.A., Title 15, § 633(a).

The Act of Congress provides: "The management of the Administration shall be vested in an Administrator who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, . . . The Administrator is authorized to appoint three Deputy Administrators to assist in the execution of the functions vested in the Administration." U.S.C.A., Title 15, § 633(b).

In defining the powers of the Administrator, U.S.C.A., Title 15, § 634(b), Congress provided, in part, as follows:

"(b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—

"(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property;

". . .

"(6) make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter";

The Administrator, under the powers vested in him by U.S.C.A., Title 15, § 634(b), issued and published the following rule: "§ 101.5-2 *Litigation.* Service of process in any suit instituted against SBA may be accomplished in accordance with the provisions of Rule 4 of the Federal Rules of Civil Procedure or in accordance with the provisions of section 2410 of Title 28, United States Code. All litigation instituted by or against SBA will be prosecuted or defended by the Attorney General through the United States Attorney for the Federal District in which the matter arises." Code of Federal Regulations, Title 13, p. 499.

Rule 4(d)(4) and Rule 4(d)(5) of the Rules of Civil Procedure for the United States District Courts, providing the manner in which service of process shall be made, contain the provisions (U.S.C.A., Title 28, p. 192) set out below.

"(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, . . .

"(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule."

U.S.C.A., Title 28, § 2410, which provides that "the United States may be named a party in any civil action or suit . . . in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien," contains this provision as to service of process: "In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia."

"The United States, however, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued." *Belknap v. Schild,* 161 U.S. 10, 16 S. Ct. 443, 40 L. Ed. 599, and cases cited. Moreover, provisions in Federal statutes whereby consent is given for the maintenance of suits against the Government, since they relate to relinquishment of a sovereign immunity, must be strictly construed. *United States v. Sherwood,* 312 U.S. 584, 61 S. Ct. 767, 85 L. Ed. 1058; *Soriano v. United States,* 352 U.S. 270, 77 S. Ct. 269, 1 L. Ed. 2d 306.

The "Small Business Administration" is not a corporate entity but an agency of the United States "under the general direction and supervision of the President." The federal statute contains no provision to the effect that the "Small Business Administration" may sue or be sued *eo nomine.* It provides, as set forth above, that the Ad-

ministrator may sue and be sued. In this connection, it is noted that service of process was not made or attempted to be made on the Administrator or on a Deputy Administrator or on any person designated by the Administrator as a process agent.

Service of process herein was not made in the manner prescribed by Rules 4(d)(4) and 4(d)(5) of said Rules of Civil Procedure or in the manner prescribed by U.S.C.A., Title 28, § 2410. Under the rule issued by the Administrator, these procedures are available for service of process upon him.

On account of plaintiff's failure to serve process in a manner prescribed by law, we are of opinion, and so hold, upon the facts disclosed by this record, that plaintiff's action, as to "Small Business Administration of Richmond, Virginia," was properly dismissed for lack of jurisdiction.

The individual defendants are not parties to this appeal.

Affirmed.

GEORGE B. GRIFFIN v. BEATRICE McBRAYER.

(Filed 24 February, 1960.)

1. Master and Servant § 32: Partnership § 5—

An unsatisfied judgment against a servant or one partner does not bar the injured person from suing the master or the other partner, but such judgment may be properly pleaded by defendant in the subsequent action, since the liability of the employer or the other partner cannot exceed that of the actual tort-feasor.

APPEAL by defendant from *McLean, J.*, August 1959 Civil Term, of BUNCOMBE.

This action was begun 18 February 1958 to recover $15,000 for personal injuries sustained by plaintiff on 26 November 1955 when his motor vehicle collided with a cow which he alleges was owned and negligently permitted by defendant to browse on the highway.

Defendant denied both ownership of the cow and the asserted negligence. As an additional defense and in bar of any recovery she alleged that plaintiff had, on 7 December 1955, instituted an action in the Superior Court of Buncombe County against her and her father, C. F. McBrayer, to recover damages for the injuries for which compensation is now sought and had in said action alleged that defendants were the owners of the cow and were jointly negligent;

present defendant denied both ownership of the cow and negligence on her part; her father and codefendant admitted he owned the cow but denied the asserted negligence, asserting to the contrary that the cow was killed by the negligence of the plaintiff for which he sought compensation; said cause of action was called for trial at the November 1955 term of court at which time plaintiff submitted to a voluntary nonsuit as to this defendant, and C. F. McBrayer submitted to a nonsuit as to his counterclaim; the jury answered the issues of negligence and contributory negligence in favor of plaintiff, fixing the amount of his damages; judgment was entered in favor of plaintiff in accord with the verdict. By reference she incorporated the judgment roll in that action as a part of her answer. She does not allege that the judgment obtained against her father has been paid.

Plaintiff demurred to the plea of *res judicata* for that the judgment did not constitute a defense. He also replied and reasserted defendant's ownership of the cow, amplifying the complaint to expressly allege that defendant was either (a) sole owner and her father was her agent acting in the scope of his authority, or (b) defendant and her father were partners, operating the dairy, and the cow was owned by the partnership. He alleges the judgment against C. F. McBrayer for $2,500 has not been paid.

Judge McLean heard the matter on the pleadings (including the judgment roll in the prior action, which was made a part by reference). He adjudged the facts asserted as *res judicata* were not sufficient to defeat plaintiff's claim and ordered the allegations stricken. Defendant excepted and appealed.

E. L. Loftin for plaintiff, appellee.

Don C. Young and Pangle, Garrison and Sams for defendant, appellant.

RODMAN, J. The appeal presents this question: Is an unsatisfied judgment against a servant or a partner a bar to another action against the master or the other partner based on the tortious conduct alleged in the prior action? The answer is succinctly stated in *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492. *Denny, J.,* said: ". . . where the doctrine of *respondeat superior* is or may be invoked, the injured party may sue the agent or servant alone, and if a judgment is obtained against the agent or servant and such judgment is not satisfied, the injured party may bring an action against the principal or master." A similar conclusion was reached in an action against a partner, *Davis v. Sanderlin,* 119 N.C. 84. The rule has been so stated

in several of our prior decisions. *MacFarlane v. Wild Life Resources Com.*, 244 N.C. 385, 93 S.E. 2d 557; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366; *Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570. Our application of the law accords with authoritative decisions elsewhere. *Bigelow v. Old Dominion C. Min. & S. Co.*, 225 U.S. 111, 56 L. Ed. 1009; *Verhoeks v. Gillivan*, 221 N.W. 287, 65 A.L.R. 1083; *Dillard v. McKnight*, 209 P. 2d 387, 11 A.L.R. 2d 835, and notes; 50 C.J.S. 71 & 284; 52 A.J. 464.

The answer given to the question here presented in no way conflicts with the conclusion reached in *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E. 2d 655, or *Dillingham v. Gardner*, 222 N.C. 79, 21 S.E. 2d 898, as urged by defendant. Liability was imposed on C. F. McBrayer in the prior action for *his* negligent failure to confine the cattle. The question of defendant's responsibility for the acts of C. F. McBrayer has not heretofore been considered. Plaintiff's allegations, if found to be true, would impose liability on her for the negligence of her agent or partner. Until the factual controversy with respect to agency or partnership has been resolved, defendant's liability cannot be determined. The distinction between the two types of cases is clearly pointed out in *Leary v. Land Bank, supra.*

While the facts alleged are not sufficient to defeat plaintiff's claim, it does not follow that the court was correct in deleting the allegations. If C. F. McBrayer was defendant's agent or partner, as alleged, the judgment against him fixes the maximum verdict which plaintiff could obtain in this action. It is in effect a limitation of liability. *Thompson v. Lassiter, supra,* and cases cited. To have the benefit of this limitation of liability, it was necessary to plead the prior judgment. *Gibson v. Gordon*, 213 N.C. 666, 197 S.E. 135; *Blackwell v. Dibbrell*, 103 N.C. 270. The court erroneously ordered the allegations stricken.

Modified and affirmed.

STATE v. HILLARD FRANCIS.

(Filed 24 February, 1960.)

1. Assault and Battery § 8—

Upon evidence tending to show that the proprietor of an establishment had twice warned drunken patrons to be quiet or leave, and that on the third occasion an assault ensued in which the proprietor shot one of the patrons, it is error for the court to charge the jury that generally a person cannot repel an unarmed assailant with a pistol, since the correct rule of law is that a person on his own premises, who is free from fault in bringing on a difficulty, is under no duty to retreat in the face of a threatened assault, regardless of its character.

2. Same—

In the exercise of the right of self-defense a person may use such force to repel an assault as is reasonably necessary or apparently necessary to protect himself from death or great bodily harm, the reasonableness of the apprehension to be determined by the jury in accordance with the facts and circumstances as they appear to defendant at the time of the assault, and an instruction omitting the element of apparent necessity must be held for error.

APPEAL by defendant from *Pless, J.*, September Term, 1959, of MCDOWELL.

This is a criminal action, tried upon a bill of indictment charging the defendant with an assault with a deadly weapon, to wit, a pistol, upon Bobby Joe Kincaid, with the felonious intent to kill and murder the said Bobby Joe Kincaid, inflicting serious injuries not resulting in death.

The State's evidence tends to show that around 10:30 on the night of 10 July 1959, Bobby Joe Kincaid, Sonny Swepson, LeRoy Jackson and Luther Fowler were at the defendant's place of business which consisted of a grocery store and a back room, separated by a swinging door, used for dancing. Kincaid and the others were in the back room and had been requested on two separate occasions to be quiet or get out. The third time the defendant went into the back room and told them to get out, LeRoy Jackson said, "We walked into your place and we will walk out, don't put your hands on us." Kincaid testified that the defendant pulled out his pistol and said, "' I told you boys to be quiet,' and when I turned, that is when he shot me in my leg. He shot me below my hip bone in the left leg."

LeRoy Jackson, a witness for the State, testified on cross-examination, "Bobby Joe and I had been together that night. * * * We had been to a ball game. * * * After we left the ball game we started drinking. * * * After we got liquored up we thought we would go to

Hillard Francis' store. * * * Yes, Bobby Joe and I were feeling pretty good along about that time. If you drink a pint you have to feel good. It was white liquor. We were talking loud. * * * In the front * * * other people were looking at television. * * * When he (Francis) told me the third time if I couldn't be quiet I could get out, I told him that I had walked in there and I would walk out. * * *"

The defendant's evidence tends to show that almost immediately after arriving at the defendant's place of business the prosecuting witness started a quarrel with one Clarence Martin, a patron in the defendant's place of business; that the defendant on two separate occasions requested Kincaid, the prosecuting witness, and others, to be quiet. When the requests were ignored, he told them they would have to be quiet or leave. Clarence Martin left. The defendant Francis took Kincaid by the arm and told him to go home, it was closing time. Kincaid said, "Keep your d... hands off of me." The prosecuting witness made a grab for the defendant who jumped out of the way. The prosecuting witness continued to advance upon the defendant who shot him in the leg and immediately thereafter called the police.

The defendant also testified that the prosecuting witness had caused trouble at his place of business on two other occasions, one time having assaulted the defendant and thrown him into a ditch just outside his door and was on top of him when his (defendant's) wife stopped him. The defendant further testified, "I know Bobby Joe's reputation for being a violent and dangerous man. He is dangerous when he is drinking. When he is sober he is as humble as he is right now."

The officer who investigated the shooting testified that Kincaid denied that he had been shot, but that he examined him and found that he had been; he further testified, "It is my opinion that he was so drunk he didn't know he had been shot."

There was a verdict of guilty of assault with a deadly weapon. Judgment was entered upon the verdict. Defendant appeals, assigning error.

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

Paul J. Story for defendant.

DENNY, J. The defendant excepts to and assigns as error the following portion of his Honor's charge to the jury: "Now, in determining the degree of force a person may use you will have to take into consideration all the surrounding circumstances. Generally speaking, gentlemen of the jury, a person can't fight somebody with a pis-

tol who is making what is called a simple assault on him, that is an assault in which no weapon is being used, such as a deadly weapon or a knife or a pistol. That would render human life too cheap. It is better for a man to be the loser in a fist fight than to cut or shoot somebody. So, in determining the degree of force one may use, the law permits a person to use such force as is reasonably necessary to protect himself, and he can even go to the extent of taking human life where it is necessary to save himself from death or great bodily harm, but if he uses more force than is reasonably necessary he is answerable to the law."

We think the above portion of the charge is erroneous in two respects. (1) The instruction virtually eliminates the defendant's right of self-defense since he used a pistol in connection with defending himself against a simple assault. This Court said in *S. v. Pennell,* 231 N.C. 651, 58 S.E. 2d 341: "Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home, or place of business, or on his own premises, the law imposes upon him no duty to retreat before he can justify his fighting in self-defense, — *regardless of the character of the assault.*" (Emphasis added) (2) It is erroneous in that the court failed to charge the jury with respect to the use of such force as was necessary or *apparently necessary* to protect the defendant from death or great bodily harm. The plea of self-defense rests upon necessity, real or apparent. *S. v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892; *S. v. Goode,* 249 N.C. 632, 107 S.E. 2d 70; *S. v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620. Or, to put it another way, one may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. The reasonableness of such belief or apprehension must be judged by the facts and circumstances as they appear to the party charged at the time of the assault. As pointed out by *Moore, J.,* in *S. v. Fowler, supra,* "The law does not require the defendant to show that he was actually in danger of great bodily harm." Neither does it limit the force to be used in self-defense to such force as may be *actually* necessary to save himself from death or great bodily harm. But the jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which the party charged acted. *S. v. Rawley, supra,* and cases cited therein.

In the case of *S. v. Sally,* 233 N.C. 225, 63 S.E. 2d 151, *Stacy, C. J.,* speaking for the Court, said: "The defendant being in his own home and place of business where he had a right to be, and acting in de-

fense of himself and his habitation, was not required to retreat in the face of a threatened assault, regardless of its character, but was entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault. *S. v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526; *S. v. Harman,* 78 N.C. 515; *S. v. Pennell,* 224 N.C. 622, 31 S.E. 2d 857. This, of course, would not excuse the defendant if he used excessive force in repelling the attack. *S. v. Jernigan,* 231 N.C. 338, 56 S.E. 2d 599; *S. v. Robinson,* 188 N.C. 784, 125 S.E. 617."

It is not necessary to discuss the additional assignments of error since, in our opinion, the defendant is entitled to a new trial, and it is so ordered. These additional questions may not recur on another hearing.

New trial.

STATE v. INEZ GUFFEY.

(Filed 24 February, 1960.)

1. Intoxicating Liquor § 5—

The possession of nontaxpaid whiskey in any quantity anywhere in this State is, without exception, unlawful, G.S. 18-48, G.S. 18-50, and raises the presumption that the possession is for the purpose of sale notwithstanding that the quantity be less than one gallon. G.S. 18-11.

2. Same—

Possession of nontaxpaid whiskey within the meaning of G.S. 18-48 may be either actual or constructive.

3. Criminal Law § 101—

Evidence which merely shows the possibility of defendant's guilt of the offense charged but raises no more than a conjecture or speculation of such guilt is insufficient to be submitted to the jury.

4. Intoxicating Liquor § 13c—

Evidence tending to show that when the sheriff entered defendant's home he saw a jar of nontaxpaid whiskey unconcealed in the kitchen, that there were then present in defendant's house five adults, including defendant's mother and daughter, that defendant was not then at home but returned while the officers were there and ran to the sheriff, but without evidence that the nontaxpaid liquor was in the kitchen at the time defendant left her home, is insufficient to be submitted to the jury on the question of defendant's possession of the liquor, either actual or constructive.

STATE *v.* GUFFEY.

APPEAL by defendant from *Pless, J.*, November 1959 Term of RUTHERFORD.

Criminal prosecution upon a warrant charging defendant with the possession of nontaxpaid liquor for the purpose of sale; the case was heard *de novo* on appeal by defendant from a conviction in the Recorder's Court of Rutherford County.

Plea: Not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, defendant appeals.

Malcolm B. Seawell, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Thomas J. Moss and Stover P. Dunagan for defendant, appellant.

PARKER, J. The evidence for the State — the defendant offered none — reveals these facts:

About 1:30 p. m. o'clock on 16 June 1959 Damon Huskey, Sheriff of Rutherford County, with a deputy, went to a house owned by defendant, and in which she has lived for ten years, on Highway #74 just east of Forest City. Defendant, her grandmother eighty years old, her daughter thirty-one years old, and her grandchildren lived in the house. He knocked at the door. Defendant's daughter came to the door, and Sheriff Huskey went in. When he went in, he saw in the house defendant's daughter, defendant's mother, a taxicab driver, Albert Downey and Strawberry Moore. Defendant was not in the house at that time. The Sheriff had no search warrant. The first time the Sheriff saw defendant, she came to the door from the outside. When Sheriff Huskey was standing in the doorway from the kitchen, he smelt a strong odor of whiskey. He turned his head, and saw a half-gallon jar of white, nontaxpaid whiskey, with the lid off the jar, sitting on a shelf above the sink in the kitchen. A bottle of Clorox and some glasses that would hold four or five ounces were close to the sink. When defendant came in the kitchen, she ran to the Sheriff.

Prior to 16 June 1959 Sheriff Huskey has seen lots of traffic in and out of defendant's home. He has arrested several people for public drunkenness coming out of her house.

A week or ten days prior to 16 June 1959 Wilbur Kiser, a deputy sheriff, saw lots of traffic, taxis and other cars, going to and from defendant's home.

During the course of the argument to the jury, the court, in its discretion, permitted the State to introduce in evidence, over defendant's objection and exception, the jar of whiskey.

At present, the possession of nontaxpaid whiskey in any quantity anywhere in the State is, without exception, unlawful. G.S. 18-48, 18-50; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907; *S. v. May,* 248 N.C. 60, 102 S.E. 2d 418 — as to alcoholic content of whiskey.

Nontaxpaid whiskey is outlawed by statute in this State. G.S. 18-48 and G.S. 18-50 are statewide in application, and the possession of any quantity of nontaxpaid liquor is, without exception, unlawful, and under G.S. 18-11 raises the presumption, even though less than one gallon in quantity, that possession is for the purpose of sale. *S. v. Hill,* 236 N.C. 704, 73 S.E. 2d 894; *S. v. Gibbs,* 238 N.C. 258, 77 S.E. 2d 779.

Possession of nontaxpaid whiskey within the meaning of G.S. 18-48 may be either actual or constructive. *S. v. Brown,* 238 N.C. 260, 77 S.E. 2d 627.

When Sheriff Huskey had entered defendant's home without a search warrant and was standing in the doorway from the kitchen, he turned his head and saw a half-gallon jar of white, nontaxpaid whiskey sitting on the shelf above the sink in the kitchen. Assuming, but not deciding, that this evidence was competent, the State had ample evidence to show that some person violated the statute relating to the possession of nontaxpaid whiskey. But the crucial question is whether the State's evidence is sufficient to carry the case to the jury that the culprit was the defendant.

When the Sheriff entered the house, the defendant was not at home. The jar of whiskey was not concealed, but exposed to view. Defendant's 80-year-old mother, her 31-year-old daughter, a taxicab driver, Albert Downey, and Strawberry Moore were there. There is no evidence that the jar of whiskey was in the kitchen, when the defendant left home. There is no evidence that the four or five glasses had the odor of whiskey, or any drops of whiskey in any of them. When defendant came into the kitchen from outside, she ran to the Sheriff. The Sheriff's testimony, "I thought she was going to get the whiskey but she didn't," we do not consider of probative value.

"Upon a motion for judgment of nonsuit the evidence is to be considered in the light most favorable for the State, but evidence which merely suggests the possibility of guilt or which raises only a conjecture is insufficient to require submission to the jury." *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47. Any other interpretation of the law would unloose a jury to wander at will in the fields of speculation and conjecture.

In *S. v. Vinson,* 63 N.C. 335, the Court said: "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. Citing authority. We may go farther and say that the evidence must be such as will support a reasonable inference of the fact in issue."

Since the evidence is so slight as not reasonably to warrant the inference that the defendant had either the actual or constructive possession of the jar of nontaxpaid liquor, but leaves to mere conjecture the all-important question whether the culprit was the defendant, who was not present when the Sheriff arrived, or someone of the five adult persons there at the time, the trial court erred in not involuntarily nonsuiting the State, which ruling defendant assigns as error.

Reversed.

PENELOPE OVERTON, ALEXANDER BADHAM, PAULINE B. TURNER AND ALL OTHER HEIRS AT LAW OF HANNIBAL BADHAM, SR., DECEASED v. LONNIE BOYCE.

(Filed 24 February, 1960.)

1. Judgments §§ 8, 35—

A judgment of nonsuit entered with the approval of the attorney for defendant upon plaintiffs' statement that all matters in controversy had been settled between the parties and that plaintiffs disclaim any further interest in the controversy, is a judgment in *retraxit* amounting to a decision on the merits, and such judgment is a bar to a subsequent action between parties to the former action upon the identical subject matter.

APPEAL by plaintiffs from *McLean, J.*, September Term, 1959, of CHOWAN.

This was an action brought by the plaintiffs on 2 April 1959 to quiet title to the real property described in the complaint filed in this action.

On 26 October 1944 the plaintiffs in the present action, and others, as heirs at law of Hannibal Badham, instituted a suit against Lonnie Boyce, the defendant in the present action, to quiet title to the land described in the complaint in said action. It is admitted that the tract of land involved in the 1944 action and in the present action is the same. In the former action, on 13 July 1945, the plaintiffs caused a judgment to be entered with the approval of their attorney and

the attorney for the defendant, which recites: " * * * that all matters in controversy have been fully settled between the parties and that there does not exist any further dispute between said parties relative to the ownership of the property described in complaint and that plaintiffs disclaim any further interest in said controversy and that said plaintiffs desire that this action be nonsuited * * *." Whereupon, judgment as of nonsuit was accordingly entered.

When the present action came on for hearing on the defendant's plea of *res judicata,* the court held that the former judgment was a consent judgment and constituted a bar to the present action.

The court below found as a fact that the plaintiffs and the defendant herein were parties to the former action; that the subject matter was identical in both actions, and that the parties are bound by the judgment entered 13 July 1945. Judgment to that effect was entered.

Plaintiffs appeal, assigning error.

R. Conrad Boddie, Samuel S. Mitchell; Chance & Mitchell of New York City, for plaintiffs appellant.

Weldon A. Hollowell, Pritchett & Cooke for defendant, appellee.

PER CURIAM. This Court said in the case of *Steele v. Beaty,* 215 N.C. 680, 2 S.E. 2d 854, "A judgment in *retraxit* is usually based upon and follows a settlement out of court. Where the parties to an action have settled their dispute and agreed to a dismissal, such dismissal is a *retraxit* and amounts to a decision upon the merits. (Citations omitted) The rule seems to be universal that a judgment of dismissal entered by agreement of the parties pursuant to a compromise and settlement of the controversy is a judgment on the merits barring any other action for the same cause."

We concur in the ruling of the court below, and no prejudicial error has been made to appear on this appeal.

Affirmed.

JOSEPH R. TYSER AND LUELLA TYSER v. EMERSON SEARS.

(Filed 24 February, 1960.)

Costs § 3—

Where the court requires each side to deposit a designated sum with the referee to cover the cost of the reference, and in confirming the referee's report fixes the compensation of the referee and makes an allowance for the court reporter and surveyor, taxing these items as a part of the cost against plaintiff less the sum theretofore advanced by defendant, the order in effect is an apportionment of the cost and is within the discretionary power given the court by G.S. 6-21 (6).

APPEAL by defendant from *Morris, J.*, in Chambers in CURRITUCK on 14 August 1959.

Petitioners instituted this proceeding to establish the boundary between their land and the land of defendant. Defendant alleged he was the owner of the land claimed by him by deed and by adverse possession.

At the September Term, 1958 an order was entered reciting that the issue to be answered was the location of the dividing line. The court appointed a referee and directed each side to make a deposit to cover the cost of the reference. Pursuant to the order, respondent deposited the sum of $150 with the referee. The referee, after a hearing, made findings of fact and on these findings concluded the line was located as contended for by respondent.

Exceptions were filed by petitioners. Judge Morris heard the exceptions and confirmed the report. He directed the court surveyor to permanently mark the line as established by the referee. He fixed the compensation of the referee, made an allowance to the court reporter and surveyor, and directed these items "be taxed as a part of the costs against the plaintiff, less the sum of $150.00 heretofore advanced by Respondent. . ." Defendant excepted and appealed, asserting that he is entitled to recover the amount paid by him to the referee.

E. Ray Etheridge and McMullan, Aydlett & White for defendant, appellant.

No counsel contra.

PER CURIAM. The judgment in effect requires the respondent to pay $150 of the compensation allowed the referee. In so ordering, the court merely exercised a discretion given by statute, G.S. 6-21(6); *Cody v. England*, 221 N.C. 40, 19 S.E. 2d 10.

Affirmed.

W. B. PHELPS v. S. F. McCOTTER AND L. G. McCOTTER.

(Filed 24 February, 1960.)

1. Trial § 11—

Even in those instances in which a consolidation of actions for trial is permissible, a motion for consolidation is addressed to the discretion of the trial court.

2. Appeal and Error § 46—

In the absence of an indication to the contrary in the record, it will be presumed that the trial court determined a discretionary matter in the exercise of its discretion, and such ruling is not reviewable in the absence of a showing of abuse of discretion, the burden being upon the appellant to so show.

APPEAL by defendants from *Bundy, J.*, August 1959 Term, of PAMLICO.

Civil action to recover damages allegedly growing out of the failure of the defendants to execute and deliver to him a deed conveying a one-third interest in fee in a tract of land in Pamlico County, as ordered in a final judgment between the same parties rendered at the Fall Term 1956 of the Superior Court of Pamlico County, the Honorable Chester Morris, Judge Presiding, heard upon a motion by defendants to consolidate for trial this action with a special proceeding for actual partition between the same parties involving the same land.

The special proceeding for partition was instituted subsequent to the present action, and commissioners to divide the tract of land have been appointed. So far as the record shows they have not acted.

The court denied the motion for consolidation for trial, and defendants excepted and appeal.

R. E. Whitehurst and David S. Henderson for plaintiff, appellee.
Sam J. Morris and J. W. Hinsdale for defendants, appellants.

PER CURIAM. Defendants' only assignment of error is to the denial by the court of their motion for consolidation for trial of the instant case and the special proceeding for actual partition.

Whether or not consolidation of cases for trial, where permissible, will be ordered is in the discretion of the court. *Horton v. Perry*, 229 N.C. 319, 49 S.E. 2d 734; *Peeples v. R. R.; Edwards v. R. R.; Kearney v. R. R.*, 228 N.C. 590, 46 S.E. 2d 649; *Robinson, Hudson, and Blackburn v. Transportation Co.*, 214 N.C. 489, 199 S.E. 725; *Person v. Bank*, 11 N.C. 294; McIntosh, N. C. Practice & Procedure, 2d Ed.,

Vol. I, p. 739; 53 Am. Jur., Trial, §66; I C. J. S., Actions, §109(d). "If the conditions essential to authorize a consolidation do not exist, the court has no discretion to exercise." 1 C. J. S., Actions, p. 1346.

The motion to consolidate here was addressed to Judge Bundy's discretion. He denied the motion. As there is nothing in the record to indicate that he denied the motion as a matter of law, it will be presumed the Judge Bundy denied it in his discretion. *Lowman v. Asheville,* 229 N.C. 247, 49 S.E. 2d 408, and cases there cited. We cannot say, as a matter of law, from an inspection of the record that Judge Bundy's denial of the motion constituted an abuse of discretion - particularly in view of the well established principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court, and the burden is upon the appellant to show prejudicial error in the case on appeal. *Durham v. Laird,* 198 N.C. 695, 153 S.E. 261; McIntosh, N. C. Practice & Procedure, 2d Ed., Vol. 2, pp. 238-9. And, therefore, we are constrained to affirm the denial below of the motion for consolidation for the purpose of trial.

Affirmed.

GUY R. DAVIS v. W. T. RALPH.

(Filed 24 February, 1960.)

Landlord and Tenant §§ 10, 11—

Where plaintiff's own evidence shows that at the end of each year he made a separate contract with defendant landlord for the ensuing year, and further discloses that no agreement for renting the land for the year in question was reached, plaintiff's own evidence discloses that he was not a tenant from year to year and nonsuit is properly entered in his action for breach of lease agreement.

APPEAL by plaintiff from *Stevens, J.,* at December 1959 Civil Term, of BEAUFORT.

Civil action to recover damages for alleged breach of oral share-crop arrangement for the year 1956 in accordance with terms of pre-existing contract.

Defendant answering denies in material aspect the allegations of the complaint.

Upon trial in Superior Court plaintiff testified in pertinent part that: "It was ordinarily my practice while I was renting from Dr. Ralph to make arrangements at the end of the year with him for the

coming year. Each year when the year was completed I went to see Dr. Ralph and always rented it ahead. Ordinarily it would be before December. It could be right after the merchandise was harvested. That was usually sometime around December. In December of the year 1955 I had a conversation concerning 1956. Dr. Ralph said 'I don't know what I'm going to do with that piece of land another year.' "

And again the plaintiff testified: "I had no other conversation with Dr. Ralph concerning this land during the month of December 1955. The next conversation I had with Dr. Ralph concerning the renting of this land was in June or July * * * I went into his office and asked him what he had decided to do. He said 'I have not decided to do nothing. I told you last year that I was not going to rent it to you next year.' I said 'Doctor, you did not tell me that. I can tell you the exact words you said. You told me that you did not know what you were going to do with that piece of land another year.' "

Motion of defendant entered when plaintiff rested his case for judgment as of nonsuit was allowed. To judgment in accordance therewith plaintiff excepts and appeals to Supreme Court, and assigns error.

Wilkinson & Ward for plaintiff, appellant.
Carter & Ross for defendant, appellee.

PER CURIAM: While there is much other evidence shown in the record of the case on appeal the quoted portions hereinabove set forth are pivotal, and justify the ruling of the trial court from which appeal is taken. Taking the evidence in the light most favorable to plaintiff, as is done in considering motion for judgment as of nonsuit, it seems clear that plaintiff recognized that he was not a tenant from year to year but that each year he entered into a new agreement with defendant for the renting of the land, and that there was no agreement for the year 1956. Hence the judgment as of nonsuit is

Affirmed.

J. W. SWAYNGIM v. R. H. SAMPSON.

(Filed 24 February, 1960.)

APPEAL by defendant from *Thompson, S. J.*, September 1959 Special Term, of JACKSON.

Action to recover $300.00, balance of contract price for construction of a private road or driveway. Defendant pleads failure of plaintiff to complete the construction in accordance with the contract, an offset of $300.00 expended by defendant for completion of the driveway, and counterclaim for the further sum of $35.00.

Defendant failed to tender an issue on his counterclaim. The jury answered in favor of plaintiff the issue submitted by the court.

From judgment in accordance with the verdict defendant appealed and assigned errors.

T. D. Bryson, Jr., and Marcellus Buchanan for plaintiff.
Hall & Thornburg for defendant.

PER CURIAM. The evidence was conflicting. There was an issue of fact for the jury which was resolved by the twelve in plaintiff's favor. The jury might well have decided the issue differently, but we see no legal ground for disturbing the verdict. All assignments of error relate to the charge of the court. When read contextually, the charge is found to be free of prejudicial error. *Weavil v. Trading Post*, 245 N.C. 106, 115, 95 S.E. 2d 533; *Taylor Co. v. Highway Commission*, 250 N.C. 533, 539, 109 S.E. 2d 243.

No error.

IN RE WILL OF FLORENCE HALL, DECEASED.

(Filed 2 March, 1960.)

1. Wills § 23b—

Testimony of testatrix's mental incapacity before and after the execution of the instrument is competent only insofar as it tends to throw light upon her testamentary capacity at the time of executing the instrument, and therefore such testimony must be limited to a reasonable time before and after the crucial time, and what is a reasonable time must be determined in accordance with the facts and circumstances of each particular case.

2. Same— Prior occurrences held too remote in point of time to be competent on issue of mental capacity.

Where abundant evidence of testatrix's mental incapacity two years before and two years after the time of the execution of the instrument is admitted, the exclusion of testimony of an occurrence some ten years prior to the execution of the instrument, when testatrix gave an acquaintance a lot and some money, and the exclusion of testimony of declarations by testatrix, a women of some age, as to her engagement for a short time to a young man, who procured a large sum of money from her some four years prior to the date the instrument was executed, *held* not prejudicial, the testimony of one witness as to such declarations by testatrix having been admitted for the limited purpose of showing the condition of testatrix's mind at the time the witness knew her, and there being no request by caveators that the testimony of the other witnesses as to such declarations should be admitted for this limited purpose.

3. Wills § 23c—

Undue influence must ordinarily be established by circumstantial evidence relating to the effect of a long course of conduct upon the mind of testatrix, and therefore proof of undue influence must usually cover a multitude of facts and circumstances forming a pattern.

4. Same—

The determination of whether incidents and circumstances relating to testatrix are too remote in point of time from the execution of the paper writing to render evidence thereof competent as tending to establish undue influence at the crucial time, is not susceptible to arbitrary rule, but must be left in large measure within the discretion of the trial court.

5 Same—

The exclusion of testimony that testatrix aided an acquaintance of long standing by giving him a lot and advancing him money *held* not erroneous, it appearing that the transaction occurred more than ten years prior to the execution of the instrument, and that the recipient of the gift was not a beneficiary under the will and was not charged with exerting any undue influence.

6. Wills § 22—

The burden is upon appealing caveators to show prejudicial error in the exclusion of evidence.

7. Wills § 23c—

Testimony of declarations of testator which disclose his state of mind or tend to show that he did or did not act freely and voluntarily at the time of executing the instrument is competent as substantive proof on the issue of undue influence, and testimony of other declarations of testator when relevant, may be admitted as corroborative evidence, although such corroborative testimony alone is insufficient to establish the fact at issue.

8. Same—

Testimony of declarations of testatrix in regard to her involvement with a young man, to whom she was engaged for a short time, and who obtained a large sum of money from her some ten years prior to the execution of the instrument, is competent solely as corroborative evidence of her state of mind at the time of executing the instrument, and where the testimony of one witness as to such declaration is admitted for this purpose, the exclusion of testimony of other witnesses of like declarations will not be held for error in the absence of request by caveators that it be admitted for the purpose of corroboration.

9. Appeal and Error § 1—

Correct rulings of the court in regard to the admission of testimony on the issues of undue influence and mental capacity on the basis of whether the evidence related to instances reasonably near in point of time to the execution of the will, will not be disturbed because of intimation by the court that it would rule upon such testimony arbitrarily on the basis of whether the instances occurred within two years before or two years after the execution of the instrument.

10. Wills § 23b—

A witness may relate incidents of conversation, conduct and demeanor of testator which tend to show testamentary capacity or want thereof, and it is not necessary that such witness have or express an opinion as to the mental capacity of testator, or that the incident or incidents related be known to another witness who expresses such opinion.

11. Same—

The exclusion of testimony of one witness as to an incident bearing upon testatrix's mental incapacity will not be held for prejudicial error when the incident excluded is remote in point of time to the execution of the paper writing and an abundance of testimony of other witnesses is admitted in regard to incidents less remote.

12. Appeal and Error § 41—

The exclusion of cumulative evidence will not be deemed prejudicial unless there is some reasonable likelihood that its admission would have changed the result of the trial.

13. Wills § 28c: Evidence § 26—

While former inconsistent wills may be competent upon the issue of undue influence, where a prior will is not offered in evidence or its unavailability shown, the court correctly excludes testimony as to the provisions of such former will, since the paper writing itself is the best evidence of its contents.

14. Trial § 32—

Where the record does not show that a request for special instructions were signed and tendered in apt time, an exception to the failure of the court to give such instructions will not be sustained.

15. Same—

It is not required that the court give instructions requested in the exact language, it being sufficient if the pertinent and applicable portions of the requested instructions are substantially given in the charge.

16. Trial § 33—

In a protracted trial it is not error for the court, after the jury had been deliberating for a number of hours, to have the jury returned to the courtroom and to remind the jury of the gravity and importance of their position and the duty imposed on them to discuss and consider the evidence with deliberation, and to compose their differences and return a verdict if they can conscientiously do so.

17. Trial § 48—

Jurors will not be allowed to attack or overthrow their verdict, nor will evidence from them be received for such purpose.

18. Trial § 52—

The failure of the court to set aside a verdict in its discretion upon learning that one of the jurors took into the jury room an Encyclopedia and read to the other jurors a definition of law involved in the suit, will not be disturbed on appeal, it appearing that the definition contained in the Encyclopedia was more favorable to appellants than the correct rule of law and that the incident, although erroneous as a matter of law, was not sufficiently prejudicial to require the exercise of the discretionary power of the court.

BOBBITT, J., concurs in result.

HIGGINS, J., dissenting.

PARKER, J., joins in the dissent.

APPEAL by caveators from *Carr, J.*, January 1959 Civil Term, of DURHAM, docketed and argued as No. 667 at Fall Term, 1959.

Mrs. Florence Hall died 8 June 1955 at the age of 85 years and left a paper writing purporting to be her last will and testament. It was probated in common form by the Clerk of Superior Court of Durham County on 10 June 1955. Fannie E. Baker, half-sister of decedent, filed caveat on 8 June 1956. Answer to caveat was filed by

W. H. Penny, the executor named in the paper writing, and by the *guardian ad litem* for the unknown heirs and next of kin of decedent. The four devisees and legatees named in the purported will are residents of Durham and none of them are related by blood or marriage to the testatrix. Twenty-eight of her heirs at law and next of kin are named in the caveat. Nine of these reside in Currituck County, two in Perquimans County, one in Cumberland County, one in Craven County, eleven in the State of Virginia, and the residences of four are unknown.

Florence Hall, *nee* Ballance, was born 17 August 1870. The record is not specific as to her place of birth, but it is inferred that Currituck is her native county. She was orphaned at an early age. A relative sent her to Oxford Orphanage when she was eight years old. She was reared and educated there. It does not appear of record that she ever again resided in her native county or eastern North Carolina. She married J. S. Hall. He was in the undertaking business and at the time of his death in 1928 was co-owner of Hall-Wynne Funeral Home of Durham. Mrs. Hall spent her adult life in Durham. She did not bear a child. She and her husband adopted a son but he died at the age of eighteen.

So far as the record discloses, the last time testatrix ever saw one of her relatives was in 1931 and none of them ever visited her in Durham. What property she had was left to her by her husband. The estimated value of her property at the time of her death was $150,000, of which approximately $42,000 was personal property consisting principally of money.

Several of caveators' witnesses testified to declarations of Mrs. Hall concerning her kinspeople. Mrs. Geneva Conklin: "She said that she didn't know if she had any people living or not, that she believed they were all dead. And once every now and then she would mention someone in her family, and where she came from and who she was before she married, and about her life in the orphanage." Mrs. Sarah Mangum: "I never heard her say anything about her relatives except for the one half-brother who carried her to the orphanage. I don't think she liked that . . . Mrs. Hall said she was going to leave the money to people that had been good to her." Mrs. Margaret Kemp Kersey: "Yes, she told me that her half-brother sent her to the orphanage when she was a young child. Yes, she was reared there until she got married."

The pertinent parts of the purported will are as follows:

"Second. At the time of executing this last will and testament I have conveyed by deed my two-thirds interest in certain property

known as 111 E. Chapel Hill Street and 108 Morris Street, now occupied by Penny Furniture Company, to my friend, W. H. Penny, subject to my life estate. I hereby affirm said conveyance and said deed, and it is my desire that said W. H. Penny have this property as conveyed to him.

"Third. At the time of executing this last will and testament I have conveyed by deed certain property known as 605 Mangum Street and a house and lot at 103 Broadway Street to my friend, W. B. Julian, subject to my life estate. I hereby affirm said conveyance and said deed, and it is my desire that said W. B. Julian have this property as conveyed to him.

"Fourth; I devise and bequeath to my friend, Hubert M. Brown, six (6) shares of Citizens National Bank Stock.

"Fifth; I have left a letter to my friend, W. H. Penny, directing him as executor of my estate to give to certain other of my friends certain personal property upon my death. I hereby devise and bequeath to my friend, W. B. Julian, such furniture and household equipment within my house on Mangum Street that I have not instructed my Executor to deliver otherwise in said letter referred to above.

"Sixth; I devise and bequeath all the residue of my estate, regardless of the type of property, whether real or personal, to my friends, Hubert M. Brown, W. B. Julian, R. R. Cannada and W. H. Penny, share and share alike. In the event that any of the four above named parties shall predecease me, then I desire that the residue of my estate shall be divided between those surviving me at the time of my death, share and share alike.

"Seventh. I have devised and bequeathed the above property to my friends and have purposely omitted devising and bequeathing any property whatsoever to any of my relatives. The above named parties have been friends of mine for many years and have rendered many favors to me and/or my deceased husband. It is the desire and intent of this will that I bequeath my property in the manner set forth above, and in order to make my intent and purpose more certain, I have conveyed certain property above referred to by deed to W. H. Penny and W. B. Julian, subject to my life estate, in order that there can be no mistake as to the intent and purpose of this will. In the event any question is raised as to said conveyance made by me, I hereby devise and bequeath said property as designated in paragraph two of this my last will and testament to my friend W. H. Penny, and I hereby devise and bequeath said property designated in para-

graph three of this my last will and testament to my friend, W. B. Julian.

"Eighth. My executor shall not be required to furnish bond.

"Ninth. I hereby constitute and appoint my friend, W. H. Penny, my lawful executor . . ."

This paper writing was signed by Florence Hall on 29 August 1951 and attested by three witnesses.

The caveat alleges that the execution of the paper writing was obtained by the undue influence of W. H. Penny, the named executor and principal beneficiary, and at the time of execution thereof testatrix lacked mental capacity to make a will.

At the trial nineteen witnesses testified for propounders and ten for caveators. The trial lasted for approximately a week. The evidence was in sharp conflict on the issues of mental capacity and undue influence.

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

"1. Was the paper writing, dated August 29, 1951, and offered for probate as the Last Will and Testament of Florence Hall, executed according to law? Answer: Yes.

"2. Did Florence Hall, at the time of the execution of said paper writing, August 29, 1951, lack sufficient mental capacity to make a will? Answer: No.

"3. Was the execution of said paper writing procured by the exercise of undue influence over Florence Hall, as alleged in the Caveat? Answer: No.

"4. Is said paper writing, dated August 29, 1951, as propounded, and each and every part thereof, the Last Will and Testament of Florence Hall, deceased? Answer: Yes."

From judgment declaring said paper writing to be the last will and testament of Florence Hall, caveators appealed and assigned errors.

Arthur Vann and Wilton Walker for Caveators, appellants.

E. C. Brooks, Jr., Reade, Fuller, Newsom & Graham, and James T. Hedrick for Propounders, appellees.

MOORE, J. Caveators noted 128 exceptions and made 60 assignments of error. The record, including assignments of error, contains 368 mimeographed pages and the briefs contain 91 pages in addition. All have been carefully read, noted and considered by the Court. It would serve no useful purpose to discuss the assignments of error *seriatim*. They will be examined in their application to the questions of law raised in appellants' brief.

(1). Caveators insist that the court erroneously set up, at the beginning of the trial, an arbitrary time limit of two years before and two years after the execution of the will on 29 August 1951 beyond which no evidence of conduct, transactions, declarations or condition of testatrix would be admitted. They contend that the court adhered to this arbitrary rule and thereby excluded relevant, material and competent evidence favorable to caveators and bearing upon the questions of mental capacity and undue influence.

Testimony of caveators' witness, Harold Mangum, to the following effect, was excluded: He is 47 years old and has known Mrs. Hall since he was 7 or 8 years of age. Prior to 1941 she gave him a vacant lot "right at the old city limits" of Durham and advanced $2,000 to help him build a house there.

Mrs. Geneva Conklin testified in substance without objection: She first became acquainted with Mrs. Hall "about April or May of 1951" and saw her often thereafter. Mrs. Hall told her she had had "quite a bit of trouble with a young man," George Whitfield, had bought him a Cadillac automobile, had given him a deed to property in Hendersonville and had gone with him on a trip to Hendersonville. Mrs. Hall further stated that Whitfield was in his early twenties, she had intended to marry him, had gotten a marriage license for that purpose but had been advised against the marriage by another man, and Whitfield had gotten her out of forty to forty-five thousand dollars. Mrs. Hall "dwelt on it all the time." Mrs. Hall was not definite in her statements as to the time of these transactions with Whitfield.

The record discloses that Whitfield was married to another woman on 15 February 1947 and such transactions as were had by testatrix with Whitfield were about the years 1946 and 1947.

At the close of the evidence for caveators the court made the following ruling with respect to Mrs. Conklin's testimony above summarized: "Gentlemen of the Jury, . . . (Mrs. Geneva Conklin) . . . stated that Mrs. Hall talked about the transactions quite a bit, and that the transactions she had with this young man seemed to be on her mind. The court instructs you that as to that testimony you may consider the fact that Mrs. Hall . . . seemed to have a transaction of that kind on her mind a good deal as it might tend to show a condition of her mind at the time Mrs. Conklin knew her. But as to the exact details of what took place between Mrs. Hall and the young man George Whitfield . . . you will not consider them, and disregard them and erase them from your mind and do not permit them to influence you in your verdict." Caveators excepted to this instruction.

In the absence of the jury, Mrs. Sarah Mangum and Mrs. Mar-

garet Kemp Kersey, caveators' witnesses, and W. B. Julian and Hubert M. Brown, propounders, related similar declarations by Mrs. Hall, some in more and some in less detail than Mrs. Conklin. Mrs. Kersey stated that her conversations with Mrs. Hall were in 1949 and that sometime prior thereto she had seen Whitfield at Mrs. Hall's home "many a-time," but she was not definite as to the year or years. Mr. Julian testified that he met Whitfield in 1948 and had conversations with Mrs. Hall about him that year. Mr. Brown stated that in 1947 Mrs. Hall showed him a marriage license, he didn't read the names on it, he asked her if she knew what she was doing and she said she had a right to do what she wanted to, that she tore the license in two in the course of the conversation.

Upon objection, the court excluded the evidence summarized in the preceding paragraph on the ground that the transactions related by Mrs. Hall to the witnesses were too remote in time, having occurred four to four and one-half years prior to the execution of the will. The record discloses no exception to the exclusion of Mr. Julian's evidence. *Jones v. Jones*, 235 N.C. 390, 391, 70 S.E. 2d 13. It does not appear from the record that caveators requested that the excluded evidence be admitted for the limited purpose of showing the state of testatrix's mind, as was done with respect to Mrs. Conklin's testimony.

We must consider the relevancy and competency of the evidence in question as it relates both to mental capacity and undue influence. The rules of admissibility of evidence are somewhat different on these issues.

Upon the second issue the ultimate inquiry was whether or not Mrs. Hall had testamentary capacity at the time she signed the paper writing on 29 August 1951. The competency of a testator to make a will is to be determined as of the date of its execution. *In re Will of Hargrove*, 206 N.C. 307, 309, 173 S.E. 577. Evidence of capacity at other times is important only in so far as it tends to show mental condition at the time of such execution. *In re Will of Stocks*, 175 N.C. 224, 225, 95 S.E. 360.

"The decided weight of authority upon the subject is to the effect that the conversation, acts, conduct and general demeanor of a testator or testatrix previous to the execution of a will, at the time of the execution, and subsequent to the execution thereof are competent and relevant upon the issue of testamentary capacity. . . . The rule of reason has been adopted as the law in this State. In the *Will of Stocks*, 175 N.C. 224, 95 S.E. 360, the Court quoted with approval the utterance of the Minnesota Court, as follows: 'Where the issue is the mental capacity of the testator at the time of making the will, evi-

dence of incapacity within a reasonable time before and after, is relevant and admissible.' Naturally, it will be inquired what is meant by reasonable time. No precise or mathematical definition can be fashioned. The term itself is ordinarily clearer than definitions. Usually definitions cloud rather than clarify. The interpretation of the term must ultimately depend upon the variability of given facts and circumstances." *In re Will of Hargrove, supra.* ". . . (T)he matter rests very largely within the discretion of the trial court according to the circumstances of the particular case. While it has been said that much latitude should be allowed in the admission of this evidence, such evidence must be sufficiently near in point of time to aid in determining the testator's condition at the time of execution, and if evidence is too remote in point of time, it may be excluded." 94 C.J.S., Wills, sec. 50, p. 752.

In the instant case, near the beginning of the trial but after six witnesses had testified and while Mrs. Conklin was on the witness stand, the court, addressing the attorneys, said: "I rather think it is a part of wisdom here to adhere as closely as possible to the rule laid down in the Hargrove case, namely, that some two years, or probably three in some instances, have not been disapproved. . . . I think you are treading on questionable ground if you undertake to exceed the Hargrove rule either way. . . . And I am rather inclined to restrict it to that period, and only pass on its competency if you go to the four years when that becomes absolutely necessary. I think the Hargrove case is authority for that. I believe if you will follow that rule you will be on safe ground, and when you get above two years before and after, you are to get in sort of dangerous territory." After making this statement, the court in nearly every instance limited the evidence with respect to testatrix's conduct, transactions, discussions and condition to that period within two years before and after the execution of the will.

In re Will of Hargrove, supra, is the case referred to by the court; it was followed very closely in the trial of the case *sub judice.* In the Hargrove case the testatrix was an elderly woman, though her exact age was not given, and she was never married. The will was executed 27 February 1906; testatrix died in 1930. Under the will nearly all property was devoted to religious purposes. Caveat was filed by certain nephews. Sixteen of caveators' witnesses had not known testatrix until after the execution of the will. They made her acquaintance at times ranging from two to twenty years after the will was made. All testified that in their opinion Miss Hargrove did not have testamentary capacity on 27 February 1906. The Court said:

"There is no evidence that the testatrix suffered with a disease tending to produce mental impairment and progressive in its nature. The opinions of the witnesses referred to were based upon disconnected and unrelated incidents. . . . At least, it can be stated that no case in this State has been called to the attention of the Court in which disconnected incidents occurring more than two or three years after the execution of the will have been approved in determining mental capacity. Therefore, the Court is of the opinion that such evidence, whether offered by propounders or caveators, is incompetent. However, it is not to be assumed that the Court intends to prescribe a time limit. The best that appellate courts can do in dealing with the subtle processes of the mind is to interpret facts in such cases by the rule of reason and common sense."

The case at bar is in some respects analogous to the Hargrove case. Miss Hargrove and Mrs. Hall were both elderly women. Neither had any immediate family. Miss Hargrove suffered no disease tending to produce mental impairment and progressive in its nature. Dr. Waldo Horne testified that he had been Mrs. Hall's physician for about fifteen years, from 1949 to 1953 he had seen her professionally three to five times a year, "her physical condition was good . . . she did have a bad heart at that time . . . she did not have a bad heart in 1949 to 1951 . . . later she had a bad heart," he treated her most of the time for "flu, colds and such things," and she did have some slight high blood pressure. There was some lay testimony of heart trouble, high blood pressure and dizziness. Mrs. Conklin testified she did not see any change in her mind from 1951 to 1953. There is no testimony of a sudden or abrupt change in her physical or mental condition at any time prior to her death.

There is abundant evidence from caveators' witnesses tending to show testamentary incapacity from 1949 to 1953. The following statements are typical: She was incapable of managing her affairs, was old, weak, nervous and mixed up emotionally. Her conversations wandered from one subject to another, she repeated things over and over, her memory was bad. She was disturbed over the affair with the young man. She imagined she heard knocking at the door, her telephone and doorbell ringing, and people eavesdropping on her telephone line. She didn't like people, said nothing good about anyone, didn't like children. She sat on her porch and made faces and vulgar remarks to passersby and people next door, would get up, turn her back and flirt her skirt-tail at them, and thought people were talking about her and laughing at her. She had no idea of the value of her

property and wanted to tear down one of her houses. Once she said if she had a gun she would "go out killing."

In the light of all the circumstances and the evidence adduced by caveators and admitted by the court, we cannot say that it was an unreasonable exercise of discretion for the court, on the question of testamentary capacity, to exclude the Mangum transactions which took place more than ten years prior to 29 August 1951, or to exclude the declarations of Mrs. Hall with respect to her transactions with Whitfield four to four and one-half years before this date. Furthermore, the court permitted the jury to consider the testimony of Mrs. Conklin with reference to the Whitfield transactions in so far as "it might tend to show a condition of her (Mrs. Hall's) mind at the time Mrs. Conklin knew her." Had a request been made and allowed for the testimony of Mrs. Mangum and Kersey and Messrs. Julian and Brown to be considered by the jury in the same manner it would have been merely cumulative. The Mangum and Whitfield transactions are isolated and disconnected incidents having no direct relation to the time of the execution of the will other than such effect as the latter may have had on testatrix's state of mind. And as to that, caveators had the benefit of it and the jury undoubtedly considered it.

We come now to the question as to whether or not the court erred in excluding this evidence on the issue of undue influence. Caveators contend that the rejected evidence shows definite susceptibility to influence on the part of testatrix.

"Undue influence is frequently employed surreptitiously and is chiefly shown by its results. When the issue of undue influence is raised, the question presented is usually one of the effect of a long course of conduct upon the mind of the testator at the time the will is made, and the evidence by which it is established is usually circumstantial. *In re Will of Lomax,* 226 N.C. 498, 39 S.E. 2d 388; (and other citations). In the Lomax case, speaking of evidence to show undue influence in a will case, the Court said: 'almost necessarily the proof must cover a multitude of facts or circumstances going into the pattern' . . ." *In re Will of Thompson,* 248 N.C. 588, 593, 104 S.E. 2d 280.

The question of remoteness of evidence bearing on the issue of undue influence is, to a large extent, in the discretion of the trial court; there is no arbitrary rule as to the time over which the inquiry may extend. *In re Everett* (Vt. 1933), 166 A. 827; Annotation: 124 A.L.R., Will Contest — Remoteness, sec. II, pp. 434 *et seq.*

The court ruled that testatrix's transactions with Mangum were too remote. It must be borne in mind that the caveat alleges that the purported will was obtained by the undue influence of W. H.

Penny. Mangum's transactions occurred more than ten years before the making of the will and had no relation to any of the activities of Penny. It does not appear from the record that Penny knew Mangum or had any knowledge of Mangum's dealings with Mrs. Hall. Mrs. Hall knew Mangum when he was a little boy, and prior to 1941 gave him a lot in the edge of town and *advanced* him $2,000 to aid in building a home. The probative value of these incidents in showing susceptibility to influence is trivial. Besides, they have no bearing at all upon Penny's exertion of undue influence upon Mrs. Hall. They are not only remote in time but remote in effect. Mangum was not named in the will. The exclusion of this evidence was proper and not an unreasonable exercise of discretion. The burden is upon caveators to show prejudicial error. *In re Will of Thompson, supra,* at page 598.

The Whitfield transactions appear only through the declarations of testatrix.

It is generally held that "Declarations made either before or after the execution of the will, but not part of the *res gestae,* are mere hearsay and are not admissible as direct evidence of the exercise of fraud or undue influence. They may be received in evidence, however, to show the state and condition of the testator's mind. Thus, they may be admitted to prove or disprove his weakness of mind and consequent susceptibility to undue influence, or his feelings and attitude toward, and relations with, persons mentioned in or excluded from his will, . . . In some cases, where there has been other independent evidence of undue influence, declarations of the testator have been admitted as corroborative evidence; and on the other hand, it is held that such declarations are admitted only as corroborative evidence, and cannot properly be received where there has been no foundation laid with other evidence. Thus, where undue influence is shown by other evidence, the testator's declarations may be admitted in evidence, not to show the existence or exercise of such influence, but to show the effect it had on his mind. When the courts do permit the declaration of a testator to be received in evidence, they do so with great caution and confine it strictly to the purpose for which it is admitted. . . . Declarations of the testator which show that he was influenced by a person other than the one charged with procuring the will by undue influence has been held to be inadmissible. . . . Declarations made by the testator, in order to be admissible, must be made at a time not too remote from the making of the will. Where no time is fixed to indicate how long before the making of the will the declaration was made, such statement is not admissible. Declarations made a long time prior or subsequent to the time of the execution of the

will may be inadmissible as too remote. The determination of whether or not a declaration is too remote has been held to rest somewhat within the discretion of the court, and that remoteness was to be measured in terms of causation and relation to the issue, rather than in terms of time." 94 C.J.S., Wills, sec. 247, pp. 1112-1116.

Our Court has not always followed the majority view as to admissibility and effect of testator's declarations with respect to the issue of undue influence. *In re Will of Ball,* 225, N.C. 91, 33 S.E. 2d 619; *In re Craven,* 169 N.C. 561, 86 S.E. 587; *In re Fowler,* 159 N.C. 203, 74 S.E. 117; *Linebarger v. Linebarger,* 143 N.C. 229, 55 S.E. 709; *Kirby v. Kirby,* 44 N.C. 454; *Howell v. Barden,* 14 N.C. 442; *Reel v. Reel,* 8 N.C. 248. *In re Will of Ball, supra,* has a clear and clarifying discussion of this subject. There it is said: "So then with us the rule comes to this. Evidence of declarations of the testator which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. *In re Fowler, supra.* Other declarations, when relevant, may be admitted as corroborative or supporting evidence, but alone they are not sufficient to establish the fact at issue. *Lee v. Williams,* 111 N.C. 200, 16 S.E. 175. See also *In re Shelton's Will,* 143 N.C. 218; *In re Welborn's Will,* 165 N.C. 636, 81 S.E. 1023; *In re Mueller's Will,* 170 N.C. 28, 86 S.E. 719; *In re Bailey,* 180 N.C. 30, 103 S.E. 896."

Whitfield is not a beneficiary under the will. His transactions were not connected with or related to any acts or conduct of Penny. There is no evidence that Penny knew him or had any knowledge of his dealings with Mrs. Hall. Mrs. Hall's declarations concerning her transactions with Whitfield are at best only corroborative evidence and admissible only to show her state of mind and her susceptibility to influence. They are not substantive evidence of the truth of the transactions referred to by her, and as to these transactions themselves her declarations are hearsay. The court admitted the testimony of Mrs. Conklin with respect thereto as bearing upon the state of testatrix's mind. This was proper and admission for any other purpose, over objection and request to limit, would have been error. As already indicated, caveators got the benefit of this testimony under proper instructions. There was no request by caveators for admission of the further evidence on this point for this restricted purpose.

Without objection testimony of many witnesses was admitted to the following import: On occasions Mrs. Hall said she didn't have

a man but could get her a man, the money she was leaving behind would go to Mr. Bennett, a good friend of hers, and other friends. She liked to talk about men and would discuss them and referred to certain men as "nice looking" and "handsome." She was partial to men. When she was "courting" she wore "up to date clothes," said she had a sweetheart to take her out, said she was courting Richard Bennett and said she used to go with George Whitfield and Harold Mangum. She changed a good bit when she went around with boys, didn't want to talk about anything except going with them. The thing she dwelt on most was about young girls and boys, the way young girls acted. There was a man calling at Mrs. Hall's home in 1948 and 1949. He would go there mostly at night. He wasn't married and went with her until the time of her death. When he called she would put the lights out. She said she had helped several young men and this was her form of charity. Bennett fixed her clock and brought her books to read.

There was no prejudicial error in the court's rulings. We do not find them arbitrary in the application made to the evidence offered. The reasons given for the rulings were partially at variance with applicable rules of law, but where, as here, no prejudice is involved the rulings will not be held erroneous. The trial court has the duty not only to insure to all litigants a full and fair hearing but to keep the inquiry within reasonable bounds and bring the proceedings to a reasonably expeditious termination.

(2) In the absence of the jury A. T. Fowler, caveators' witness, testified: He had operated a service station at the corner of Mangum and Broadway for twelve years. Sometime in 1948 a sewer pipe had been laid through Mrs. Hall's driveway. The excavation for the pipe had been filled but the dirt had not settled. She asked Fowler to pack the dirt by running his truck over the driveway and he at first agreed. She then said: ". . . when you get it packed, stay out." This statement annoyed him and he did not pack the dirt. He explained his attitude toward her by saying: "She didn't bother me and I didn't bother her." He expressed no opinion as to her mental competency. The court excluded the evidence from the consideration of the jury and assigned as one reason the remoteness in time.

Counsel for caveators stated that he had proof of any number of isolated incidents such as Fowler had related. "They run into the hundreds . . . just isolated incidents," from which the witnesses "would not have an opinion about her mental condition." After indicating that he "could not rule on it without hearing it," the court said: "Unless they are related to the subject matter that has already

been offered, I don't think they would be competent. That is where the witness comes up with an entirely new act on her part that no other witness has seen or observed, and has no opinion about her mental capacity and offers none, I don't think that would be competent."

The court's statement, next above, is in error. *In re Will of Tatum,* 233 N.C. 723, 727, 65 S.E. 2d 351. In the *Tatum* case, after stating the rules under which a lay witness may express an opinion as to the testamentary capacity of a testator, the court declared: "And, of course, a nonexpert witness who appears to be qualified to give an opinion, nevertheless may refrain from doing so, and elect instead to relate the facts observed by him, and describe as best he can the acts, conduct, and demeanor of the person under investigation. Indeed, prior to the notable decision of this Court (delivered by *Gaston, J.*) in *Clary v. Clary, supra* (24 N.C. 78), it seems that under the rule which prevailed generally in the United States at that time, a lay witness was permitted to relate only observed facts, and never allowed to give an opinion based thereon. Wigmore on Evidence, Third Edition, Vol. III, sec. 1933, p. 31 *et seq.*" It is the law in this jurisdiction that a witness may relate incidents of conversation, conduct and demeanor of testator which tend to show testamentary capacity, or want thereof. And it is not necessary that such witness have or express an opinion as to mental competency of testator, or that the incident or incidents related be known to another witness who did express such opinion.

Caveators did not offer in evidence the "hundreds" of incidents or any of them. So the court's statement was only a declaration, in the abstract, unrelated to anything that actually transpired at the trial save, perhaps, the testimony of Fowler. If the exclusion of Fowler's evidence was erroneous, the error is not sufficiently harmful to warrant a new trial in view of the abundance of evidence of the acts and conduct of Mrs. Hall at a time less remote. The exclusion of cumulative evidence will not be deemed prejudicial unless there is some reasonable likelihood that its admission would have changed the result of the trial. *Fleming v. R. R.,* 236 N.C. 568, 575, 73 S.E. 2d 544; *Freeman v. Ponder,* 234 N.C. 294, 308, 67 S.E. 2d 292; *Realty Co. v. Demetrelis,* 213 N.C. 52, 55, 194 S.E. 897.

(3) Hubert M. Brown, a beneficiary under the will in controversy, was asked on cross-examination: "Mr. Brown, were you the primary beneficiary under Mrs. Hall's will of 1945?" Objection to the question was sustained. Later the court excluded testimony of the same

witness to the effect that W. H. Penny was not a beneficiary under the former will made in 1945.

It is generally recognized ". . . that former wills of the testator, executed at a time when undue influence is not charged or does not appear to have been present, which contains provisions inconsistent with those of the will in contest, may be admitted . . . in support of a charge of undue influence." 57 Am. Jur., Wills, sec. 409, p. 292. See also *In re Will of Mueller,* 170 N.C. 28, 30, 86 S.E. 719; Annotation: 82 A.L.R., Mental Capacity or Undue Influence, p. 970.

Even so, it does not appear from the record that the will of 1945 was ever offered in evidence by caveators or its unavailability shown. The paper writing itself was the best evidence of its contents. *Pegram-West v. Insurance Co.,* 231 N.C. 277, 284, 56 S.E. 2d 607.

(4) Caveators presented to the court written request for special instructions on the issue of undue influence. They noted an exception to the failure of the court to give these instructions.

The request appears in the record following the court's charge and the jury's verdict and is not signed by counsel. There is nothing to indicate that it was presented in apt time. "Requests for special instructions to the jury must be . . . Signed by counsel submitting them . . . (and) must be submitted to the trial judge before the judge's charge to the jury is begun." G.S. 1-181.

Where the prayer for special instructions is properly presented, the court ". . . is not required to give them in the exact words used, and a substantial compliance with the request is sufficient." 2 N.C. Practice and Procedure: McIntosh, sec. 1517, p. 56; *Michaux v. Rubber Co.,* 190 N.C. 617, 619, 130 S.E. 306. While it does not appear that the prayer for instructions was properly made in the instant case, we find that the pertinent and applicable portions of the requested instructions were substantially given to the jury in the judge's charge.

(5) After the jury had deliberated for approximately seven and one-half hours, the court caused them to return to the courtroom and inquired of their progress in arriving at a verdict. They indicated that they were numerically divided ten to two and had made no progress in the last six ballots. The court they stated: "I presume you gentlemen realize was (what) a disagreement means. It means, of course, that it will be another week of the time of the Court that will have to be consumed in the trial of this action again. I don't want to force you or coerce you in any way to reach a verdict, but it is my duty to tell you that it is the duty of the jurors to try to reconcile their differences and reach a verdict if it can be done without any surrender

of one's conscientious convictions. You have heard the evidence in the case. A mistrial, of course, will mean that another jury will have to be selected to hear the case and evidence again. And the Court recognizes the fact that there are sometimes reasons why jurors cannot agree. The Court wants to emphasize the fact that it is the duty of jurors to do whatever they can to reason the matter over together as reasonable men and to reconcile the difference, if such is possible, without the surrender of conscientious convictions and to reach a verdict. I will let you resume your deliberations and see if you can." The jury retired and thirty minutes later returned the verdict.

Appellants contend that the quoted statement was coercive and intimidating and compelled an unwilling jury to reach a verdict. "The trial judges have no right to coerce verdicts or in any manner, either directly or indirectly, intimidate a jury." *Trantham v. Furniture Co.*, 194 N.C. 615, 616, 140 S.E. 300. But we find nothing in Judge Carr's remarks that tends to any such result. They did not indicate any opinion of the court as to the weight of the evidence or what the verdict should be. The court did not know in whose favor the majority of the jury was voting. Instructions in almost identical words have been approved by this Court. *State v. Brodie,* 190 N.C. 554, 557, 130 S.E. 205. Judge Carr's comments are in accord with a long line of decisions in this jurisdiction. *State v. Barnes,* 243 N.C. 174, 90 S.E. 2d 321; *State v. Lefevers,* 216 N.C. 494, 496-7, 5 S.E. 2d 552; *Nixon v. Oil Mill,* 174 N.C. 730, 734, 94 S.E. 410, and many others. "The law anticipates a verdict in every case after the jury have had a reasonable time for consideration." *Osborne v. Wilkes,* 108 N.C. 651, 666, 13 S.E. 285. ". . . (N)o juror, from mere pride of opinion, hastily expressed during the consultation, should refuse to agree . . . it (is) the privilege, and, indeed, the duty of each juror to reason with his fellows concerning the facts in the case, with an honest desire to arrive at the truth, and with a view of arriving at a verdict." *Warlick v. Plonk,* 103 N.C. 81, 83, 9 S.E. 190. Certainly it is not error for the trial court to remind the jury of the gravity and importance of their position and the duty imposed on them to discuss and consider the evidence with deliberation, compose their differences and return a verdict if they can conscientiously do so.

(6) Appellants moved to set aside the verdict and in support of the motion presented to the court affidavits of eight of the jurors who served at the trial. The affidavits are to the effect that one of their number brought to the jury room volume 27 of the Encyclopedia Americana containing a definition of "undue influence," that the definition was read to the jury and a number of them studied it indi-

vidually, and that the jury was influenced thereby. One or more of the affiants stated that the jury felt that Penny had influenced Mrs. Hall in making her will but decided in favor of the propounders because there was no evidence of force or violence.

The Encyclopedia definition of "undue influence" reads: "UNDUE INFLUENCE, a legal term of frequent use in testamentary suits, and sometimes in cases of contested elections. Undue influence in the making of a will is exerted when the testator is so unnaturally influenced that he makes his will in favor of someone other than his natural heirs, — undue influence being oftenest charged when the testator's mind was infirm or weakened by illness and his will was made while he was under the supervision of the outside beneficiary. Where undue influence is proved the court will set a will aside or allow compensation. See WILL.

"In voting, undue influence consists of force, violence, restraint, threat or intimidation practiced at the polls to influence votes to the way of thinking of the person making such demonstration. When proved it vitiates the election and subjects the perpetrator to criminal action. The burden of proof rests on the party making the accusation." Caveators excepted to the denial of the motion to set aside the verdict.

"The jury should make up their verdict upon evidence offered to their senses; that is, what they see and hear in the presence of the court, and should not be allowed to take papers which have been received as competent evidence into the jury room, so as to make a comparison of handwriting, or draw any other inference which their imagination may suggest, because the opposite party should have an opportunity to reply to any suggestion of an inference contrary to what was made in open court. This being the rule as to papers introduced as competent evidence, the use of papers not used in evidence would, of course, be excluded in any case." 2 N.C. Practice and Procedure, McIntosh, sec. 1545, p. 69; *State v. Stephenson,* 218 N.C. 258, 265, 10 S.E. 2d 819; *Brown v. Buchanan,* 194 N.C. 675, 679, 140 S.E. 749. "It is reversible error to permit the jury to take law books with them so that they can determine the law for themselves . . . (I)t generally is ground for reversal that the jury obtained and took into the jury room a dictionary which they consulted to determine the meaning of legal or other terms, which they do not understand." 89 C.J.S. Trial, sec. 465(b), p. 102.

We are here confronted with the fact that all the evidence of use of the Encyclopedia came from the jurors themselves. "It is firmly established in this State that jurors will not be allowed to attack or

overthrow their verdicts, nor will evidence from them be received for such purpose." *Lumber Co. v. Lumber Co.*, 187 N.C. 417, 418, 121 S.E. 755, and cases there cited. This rule has been steadfastly adhered to. *Lambert v. Caronna*, 206 N.C. 616, 621-2, 175 S.E. 303; *Campbell v. R. R.*, 201 N.C. 102, 108, 159 S.E. 327; *Newton v. Brassfield*, 198 N.C. 536, 539, 152 S.E. 499. The rule is a salutary one. If it were otherwise, every verdict would be subject to impeachment.

In our opinion, the patient, painstaking, impartial and learned judge who presided at the trial below would have set the verdict aside in his discretion, notwithstanding the foregoing rule of law, had he considered that the incident worked an injustice to appellants. Indeed, it is difficult to perceive how the definition in question could have prejudiced caveators, despite the affidavits of some of the jurors. A juror sufficiently literate and intelligent to have gained any guidance therefrom would not have applied the portion relating to "elections." It would be ridiculous to suggest that the jury might have thought for one moment that they were passing upon an election case or a case involving undue influence exerted "at the polls." The portion of the definition relating to will contests is more favorable to caveators than that applied by our courts.

"The rationale of the doctrine of undue influence sufficient to avoid a will is that influence is exerted by various means of a kind that so overpowers and subjugates the mind of the testator as to destroy his free agency, and to make him execute a will, which, although his, in outward form, is in reality not his will, but the will of another person, which is substituted for that of the testator. (Citing cases). The undue influence which renders a will invalid must be of a kind which operates on the mind of the testator at the very time the will is made, and causes its execution. (Citing authorities). 'It is not material when the undue influence was exercised, if it was present and operating on the mind of the testator at the time the will was executed.' (Citing authority)." *In re Will of Thompson, supra,* at page 593. ". . . (U)ndue influence is a fraudulent, overreaching or dominant influence over the mind of another which induces him to execute a will or other instrument materially affecting his rights, which he would not have executed otherwise. Or, to put it another way, it means the exercise of an improper influence over the mind and will of another to such an extent that his professed act is not that of a free agent, but in reality is the act of the third person who procured the result." *In re Will of Franks,* 231 N.C. 252, 260, 56 S.E. 2d 668.

We find no error in the refusal of the court to permit the jury to impeach the verdict.

(7) As already indicated, there were many assignments of error. Those not discussed in this opinion present no novel or unusual questions of law. We have carefully considered each of them and find no error that would warrant a new trial.

No error.

BOBBITT, J., concurs in result.

HIGGINS, J., dissenting: The dominant purpose of a jury trial is to determine and declare the truth with respect to disputed issues of fact. The pleadings, the evidence, the argument of counsel, and the charge of the court — these and these only — form the basis for the verdict. The jurors sit together as a body, return the verdict as a body, then disperse. It is a matter of public policy that they should not thereafter be permitted individually to impeach what they did as a body.

However, when it develops that a verdict was influenced by something entirely extrinsic to the trial, taken into the jury room and used in the deliberation which has, or may have, influenced the verdict, it thereby loses its shield from impeachment. This is so for the simple reason that the verdict was not rendered as the law contemplates. No doubt the juror who took his own law to the jury room and used it for the purpose of influencing the verdict, acted in good faith. A juror who is not satisfied with the law as laid down by the court has no right to supplement it by his own research. If this be proper, the next juror who is dissatisfied with the evidence may want to bring in another deed or to call another witness.

In denying the motion to set aside the verdict, the court said: " . . . assuming that there is a variance with the court's instructions, and assuming that some of the jurors followed that in lieu of what the court said, yet can you go into the jury room and prove that without running right head-on into that wall that has been put up that jurors cannot impeach their own verdict. That is the stone wall."

The court ordered the affidavits of the jurors stricken from the motion to set the verdict aside. It seems apparent the court made its ruling refusing to set aside the verdict as a matter of law and not of discretion. I think it was error not to inquire and to act in the court's discretion.

Too, I am unable to agree with the statement in the majority opinion that the best evidence rule prevents a witness from testifying to the contents of a former will (not involved in the litigation) without accounting for the loss or nonproduction of the document.

I vote to set the verdict aside and award a new trial.

I am authorized to say that PARKER, J., joins in this dissent.

HAZEL M. LANE v. JESSIE L. DORNEY, EXECUTRIX OF THE ESTATE OF HERBERT G. DORNEY, DECEASED

AND

V. WILTON LANE, ADMINISTRATOR OF THE ESTATE OF HERBERT S. LANE, DECEASED v. JESSIE L. DORNEY, EXECUTRIX OF THE ESTATE OF HERBERT G. DORNEY, DECEASED.

(Filed 2 March, 1960.)

1. Automobiles § 36—

The doctrine of *res ipsa loquitur* is not applicable upon a mere showing of the wreck of an automobile on the highway, but evidence that the driver ran off the road to the right while attempting to negotiate a long curve to the left, with further evidence, physical or direct, tending to show that this was the result of the failure of the driver to exercise due care to maintain a proper lookout and to keep his car under control, may raise an inference of negligence sufficient to take the issue to the jury.

2. Appeal and Error § 53—

Petition to rehear the prior decision of the court sustaining judgment of nonsuit allowed in this case for error of law, it appearing that the physical facts and the oral testimony were sufficient to permit an inference of negligence and to take the issue to the jury.

3. Negligence § 24a—

Nonsuit is proper in an action to recover for negligence only if the evidence is free from material conflict and the only reasonable inference to be drawn therefrom is that there was no negligence on the part of the defendant or that the negligence of the defendant was not the proximate cause of the injury.

4. Automobiles § 41b— Evidence held sufficient to support inference that driver failed to exercise due care to maintain a proper lookout and keep his car under control.

Evidence tending to show that the driver of an automobile while attempting to negotiate a long curve to the left ran off the right side of the highway, hit an embankment and overturned, together with evidence of a tire mark leading off the road from the edge of the pavement and that the tire mark was made by this car, that the road was hardsurfaced, dry and free of defects, that no other vehicles were on the highway at the time and place of the accident, with further testimony of a passenger in the car that the driver was in good health and the vehicle in good mechanical condition, that the driver and the front seat passenger were talking, and that nothing unusual occurred before the wreck, *is held* sufficient to permit an inference that the wreck was the result of the driver's failure to maintain a proper lookout and keep his car under control, and therefore judgment as of nonsuit was improperly entered.

5. Negligence § 24a—

Negligence need not be established by direct and positive evidence,

but may be established by circumstantial evidence, either alone or in combination with direct evidence.

6. Automobiles §§ 39, 41a—

Physical facts at the scene of the accident may be sufficiently strong within themselves, or in combination with other evidence, to permit the legitimate inference of negligence on the part of the driver.

DENNY, J., concurring in part and dissenting in part.

WINBORNE, C. J., and MOORE, J., concur in the opinion of DENNY, J.

On petition by plaintiffs to rehear decision in 250 N.C. 15, 108 S.E. 2d 55.

McLendon, Brim, Holderness & Brooks By: L. P. McLendon, Jr., C. T. Leonard, Jr., for plaintiffs, appellants.

Jordan, Wright, Henson & Nichols, William D. Caffrey, and Wharton & Wharton, for defendant, respondent.

HIGGINS, J. Pursuant to the petition and order entered by the two Justices to whom it was referred, the cases were reheard by the full Court. The parties filed new briefs and made extended oral arguments. The petition presents the questions whether the Court, in the original decision, committed errors of law in sustaining the judgment of nonsuit (1) by refusing to apply the rule *res ipsa loquitur*, and (2) by overlooking "the physical facts and direct testimony in the record . . . sufficient to raise an inference of negligence."

The cases are now before us for our determination whether error of law was committed either in holding *res ipsa loquitur* inapplicable, or the evidence of actionable negligence insufficient to go to the jury.

Is *res ipsa loquitur* applicable? The expression means the thing (or the transaction) speaks for itself. Its foundation is inference from facts and is based on probabilities. The classic example is a train collision. The showing of a collision and injury permits an inference of negligence on the part of the railroad. This is so for the sound reason the railroad is in exclusive possession of and is responsible for the condition of the road, for the equipment, and for the operation of all trains. If a collision occurs, the probability is, and it is fair to assume it resulted from the negligence of some company agent.

For a reason equally sound, negligence should not be presumed from the mere showing a driver's automobile wrecked on the highway. A driver is neither responsible for the condition of the road nor for the traffic on it. Consequently many combinations of acts, conditions, and circumstances for which the driver may not be responsible, have,

or may have, controlling influence in causing accidents. A tire may blow. The vehicle may skid. Mechanical defects may develop. The driver may have a sudden seizure. He may be confronted by sudden emergencies for which he is not responsible. Another vehicle may force him off the road. As a prerequisite to the presumption of driver responsibility, some evidence, physical, direct, or a combination of both, should be offered that other probable causes were absent, leaving the fair inference the accident resulted from the driver's negligence.

Petitioners cite *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477, as holding *res ipsa loquitur* applicable. On the contrary, the case held the plaintiff had offered evidence tending to support his allegations that the defendant operated "a motor vehicle without due caution and circumspection . . . in a manner so as to endanger . . . person or property . . . at a speed greater than is reasonable and prudent under the conditions then existing." *Etheridge* is not authority for holding that evidence of an accident and injury makes out a case for the jury.

The members of the Court are in agreement that *res ipsa loquitur* is not applicable to these cases. The former decision to that effect was correct, and is approved. However, there is disagreement as to whether the evidence offered made out a case for the jury. This presents a question of law. *McFalls v. Smith,* 249 N.C. 123, 105 S.E. 2d 297; *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463.

The respondent insists the petition should be dismissed for that all the evidence was before the Court on the original hearing and that nothing was overlooked; that the evidence left the cause of the accident in the realm of speculation. This view is illustrated by the following quotations from the original opinion: "Just what happened to bring about the 'great impact' . . . is pure guesswork. . . . Further it is noted that in the case in hand the evidence discloses nothing except that there was an unexplained and mysterious upset of the car being driven by the testator of the defendant. He died in the accident. Thus the record leaves the case wholly in the area of speculation and conjecture."

The petitioners admit the majority opinion did not overlook the words of the witnesses. However, they contend that the above quotations show the Court did overlook the legal effect; that when the physical facts and the oral testimony are analyzed they present a case for the jury. *Boone v. Matheny,* 224 N.C. 250, 29 S.E. 2d 687.

Squarely before us, therefore, is the question whether the evidence was sufficient to survive the motion for nonsuit and to require a jury trial. "The rule applicable in cases of this kind is that if diverse in-

ferences may reasonably be drawn, some favorable to the plaintiff and others to the defendant, the cause should be submitted to the jury. . . ." *Stacy, C. J.*, in *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793. . . . "We must be guided by the accepted rule that the question of the liability of a defendant in an action for negligence can be taken from the jury and determined by the court as a matter of law by an involuntary nonsuit only in case the evidence is free from material conflict, and the only reasonable inference to be drawn therefrom is either that there was no negligence on the part of the defendant, or that the negligence of the defendant was not the proximate cause of the plaintiff's injury." *Ervin, J.*, in *Thomas v. Motor Lines*, 230 N.C. 122, 52 S.E. 2d 377. . . . "A nonsuit on the issue of negligence should not be allowed unless the evidence is free from material conflict and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of the defendant, or that his negligence was not the proximate cause of the injury." *Denny, J.*, in *Goodson v. Williams*, 237 N.C. 291, 74 S.E. 2d 762.

The testimony presented by the plaintiffs disclosed that Mr. Dorney was driving the car from Greensboro to High Point in the nighttime. He was "perfectly well." His vehicle was in good mechanical condition. The traveled portion of the highway was hard surfaced, 18 feet wide with dirt shoulders three feet wide. The surface was dry and free of defects. No other travelers were using the highway at the time and place of the accident. The vehicle, with Mr. Dorney at the wheel, going downhill on a long, sweeping curve to the left, failed to make the curve, ran off the road to the right over an embankment, apparently jumped a stream, landed on its top, "completely demolished." On the right shoulder the investigating officer discovered a tire mark. "The nature of the tire mark was an indenture in the shoulder of the road leading off from the edge of the pavement over to the steps." The steps leading down from the level of the road to the level of the stream were concrete, with concrete side walls. The tire mark, the steps, and the wrecked vehicle were all on the right-hand side of the Greensboro to High Point road. There was no evidence as to any other tire marks on the dirt shoulder or any evidence to suggest the vehicle may have left the road at any place other than as indicated by the tire mark described by the officer.

Mrs. Dorney was in the car with her husband and Mr. and Mrs. Lane. Mr. Dorney and Mr. Lane were talking. "I was not conscious of anything unusual happening on the road before this car was involved in this crash. I do not know whether there was any skidding of the car before the crash. I was conscious of none. I was not con-

scious of any swerving while it was on the paved portion of the road. I was not conscious of the car hitting anything in the road or anything of that sort." There was no evidence of a blowout, of blinding lights, of skidding, or of mechanical defects, or of negligence on the part of another traveler. Thus Mrs. Dorney's evidence, though somewhat negative, nevertheless tends to remove everything that might have influenced the movement of the car, causing it to leave the road, save and except the hands of the man at the wheel. We may assume the wife saw her husband's acts and conduct in the light not unfavorable to him, and yet she saw nothing that would tend to excuse the driver's failure to keep the vehicle on the road. Why Mr. Dorney drove off the road may be "guesswork," but the fact remains he was at the wheel and in control of the vehicle when it left the road. His wife could offer nothing by way of excuse. "What occurred immediately prior to and at the moment of impact may be established by circumstantial evidence, either alone or in combination with direct evidence." *Kirkman v. Baucom,* 246 N.C. 510, 98 S.E. 2d 922. "Evidence of actionable negligence need not be direct and positive. Circumstantial evidence is sufficient, either alone or in combination with direct evidence." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411.

Physical facts tell their own story. They may be sufficiently strong within themselves, or in combination with other evidence, to permit the legitimate inference of negligence on the part of the driver. ". . . Physical facts are sometimes more convincing than oral testimony." *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88. " . . . What the physical facts say when they speak is ordinarily a matter for the determination of the jury." *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912.

The case of *Ivey v. Rollins,* 250 N.C. 89, 108 S.E. 2d 63, on rehearing, 251 N.C. 345, is distinguishable. In that case the evidence disclosed that the driver, 14 years of age, his mother and his brother, age 4, were riding in the front seat of the Chrysler and the father and the dog were in the rear seat. The vehicle was equipped with power steering mechanism, "extremely sensitive to the touch." One eye-witness some distance away saw the vehicle suddenly swerve to the right and strike an abutment to a bridge. In the accident all occupants, including the dog, were killed. Whether the driver or the little brother intentionally or unintentionally moved the sensitive steering mechanism, causing the wreck, is undisclosed. We have nothing from the inside of the car, or from the outside for that matter, from which we may ascertain what occurred at the time of the accident. So, non-

suit seemed justified, though it must be admitted the case is somewhat borderline.

In these cases, however, the driver's wife, adversely examined, tended to remove other possible contingencies, leaving the permissible inference that her husband was careless in the discharge of his duties to his passengers by failing to see the curve which he should have seen, or by failing to have his vehicle under such control as would enable him to keep it on the road. Failure in either particular would constitute negligence. "From the foregoing evidence it is inferable that the defendant in rounding the curve failed to exercise due care to maintain a proper lookout and to keep his car under control, and that he was driving recklessly in violation of G.S. 20-140. The evidence was sufficient to carry the case to the jury on the issue of actionable negligence." *Tatem v. Tatem,* 245 N.C. 587, 96 S.E. 2d 725.

After careful and critical reconsideration of the evidence offered on the original hearing, we now conclude the evidence was sufficient to raise issues of fact for the jury, and that the nonsuit was erroneous. The cases will go back for a jury trial.

Petition allowed.

DENNY, J., concurring in part and dissenting in part. I concur with the majority opinion insofar as it holds that the doctrine of *res ipsa loquitur* is not applicable to the facts in these cases, which were consolidated for trial by consent. *Ivey v. Rollins,* 251 N.C. 345, 111 S.E. 2d 194; *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.

On the other hand, in my opinion, without applying the doctrine of *res ipsa loquitur* to the facts in these cases, the evidence leads only into the field of conjecture, speculation and surmise as to how and why the accident occurred. Such evidence is insufficient to carry a case to the jury. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670, and cited cases.

In the last cited case, *Ervin, J.,* speaking for the Court, said: "In an action for death by wrongful act based on negligence, the burden rests on the plaintiff to produce evidence, either direct or circumstantial, sufficient to establish the two essential elements of actionable negligence, namely: (1) That the defendant was guilty of a negligent act or omission; and (2) that such act or omission proximately caused the death of the decedent. • • •

"To carry this burden by circumstantial evidence, the plaintiff must present facts which reasonably warrant the inference that the decedent

was killed by the actionable negligence of the defendant. *Wyrick v. Ballard Co., Inc.*, 224 N.C. 301, 29 S.E. 2d 900; *Corum v. Tobacco Co.*, 205 N.C. 213, 171 S.E. 78; *Lynch v. Telephone Co.*, 204 N.C. 252, 167 S.E. 847. An inference of negligence cannot rest on conjecture or surmise. *Smith v. Duke University*, 219 N.C. 628, 14 S.E. 2d 643; *Mills v. Moore*, 219 N.C. 25, 12 S.E. 2d 611; *Ham v. Fuel Co.*, 204 N.C. 614, 169 S.E. 180; *Grimes v. Coach Co.*, 203 N.C. 605, 166 S.E. 599; *Rountree v. Fountain*, 203 N.C. 381, 166 S.E. 329. This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof. *Cogdell v. Railroad*, 132 N. C. 852, 44 S.E. 618; *Wollard v. Peterson*, 143 Kan. 566, 56 P. 2d 476."

"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; Whitson v. Frances*, 240 N.C. 733, 83 S.E. 2d 879; *Robbins v. Crawford*, 246 N.C. 622, 99 S.E. 2d 852; *Williams v. McSwain*, 248 N.C. 13, 102 S.E. 2d 464; *Williamson v. Randall*, 248 N.C. 20, 102 S.E. 2d 381; *Sloan v. Light Co.*, 248 N.C. 125, 102 S.E. 2d 822.

In *Whitson v. Frances, supra*, this Court said: "When, in a case such as this, the plaintiff must rely on the physical facts and other evidence which is circumstantial in nature, he must establish attendant facts and circumstances which reasonably warrant the inference that the death of his intestate was proximately caused by the actionable negligence of the defendant."

Likewise, in the case of *Williamson v. Randall, supra, Parker, J.*, speaking for the Court, said: "The plaintiffs, to carry their case to the jury against the defendant on the ground of actionable negligence, must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts. *Parker v. Wilson*, 247 N.C. 47, 100 S.E. 2d 258."

Moreover, in the case now before us, the evidence of Mrs. Dorney, while negative in character, completely negatives any attendant facts, direct or circumstantial, that might explain the cause of the accident. The plaintiff's evidence, exclusive of showing the injuries sustained, supports one fact and one fact only — the mere happening of an accident. There is no evidence tending to show any defect in the automobile, or that it was being operated at an excessive rate of speed or in any other negligent manner. *Springs v. Doll, supra.* This was not the case in *Etheridge v. Etheridge, supra*, as stated in the majority opinion, to wit: " • • • the court held the plaintiff had offered evidence

tending to support his allegations that the defendant operated ' a motor vehicle without due caution and circumspection * * * in a manner so as to endanger * * * person or property * * * at a speed greater than is reasonable and prudent under the conditions then existing.' " There is no such evidence in the present case.

The evidence before us now is the same evidence that was before us at the Fall Term 1958 (decided at the Spring Term 1959, with all members of the Court present and participating), and the points now raised were raised and forcefully argued by counsel for the plaintiffs on the original appeal, and the questions were duly and carefully considered in arriving at the decision filed on 8 April 1959. *Lane v. Dorney*, 250 N.C. 15, 108 S.E. 2d 55. This fact is confirmed by the dissenting opinion filed at the time the original opinion was filed. The writer of the dissenting opinion stated: "From the evidence, which is fully and fairly stated in the opinion, I draw inferences different from those expressed by the Chief Justice."

When these consolidated cases were originally before us I was of the opinion that the plaintiff had offered no evidence of sufficient probative value to warrant the submission of the cases to the jury, in the absence of the application of the doctrine of *res ipsa loquitur*. I am still of the same opinion.

I am authorized to state that *Winborne, C. J.* and *Moore, J.*, concur in this opinion.

T. CURTIS ANDREWS AND WIFE, KATHERINE ANDREWS
v. T. B. ANDREWS.

(Filed 2 March, 1960.)

1. Boundaries § 7: Courts § 6—

Where a proceeding to establish the true dividing line between contiguous tracts of land is removed from the Clerk to the Superior Court, the Superior Court acquires jurisdiction and may dispose of the proceeding notwithstanding that the Clerk did not hear the proceeding and render a decision therein, the statutory direction that the proceeding be heard first by the Clerk not being jurisdictional.

2. Boundaries § 8—

In a proceeding to establish the true boundary line between adjoining tracts of land, what constitutes the line is a matter of law for the court, where the line is actually located on the ground is a question of fact for the jury.

3. Boundaries § 3—

Where a corner is known and fixed, but the markers of the preceding corners have been destroyed, such preceding corners may be established by reversing the calls.

4. Boundaries § 4—

While corners marked and agreed upon by parties contemporaneously with the execution of the deeds may prevail over the descriptions contained in the instruments, where the corners can be definitely located from the descriptions in the deeds by extrinsic evidence, the location of such corners may not be changed by later parol agreement of the respective owners of the contiguous tracts.

APPEAL by respondent from *Fountain, S. J.*, February 1959 Term, of RICHMOND — argued as No. 462 at Fall Term, 1959.

Processioning proceeding under N.C.G.S., Chapter 38, to locate and establish a disputed boundary line between adjoining landowners, who acquired their lands from a common source.

Petitioners allege and contend that the actual location on the premises in controversy of the true dividing line is the line from point "B" to point "CC" to point "DD" as shown on the court map.

Respondent alleges that the actual location on the premises in controversy of the true dividing line is the line from point "2" to point "3" to point "4" as shown on the court map, which line was orally agreed upon by the parties, subsequent to the execution of their deeds to the lands, that concrete markers were placed on the agreed line on 14 April 1952, and that respondent occupied and cultivated and exercised ownership up to where the concrete markers were placed in 1952 since 1937.

According to the testimony of T. Berry Liles, one of the court appointed surveyors, who with T. M. Bray, another court appointed surveyor, made the court maps, the area of land in dispute is less than a tenth of an acre, the point "CC," as shown on the court map, is 1.05 feet west of a concrete marker at point "3," and there is a distance of 1.8 feet from the wooden stake at point "DD" to the concrete marker at point "4." The judge in his charge stated that he understood that points "DD" and "4" are about 18 inches, perhaps 20 inches apart, and at this place in the charge is a note in parenthesis, "Attorneys nod affirmatively."

One issue was submitted to the jury. On page 31 of the record immediately preceding the charge the issue is stated thus: "What is the true dividing line between the lands of the plaintiffs and defendant?" In the charge of the court and in the judgment the issue is stated as follows: "Where is the true dividing line between the lands of the

plaintiffs and the lands of defendant?" The jury answered the issue: "From point 'B' to point 'CC' to point 'DD,' as shown on the court map."

From judgment entered in accord with the verdict, respondent appeals.

Page & Page and M. C. McLeod for petitioners, appellees.
Bynum & Bynum for respondent, appellant.

PARKER, J. There is no merit in respondent's contention that the Superior Court had no jurisdiction, for the reason that the Clerk of the Superior Court did not hear and render a decision in the proceeding. The statute directs a proceeding of this kind to be heard first by the clerk, but this direction is not jurisdictional. *Lance v. Cogdill,* 236 N.C. 134, 71 S.E. 2d 918. The parties stipulated that the proceeding was removed from the clerk to the Superior Court. This being so, the Superior Court could retain jurisdiction and dispose of the proceeding. *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810.

The controversy in this proceeding is the proper location of the true boundary line between the adjoining tracts of lands of petitioners and respondent, who acquired their lands from a common source. In such a proceeding, what constitutes the line is a matter of law for the court: where the line is actually located on the premises in controversy is an issue of fact for the jury. *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311.

A clear understanding of the facts is not without difficulty, due to the condition of the fourteen court maps filed with the record. Twelve of these maps representing a survey made November 1956 show no points marked "CC" and "DD" and no line marked with points "CC" and "DD." These maps state the contentions of petitioners are points "A-B-C-D-E-F-G-H-I-J-K," and the contentions of respondent are points "1-2-3-4-5-6-7-8-9-10-11," and lines showing such contentions of the parties and so marked are shown on these twelve maps. Another map is identical with these twelve maps, except between point "C" and point "3" there appear two small letters "CC," and between point "D" and point "4" there appear two small letters "DD," but no line is shown connecting these letters "CC" and "DD." Another map is substantially similar to the twelve maps (and also the other map, omitting the small letters "CC" and "DD") with these additions: One, it shows a line running from point "B" to point "CC" to point "DD" between the line running from point "B" to point "C" to point "D" and the line running from point "2" to point "3" to point "4."

Two, this map states "Points CC - DD surveyed Sept. 29, 1958." Three. This map states the contentions of petitioners as on the thirteen other maps, with this addition: "A-B-CC-DD-E-F-G-H-I-J-K." There is an identical statement of the contentions of respondent on all fourteen maps. It seems clear that the jury, and the judgment entered in accord therewith, fixed the dividing line as the line running from point "B" to point "CC" to point "DD," as shown on this last map set forth above.

It is alleged in the amended petition: "6. That the following three calls in the description of the lands of the petitioners and the lands of the respondent are identical and as follows: 'Thence with his line as follows: S. 66 deg. 20 min. E., 450.4 feet to a stake, S. 3 deg. E. 1817.4 feet along a plantation road to an iron stake in the center of said road; thence along said road S. 21 deg. 15 min. E. 1247.8 feet to an iron stake'; that both the corners of the line, 'S. 66 deg. 20 min. E., 450.4 ft. to a stake,' are known and established and marked by iron stakes; that the boundary line between the property of the petitioners and respondent will be properly located when the above call, 'S. 3 deg. E., 1817.4 feet along the plantation road to an iron stake in the center of said road; thence along said road S. 21 deg. 15 min. E., 1217.8 feet to an iron stake,' is properly surveyed and the two missing corners established." The answer thereto is: "That Allegation 6 of the amended complaint is correct and this answering defendant avers that the line should properly run 'along the plantation road to an iron stake in the center of said road'; that since said stake is properly in the center of said road, this defendant and the petitioner T. Curtis Andrews met on the premises on April 14, 1952, and, in the presence of other witnesses, including Surveyor T. Berry Liles, agreed that said stake was in the center of said road and by agreement both parties agreed to move said stake to the edge of said road rather than leave it in the center of said road and that, in accordance with said agreement, the corner was moved to the edge of said road and with the further agreement that a concrete monument should be placed at said agreed point; that said concrete monument was placed at the agreed point and is still in the same place that was agreed upon, and this defendant contends that the said concrete monument is now a correct corner between the lands of the petitioners and the respondent, or defendant, T. B. Andrews."

The parties, at the beginning of the trial, stipulated that "the point designated as 'B' and '2' is a fixed iron stake, and admitted correct corner, and the same as to point '11.'" The parties also stipulated and agreed "that the call, 'South 20, 45 East, which runs from point

C to D,' and the call, 'South 2 deg. 30' East,' which runs from 'B' and '2' to 'C,' both of which appear in the deeds of petitioners and respondent are incorrect."

The Court charged the jury as to what constitutes the true boundary line between the contiguous lands of the parties as follows: "Now, the petition alleges the call contributing (sic) the true dividing line, and that is admitted in the answer to be the true dividing line. And so I will state to you as a matter of law what the true dividing line is, reminding you, however, that it is for you to determine where that line is located. The line is 'thence with his line,' and this is reading from the deed to the plaintiffs, as I recall, 'thence with his line,' referring to the defendant's line, 'South 66 deg. 20' East, 450.4 feet to a stake, being South 3 deg. 1817.4 along a plantation road to an iron stake in the center of said road, and thence along said road South 21 deg. 15' East 1247.8 feet to an iron stake.' " Respondent does not challenge this part of the charge by any exception.

Petitioners' evidence tends to show that running the line called for in their deed forward from point "B," an admitted correct corner, would not ascertain and fix with certainty the location on the premises of the two iron stakes destroyed by the U. S. Army maneuvers, but that beginning with point "11," an admitted correct corner, and reversing the calls in their deed, and running reversely the location on the premises of these two destroyed iron stakes could be ascertained and fixed with certainty at points "DD" and "CC," as shown on the court map. This Court said in *Powell v. Mills*, 237 N.C. 582, 589, 75 S.E. 2d 759, 765: "The general rule as to this is that in order to locate a boundary of land, the lines should be run with the calls in the regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line."

Respondent assigns as error this part of the charge: "Now, there has been evidence relating to an alleged agreement between T. C. Andrews and T. B. Andrews in April, 1952, and evidence relating to the concrete markers, one placed at '3' and '4' and one, I think, I have made reference to point '2' as the concrete marker, but, actually, at or near a pine tree some 200 feet south of the point '2.' I instruct you as to that, that if the plaintiff T. C. Andrews and the defendant Thomas B. Andrews did agree on the location of either or all of those concrete markers, and if they did agree to consider those as designating the true boundary lines, then that would constitute only evidence for you to consider as to where the true boundary actually is, and if

you find from the evidence and by its greater weight that the boundary line, the true boundary line, is at some point other than the point, or points, if any, that you find they did agree to, then it would be your duty to locate the true dividing line at the point where it actually is, where you find from the evidence and by its greater weight the true dividing line to actually be, notwithstanding any agreement as to where the line would be considered to be or treated as being. On the other hand, if you find that there was such an agreement, then, of course, that is a circumstance and constitutes evidence for you to consider as bearing upon the question of where the true dividing line actually is located."

Respondent's evidence tends to show that the parties fixed the disputed boundary line between their adjoining tracts of land by parol agreement; that pursuant to such agreement, concrete markers were placed on the agreed line, and respondent contends that the judge should have instructed the jury that if they so found the facts, they should answer the issue submitted to them from point "B" to point "3" to point "4," as shown on the court map.

In the present proceeding what constitutes as a matter of law the true boundary line between the contiguous lands of the parties, as stated by the court in its charge, stands unchallenged by any exception by respondent. That is certain which can be made certain, and petitioners' evidence shows that the location on the premises of this true boundary line as set forth in petitioners' and respondent's deeds can be made certain by the deeds and a survey. Respondent offered no evidence to the contrary. A multitude of jurisdictions hold that an uncertain and disputed boundary line may, under certain circumstances, be fixed permanently by parol agreement, if accompanied by sufficient acquiescence and possession, but where there is no *uncertainty* as to the boundary line, a parol agreement fixing a boundary line in disregard of those fixed by the deeds is void under the Statute of Frauds, as it amounts to a conveyance of land by parol. 11 C.J.S., Boundaries, Sec. 67; 8 Am. Jur., Boundaries, Sec. 73; Tiffany Real Property, 3rd Ed., Sec. 653; Annotation 69 A.L.R. 1433. This general rule of law invoked by respondent is not applicable to the facts here, and it is not necessary for us to decide as to whether or not it is in conflict with some of our decisions, for the reason that here there is no uncertainty as to what the true boundary line is, and its true location on the premises can be fixed by the deeds and a survey.

This Court said in *Haddock v. Leary,* 148 N.C. 378, 62 S.E. 426: "For nothing is better settled in this State than that if the calls of a deed are sufficiently definite to be located by extrinsic evidence, the

location cannot be changed by parol agreement, unless the agreement was contemporaneous with the making of the deed."

This Court said in *Kirkpatrick v. McCracken,* 161 N.C. 198, 76 S. S. 821: "Where a division line between tracts of land is well ascertained, and can be located by the plain and unambiguous calls of the deed, the acts and admissions of the parties claiming the respective tracts are not competent evidence, either to change the line or to estop the party from setting up the true line. *Shaffer v. Gaynor,* 117 N.C. 15. But where the dividing line is in dispute, and is unfixed and uncertain, the acts and admissions of the adjoining proprietors recognizing a certain line as the proper division line is evidence competent to be submitted to the jury."

"If the calls in a deed are sufficiently definite to be located by extrinsic evidence, the location cannot be changed by parol agreement unless the agreement was contemporaneous with the making of the deed." *Daniel v. Power Co.,* 204 N.C. 274, 168 S.E. 217.

The true principle is laid down by *Smith, C. J.,* in laconic language in *Davidson v. Arledge,* 97 N.C. 172, 2 S.E. 378: "The rejected evidence would have been competent to fix an uncertain and controverted boundary, but not to change that made in the deed that distinctly defines it."

Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685, was an action brought to recover a parcel of land the ownership of which depended on the true location of the dividing line between adjoining landowners. The Court said: "Plaintiff proposed to show that the line had been run some years before the time of the trial by Posey Hyde, and that the respective owners had recognized it as the line of division between them for many years. This evidence was excluded by the Court, but we think it was competent, not to change the boundaries of the land (*Davidson v. Arledge,* 97 N.C. 172), or, in other words, to show that the parties had orally agreed upon a line different from the true line, but as some evidence to prove where was the true line."

Dudley v. Jeffress, 178 N.C. 111, 100 S.E. 253, relied on by respondent is not in point. In that case two tenants in common had a divisional line run by a surveyor, went upon the land with him, and ran and established this line with the intent of making deeds to the land in severalty, and so made the deeds. In its opinion the Court said: quoting from *Millikin v. Sessoms,* 173 N.C. 723, 92 S.E. 359: "It is settled beyond a controversy in this State that a line surveyed and marked out and agreed upon by the parties at the time of the execution of the deed will control the course and distance set out in the instrument."

Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E. 2d 472, and *Lowder v. Smith*, 201 N.C. 642, 161 S.E. 223, relied on by respondent are distinguishable, in that, *inter alia*, in both cases there are written agreements to settle a disputed boundary line.

According to the allegations of paragraph 6 of respondent's answer, above set forth, respondent and petitioner T. Curtis Andrews, met on the premises on 14 April 1952, and agreed that the stake was in the center of the road, and by agreement agreed to move the stake to the edge of the road, and it was so moved, and a concrete monument was placed at the agreed point, and respondent contends the concrete monument is now a correct corner between their lands. The authorities are practically unanimous that coterminous landowners cannot conclusively establish as a boundary between their lands a line which they know not to be the true one, except by an agreement in writing based on a proper consideration and containing words of conveyance. *Haddock v. Leary, supra; Lewis v. Ogram*, 149 Cal. 505, 87 P. 60, 10 L.R.A. (N.S.) 610, 117 Am. St. Rep. 151; *Jones v. Scott*, 314 Ill. 118, 145 N.E. 378; *Volkart v. Groom*, (Mo., Supreme—1928), 9 S.W. 2d 947; *Lacy v. Bartlett*, (Texas Civil Appeals), 78 S.W. 2d 219; Annotations 69 A.L.R. 1451 and 113 A.L.R. 427, where many cases are cited; 8 Ann. Cas. 85, where many cases are cited; 8 Am. Jur., Boundaries, Sec. 72; 11 C.J.S., Boundaries, p. 640.

The assignment of error to the charge above set forth is not prejudicial to respondent, and is overruled.

The other assignments of error brought forward and discussed in respondent's brief have been examined and are overruled.

In the trial below we find no error sufficiently prejudicial to warrant a new trial.

No error.

IN THE MATTER OF: THE LAST WILL AND TESTAMENT OF S. E. HARRINGTON, DECEASED.

(Filed 2 March, 1960.)

1. Wills § 24— Fact that testator devised lands held by entireties held not evidence of mental incapacity under facts of this case.

Testator devised to two named sons one of testator's farms and devised and bequeathed to his wife one-third of his personalty and a life estate in his other lands, with remainder to other children and to grandchildren. A farm thus devised the wife for life was owned by testator and his wife by the entireties. *Held*: The fact that testator devised lands held by the entireties is no indicia of mental incapacity, since if he had survived his wife or if she, having survived him, elected to take under the will. his devise of the lands held by the entireties would be effective, and if she dissented from the will she might, in making final disposition of her property, take into account the property advanced to their children under the effective provisions of his will, and testimony of mental incapacity based solely on the fact that he thus devised lands not belonging to him is insufficient to present any controversy as to his mental capacity.

2. Wills § 23b—

The widow's election to dissent from the will is without probative value on the issue of the mental capacity of the husband to make a will, and the exclusion of evidence of such dissent is proper.

3. Wills § 21b—

The mental capacity of a testator to execute a will must be determined in accordance with the circumstances facing him at the time of the execution of the instrument, unaffected by the happening of subsequent contingencies.

4. Appeal and Error § 40: Wills § 24—

While it is technical error for the court to direct a verdict on the issue of the due execution of the paper writing propounded, where the evidence is to the effect that all the requirements of the law were strictly complied with in the formal execution and publication of the will, and the parties so stipulate, an instruction that the jury should answer the issue of due execution in the affirmative cannot be prejudicial.

5. Wills § 24: Trial § 28—

Where in caveat proceedings the testimony is to the effect that testator possessed mental capacity to execute the instrument and there is no evidence to the contrary sufficient to raise a controversy upon this issue, the court may correctly charge the jury that if the jury finds from the evidence, and by its greater weight, the facts to be as all the evidence tends to show, the jury should answer the issue in the affirmative, and that if it does not so find, to answer the issue in the negative, since such instruction leaves it to the jury to pass upon the credibility of the evidence.

IN RE WILL OF HARRINGTON.

APPEAL by caveators from *Bundy, J.*, October, 1959 Term, PITT Superior Court.

S. E. Harrington died July 25, 1959. Two days thereafter Lloyd Harrington offered for probate as the last will and testament of S. E. Harrington three written instruments. The first, dated March 28, 1956, purported to be the will; and two, dated the following day, purported to be codicils thereto. Upon the oath and examination of the two subscribing witnesses to the documents, the Clerk Superior Court of Pitt County admitted them to probate in common form and issued letters testamentary to Lloyd Harrington, one of the executors.

The testator gave to his sons, Lloyd Harrington and Mack Harrington, in fee, his Kirkman Farm in Craven County and the personal property located thereon. He gave to his wife, Mamie E. Harrington, "if she survive me," one-third of all his personal property, excluding that located on the Kirkman Farm. He also devised to her a life estate in substantially all his lands except the Craven County farm. All other personalty was to be equally divided among his children and those that represented them. He devised tracts and lots of land in Pitt County to his children and grandchildren, subject to his wife's life estate if she survived.

On August 13, 1959, Elsie Harrington Collins, a daughter of S. E. Harrington, filed a caveat to the will, alleging the documents admitted to probate in common form were not the will of her father for that (a) the execution of the will was obtained by undue and improper influence and duress on the part of Lloyd Harrington and Mack Harrington; and (b) S. E. Harrington, at the time he signed the will and continuously thereafter, did not have sufficient mental capacity to make a will.

Upon the service of a citation, some of the devisees and heirs at law aligned themselves on the side of the propounder and joined in the answer to the caveat. Others joined the caveators. The clerk transferred the proceeding to the superior court for jury trial. The caveators amended their caveat by striking the allegation of undue influence, leaving lack of mental capacity on the part of the testator as their only objection to the validity of the will.

At the trial the propounders proved the formal execution of the will and offered it in evidence. The caveators examined Geraldine Harrington Sharpe, one of the testator's daughters, relative to his mental capacity. She testified: "I had occasion to see and converse with my father before he died quite often. I was in his home five or six hours a day in which I cleaned house and cooked for my mother while they were sick. . . . Before he died my father was in fairly good health. He

was 81 years old at the time of his death. I have lived next door to my father since 1954. My father continued to tend to his business affairs up to the time of his death. He did very well. . . . I have an opinion satisfactory to myself as to whether my father, S. E. Harrington, at the time of the execution of his last will and testament, on March 28, 1956, and at the time of the execution of the two codicils thereto on March 29, 1956, had sufficient mental capacity to understand the business about which he was engaged when he executed the will, to understand the nature and extent of the property which he owned, to know the persons who are the natural objects of his bounty, and to know the force and effect of his act in making a will disposing of his property. In my opinion he was a very good business man. He was very forgetful in his later years and he did not have the mental capacity to make a will because he didn't know the nature and extent of his property because he willed property to the children that he did not own. It belonged to my mother. He had the mental capacity to know who his children and grandchildren were. He had the mental capacity to know what he was doing when he executed the will. He lacked mental capacity only in that he did not know the extent of his property or he wouldn't have willed property that did not belong to him."

On cross-examination, Mrs. Sharpe testified: "My father tended to his farm very well. He carried on his business. He told the tenants where to plant the crops. He gave all instructions in respect to the growing and marketing. He went to the tobacco market with his tobacco and he received the checks and deposited the checks in the bank. I don't know his business well enough to know whether he left undone anything with respect to the management of his property through the years. *The only thing that I know is he just willed me property that he didn't own.* . . . I say in my opinion he had sufficient mental capacity to manage his property and to know the nature of his property. I said a moment ago to Mr. Owens that my father had mental capacity sufficient to execute a will. I said that he did not know the extent of his property. I testified that I didn't doubt that my father had the mental capacity to know what he was about when he went to make his will."

The caveators offered a stipulation with respect to the deed to the Pitt County lands. Its purport and effect will be discussed in the opinion.

The caveators identified and attempted to offer in evidence the widow's dissent from the will. Assignment of error No. 1 is based on

the court's refusal to admit the dissent in evidence. The court submitted to the jury the following issues:

"1. Were the paper writings propounded, dated March 28, 1956, March 29, 1956, and March 29, 1956, executed by S. E. Harrington, according to the formalities of the law required to make a valid Last Will and Testament?

"2. Did S. E. Harrington, on the 28th day of March, 1956, have the testamentary capacity to execute a Last Will and Testament?

"3. Did S. E. Harrington, on the 29th day of March, 1956, have the necessary testamentary capacity to execute the codicils to the last will and testament?

"4. Is the paper writing propounded for probate and the codicils attached thereto and every part thereof the last will and testament of S. E. Harrington?"

The jury answered all issues in the affirmative. The court entered judgment declaring the will and codicils probated in solemn form as the last will and testament of S. E. Harrington, Deceased. Caveators appealed, assigning errors.

Owens & Langley, Robert D. Wheeler, for caveators, appellants.

M. E. Cavendish, L. W. Gaylord, Jr., Albion Dunn for propounders, appellees.

HIGGINS, J. Prior to 1944 the testator was the owner in fee of the Kirkman Farm in Craven County. He also owned substantial real estate in Pitt County, where he lived. On November 28, 1944, he executed a deed conveying the Pitt County lands (with the exception of a few small lots) to Edwin Harrington, Trustee, who on the same day executed a deed for the said lands to the testator and his wife, Mamie E. Harrington. It is stipulated the deed to the testator and his wife created an estate by entireties. It is further stipulated: "S. E. Harrington continued in active possession and control of the same and collected all rents and profits up until his death on July 27, 1959."

The testator, in dividing his real estate among his wife, his children and grandchildren, (the latter representing their deceased parent) treated the Pitt County lands as his own. The trouble arose when it was ascertained the Craven County land passed by the will to the two sons but that the Pitt County lands, upon the death of the testator, passed to his wife as survivor.

The will is challenged only on the ground the testator lacked mental capacity to make it. It is significant the only evidence offered as tending to show lack of mental capacity is the daughter's conclusion from

the fact the testator attempted to devise lands in Pitt County which he and his wife held by the entireties at the time he executed his will in 1956. Is the evidence offered sufficient to present any controversy as to his mental capacity? Reduced to its final analysis, the evidence of mental incapacity rests solely on the conclusion he devised the lands which belonged not to him, but to his wife. The evidence from which the conclusion is drawn looks backward from the testator's death to the time he made his will. In order to ascertain his capacity, we must look at the situation on the date he executed the will. Assuming he understood the full purport of the doctrine of survivorship, nevertheless it was not unreasonable to suppose his purpose to divide his lands equitably would eventually be carried out.

The testator, prior to 1944, was the fee simple owner of the lands both in Craven and Pitt Counties. The effect of the transactions creating the estate by the entireties in the testator and his wife was to provide for the survivor to take all. At the time the will was executed the testator, of course, did not know whether he or his wife would survive. If he survived, the estate would go according to the terms of his will. The will made provision for the wife to take personal property and a life estate in the Pitt County lands. If she survived, and elected to take under the will, the devise to the children would be effective to pass title to them. The wife had the right to dissent from the will and take as survivor, or she had an equal right to abide by the will and take under it. Even though the widow should dissent and take the Pitt County lands as survivor, nevertheless in the final disposition of her estate she had the undoubted right to dispose of the lands, taking into account the advancements already made by her husband. In this view we hold the attempt to devise the Pitt County lands and the conclusion of his daughter with respect to his mental capacity are insufficient to sustain a finding the testator lacked mental capacity to execute a will. Under the circumstances here disclosed, the widow's dissent, filed after the testator's death, in 1959, was not evidence of his lack of mental capacity to make a will in 1956. The widow's election to dissent is without probative value on the issue of mental capacity. The exclusion was proper. *In re Estate of Povey,* 271 Mich. 627, 262 N.W. 98. Assignment of Error No. 1 is not sustained.

The caveators assign as error the court's charge on the first issue: "The caveators agree that it (the will) was executed according to the formalities of the law and that you shall answer that issue in the affirmative, or yes." Technically the charge is not in the approved form, although the evidence was unconditionally to the effect that all re-

quirements of the law were strictly complied with in the formal execution and publication of the will. Nevertheless, the probate proceeding being *in rem,* with the burden on the propounders to show the formal execution of the will, the credibility of the evidence was at issue. *In re Will of Harris,* 218 N.C. 459, 11 S.E. 2d 310; *In re Will of Evans,* 223 N.C. 206, 25 S.E. 2d 556. Under the circumstances, the court should have charged in substance if the jury finds the facts with respect to the execution of the will to be as all the evidence tends to show, and so finds by the greater weight of the evidence, then the answer to the first issue should be, "Yes"; otherwise, "No." The failure to charge substantially as indicated is technical, though not reversible error. The error was invited by the stipulation. The caveators, in presenting the assignment of error, frankly state in their brief: "The caveators will concede that their ultimate success . . . will depend more on other assignments . . . as there was no evidence that the will was not duly executed and even if proper instructions had been given, the jury would probably have answered the issue 'yes,' and probably will do so on any new trial." Under the facts here disclosed, the technical error is not prejudicial. It was not the denial of any substantial right. *In re Thompson's Will,* 248 N.C. 588, 104 S.E. 2d 280; *In re Efird's Will,* 195 N.C. 76, 141 S.E. 460.

The caveators assign as error the refusal of the court to give the special instructions requested. These instructions are based on the premise that the evidence was sufficient to go to the jury and to support an affirmative finding that the testator did not have sufficient mental capacity to enable him to make a valid will. In no view of the evidence is it sufficient to support a finding of mental incapacity. The court, therefore, was required to charge the jury if it found from the evidence, and by its greater weight, the facts to be as all the evidence tended to show, then issues 2, 3, and 4 should be answered, "Yes." If the jury failed so to find, the answer should be, "No." The instructions left with the jury the function of passing on the credibility of the evidence. The charge given was in substance as above indicated. *Coffey v. Greer,* 249 N.C. 256, 106 S.E. 2d 209; *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265; *Commercial Solvents, Inc. v. Johnson,* 235 N.C. 237, 69 S.E. 2d 716; *In re Will of Evans,* 223 N.C. 206, 25 S.E. 2d 556.

While a nonsuit cannot be entered and a verdict cannot be directed in a caveat proceeding, *In re Will of Ellis,* 235 N.C. 27, 69 S.E. 2d 25, nevertheless, when the evidence offered is all one way without conflict, and subject to only one interpretation, an instruction similar to that given by the court on the second, third and fourth issues is not

erroneous. This Court, in the case of *In re Will of Duke*, 241 N.C. 344, 85 S.E. 2d 332, said: " 'The court instructs you the burden of that issue is upon the propounders to satisfy the jury upon the evidence and by its greater weight that the said paper writing propounded as the last will and testament of Hilda S. Duke was executed in accordance with the formalities required by law; and the propounders have offered such evidence and the court is not aware of any evidence to the contrary, and therefore instructs the jury that if you believe the evidence and all of the evidence and find the facts to be as all of the evidence tends to show, and by its greater weight, it would be your duty to answer that first issue, "Yes," ' . . . it was proper for the court to give the instruction quoted above. The verdict is made to rest upon the finding of the jury upon the evidence offered."

The other errors assigned have been carefully examined. They fail to show merit.

No error.

ROLAND CANNON AND HELEN CANNON v. PAUL T. BAKER.

(Filed 2 March, 1960.)

1. Deeds § 11—

In construing a deed, the intent of grantor as ascertained from the language used, giving force and effect to all parts if possible by any reasonable construction, will prevail unless in conflict with some settled rule of law or public policy.

2. Deeds § 15—

A conveyance to grantors' son during his natural life and at his death to the son's "living issue or children," with further provision that if the son had no living issue or children at his death the land should go to the heirs at law of grantors, *is held* to create a defeasible fee in the children of the life tenant, since the word "issue" construed in context, means "lineal descendants" and is a word of purchase, so that upon the death of one or more of the children of the life tenant leaving issue surviving, such issue would take as purchases under the deed and not by descent.

APPEAL by defendant from *Bundy, J.*, 14 December Mixed Term, 1959, of PITT.

This action was instituted by the plaintiffs against the defendant for specific performance of a contract for the purchase and sale of the 31.7 acres of land described by metes and bounds in the complaint,

for the sum of $15,000. The defendant refused to accept tender of deed, claiming the plaintiffs could not convey a fee simple title thereto.

In 1922, Erastus Cannon and wife, Betty Cannon, reserving a life estate, conveyed the land in question to Roland Cannon (referred to in said deed as *Rowland* Cannon) during the term of his natural life, the life tenancy of Roland Cannon not to take effect until the death of the grantors. The deed contained the following pertinent provisions:

"If the grantee, Rowland Cannon, should die before the grantors, Erastus Cannon and wife, Betty Cannon, then the above tract or parcel of land shall go to the living children of the said Rowland Cannon in fee simple, share and share alike. If however the said grantee, Rowland Cannon, should outlive the grantors herein, and the life tenancy herein granted and conveyed should become effective, then upon the death of the said Rowland Cannon, said tract or parcel of land shall go to the living issue or children of the said Rowland Cannon, in fee simple, share and share alike, but if the said Rowland Cannon shall have no children at the time of his death, then tract or parcel of land shall go to the heirs at law of the said Erastus Cannon and wife, Betty Cannon, in fee simple.

"The intent and meaning of this deed being, that the said Rowland Cannon shall have and hold said lands and premises during the term of his natural life, at his death same shall go to his living issue or children in fee simple, and if at his death he have no living issue or children, then said tract or parcel of land shall go to the heirs at law of the grantors hereof, in fee simple, share and share alike * * *."

Roland Cannon survived Erastus Cannon and wife, Betty Cannon. In 1935, the then living lineal heirs at law of Erastus Cannon and wife conveyed their interest in the land to Helen Cannon. In 1949, the children of Roland Cannon conveyed their interest to Roland Cannon and wife, Helen Cannon. In both deeds spouses joined in the execution thereof. The plaintiffs are husband and wife. Roland Cannon is 64 years of age, and Helen Cannon is 61 years of age.

A jury trial was waived and his Honor held upon the foregoing facts that the plaintiffs could give a good indefeasible fee simple title to the land involved and entered judgment in favor of the plaintiffs in the sum of $15,000, said sum to be paid upon delivery of a deed in fee simple to the defendant for the land described in the complaint.

The defendant appeals, assigning error.

James & Speight, W. H. Watson for plaintiffs.

J. Harvey Turner for defendant.

DENNY, J. Since Roland Cannon outlived Erastus Cannon and wife, Betty Cannon, it is only necessary to consider and construe those provisions of the deed from Erastus Cannon and wife to Roland Cannon with respect to the disposition of the property at the death of the life tenant, Roland Cannon.

The accepted rule in the interpretation of a deed is well stated in *Griffin v. Springer,* 244 N.C. 95, 92 S.E. 2d 682, by *Parker, J.,* where he said: "From the earliest periods, and continuously to the present time, we have adhered to the rule that in construing a deed the discovery of the intention of the grantor must be gathered from the language he has chosen to employ, and all parts of the deed should be given force and effect, if this can be done by any reasonable interpretation, unless the intention is in conflict with some unyielding canon of construction, or settled rule of property, or fixed rule of law, or is repugnant to the terms of the grant," citing numerous authorities.

Therefore, we must construe the deed under consideration in light of all its provisions in order to ascertan the intent of the grantors.

The deed provides, " * * * upon the death of the said Roland Cannon, said tract or parcel of land shall go to the living issue or children of the said Roland Cannon, in fee simple, share and share alike, but if the said Roland Cannon shall have no children at the time of his death, then tract or parcel of land shall go to the heirs at law of the said Erastus Cannon and wife, Betty Cannon, in fee simple."

If no other provision or explanation had been added in this deed, we would be inclined to hold that the words "living issue," as used, were synonymous with "children." But, in view of the explanation made by the grantors, we are inclined to the view that the grantors used the words "living issue" as words of purchase, meaning lineal descendants. *Edmondson v. Leigh,* 189 N.C. 196, 126 S.E. 497; *Turpin v. Jarrett,* 226 N.C. 135, 37 S.E. 2d 124; *Matthews v. Matthews,* 214 N.C. 204, 198 S.E. 663; *Dolbeare v. Dolbeare,* 124 Conn. 286, 199 A. 555, 117 A.L.R. 687; Anno: — "Issue" Used as a Word of Purchase, 117 A.L.R. 692.

The grantors included this explanation in the deed: "The intent and meaning of this deed being, that the said Roland Cannon shall have and hold said lands and premises during the term of his natural life, at his death same shall go to his living issue or children in fee simple, and if at his death he have no living issue or children, then said tract or parcel of land shall go to the heirs at law of the grantors hereof, in fee simple, share and share alike * * *."

Since, in our opinion, the words "living issue" include children, grandchildren, and all other lineal descendants of Roland Cannon,

and that the word "issue" is used as a word of purchase, the living issue of Roland Cannon cannot be ascertained until his death.

At the time of the death of Roland Cannon, which of his children will be living? One or more or all of his children may predecease him. If so, they may leave children or grandchildren who would be the living issue of Roland Cannon. As such, they would take the land in controversy, in fee simple, share and share alike, not from Roland Cannon through inheritance but directly from Erastus Cannon and wife, Betty Cannon, as purchasers. *Blanchard v. Ward,* 244 N.C. 142, 92 S.E. 2d 776; *Neill v. Bach,* 231 N.C. 391, 57 S.E. 2d 385; *Turpin v. Jarrett, supra; Pratt v. Mills,* 186 N.C. 396, 119 S.E. 766; *Witty v. Witty,* 184 N.C. 375, 114 S.E. 482; *Thompson v. Humphrey,* 179 N. C. 44, 101 S.E. 738.

In the last cited case the property was devised to the widow for life or until her remarriage, and upon her death or remarriage the property was to go to the children of the devisor, naming them. Provision was then made for the management of the estate until the children became 21 years of age in the event of the death or remarriage of the widow before his children attained such age. The will further provided, "* * * or if any of my said children have married and died, leaving surviving a child or children, it or they to have that portion which would have fallen to its mother or father (as the case may be) had he or she been living." On appeal, this Court held that before the death or remarriage of the widow, the life tenant, a valid conveyance of the fee simple title to the property could not be made, and in the event of the remarriage of the widow, not until the children became 21 years of age. The Court said: "The construction of the will makes the estate of the children a defeasible fee, for they may never take, as the mother may survive all of them, in which event their children would take in their places, and then, not by descent from them, as in *Whitfield v. Garris,* 134 N.C. 24, but directly from the devisor, under his will, as purchasers."

Therefore, we hold that Roland Cannon and his wife cannot convey a good and indefeasible fee simple title to the premises involved herein, since it cannot be ascertained or determined what child, children, or *living issue* Roland Cannon will leave surviving him, who may take under the provisions of the deed, until his death.

The judgment of the court below is

Reversed.

STATE v. ROBERT FRANKLIN BURELL.

(Filed 2 March, 1960.)

1. Rape § 1—

The slightest penetration of the sexual organ of the female by the sexual organ of the male is sufficient to constitute this element of the offense of rape.

2. Rape § 4—

The evidence in this case, considered in the light most favorable to the State, *is held* sufficient to warrant the submission to the jury of the question of defendant's guilt of rape. G.S. 14-23.

3. Criminal Law § 101—

The contention that the testimony of the prosecutrix is contrary to reason and experience and therefore should be rejected as unworthy of belief cannot justify nonsuit, since the probative value of the testimony is solely for the determination of the jury and discrepancies and contradictions in the State's evidence are for the jury to resolve.

4. Criminal Law § 111—

Defendant's character evidence is a subordinate feature of the case and the failure of the court to give any instructions in regard thereto will not be held prejudicial in the absence of a request for special instructions.

APPEAL by defendant from *Bundy, J.*, November Term, 1959, of CRAVEN.

Criminal prosecution on indictment for rape charging in substance that defendant, on or about August 16, 1959, unlawfully, wilfully and feloniously, did ravish and carnally know Mrs. Emma Estelle Harrison, a female, by force and against her will.

The bill of indictment was returned at September Term, 1959. Upon arraignment, defendant pleaded not guilty. Defendant being without means to employ counsel, the court, on September 10, 1959, appointed Robert D. Glass, Esquire, to represent him; and defendant was represented by Glass at the trial at November Term, 1959.

In brief, the State's evidence tended to show the facts narrated below.

Defendant (Beau) and the prosecutrix (Estelle) and Alexander Harrison (Moe), the husband of the prosecutrix, had been friends. Moe and Beau, each a staff sergeant, were stationed at the Marine Corps Air Station at Cherry Point, North Carolina. Moe and Estelle lived in a government housing project in Havelock, North Carolina, where Beau had visited them, had meals, etc. Nothing in the evidence in-

dicates that Beau had made any improper advances on Estelle prior to the incident on which this prosecution is based.

Earlier, 1:00 a.m. or 2:00 a.m., Moe and Beau had met in New Bern and had a drink together. About 3.00 a.m., Beau, observing a light on in Moe's house, knocked at the door. Estelle was there alone. She had been to bed but got up; and, wearing her nightgown and robe, had gone downstairs for a drink of milk. Upon hearing a knock at the door, she asked who was there; and, upon hearing the answer, "Beau," she let defendant in, asked him where he had been and whether he had seen her husband. Beau replied that he had just left her husband and that her husband would be home in about fifteen or twenty minutes. They sat down, Estelle on a chair and Beau on a sofa, and chatted. In "about five minutes," Beau got up, came over to Estelle, pulled her to him and declared his determination to have her. She resisted. They struggled. Beau first got Estelle upon the sofa. In the struggle there, they fell to the floor. On the floor, Beau succeeded in having sexual intercourse with Estelle, notwithstanding her resistance, to the extent indicated in the opinion.

In submitting the case, the court instructed the jury it could return any one of these verdicts, (1) guilty of rape, (2) guilty of rape with recommendation of life imprisonment, (3) guilty of an assault with intent to commit rape, (4) guilty of an assault on a female by a male person over eighteen years of age, and (5) not guilty.

The jury returned a verdict of guilty of an assault with intent to commit rape. The court entered judgment that defendant be confined in the State's Prison for fifteen years.

Defendant excepted, gave notice of appeal, and was permitted to appeal in *forma pauperis*. Glass, it appearing that he would be unable to represent defendant in connection with the appeal, was permitted to withdraw as counsel. Thereupon the court appointed Charles L. Abernethy, Jr., Esquire, as counsel for defendant in connection with this appeal.

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

Charles L. Abernethy, Jr., for defendant, appellant.

BOBBITT, J. While defendant assigns as error the overruling of his *general* motions for judgment of nonsuit, he does not contend that the case should have been dismissed in its entirety but that the evidence was insufficient to support a conviction for rape. Upon this premise, defendant asserts that, although he was not convicted of

rape, the submission of the case as to rape constitutes prejudicial error.

The testimony of the prosecutrix is to the effect that defendant, forcibly and against her will, penetrated her sexual organ "half-way" with his sexual organ; that, when he took his hand from her mouth, she screamed; and that he then relaxed to such extent that she was able to get from under him and run to a neighbor's house. This evidence was sufficient as to penetration. *S. v. Jones,* 249 N.C. 134, 105 S.E. 2d 513, and cases cited. When considered in the light most favorable to the State, the evidence was sufficient to support a conviction for rape. *S. v. Green,* 246 N.C. 717, 100 S.E. 2d 52, and cases cited; G.S. 14-23.

Defendant's counsel's real contention is that the testimony of the prosecutrix is contrary to reason and experience and therefore should be rejected as unworthy of belief. Upon the printed record, there appears to be much force to this contention. Even so, we are mindful of the fact that the jury observed the witnesses as they gave their testimony; and the probative value of the testimony was solely for determination by the jury. Moreover, discrepancies and contradictions in the testimony of the prosecutrix were matters for the jury and not for the court. *S. v. Bryant,* 250 N.C. 113, 117, 108 S.E. 2d 128, and cases cited.

Defendant testified in his own behalf. Suffice to say, his testimony was to the effect that he did not attempt in any manner to have sexual relations with the prosecutrix but that she ran when he struck her under circumstances that need not be set forth in detail. In addition to his testimony, defendant offered three witnesses (officers in the Marine Corps) who testified that defendant's general reputation was excellent.

Defendant assigns as error the failure of the court to instruct the jury as to the significance of the character evidence, namely, the testimony of said three officers. It appears that the trial judge, in reviewing the evidence, stated the substance of the testimony of these witnesses, but gave no instruction relevant to its legal significance. No request was made that he do so.

When a defendant, who has testified in his own behalf, offers evidence as to his good general reputation, and the court undertakes to instruct the jury as to the legal significance of such character evidence and how it should be considered by the jury, erroneous or incomplete instructions have been held sufficient ground for a new trial. *S. v. Wortham,* 240 N.C. 132, 81 S.E. 2d 254; *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867. However, since evidence of the good character of a

defendant on trial for rape is a subordinate and not a substantive feature of the trial, the failure of the trial judge, in the absence of a request therefor, to give any instruction relative to the significance of character evidence, is not prejudicial error. *S. v. Glatly,* 230 N.C. 177, 52 S.E. 2d 277; *S. v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473; *S. v. Sims,* 213 N.C. 590, 197 S.E. 176. It is noted that in *S. v. Sims, supra,* the defendant was tried and convicted of murder in the first degree.

We have considered each of defendant's remaining assignments of error. Suffice to say, none discloses prejudicial error or requires particular discussion. In short, after a full and careful consideration of the record, we find no error of law that would afford sufficient basis for awarding a new trial.

No error.

GLENN CARR, BY HIS NEXT FRIEND, HUEY FRANK CARR v. LEXTON O'NEIL STEWART AND LESSIE HONEYCUTT STEWART.

(Filed 2 March, 1960.)

1. Automobiles § 17—

A vehicle first reaching an intersection which has no stop sign or traffic control signal in operation has the right of way over a vehicle subsequently reaching the intersection, regardless of whether the first vehicle is going straight through the intersection or turning thereat. G.S. 20-155(b).

2. Automobiles § 41g—

Plaintiff's testimony to the effect that, in approaching an intersection, he looked both ways, saw no traffic approaching, and entered the intersection at 10 miles per hour, and that after his front wheels had cleared the intersection, defendant's vehicle, approaching the intersection from plaintiff's right, struck plaintiff's vehicle with such force as to render it "a total loss," together with testimony of a witness that plaintiff's car entered the intersection first, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence, and not to justify nonsuit as a matter of law for contributory negligence.

APPEAL by plaintiff from *Stevens, J.,* September Civil Term, 1959, of SAMPSON.

This is an action instituted by the plaintiff, by his next friend, to recover for personal injuries and property damages sustained in a collision between his 1950 Chevrolet automobile and an automobile owned by Lessie Honeycutt Stewart and operated at the time with his permission by his son, Lexton O'Neil Stewart, allegedly in an

unlawful and negligent manner. The collision occurred on 10 September 1958 at approximately 1:00 o'clock p.m. at the intersection of Faison and McKoy Streets in the City of Clinton. The plaintiff was driving his car in an easterly direction along Faison Street. The legal speed limit on Faison Street was 35 miles per hour, and on McKoy Street 20 miles per hour, it being a business street and also Highway No. 421.

The evidence of the plaintiff tends to show that as he approached the intersection of Faison and McKoy Streets he reduced the speed of his automobile to about 10 miles per hour, and immediately prior to crossing the intersection he looked in both directions and seeing no one approaching from either direction, started across the intersection. The signal or traffic control light at this intersection was not functioning at the time of the collision. There was no stop sign or signal at the intersection except the nonfunctioning traffic control signal.

The plaintiff testified, "I saw no traffic approaching from either way when I got to the curb line. I never did see the car driven by the defendant before it struck me. * * * To the best of my recollection, I know I got my two front wheels across the other side of the curb, that being the other side of the street, the eastern side, where the sidewalk was running, and I know I got my two front wheels at the sidewalk."

On cross-examination this witness testified, "I looked out to see if I could get across and I didn't see anybody coming and I looked good." On redirect examination the plaintiff testified, "I was in the intersection before the other boy was."

The investigating officer testified, "The front wheels of the Glenn Carr vehicle were through the intersection and it had been struck about center-ways by the automobile driven by Stewart." This officer further testified that both streets were 24 feet wide and that the plaintiff's car was damaged to such an extent "it was determined to be a total loss."

Mrs. Frances O'Neil, an eyewitness to the accident, testified for the plaintiff as follows: " * * * the car (plaintiff's car) was coming up from here and he just about got through the intersection when this car (defendant's car) hit him. * * * I would say that he was practically all the way through the intersection when he was struck by the other car, and that the plaintiff's car entered the intersection first."

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

Chesnutt & Chambliss for plaintiff.
Butler, Butler & Lee for defendant.

DENNY, J. In our opinion, the plaintiff's testimony when considerd in the light most favorable to him is sufficient to carry the case to the jury. The issues of negligence and contributory negligence raised by the pleadings present questions to be resolved by a jury and not by the court.

In the case of *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532, *Ervin, J.,* speaking for the Court, said: "When the driver of a motor vehicle on the left comes to an intersection and finds no one approaching it on the other street within such distance as reasonably to indicate danger of collision, he is under no obligation to stop or wait, but may proceed to use such intersection as a matter of right. * * *

"A driver having the right of way may act upon the assumption in the absence of notice to the contrary that the other motorist will recognize his right of way and grant him a free passage over the intersection. * * *"

G.S. 20-155, in pertinent part, reads as follows: "(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right * * *. (b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right of way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction * * *." Under subsection (b) of the statute the vehicle first reaching an intersection which has no stop sign or traffic signal has the right of way over a vehicle subsequently reaching it, whether the vehicle in the intersection is proceeding straight ahead or turning in either direction; and it is the duty of the driver of the vehicle not having entered the intersection to delay his progress and allow the vehicle which first entered the intersection to pass in safety. *Downs v. Odom,* 250 N.C. 81, 108 S.E. 2d 65; *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *Kennedy v. Smith,* 226 N.C. 514, 39 S.E. 2d 380; *Crone v. Fisher,* 223 N.C. 635, 27 S.E. 2d 642; *Yellow Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631.

In the case of *Donlop v. Snyder, supra,* the Court said: "Here, the defendant's argument seems to be grounded on the assumption that this evidence conclusively shows the two cars approached the intersection at approximately the same time. Such does not appear. The evidence does not give the defendant's car any fixed location. The

plaintiff said he looked and did not see the defendant's car. It is simply negative evidence. While this testimony may support the inference that the two cars approached the intersection 'at approximately the same time,' with equal logic it supports the inference that the defendant's car was at a point relatively remote from the intersection when the plaintiff looked. He said he could see up the street about a block. That the defendant was some considerable distance up the street when the plaintiff said he stopped and looked is supported by the physical evidence at the scene of the wreck tending to show that the defendant was driving at a high rate of speed; whereas the plaintiff said he moved through the intersection in second gear and was hit as he was emerging on the far side."

The plaintiff's evidence in the instant case tends to show that he entered the intersection first. Hence, in our opinion, he is entitled to have his case heard by a jury on appropriate issues, and we so hold.

The judgment of the court below is

Reversed.

STATE v. FOREST M. HOLDER.

(Filed 2 March, 1960.)

1. Criminal Law § 156—

An inadvertence of the court in stating the contentions of defendant must be brought to the court's attention in time for correction in order to be considered on appeal.

APPEAL by defendant from *Nettles, E. J.*, September Term, 1959, GASTON Superior Court.

This criminal prosecution originated in the Municipal Court of the City of Gastonia upon a warrant charging the defendant with the operation of a motor vehicle on the public highway while under the influence of intoxicating liquor. From a conviction and judgment in the Municipal Court, he appealed to the Superior Court of Gaston County. Upon the trial in the superior court the defendant called the Sheriff of Gaston County as a witness. The Sheriff testified he had known the defendant for 10 years — had seen him when he was drunk and when he was sober; that he saw him in jail about 30 minutes after his arrest and it was his opinion that the defendant "was not under the influence."

On cross-examination, he testified without objection: "Later on

that week Mr. Holder did get drunk and I took him to Dix Hill."

The court, with respect to the defendant's evidence and contentions, charged the jury: "He argues and contends . . . Sheriff Beam has testified that he saw the defendant some 30 minutes after he had been apprehended . . . that in his opinion he was not drunk. . . . and that thereafter, in about two days, he took him to the State Hospital at Raleigh for the purpose of having him treated for alcoholism."

From a verdict of guilty and judgment thereon, the defendant appealed.

Malcolm B. Seawell Attorney General, Glenn L. Hooper, Jr., Assistant Attorney General for the State.

Mullen, Holland & Cooke, by: Frank P. Cooke for defendant, appellant.

PER CURIAM. The defendant asked for a new trial solely upon the ground that the court committed error in recapitulating the defendant's evidence and contentions and that he was prejudiced by the reference to the treatment of alcoholism.

Inadvertence in stating the contentions or in recapitulating the evidence must be called to the attention of the court in time for correction. After verdict the objection comes too late. *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902.

No error.

JULIUS J. GWYN, ANCILLARY ADMINISTRATOR OF THE ESTATE OF CHARLES H. WOODRUFF, DECEASED, v. LUCKY CITY MOTORS, INC., AND FORD MOTOR COMPANY.

(Filed 16 March, 1960.)

1. Automobiles § 5: Sales § 30—

The manufacturer of a truck is under duty to the ultimate purchaser, irrespective of contract, to use reasonable care in the manufacture of the article and to make reasonable inspection so as not to subject the purchaser to injury from a hidden or latent defect.

2. Trial § 21—

Upon a motion to nonsuit the court does not pass upon the weight or credibility of the evidence, but is required to determine only whether there is any evidence sufficient to make out plaintiff's cause of action.

3. Automobiles § 5: Sales § 30— Evidence held for jury on question of manufacturer's liability for injury from latent defect.

Evidence tending to show that intestate purchased a new vehicle manufactured by defendant, that the vehicle was equipped with a "one-piece" check valve in the master cylinder brake assembly, which rendered the brakes inoperative if the driver suddenly applied the brakes, that after having trouble with the brakes for this reason, intestate took the vehicle to an authorized dealer for repairs, and that thereafter the brakes failed in the same manner, causing the vehicle to roll backwards down a steep incline, resulting in fatal injury to intestate, together with further evidence tending to show that after the repairs the master brake cylinder was still equipped with a "one-piece" check valve and that no other mechanic had made any repair to the brakes, *is held* sufficient to overrule nonsuit in an action against the manufacturer for the wrongful death of intestate.

4. Same— Liability of manufacturer for latent defect held not insulated by failure of repairman to remedy the defect.

The negligence of the manufacturer in equipping a vehicle with a "one-piece" check valve in the master brake cylinder so that the brakes would not operate if suddenly applied, a "two-piece" check valve being necessary for the proper operation of the brakes in such circumstances, is not insulated as a matter of law by the intervening act of a mechanic repairing the brake assembly in failing to replace the "one-piece" check valve, there being no evidence that the mechanic had knowledge or notice that the malfunctioning of the brakes was caused by the presence of the "one-piece" check valve within the brake assembly, and there being no break in the chain of causation set in motion by the negligence of the manufacturer.

5. Same— Malfunctioning of brakes held not to constitute notice as a matter of law of a latent defect in the brake assembly.

The evidence tended to show that the brakes of the vehicle in question would not operate if the brakes were suddenly applied because of a "one-piece" check valve in the master brake assembly, a "two-piece"

check valve being necessary to the proper operation of the brakes under such circumstances. *Held:* The fact that the purchaser, after having had trouble with the brakes for this reason and after having had the brakes of the vehicle repaired by a mechanic, who failed to replace the "one-piece" check valve, continued to drive the vehicle does not constitute contributory negligence as a matter of law, there being no evidence that the driver had knowledge that the malfunctioning of the brakes was due to the presence of a "one-piece" check valve in the brake assembly.

APPEAL by plaintiff from *Preyer, J.*, March Term, 1959, of ROCKINGHAM, docketed and argued as No. 665 at Fall Term, 1959.

Civil action instituted December 13, 1957, to recover damages on account of the death on June 13, 1957, of plaintiff's intestate, hereafter called Woodruff, allegedly caused by the negligence of defendants.

The complaint, summarized in part and quoted in part, alleged:

On or before February 21, 1957, an authorized dealer of Ford Motor Company sold and delivered to Woodruff a new 1957 Ford three-quarter ton pickup truck, serial No. F25K7N12773, manufactured by Ford Motor Company. As so manufactured, sold and delivered, the truck "was equipped with a master cylinder assembly, which transmitted the pressure from the foot pedal to the hydraulic main braking system, which said master cylinder assembly was of improper design, improperly assembled, and which contained a hidden defect in that the check valve therein would fail, on occasion, to open, thus jamming the master cylinder so that no pressure would be applied to the wheel brakes when an application was desired."

In April, 1957, Lucky City Motors, Inc., "the authorized dealer and service representative of said defendant, Ford Motor Company, acting as the agent and servant of said defendant, Ford Motor Company, as its instrumentality for the performance of the obligations of the defendant, Ford Motor Company, under its warranty issued to said intestate when said vehicle was purchased, assumed the duty of correcting said braking malfunctioning, and, in the course of the performance of said duty inspected said vehicle, and replaced a portion of the master cylinder assembly using parts furnished by said defendant, Ford Motor Company, and following the procedures outlined by it, which said replacement did not correct the hidden defect in said assembly."

Woodruff relied upon "the implied representations of said defendant, Lucky City Motors, Inc. that it had corrected said difficulty in accord with the standard service warranty and procedures of the defendant, Ford Motor Company, (and) continued to use said vehicle."

On June 13, 1957, Woodruff, "while backing this said vehicle on a public street in the Town of Marshall, Madison County, North Carolina, sought to apply the brakes thereon, which said brakes utterly failed as a result of the defects hereinbefore mentioned, with the result that said vehicle went backwards over a steep embankment and crashed at the bottom thereof, . . . causing his near instantaneous death, . . ."

The combined and concurring negligence of defendants, in particulars set forth, proximately caused the said failure of the brakes, the resulting death of Woodruff and damage to the truck, for which plaintiff alleged damages of $100,000.00 for Woodruff's death and of $2,100.00 for the damage to the truck.

Defendant Ford Motor Company, answering, admitted "that Ford trucks are equipped with a master cylinder assembly." It asserted it had no knowledge of the truth or falsity of the allegations relating to Lucky City Motors, Inc., and denied such allegations upon information and belief. It denied specifically (1) "that the Lucky City Motors, Inc. was a service representative or agent or servant of the defendant, Ford Motor Company," and (2) "that the Ford Motor Company ever issued any warranty to plaintiff's intestate." Except as otherwise indicated, there was a general denial of plaintiff's allegations. As a further defense, it pleaded Woodruff's contributory negligence in particulars set forth, in bar of plaintiff's right to recover.

The answer of Lucky City Motors, Inc., is not in the record.

At the close of plaintiff's evidence, each defendant moved for judgment of nonsuit. These motions were overruled. Thereafter, evidence was offered by Lucky City Motors, Inc. Ford Motor Company did not offer evidence. No further evidence was offered by plaintiff.

At the close of all the evidence, each defendant moved for judgment of nonsuit. The motion of Lucky City Motors, Inc., was then overruled. The jury was dismissed "over the weekend after being given the usual cautions."

The court reserved its ruling on Ford Motor Company's motion "until Monday, March 9, 1959," at which time the court entered judgment nonsuiting plaintiff and dismissing plaintiff's action as to Ford Motor Company. This judgment contains no reference to Lucky City Motors, Inc. Nothing in the record indicates what, if anything, thereafter occurred in respect of plaintiff's action against Lucky City Motors, Inc. Lucky City Motors, Inc., is not a party to this appeal.

This appeal by plaintiff is from said judgment of involuntary nonsuit as to Ford Motor Company.

Ernest R. Taylor, Herbert M. Bacon, Price & Osborne and Allen, Henderson & Williams for plaintiff, appellant.

Brown, Scurry, McMichael & Griffin and D. Leon Moore for Ford Motor Company, appellee.

BOBBITT, J. Whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury as to the alleged negligence of Ford Motor Company, is the question for decision.

It was stipulated that the 1957 Ford pickup truck was manufactured by Ford Motor Company; that it was purchased by Woodruff from Crowell Long Auto Company, Inc., of Danville, Virginia, an authorized Ford dealer, on or about February 21, 1957; and that, when sold and delivered to Woodruff, it was a new truck.

Our consideration of the evidence is directed principally to plaintiff's allegation that Ford Motor Company was negligent in that it manufactured and delivered to its authorized dealer for sale a 1957 truck equipped with defective hydraulic brakes. (Note: Plaintiff also alleged negligence on the part of Lucky City Motors, Inc., and that Ford Motor Company was responsible therefor under the doctrine *respondeat superior.*)

"The over-whelming weight of authority is to the effect that the manufacturer of a truck, like the one here in question, owes a duty to the public, irrespective of contract, to use reasonable care in its manufacture and to make reasonable inspection of the construction in the plant where the truck was manufactured." *General Motors Corporation v. Johnson*, C.C.A. (4th), 137 F. 2d 320; *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 696, Ann. Cas. 1916C 440; 5 Am. Jur., Automobiles § 350; 60 C.J.S., Motor Vehicles § 165; Annotations: 156 A.L.R. 479; 164 A.L.R. 569, 584.

We find no North Carolina decision in which an injured party has recovered against the manufacturer of an automobile on account of negligence in the construction and assembly thereof. However, in a case where the evidence was held insufficient, plaintiff's right to recover was tested by the rule stated above. *Harward v. General Motors Corp.*, 235 N.C. 88, 68 S.E. 2d 855. Also, see *Jones v. Chevrolet Co.*, 217 N.C. 693, 9 S.E. 2d 395, and *Hudson v. Drive It Yourself, Inc.*, 236 N.C. 503, 73 S.E. 2d 4.

Appellee does not question the applicability of the general rule stated above, but rightly refers to *MacPherson v. Buick Motor Co.*, *supra*, as a landmark decision. Rather, appellee asserts the present case is factually distinguishable in that (1) the plaintiff in *MacPherson*

had no notice of the defect in the wheel prior to the accident, and (2) there was no intervention by a third party "such as the intervention by Lucky City Motors in this case."

Decision requires an analysis of the evidence. In testing the sufficiency thereof, we are mindful of this well established rule: "If there is any evidence, more than a scintilla, the judge should allow the case to go to the jury, since he is not to consider the weight of the evidence, but whether there is any evidence sufficient for the jury to consider." McIntosh, North Carolina Practice and Procedure, § 565, p. 615, and cases cited.

Woodruff was an itinerant "spray painter." He worked by the job. He went from house to house in search of jobs. He would stay in one territory "until he worked out" and then move to another. In each territory he would establish a temporary place of residence and work out from such place.

In February, March and April, 1957, Woodruff lived, with his wife, children, and other members of the family, in Ruffin, N. C. Banell Small, a brother of Woodruff's wife, then a 14-year old boy, lived as a member of this family group. About May 1, 1957, Woodruff moved from Ruffin to Morristown, Tennessee.

Plaintiff's evidence as to what occurred prior to and on the occasion of the fatal accident consists of the testimony of Banell Small.

Banell Small testified that he was with Woodruff when the 1957 truck was delivered in Danville; that he helped Woodruff in his work when he operated out from Ruffin and later when he operated out from Morristown; that he was with Woodruff on April 17, 1957, when the truck was taken to Lucky City Motors, Inc., in Reidsville, to have the brakes fixed; and that he was with Woodruff in Marshall, N. C., on June 13, 1957, when the fatal accident occurred. Banell Small's testimony also tends to show the facts stated in the following two numbered paragraphs.

1. On June 13, 1957, Woodruff, driving the 1957 truck and accompanied by Banell Small, left Morristown for Marshall. In Marshall, about noon, they went to the house of one Everett Barnett. In so doing, they traveled (north) up a mountain road (ten or eleven feet wide), referred to as Hill Street. Barnett's private driveway ("just room enough for one vehicle") extended (east) from Hill Street, down the mountain. The grade on Hill Street and on Barnett's driveway was steep. On the west side of Hill Street, opposite the entrance to the Barnett driveway, there was a bank, that is, the side of the mountain.

2. In leaving the Barnett house, Woodruff drove up the driveway

and onto and across Hill Street. He stopped when the front bumper hit the bank on the far (west) side, being unable to make the turn into Hill Street without backing. When the truck was still in "low, low gear," with the engine running, it started to roll back toward the east edge of Hill Street. When this occurred, Woodruff "stomped" the brakes. The brakes "froze" and failed to take effect. The truck rolled back over the east edge of Hill Street, down the side of the mountain toward the Barnett house, turned over and fell against an apple tree, and Woodruff was "pinned in" in such manner as to cause his death.

On this phase of the case, we must conclude that plaintiff's evidence was sufficient to require submission for jury determination whether the failure of the brakes proximately caused the fatal accident.

After the fatal accident, the Woodruff truck was removed to the warehouse of Service Motor Sales in Marshall. There was evidence that nothing was done to the truck in respect of brakes or otherwise prior to July 29th, the date the truck was sold to Mr. Derwood Trent of Morristown. Trent drove the Woodruff truck from Marshall to Morristown. As to what occurred on this trip, Trent testified: "I found if I would hit the brake real suddenly I had no brake at all, just like a hard pedal that wouldn't release at all. If I released the pedal gradually, applied small pressure on it, it would depress. In other words, I mean if you stamped them all of a sudden, the pedal would stay firm and not depress. If you applied the brakes gradually, you had a brake."

There was testimony by Trent and by John Self, Trent's mechanic, as to tests made in respect of the brakes on the Woodruff truck. In short, their testimony tended to show that the master (brake) cylinder assembly was defective in that it contained a "one-piece" check valve instead of the "two-piece" check valve called for by the 1957 Ford Manual. Their testimony tended to show that, after purchasing a 1957 brake assembly "kit" from the Ford dealer in Morristown, they replaced the "one-piece" check valve with a "two-piece" check valve and after doing so the hydraulic brakes worked perfectly. According to their testimony, when the "one-piece" check valve was used, the brake would operate satisfactorily if gradually applied but "on sudden application" the outlet for the brake fluid would completely close and the fluid would not reach the brake cylinders in the wheels of the truck.

On this phase of the case, we must conclude that there was evidence sufficient to support findings that the master cylinder assembly in Woodruff's truck on June 13, 1957, contained a "one-piece" check

valve, and that this "one-piece" check valve rendered the brakes inoperative if the driver suddenly applied or "stomped" the brakes. In this connection, it is noted that the evidence offered by Lucky City Motors, Inc., tends to show that a master cylinder assembly for a 1957 truck should have a "two-piece" check valve as one of its component parts.

The question arises: Did the master cylinder assembly in Woodruff's 1957 truck contain a "one-piece" check valve when delivered by Ford Motor Company to the Danville dealer from whom it was purchased by Woodruff? To answer this question, we consider the evidence as to what occurred prior to and on April 17th, the date Woodruff took the truck to Lucky City Motors, Inc., to have the brakes fixed. As to this, the testimony of Banell Small and the testimony of James V. Lassiter, Jr., then the Service Manager for Lucky City Motors, Inc., a witness for Lucky City Motors, Inc., is in conflict, particularly with reference to what was wrong with the brakes when Woodruff took the truck to Lucky City Motors, Inc., on April 17th.

Banell Small testified: "In between the time that the new Ford truck was delivered to him (Woodruff) and April 17, when you hit the brakes real hard, they would freeze, wouldn't go down; like you'd be going along and hit them suddenly, they just wouldn't stop, wouldn't hold at all, just freeze." This was first noticed, according to Banell Small, a week or so after the 1957 truck was delivered to Woodruff, when, approaching a red light, Woodruff "stomped on the brakes" and they just "went right on." According to Banell Small, when the truck was taken to Lucky City Motors, Inc., on April 17th, Woodruff "told them how the brakes was acting, how when he hit it they wouldn't hold, would just freeze, and stuff like that."

On the other hand, Lassiter testified that Woodruff's complaint on April 17th was: "My brakes are locking up; I can't drive it on the road." Lassiter testified: "The brakes was locking up. He had too much brakes; he couldn't drive it. . . . After getting in it I tried the brakes and it would not move without putting it in low gear and barely moved then. . . . He said in applying the brakes they seemed to get tighter and tighter until it stopped."

As to what was done by Lucky City Motors, Inc., on April 17th, Banell Small testified: "He (the mechanic) took the master cylinder off, the brake thing and tore it down." Again: He ". . . tore the master cylinder, fixed a part and put it back on, and we drove on out with it." Again: "I don't know what they put in it or what they didn't." Lassiter's testimony was to the effect that Woodruff's use of improper

brake fluid had caused the damage to certain component parts of the brake assembly; and that, among other repairs and replacements, he removed a "two-piece" check valve from the brake assembly and replaced it with another "two-piece" check valve.

True, if Lassiter's testimony is accepted, the "one-piece" check valve in Woodruff's truck on June 13, 1957, was put there by some person and on some occasion not disclosed by the evidence. Indeed, Lucky City Motors, Inc., offered a witness who testified that on June 13, 1957, in Marshall, Woodruff's truck had defective brakes; and that, when the witness cautioned Woodruff to have the brakes fixed, Woodruff replied that he had "had these brakes worked on two or three times." Yet Banell Small testified that Woodruff had had no trouble with the brakes from April 17th to June 13th; that he had been with him constantly on all occasions when Woodruff had driven the truck; and that no work had been done on the brakes by anybody after April 17th.

Appellee contends: *If* a "one-piece" check valve was in the brake assembly on June 13, 1957, and *if* nothing had been done to the brakes from April 17th to June 13th, the only inference to be drawn is that the "one-piece" check valve was put in the brake assembly by Lucky City Motors, Inc. It is noted that this contention runs counter to the testimony of Lassiter. The jury was at liberty to accept or to reject, in whole or in part, Lassiter's testimony. Whether Lassiter removed a "two-piece" check valve from the brake assembly was for jury determination.

If the evidence most favorable to plaintiff is accepted, the brake failure on June 13th was precisely the same in character as the brake failures prior to April 17th, and the cause of the brake failure on June 13th was the fact that a "one-piece" check valve instead of the "two-piece" check valve was a component part of the brake assembly. When all inferences are drawn in favor of plaintiff, the evidence was sufficient to permit a finding that the "one-piece" check valve in the brake assembly on June 13th was in the brake assembly when the 1957 truck purchased by Woodruff was delivered by the manufacturer to its dealer in Danville.

Even so, appellee contends the original liability of Ford Motor Company, if any, ended upon discovery of the defect prior to April 17th; and that, with knowledge of such defect, Woodruff had the truck inspected and repaired by Lucky City Motors, Inc. Here, appellee relies largely upon *Harley v. General Motors Corp.*, 97 Ga. App. 348, 103 S.E. 2d 191, where it is said: "In the instant case, the plaintiff's father discovered the defective condition of the accelera-

tor rod before it had caused any injury and at the discovery thereof, the defective condition of the accelerator rod ceased to be a latent defect. Once the defect was discovered and the dangerous condition of the defective machine became apparent, that discovery insulated the manufacturer from any damages resulting from its manufacture of a latently defective machine." Suffice to say, if the brake assembly placed in the 1957 truck by Ford Motor Company contained a "one-piece" check valve, we cannot say as a matter of law that the mere fact that Woodruff discovered (prior to April 17th) that his brakes were not working satisfactorily is sufficient to absolve Ford Motor Company from liability. There is no evidence that Woodruff had knowledge or notice that the malfunctioning of the brakes was caused by the presence, within the brake assembly, of a "one-piece" check valve. In short, the cause of the hazard was not obvious but concealed. Compare, *Tyson v. Manufacturing Co.*, 249 N.C. 557, 107 S.E. 2d 170.

Here the alleged negligence of Ford Motor Company was the use of a "one-piece" check valve as a component part of the brake assembly on Woodruff's 1957 truck. There was evidence that the brake assembly used on certain Ford trucks and cars for 1956 (models) and prior years contained a "one-piece" check valve.

This question arises: If Lucky City Motors, Inc., was negligent, either in its failure to discover or to remedy the defect, did such negligence intervene and supersede the original negligence of Ford Motor Company? Without appraising the sufficiency of the evidence to establish negligence on the part of Lucky City Motors, Inc., it is enough to say it does not establish negligence on its part as a matter of law.

The doctrine of intervening (insulating) negligence has been discussed in many cases. For a full discussion, see *Hayes v. Wilmington*, 243 N.C. 525, 540, 91 S.E. 2d 673, and cases cited. If, as manufactured by Ford Motor Company, the brake assembly had a "one-piece" check valve in it, and this was permitted to remain therein by Lucky City Motors, Inc., there was no break in the chain of causation set in motion by the negligence of Ford Motor Company. Too, we cannot say as a matter of law that Ford Motor Company could not have reasonably anticipated that a mechanic, undertaking to repair the brakes, would not permit to remain in the brake assembly a "one-piece" check valve put there by the manufacturer.

In *Pierce v. Motor Co.* (C.C.A. 4th), 190 F. 2d 910, 913, (S. c., *Ford Motor Co. v. Mahone*, 205 F. 2d 267), *Parker, Chief Judge,* said: "It is argued that any negligence of the manufacturer in turning out a defective car is insulated by that of a mechanic who inspects it afterwards so that the latter will be deemed the proximate cause of any

injury resulting from its defective condition; but this argument is entirely without merit. As said in Harper on Torts ch. 7 sec. 106, quoted in *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A. 2d 517, 529: 'A negligent defendant can not escape liability because of a failure on the part of some third person to perform an affirmative duty which, if properly performed, would have enabled the plaintiff to avoid the risk created by the defendant's negligence. The failure of the other to inspect adequately may make him liable to the party harmed, but it will not relieve the defendant whose negligence was responsible for the hazard in the first place.' "

Careful consideration of the evidence raises many doubts as to (1) whether the fatal accident was caused by failure of brakes or by backing off the edge of the mountain road, (2) whether the alleged defect was not of such nature that Woodruff, in his extensive travels, became fully aware thereof between April 17th and June 13th, and (3) whether Woodruff had not had the brakes worked on on one or more occasions after April 17th at times and under circumstances not disclosed by the evidence. But a decision adverse to plaintiff would require that we weigh the evidence, particularly the testimony of Banell Small. The credibility of the witnesses and the weight of the evidence are for jury determination.

As to contributory negligence, it is enough to say that the evidence does not suffice to establish contributory negligence on the part of Woodruff as a matter of law.

We do not reach the question as to whether the evidence was sufficient to support a finding that Ford Motor Company was liable for the negligence, if any, of Lucky City Motors, Inc., under the doctrine *respondeat superior*.

Under the circumstances disclosed by the record, we refrain from comment on the present status of the action as between plaintiff and Lucky City Motors, Inc.

The judgment of involuntary nonsuit as to Ford Motor Company is reversed.

Reversed.

STATE v. GENEVA PHIFER HOOVER AND FLORENCE STALLWORTH.

(Filed 16 March, 1960.)

1. Abortion § 1—

G.S. 14-44 and G.S. 14-45 create separate and distinct offenses, the first, designed to protect the life of a child *in ventre sa mere*, making it unlawful to employ an instrument upon a woman quick with child with intent to destroy the child unless necessary to preserve the life of the mother, and the second, designed to protect the health or life of a pregnant woman, making it unlawful to administer any drugs or use any instrument upon a pregnant woman with intent thereby to produce the miscarriage of such woman.

2. Abortion § 3—

In a prosecution for abortion it is competent for the femme to testify as to her belief on the day of the alleged operation that she was pregnant.

3. Same—

In a prosecution under G.S. 14-45 it is required that the State prove the fact of pregnancy but it is not required that it prove an actual miscarriage.

4. Same—

In a prosecution under G.S. 14-45 it is not required that the child be quick, but the offense may be committed during any stage of pregnancy.

5. Same—

Testimony of the femme in a prosecution under G.S. 14-45 that at the time of the operation she believed she was a month and a half or two months pregnant, together with testimony of two physicians, who examined her the day after the operation, to the effect that from the size of her uterus it was their opinion that the femme was about two months pregnant, is sufficient to be submitted to the jury on this element of the offense.

6. Abortion § 1—

In a prosecution upon an indictment charging violation of G.S. 14-44 and the violation of G.S. 14-45, the State may not be nonsuited if there is sufficient evidence of defendant's guilt of either of the offenses.

7. Criminal Law § 101—

Where the indictment contains separate counts charging separate offenses the State may not be nonsuited if there is sufficient evidence of defendant's guilt on either count.

8. Abortion § 2—

A defendant cannot be convicted under G.S. 14-44 if there is no evidence that at the time the offense was committed the child was quick.

9. Criminal Law § 94—

The remark of the court during the examination of a witness for the State that the court found the witness a reluctant witness and that

therefore the court would allow a certain line of questioning, *held* not prejudicial to defendant, since the remark, when considered in the light of all the facts and circumstances, had the effect of lessening the strength or minimizing the weight of the testimony of the State's witness.

10. Same—

Not every remark of the court or question propounded by it to a witness is of such harmful effect as to constitute reversible error, and a new trial will not be granted therefor unless it is apparent that such action might reasonably have prejudiced defendant.

11. Criminal Law § 160—

Defendant may not object to an infraction of the rule prohibiting the court from expressing an opinion on the credibility of a witness when such occurrence is prejudicial to the State rather than to defendant.

12. Criminal Law § 84—

The admission in evidence of a written statement made by a witness for the State for the sole purpose of corroborating her testimony upon the trial *held* not to justify a new trial.

13. Criminal Law § 91—

Where the court sustains defendant's objection to testimony and strikes it and then sustains the objection to the following question, an assignment of error to the asking of the second question will not be held prejudicial.

14. Criminal Law § 117—

A verdict of guilty as charged rendered in a prosecution on an indictment containing two separate counts is a verdict of guilty as to both counts.

15. Criminal Law § 161—

Where the charge of the court is not in the record it will be presumed that the court correctly charged the law arising upon the evidence.

16. Criminal Law § 132—

Under a judgment of imprisonment for not less than one year defendant cannot be lawfully imprisoned for more than one year.

17. Criminal Law § 164—

Where the trial of the defendant upon an indictment containing two counts is free from prejudicial error and but a single judgment of imprisonment is imposed, which is less than the maximum which might be imposed on either one of the counts, the fact that the evidence is insufficient to support a conviction of one of the counts does not warrant a new trial, there being sufficient evidence to support the verdict and judgment on the other count.

APPEAL by defendants from *Clarkson, J.*, 7 September 1959 Regular B Criminal Term, of MECKLENBURG.

Criminal action on an indictment with two counts: the first count charging both defendants with using and employing instruments upon Juanita Rozzell, a woman pregnant or quick with child, with intent thereby to destroy such child, the same not being necessary to preserve the life of the mother, a violation of G.S. 14-44, and the second count charging both defendants with using instruments and applications upon Juanita Rozzell, a pregnant woman, with intent thereby to procure the miscarriage of such woman, a violation of G.S. 14-45.

Plea: Not Guilty by both defendants. Verdict: Defendant Hoover is guilty as charged, defendant Stallworth is guilty as charged.

From a judgment of imprisonment as to each defendant of not less than one year, each defendant appeals.

T. W. Bruton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

Allen A. Bailey, Attorney for Defendant Geneva Phifer Hoover, Henry E. Fisher, Attorney for Defendant Florence Stallworth, and Francis M. Fletcher, Jr., Counsel for defendants on appeal.

PARKER, J. G.S. 14-44 and G.S. 14-45 create two separate and distinct criminal offenses. G.S. 14-44 makes it unlawful to use or employ any instrument upon a woman, "either pregnant or quick with child" with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother. This statute is designed to protect the life of a child *in ventre sa mere*. " 'Either pregnant or quick with child' as used in G.S. 14-44, means 'pregnant, i.e., quick with child' or 'pregnant with child that is quick.' " *S. v. Jordon,* 227 N.C. 579, 42 S.E. 2d 674. G.S. 14-45 condemns the administration of medicine, drugs or anything whatsoever to or the using of any instrument or application upon "any pregnant woman" with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman. G.S. 14-45 relates to the miscarriage of, or to the injury or destruction of a pregnant woman. G.S. 14-44 provides for a greater punishment than G.S. 14-45. *S. v. Forte,* 222 N.C. 537, 23 S.E. 2d 842; *S. v. Jordon, supra; S. v. Green,* 230 N.C. 381, 53 S.E. 2d 285.

Defendant Stallworth offered evidence: defendant Hoover did not. Both defendants assign as error the overruling of their motions for judgments of nonsuit made at the close of all the evidence. Defendants filed a joint brief. In their brief they state their "primary argument on appeal" is that the State's evidence as to the alleged pregnancy of the

prosecutrix, Juanita Rozzell, at the time the alleged offense was committed is insufficient to carry the case to the jury.

The State's evidence tends to show the following facts: Juanita Rozzell is 22 years old. She has a four-year-old girl. She and her husband are living apart. Juanita Rozzell was asked on direct examination what was her physical condition on January 16th. She replied: "I was expecting." She was then asked what she meant by expecting. She replied: "I was pregnant. Before January 16th I had missed my monthly period, I was going on the second month." She testified without objection on cross-examination by defendant Hoover, "I know I was pregnant. . . . The father of the child I thought I was pregnant with was Robert Falls, he lives in Charlotte."

Defendants assign as error the denial by the court of their motions to strike out her testimony "I was expecting," and "I was pregnant." The court properly denied the motions. The evidence was competent. *Commonwealth v. Leger,* 264 Mass. 217, 162 N.E. 337, was an abortion case. The victim was Anna E. Craham, an unmarried woman, who believed herself pregnant because menstruation had ceased for two preceding periods. The Court said: "It was competent for Miss Craham to testify that 'she thought she was pregnant.' " In *S. v. Horwitz,* 108 Conn. 53, 142 A. 470, the Court held that in a prosecution for abortion, belief of victim on the day of alleged operation that she was pregnant was a relevant circumstance, properly proved by her own testimony. To the same effect: *People v. Ames,* 151 Cal. App. 2d 714, 312 P. 2d 1111, cert. denied 355 U.S. 891, 2 L. Ed. 2d 190, which holds no error was committed in permitting evidence of victims that they believed they were pregnant; *Holloway v. State,* 90 Ga. App. 86, 82 S.E. 2d 235; 3 Burdick, Law of Crime, pp. 291-292. See also: *Commonwealth v. Longwell,* 79 Pa. Super. 68; *S. v. Miller,* 90 Kan. 230, 133 P. 878, Ann. Cas. 1915B, 818.

About a week before 16 January 1959, Juanita Rozzell went to see the defendant Hoover at the Grill about having an abortion, and to see if she knew anyone who would do it. Defendant Hoover replied she thought she knew some one; that it would cost $75.00. This conversation was admitted against defendant Hoover alone.

On 16 January 1959, Juanita Rozzell went back to the Grill. She had $85.00 with her. Defendant Hoover carried Juanita Rozzell to her house on Statesville Avenue. When defendant Hoover went in her house, she made a telephone call, and said "This is Geneva, O. K." In a short time defendant Stallworth came in the house.

Juanita Rozzell then testified that the two defendants and she went into a back room, and she testified in detail as to defendant Stallworth

inserting long scissors-like instruments into her private parts, and what was done, etc., the sordid details of which we omit, as their recital here would serve no useful purpose. Defendant Hoover was present, assisting. After it was over Juanita Rozzell gave defendant Stallworth $75.00.

Five or six minutes after Juanita Rozzell got off the bed and put her pants on, policemen came in the house. In the room the policemen found two instruments, one having a small amount of blood on the point of it, syringe, tubes, etc.

Dr. Joseph B. McCoy, Jr., a medical doctor, and a medical expert in the field of obstetrics and gynecology, on 17 January 1959 examined Juanita Rozzell at the Good Samaritan Hospital. He testified, as a witness for the State, that he found, *inter alia,* blood in the vagina and "uterus anterior size of two months pregnancy and firm." Dr. McCoy testified that, based on his examination of Juanita Rozzell, she was pregnant, in his opinion. He testified on cross-examination that the size of her uterus was the size of two months pregnancy. He further testified on cross-examination: "The size of the uterus was the size of two months pregnancy. There were no lacerations I could detect. There was no damage to tissue in any way. While it is my opinion the patient was about two months pregnant I could be mistaken in that; it is merely an opinion, based primarily upon the size of the uterus and the color of the cervix. . . . Any number of things can cause an enlargement of the uterus."

Dr. Richard Dennis Hill, a medical doctor, engaged in the practice of obstetrics and gynecology, and a witness for the State, examined Juanita Rozzell on 17 January 1959. On such examination he found her uterus slightly enlarged, which is "consistent with about a size of 6 to 8 weeks pregnancy." Dr. Hill testified that he could not give an opinion as to whether she was pregnant or not. That definite signs of pregnancy are X-ray findings of the fetal skeleton or auscultation of the fetal heart rate, which are usually not seen until the 16th or 18th week of pregnancy, and these were not present.

When defendant Stallworth came out of the Hoover house, she was arrested by policemen, and carried to police headquarters. The policemen then went into the Hoover house. At police headquarters each defendant made a statement in the presence of the other. The substance of defendant Hoover's statement is: Juanita Rozzell came to her, and said she needed some help. Then she asked Juanita what she was talking about, and she replied "I want an abortion." She told Juanita she would see what she could do, and to contact her the following Wednesday. Later Juanita called her at the cafe, and asked

if she could get it done Friday. Juanita came to the cafe, and she took her to her home on Statesville Avenue. That when they reached there she called Florence Stallworth, that Florence Stallworth came over, and they took Juanita in the back room on the right where Florence Stallworth performed the abortion. That Florence gave her $35.00 in the hall. The substance of Florence Stallworth's statement is: She was contacted by Geneva Hoover, and told to come to her house. She went to the house. They went into a back room, and she asked Juanita how many months she was pregnant. She replied "one and a half or two months." She replied all right, and Juanita got on the bed. Defendant Stallworth told then in detail of putting the instrument into Juanita's vagina, and what she did. That Juanita paid her $75.00, and she gave Geneva Hoover $35.00, that when the police came up she was leaving, and they told her to get in their car, and she dropped the money by her car. Neither defendant denied the statement of the other.

An actual miscarriage is not a necessary element of the offense condemned by G.S. 14-45. 1 Am. Jur., Abortion, Sec. 12.

In a prosecution for a violation of G.S. 14-45, proof of pregnancy is essential. However, a woman may be pregnant within the meaning of G.S. 14-45, though the fetus has not quickened. 1 Am. Jur., Abortion, Sec. 16; Annotation: 46 A.L.R. 2d pp. 1397-1399, where cases are cited. See *S. v. Slagle*, 83 N.C. 630, as to the common law rule, where this Court held an abortion "may be committed at any stage of pregnancy." As to similar holdings as to the common law rule see Annotation 46 A.L.R. 2d pp. 1396-7, where cases are cited.

In annotation 16 A.L.R. 2d 951, it is said: "Statutes using the term 'pregnant woman' have been interpreted as meaning pregnancy during any stage, regardless of the vitality of the fetus."

The courts are in agreement that the element of pregnancy, like other elements of the offense, need not be established conclusively, but only beyond a reasonable doubt. 1 Am. Jur., Abortion, Sec. 47; 1 C.J.S., Abortion, Sec. 34; Annotation: 46 A.L.R. 2d 1404.

It is our opinion that the State's evidence has legal sufficiency to carry the case to the jury on the second count in the indictment, which charges a violation of G.S. 14-45, and is legally sufficient to support a verdict of guilty on that count.

The State's evidence does not show a violation of G.S. 14-44, as charged in the first count in the indictment, for the reason that there is no evidence that at the time of the offense charged Juanita Rozzell was "quick with child."

However, as the State's evidence was sufficient to support the second

count in the indictment, it was not permissible to nonsuit the State's case. On this question *S. v. Martin,* 182 N.C. 846, 109 S.E. 74, is directly in point. The trial court properly overruled the defendants' motions for judgment of nonsuit renewed at the close of all the evidence.

During the first part of the direct examination of the prosecutrix, Juanita Rozzell, she was asked several questions about what was said about money in her conversation at the Grill with defendant Hoover in respect to having an abortion performed. At this point the trial judge made this remark: "The court, in its discretion, finds this witness is a rather reluctant witness, and the court, in its discretion, allows this line of questioning." The defendants assign this as error, contending that in making such a remark the trial judge violated G.S. 1-180.

This Court said in *S. v. Perry,* 231 N.C. 467, 57 S.E. 2d 774: "It does not follow, however, that every ill-advised comment by the trial judge or question propounded by him which may tend to impeach the witness, is of such harmful effect as to constitute reversible error. The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." Applying this test here, the remark of the trial judge, when considered in the light of all the facts and attendant circumstances shown by the record was not, in our opinion, of such a prejudicial nature as to have had any effect on the result of the trial. If such remark had any effect, it had the effect of lessening the strength or of minimizing the weight of the testimony of the prosecutrix, who was a witness for the State, and if there was any error, it was prejudicial to the State. This Court said in *S. v. Puett,* 210 N.C. 633, 188 S.E. 75: "The rule is clearly expressed in these words: 'Any remarks of the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds *against the unsuccessful party,* will afford ground for reversal of the judgment.' *Perry v. Perry,* 144 N.C., 328 (330). To constitute reversible error, an expression of opinion on the part of the court must be prejudicial to the interest of the appellant." *S. v. Rogers,* 173 N.C. 755, 91 S.E. 854, relied on by defendants, is clearly distinguishable. The prejudicial remark of the judge in that case was addressed to the defendant, who was testifying in his own behalf, and was to the effect to answer concisely the questions asked on cross-examination, "and not be dodging." This assignment of error is overruled.

The assignment of error as to the admission in evidence of a written statement of the prosecutrix, Juanita Rozzell, made to John W. Severs, a member of the detective bureau of the Charlotte Police Department, for the sole purpose of corroborating her, in respect to the offense charged, has been given due consideration, and is without sufficient merit to justify a new trial.

On direct-examination of Dr. Richard Dennis Hill, a witness for the State, he was asked this question: "Were any tests to determine whether or not the patient was pregnant made, either in your presence or by yourself?" He answered, "I did not make the test, but the test was made." Defendants' motion to strike the answer was allowed. He was then asked this question: "Did you get the benefit of the test that was made?" An objection to the question by defendants was sustained. Defendants assign as error the asking of the question. Prejudicial error is not shown, and this assignment of error is overruled.

The charge of the court is not brought forward. We cannot determine with certainty from the record, whether the trial judge submitted both counts in the indictment or only the second count in the indictment to the jury. Defendants in their brief speak of G.S. 14-45, and a pregnant woman, but their brief has nothing in respect to a woman "quick with child." However that may be, the record shows a verdict as to each defendant of guilty as charged, which is a verdict of guilty as to both counts in the indictment. *S. v. Best*, 232 N.C. 575, 61 S.E. 2d 612; *S. v. Graham*, 224 N.C. 347, 30 S.E. 2d 151; *S. v. Toole*, 106 N.C. 736, 11 S.E. 168. As to each defendant a single sentence was imposed, without reference to either count in the indictment.

Defendants' exceptions to the judgment are formal. They are not discussed in their brief.

In *S. v. Snipes*, 185 N.C. 743, 117 S.E. 500, the Court says that the following rule is generally recognized and applied: "Where the indictment contains several counts and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates." The first syllabus in our Reports in *S. v. Holder*, 133 N.C. 709, 45 S.E. 862, is: "Where there is more than one count in a bill of indictment, and there is a general verdict, the verdict is on each count; and if there is a defect in one or more of the counts, the verdict will be imputed to the second count."

In this case there was no admission of improper evidence such as could have affected the verdict, and there is no contention there was an improper instruction. The charge of the court to the jury is not in the record. Therefore, it is presumed that the jury was charged cor-

rectly as to the law arising upon the evidence, as required by G.S. 1-180. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481.

Here there is a verdict of "guilty as charged" in respect to each defendant. The trial is free from prejudicial error. The single judgment of imprisonment imposed on each defendant is upheld, for the reason that the second count in the indictment is sufficient to support the verdict and judgment as to each defendant. *S. v. Best, supra; S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363; *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *S. v. Toole, supra.* See *S. v. Meshaw,* 246 N.C. 205, 209-210, 98 S.E. 2d 13, 16; *In re Powell,* 241 N.C. 288, 84 S.E. 2d 906.

G.S. 14-45 provides for imprisonment "for not less than one year nor more than five years and shall be fined at the discretion of the court." The judgment here as to each defendant is for imprisonment for not less than one year. Under these judgments the defendants cannot validly be imprisoned for more than one year.

No reversible error has been made manifest, hence the verdict and judgments will be upheld.

No error.

GEORGE G. WILLIAMS, PETITIONER, v.
STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 16 March, 1960.)

1. Eminent Domain § 1—

The requirement of payment of just compensation for the taking of private property under the power of eminent domain is imposed on the Federal government by the Fifth Amendment to the U. S. Constitution and upon the State government and its agencies by the Fourteenth Amendment to the federal constitution and by Article I, Section 17, of the Constitution of North Carolina.

2. Same—

The power of eminent domain is the power of the sovereign to take private property for a public purpose upon payment of just compensation.

3. Eminent Domain § 5—

The compensation for the taking of private property under the power of eminent domain is to be measured by the value of the property taken together with damages to the remaining property, but recovery may not be had for other injuries resulting from the taking which are merely incidental thereto and do not constitute the taking of property.

4. Same—

Where an entire leasehold estate is taken in the exercise of the power of eminent domain the lessee is not entitled to recover compensation for the incidental loss attributable to the costs of removing his stock of merchandise, fixtures and other personal property, the interruption or loss of business or loss of customers or goodwill incident to the necessity of moving to a new location, since such losses are not property and are noncompensable.

APPEAL by petitioner from *Thompson, S. J.*, October 1959 Civil Term, of BUNCOMBE.

Civil action heard upon a written demurrer.

From a judgment sustaining the demurrer, and dismissing the action, petitioner appeals.

T. W. Bruton, Attorney General, Kenneth Wooten, Jr., Assistant Attorney General, Andrew H. McDaniel, Trial Attorney, and Harkins, Van Winkle, Walton & Buck, Associate Counsel, for defendant, appellee.

Williams, Williams & Morris for plaintiff, appellant.

PARKER, J. Petitioner instituted a special proceeding before the Clerk of the Superior Court of Buncombe County under G.S. 40-11 *et seq.*, to recover compensation for the entire taking by respondent under G.S. 136-19 of a whole leasehold estate owned by petitioner in a store building and premises on Montford Avenue in the city of Asheville. The lease was for five years, commencing on 1 September 1956.

While petitioner was in possession of the store building and premises by virtue of his lease, respondent took the whole store building and premises for the purpose of the relocation, reconstruction, widening and improving of the Asheville Expressway, on 30 January 1959 obtained a court order removing petitioner from the store building and premises, and has appropriated all of the same to use as a highway right-of-way for the Asheville Expressway.

In the petition in this special proceeding, petitioner sets forth what he terms a "Second and Further Cause of Action." In this "Second and Further Cause of Action" petitioner alleges that he was caused by respondent appropriating his leasehold estate for highway purposes and removing him therefrom by court order to incur large expenses in moving his stock of merchandise, furniture and fixtures to another location, that in moving his stock of merchandise was damaged, that his moving his grocery business to another location lost him business, customers and good will. Wherefore, petitioner prays

that he recover from respondent $750.00 for expenses incurred in his moving to another location, and that he recover from respondent $7,500.00 for loss and interruption of business and loss of customers and good will.

Respondent made a motion before the Clerk of the Superior Court of Buncombe County to strike from the petition in the special proceeding, and from the "Second and Further Cause of Action," identical allegations that "on or about the 30th day of January, 1959, obtained a court order removing this petitioner from said premises and." The motion was allowed.

Respondent demurred to petitioner's pleading on the ground that there was a misjoinder of causes. The Clerk of the Superior Court of Buncombe County sustained the demurrer for misjoinder of causes, and ordered a severance, retaining before him for further proceedings the special proceeding under G.S. 40-11 *et seq.* to recover compensation for the entire taking by respondent of petitioner's whole leasehold estate under G.S. 136-19, and transferring petitioner's "Second and Further Cause of Action" to the civil issue docket of the Superior Court of Buncombe County. To this order there is no exception. The petition in the special proceeding retained by the Clerk is not in the record before us.

Respondent filed a written demurrer to petitioner's "Second and Further Cause of Action" on the ground that the court has no jurisdiction of the subject matter for the reason that the "Second and Further Cause of Action" alleges a tort action, and the State has not consented to or authorized the maintenance of a tort action against the State Highway Commission. Judge Thompson rendered an order sustaining the demurrer, and dismissing petitioner's "Second and Further Cause of Action."

In this Court respondent filed a demurrer *ore tenus* on the following grounds: One, the "Second and Further Cause of Action" does not state facts sufficient to constitute a cause of action, in that it seeks a recovery of damages which are non-compensable, resulting from the taking of private property for public use by respondent. Two, the Court has no jurisdiction over the subject matter, since the "Second and Further Cause of Action" alleges a taking by respondent, and in matters of taking by respondent the statutes require a special proceeding to be brought before the Clerk of the Superior Court.

The State Highway Commission states in its brief: "No one questions the right of plaintiff to just compensation for the taking of the leasehold interest."

Here the respondent *entirely took the whole leasehold estate.* Should

petitioner's removal expenses, and damages to his stock of merchandise caused by such removal, be included in the measure of just compensation, and awarded to him?

The Fifth Amendment to the United States Constitution, which is a limitation upon the federal government, and not upon the states, *Brown v. New Jersey,* 175 U.S. 172, 44 L. Ed. 119, provides that private property shall not be taken for public use without just compensation. Art. I, Section 17, of the North Carolina Constitution uses language of similar import. *DeBruhl v. Highway Commission,* 247 N.C. 671, 102 S.E. 2d 229. Respondent is an agency of the State government. It entirely took petitioner's whole leasehold estate under the right of eminent domain, which is the power of the sovereign to take or damage private property for a public use on payment of just compensation. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129. Under the Fourteenth Amendment to the federal constitution, no state can deprive an individual of his property for public use without the payment of just compensation. *Delaware, L. & W. R. Co. v. Morristown,* 276 U.S. 182, 72 L. Ed. 523, 56 A.L.R. 756; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 67 L. Ed. 322, 28 A.L.R. 1321.

Under the settled rule against allowance for consequential losses in federal condemnation proceedings, expenses of removal or of relocation of personal property are not to be included in valuing property taken, where there is an *entire taking* of a condemnee's property, whether that property represents the interest in a leasehold or a fee. *U. S. v. General Motors Corp.,* 323 U.S. 373, 89 L. Ed. 311; *U. S. v. Petty Motor Co.,* 327 U.S. 372, 90 L. Ed. 729; *U. S. v. Westinghouse E. & Mfg. Co.,* 339 U.S. 261, 94 L. Ed. 816. However, it is apparent from these three cases that if the government takes merely temporary occupancy of premises under lease, then the cost of removal may be considered in determination of just compensation. *Intertype Corp. v. Clark-Congress Corp.,* (1957), 240 F. 2d 375.

A majority of the State Courts hold that, in the absence of a statute or agreement to the contrary, the removal costs of a stock of merchandise, or other personal property, and the breakages or other injury to such property caused by such removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property. *Housing Authority of City of E. St. Louis v. Kosydor,* (19 Nov. 1959), ... Ill. ....., 162 N.E. 2d 357; *Edgcomb Steel of New England v. State,* (1957), 100 N.H. 480, 131 A. 2d 70; *Emery v. Boston Terminal Co.,* 178 Mass. 172, 59 N.E. 763 (opinion

C. J. Holmes); Nichols on Eminent Domain, 3rd Ed., Vol. 4, pp. 401-414; Orgel on Valuation under Eminent Domain, 2nd Ed., Vol. I, Sec. 69; Jahr, Eminent Domain, Sec. 112; 18 Am. Jur., Eminent Domain, pp. 895-6; Annotation: 4 L.R.A. (N.S.) 890; L.R.A. 1915D,496; L.R.A. 1916D, 719; 85 Am. St. Rep. 298; 8 Ann. Cas. 696; 16 Ann. Cas. 787; Ann. Cas. 1918B, 886; 34 A.L.R. 1523; 90 A.L.R. 165, 166; 3 A.L.R. 2d 312; Note, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses, 67 Yale L. Journal, pp. 62, 76 and 79. In these texts a multitude of cases are cited.

In *Housing Authority of City of E. St. Louis v. Kosydor, supra,* the Court said: "For the reasons stated we cannot agree with the suggestion that a denial of damages for defendants' moving expenses amounts to a confiscation of their stock in trade. Conceivably an expected return on their investment has been frustrated by the exercise of the power of eminent domain by an agency of the State. Similar frustrations have been involved in the denial of other incidental losses, due to continuing payrolls during the time spent in moving, loss of goodwill, and the like. At times they may be substantial for the individual. (Citing authorities). But in the absence of legislation, (Citing authorities), they have been regarded as a part of the burdens of common citizenship."

The rationale of the decisions for not allowing the damages are: one, the tenant eventually would have to move anyhow, and this is one of the circumstances attached to placing property on leased premises; second, it is not a taking of property within the language of the constitution, in that the expense of moving and injury to the property in moving is neither a taking or damaging of the property; three, a verdict would be based on conjecture; four, such expenses constitute no gain to the taker; and five, a taking of real estate or a leasehold does not affect the ownership of personal property kept on the premises taken, but not permanently affixed thereto, and the owner is entitled to remove such property.

Petitioner alleges that he incurred large expenses in removing his fixtures to another location, and that he is entitled to recover the cost of removing such fixtures. The petition does not allege what sort of fixtures they were, or how they were placed in the store. Ordinarily a tenant is not allowed the cost of removing his fixtures and appliances, when his leasehold is taken for public use under the sovereign power of eminent domain, in the absence of a statute or an agreement to the contrary. *U. S. v. Meyers, et al.* (1911; D.C. Conn.), 190 F. Reporter 688; Metropolitan, etc., *R. Co. v. Siegel,* 161 Ill. 638, 44 N.E. 276; *Baltimore v. Gamse,* 132 Md. 290, 104 A. 429; *Emery v. Boston*

Terminal Co., supra; Ranlet v. Concord Corp., 62 N.H. 561; *Fiorini v. Kenosha*, 208 Wis. 496, 243 N.W. 761; *U. S. v. Building, etc.*, 55 F. Supp. 667; 18 Am. Jur., Eminent Domain, pp. 894-5; Annotation: 34 A.L.R. 1526; 156 A.L.R. 397; 3 A.L.R. 2d 312; 100 L. Ed. 261, where many cases are cited; 29 C.J.S., Eminent Domain, pp. 1048-1050; Nichols on Eminent Domain, 3rd Ed. Vol. 4, p. 400. There is contrary authority.

Sale v. Highway Commission, 242 N.C. 612, 89 S.E. 2d 290, is clearly distinguishable. In that case the consideration for the right-of-way agreement was the payment of $3,622.50 and the removal at the Commission's expense of one two-story frame warehouse and such portion of a lumber shed as is in the right-of-way limits from the right-of-way, and the buildings on the right-of-way, other than the frame garage, to be reconstructed on property belonging to the trust, under the general contract and at the expense of the Commission.

Petitioner alleges that his moving his grocery business to another location lost him business, customers and good will, and he prays that he recover from respondent $7,500.00 for loss and interruption of business and loss of customers and good will.

" 'Good will,' as pointed out previously in this work, does not constitute 'property' in the constitutional sense when land is taken under the power of eminent domain. It is universally held in this country that, in the absence of statutory authorization to the contrary, the loss of or injury to the good will of a business is not an element of the compensating damages to be awarded. The contrary rule prevails in Canada and England." Nichols on Eminent Domain, 3rd Ed., Vol. 4, Sec. 13.31, where many cases are cited. To the same effect: 18 Am. Jur., Eminent Domain, Sec. 261; Annotation: 41 A.L.R. 1026; Ann. Cas. 1918B, 878; 29 C.J.S., Eminent Domain, Sec. 162; Jahr, Eminent Domain, Sec. 115; Orgel on Valuation under Eminent Domain, 2nd Ed., Vol. I, Sec. 75; Note, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses, 67 Yale L. Journal, pp. 74-6. This is not a case where a condemnor acquires not only the physical assets of a business, but the good will as well, and carries on the business.

In *U. S. v. Petty Motor Co., supra*, the Court said: "The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.' It is recognized that an owner often receives less than the value of the property to him but experience has shown

that the rule is reasonably satisfactory. Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings."

As in the case of other losses caused to a business by reason of the condemnation of a leasehold or of the land on which it is conducted, such loss where made up of the profits which might have been made by the business but of which the owner was deprived by reason of the necessary interruption of such business by the condemnor is under the prevailing rule excluded from consideration in determining the damages to which the owner is entitled. *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258; *State v. Lumber Co.,* 199 N.C. 199, 154 S.E. 72; Nichols on Eminent Domain, 3rd Ed., Vol. 4, Sec. 13.32(2), where many cases are cited; 18 Am. Jur., Eminent Domain, Sec. 259; 29 C.J.S., Eminent Domain, Sec. 162; Jahr, Eminent Domain, Sec. 115; Orgel on Valuation under Eminent Domain, Sec. 72.

This Court said in *State v. Lumber Co., supra:* "Neither is it controverted that, unless sanctioned by statute, loss of profits from a business conducted on the property" (taken in condemnation) "or in connection therewith, is not to be included in the award for the taking."

Gauley & E. R. Co. v. Conley, 84 W. Va. 489, 100 S.E. 290, 7 A.L.R. 157, was a condemnation proceeding. The Court said: "All of the evidence tending to prove that the new barn is not as conveniently or advantageously located as the old one was improperly admitted. As in the case of profits, it pertains, not to the value of the property taken or damage to the residue, but to the business of one of the defendants. For injury or detriment to that the law does not require the condemnor to compensate."

City of Newark v. Cook, 99 N.J. Eq. 527, 133 A. 875, was a case where the Court was concerned with determining compensation to be awarded lessees of store buildings taken in a street widening proceeding. The Court said: "Loss of business, profits, good will, fixtures, and cost of removal and the like suffered by the tenants obviously are not lands or real estate, or rights or interest therein in the legal sense and not within the criterion fixed by the statute."

Sawyer v. Commonwealth, 182 Mass. 245, 65 N.E. 52, 59 L.R.A. 726, was a petition to determine the damages to be awarded to petitioners caused by a decrease in value of their business in consequence of the taking of certain property under the metropolitan water supply act. The Court held: A business is not property within the mean-

ing of a statute providing a jury trial to determine the damage in case of injury to "property" by the exercise of the right of eminent domain. In the opinion *C. J. Oliver Wendell Holmes* said: "It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a *quid pro quo*. No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other. See *Smith v. Boston,* 7 Cush. 254; *Stanwood v. Malden,* 157 Mass. 17, 16 L.R.A. 591, 31 N.E. 702. It seems to us that the case stands no differently when the business is destroyed by taking the land on which it was carried on, except so far as it may have enhanced the value of the land. See *New York, N. H. & H. R. Co. v. Blacker,* 178 Mass. 386, 390, 59 N.E. 1020."

In *U. S. ex rel. T. V. A. v. Powelson,* 319 U.S. 266, 87 L. Ed. 1390, 1401, the Court said: "In absence of a statutory mandate (*U. S. v. Miller, supra* (317 U.S. 370, *ante,* 341, 63 S. Ct. 276, 147 A.L.R. 55)), the sovereign must pay only for what it takes, not for opportunities which the owner may lose."

Respondent's written demurrer *ore tenus* filed in this Court on the ground that petitioner's "Second and Further Cause of Action" does not state facts sufficient to constitute a cause of action, in that petitioner seeks a recovery of alleged damages, which are noncompensable, as they resulted from the taking of private property for a public use by respondent acting under the State's sovereign power of eminent domain is sustained.

Affirmed.

GEORGE JOHN ZOURZOUKIS, AND GEORGE JOHN ZOURZOUKIS, ADMINISTRATOR OF THE ESTATE OF ATHAS PALICARAS, DECEASED, PETITIONERS, v. STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 16 March, 1960.)

APPEAL by petitioners from *Thompson, S. J.*, October 1959 Civil Term, of BUNCOMBE.

Civil action heard upon a written demurrer.

From a judgment sustaining the demurrer, and dismissing the action, petitioners appeal.

T. W. Bruton, Attorney General, Kenneth Wooten, Jr., Assistant Attorney General, Andrew H. McDaniel, Trial Attorney, and Harkins, Van Winkle, Walton & Buck, Associate Counsel, for the State.

Williams, Williams & Morris for plaintiffs, appellants.

PER CURIAM. Petitioners instituted a special proceeding before the Clerk of the Superior Court of Buncombe County under G.S. 40-11 *et seq.* to recover compensation for the entire taking by respondent under G.S. 136-19 of a whole leasehold estate owned by them in a store building and premises on Montford Avenue in the city of Asheville, North Carolina, which premises is now in use as a highway right-of-way for the Asheville Expressway.

In their petition, petitioners set forth what they term a "Second Cause of Action," wherein they seek to recover damages for expenses incurred in the removal from the condemned premises of their stock of goods, merchandise, movable furniture and fixtures (there is no allegation as to what sort of fixtures they were), damages for loss and injury to such property in the removal, and damages for loss of business, customers and good will in their cafe business by reason of such removal.

The Clerk of the Superior Court sustained respondent's demurrer for misjoinder of causes, and ordered a severance, retaining before him for further proceedings the special proceeding under G.S. 40-11 *et seq.* to recover compensation for the entire taking by respondent of petitioners' whole leasehold under G.S. 136-19, and transferring the "Second Cause of Action" to the civil issue docket of the Superior Court of Buncombe County. To this order there is no exception.

In the Superior Court Judge Thompson sustained a demurrer to petitioners' "Second Cause of Action," and dismissed it.

Respondent filed a written demurrer *ore tenus* to petitioners' "Second Cause of Action" in this Court for the reason that the "Second

Cause of Action," *inter alia,* does not state facts sufficient to constitute a cause of action, in that it seeks a recovery of damages which are noncompensable, resulting from the taking of private property for public use by respondent.

The relief sought in this action is identical with the relief sought in the case of *Williams v. State Highway Commission, ante,* 141, 113 S.E. 2d 263, the opinion of the Court in which is filed contemporaneously with this opinion. Counsel for the parties in both cases are the same, and the briefs in both cases are identical so far as the argument and citation of authority are concerned. The decision in this case is controlled by the decision in the *Williams* case.

Respondent's written demurrer *ore tenus* filed in this Court on the ground that petitioners' "Second Cause of Action" does not state facts sufficient to constitute a cause of action, in that petitioners seek a recovery of alleged damages, which are noncompensable, as they resulted from the taking of private property for public use by respondent acting under the State's sovereign power of eminent domain is sustained upon the authority of *Williams v. State Highway Commission, supra.*

Affirmed.

BESSIE N. SWARTZBERG, EXECUTRIX OF THE ESTATE OF ROY E. SWARTZBERG v. RESERVE LIFE INSURANCE COMPANY.

(Filed 16 March, 1960.)

1. Insurance § 17—

If insurer would not have issued the policy had it known the truth, a false statement in an application for insurance to the effect that insured had never had diabetes constitutes a material misrepresentation as a matter of law, entitling insurer to rescind the policy upon tender of the premiums paid, nothing else appearing.

2. Trial § 53½—

Where the parties waive a jury trial and submit the cause to the court upon stipulated facts, the court has no authority to make additional findings of fact unless so authorized by the stipulations.

3. Insurance § 18—

Insurer is not estopped to declare a forfeiture of a policy for material misrepresentations in the application, nor does it waive its right to rescission on this ground, by paying claims or accepting premiums, unless at the time of doing so it had knowledge or notice of the falsity of the representations.

4. Insurance § 26—

In an action on an insurance policy the burden is upon plaintiff to establish facts sufficient to constitute waiver or estoppel of insurer to set up a particular defense.

5. Waiver § 2—

Acts of a party cannot constitute a waiver of a right when such party at the time has no knowledge of the existence of the right.

6. Insurance § 26: Limitation of Actions § 17—

Where plaintiff in an action on an insurance policy asserts that insurer's right to rescind the policy for misrepresentations in the application was barred by the statute of limitations, the burden is upon insurer to prove that its right to rescission was asserted within the time allowed.

7. Insurance § 17: Limitation of Actions § 7—

G.S. 1-52(9) is applicable to the right of insurer to rescind a policy of insurance for material misrepresentations in the applications, and insurer's right to rescind is not barred until three years after insurer knew or, in the exercise of due care, should have known of the falsity of the representations.

8. Trial § 55—

Where the parties waive a jury trial and submit the cause to the court upon a stipulation of facts, and the facts contained in the stipulation are insufficient for an adjudication of the rights of the parties, the court should not make an adjudication adversely to the party upon whom rests the burden of proof, but should proceed to trial to determine upon evidence the crucial factual issues not covered by the stipulations.

APPEAL by defendant from *McLean, J.*, October Term, 1959, of BUNCOMBE.

Civil action instituted July 10, 1957, in the General County Court of Buncombe County by Roy E. Swartzberg, the insured, to recover benefits allegedly owing by defendant under an insurance policy issued by defendant on January 2, 1952.

Answering, defendant admitted the issuance of the policy and the payment of the premiums thereon. It denied, for lack of knowledge or information sufficient to form a belief, Swartzberg's allegations as to the facts on which the present claim is based. In its further answer and defense, defendant denied that it had any obligation under the policy, alleging that the insured, in his application therefor, had made false material statements, upon which defendant relied, and that defendant would not have issued the policy had it known the true facts, and that it had returned or tendered to Swartzberg the full amount of the premiums Swartzberg had paid.

Upon the death of Swartzberg, his executrix, pursuant to court or-

der, was substituted as party plaintiff, adopted the original complaint and filed a reply to defendant's said answer.

Replying, plaintiff (executrix) denied, for lack of knowledge or information sufficient to form a belief, the said allegations of defendant's further answer and defense. Replying further, she alleged that defendant knew or should have known of the existence of any facts giving rise to a cause of action for rescission of the policy at all times from and after January 2, 1952, and that defendant, by its continued acceptance of premiums, waived, and is estopped to assert, any right it may have had to rescind the policy or to deny liability thereon upon the grounds asserted in its said pleading. Plaintiff alleged further that defendant on January 17, 1957, for the first time, attempted to rescind the policy by return of premiums paid by insured, and that "defendant's cause of action, if any, for rescission of said contract of insurance accrued more than five years prior to the institution of this action and more than five years prior to the filing of defendant's further answer and defense in this action, and said lapse of time is hereby expressly pleaded in bar of the matters and things alleged in defendant's further answer and defense."

Upon waiver of jury trial, the cause was heard in the general county court upon stipulated facts which, in substance, were as follows:

In 1956, the insured was hospitalized and operated upon for a prostate gland condition; and, if entitled to recover on said policy, was entitled to recover, as hospital, surgical and ambulance benefits, a total of $703.25.

The premiums paid by the insured, a total of $325.30, were sufficient to extend the coverage beyond the period covered by the present claim. Defendant had paid the insured $156.00 as benefits on prior claims filed under said policy. On January 17, 1957, defendant tendered $169.30 to the insured. Two checks, aggregating $169.30, issued by defendant to the insured, are now held by the plaintiff.

The policy and Swartzberg's application therefor (dated December 28, 1951) constituted the entire contract. In his written answers to the questions on the application form, Swartzberg stated, *inter alia*, (1) that he was then in good health and free from any physical defect, and (2) that he had never had diabetes. As to whether he had received medical and surgical advice and treatment within the past three years, Swartzberg answered, "Yes," and gave as "details" a hernia operation and his doctor's (N. H. Matros) name. Swartzberg's answers or statements were false in that he was not in good health but was suffering from diabetes, so diagnosed by two doctors (Dr. Matros and Dr. Groce) in May, 1951, for which he was given a spe-

cial diet and took insulin and made periodic visits to the doctor, all prior to the date of his said application. The said statements made by Swartzberg were false and were relied upon by defendant and defendant would not have issued the policy had it known the true facts, all of which were in existence on December 28, 1951, and on January 2, 1952.

The "Findings of Fact" set forth in the judgment consist of the facts stipulated and this additional finding: "That the facts regarding any false statements made by Roy E. Swartzberg in said application could have been discovered, upon the exercise of proper effort and reasonable care by the defendant, within a reasonable time after January 2, 1952." This additional finding is apparently based on a separate stipulation, to wit: "It is FURTHER STIPULATED that the doctors, Frank B. Gross *(sic)*, Jr. and N. H. Matros, if called to testify in this cause would testify that they would have divulged all the medical information known to them concerning Roy E. Swartzberg upon proper authorization from the said Roy E. Swartzberg; that when the defendant, Reserve Life Insurance Company, first requested such authorization from Roy E. Swartzberg for the disclosure of medical facts from his physician such authorization was granted."

The "Conclusions of Law" set forth in the judgment are as follows:

"1. That the plaintiff is entitled to have and recover of the defendant the sum of $703.25 plus interest upon the contract of insurance as stipulated unless plaintiff's claim is barred by reason of the affirmative matters alleged in defendant's answer.

"2. That a period of no more than six months from and after January 2, 1952, would constitute a reasonable time under equitable principles during which the defendant could have discovered the true facts regarding the matters set forth in the plaintiff's application if the defendant had exercised proper effort and reasonable care.

"3. That the defendant by making payment of other claims over a period of five years from and after January 2, 1952, and by accepting premiums throughout said period led plaintiff to believe that he had a valid and subsisting contract of insurance and defendant thereby waived its right to rescind the contract.

"4. That defendant's attempted rescission of this contract of insurance by tendering premiums previously paid on the 17th day of January 1957, was of no legal force and effect; that the matters of defense set forth in defendant's answer and further defense alleged giving rise to a cause of action by rescission of the contract should have been known to the defendant for a period of more than three

years prior to defendant's attempted rescission and for said reason those matters of defense are barred by laches and the statute of limitations."

Judgment was entered that plaintiff recover of defendant the sum of $703.25 and costs.

Defendant, excepting to said additional finding of fact, to each of the conclusions of law and to the court's refusal to make certain findings of fact and conclusions of law tendered by it, appealed to the superior court.

In the superior court, each and all of defendant's exceptive assignments of error were overruled and the judgment of the general county court was affirmed. Defendant excepted and appealed. Upon appeal, defendant assigns as error the overruling of each exceptive assignment of error previously directed to the judgment of the general county court.

Uzzell & DuMont and William Vance Burrow for plaintiff, appellee.

Van Winkle, Walton, Buck & Wall and Herbert L. Hyde for defendant, appellant.

BOBBITT, J. This is an action at law to recover benefits allegedly owing under the terms of an insurance policy. It is not a controversy without action, submitted upon an agreed statement of facts for the determination of a question in difference between the parties, as authorized by G.S. 1-250. *Dowling v. R. R.*, 194 N.C. 488, 140 S.E. 213; *Briggs v. Developers*, 191 N.C. 784, 133 S.E. 3.

Absent the stipulations, the action was for trial *upon evidence* pertinent to the issues raised by the pleadings. The crucial issues were raised by the allegations of defendant's further answer and defense and plaintiff's reply thereto. They were, in substance, as follows: (1) Did defendant issue its policy in reliance upon false statements made by Swartzberg in his application therefor, as alleged by defendant? (2) If so, is defendant's right to rescind the policy barred by estoppel or by waiver, as alleged by plaintiff? (3) Is defendant's right to rescind barred by the statute of limitations? In lieu of having these issues determined upon evidence by the court or a jury, the parties submitted the case for determination by the court on stipulated facts.

G.S. 58-30 provides: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed

representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy."

"Interpreting this statute, it is well settled that a material representation which is false will constitute sufficient ground upon which to avoid the policy." *Tolbert v. Insurance Co.*, 236 N.C. 416, 419, 72 S.E. 2d 915, and cases cited. Under the stipulated facts, Swartzberg's false statements were material to the risk as a matter of law. *Assurance Society v. Ashby*, 215 N.C. 280, 1 S.E. 2d 830, and cases cited. Nothing else appearing, defendant was entitled to institute and maintain an action for rescission of the policy upon tender of the amount paid as premiums. *Ins. Co. v. Box Co.*, 185 N.C. 543, 117 S.E. 785.

Defendant excepted to said additional finding of fact. True, unless so authorized by the stipulations under which the case was submitted, the court had no authority to make additional findings of fact. *Edwards v. Raleigh*, 240 N.C. 137, 81 S.E. 2d 273; *Credit Association v. Whedbee*, 251 N.C. 24, 110 S.E. 2d 795. However, for the reasons stated below, it is unnecessary to determine whether the stipulations under which the case was submitted are similar in any respect to the stipulations considered in *Credit Association v. Whedbee, supra.*

Whether the doctors who treated Swartzberg would have divulged the falsity of said statements in the application is not determinative. Nor does decision depend upon whether defendant, by questioning these doctors or otherwise, *could* have discovered, within a reasonable time after January 2, 1952, that Swartzberg's said statements were false.

The conclusions of law to the effect that defendant had waived its right to rescind by its failure to ascertain within six months from January 2, 1952, that said statements were false, and by its acceptance of premiums, are erroneous. The legal principles applicable to waiver are fully discussed in *Gouldin v. Insurance Co.*, 248 N.C. 161, 102 S.E. 2d 846. As to equitable estoppel, see *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745.

In *Gardner v. Insurance Co.*, 163 N.C. 367, 378, 79 S.E. 806, *Walker, J.*, quotes with approval this statement from 29 A. & E. Enc. of Law, p. 1093: "There can be no waiver, unless the person against whom it is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for their enforcement. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it." Defendant was under no duty, legal or equitable, to question the truth of the applicant's statements or, absent facts sufficient to put it on

inquiry, to conduct an investigation to determine the truth or falsity thereof. *Hardin v. Ins. Co.*, 189 N.C. 423, 127 S.E. 353.

The burden of proof was on plaintiff to establish facts sufficient to constitute waiver or estoppel. *Gouldin v. Insurance Co., supra; Peek v. Trust Co., supra.* She failed to do so.

When we come to consider the statute of limitations, the shoe is on the other foot. Here, as indicated below, the burden of proof was on defendant.

It is noted that defendant, having paid or tendered a total of $325.30, an amount equal to the premiums paid by Swartzberg, seeks to avoid the policy *ab initio* and in its entirety. Although called a further answer and defense, defendant's plea is in legal effect a cross action to rescind the policy.

Plaintiff's plea of the statute of limitations was sufficient. McIntosh, North Carolina Practice and Procedure, § 142, and cases cited. Defendant's cause or right of action to rescind accrued on January 2, 1952, immediately after the issuance of the policy. "In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises, . . ." 54 C.J.S., Limitation of Actions § 109; 34 Am. Jur., Limitation of Actions § 113; *Aydlett v. Major & Loomis Co.*, 211 N. C. 548, 551, 191 S.E. 31; *Peal v. Martin*, 207 N.C. 106, 176 S.E. 282.

Obviously, defendant's alleged cause of action to rescind is barred by the three year statute of limitations if considered solely as an action for breach of contract. G.S. 1-52(1). The view most favorable to defendant is that G.S. 1-52(9) applies, under which an action "(f)or relief on the ground of fraud or mistake" must be instituted within three years from the date the cause of action accrues, but in such case "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." "In the construction of this section, the words, 'relief on the ground of fraud,' are used in the broad sense, to apply to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress, and undue influence." McIntosh, North Carolina Practice and Procedure, § 183; *Little v. Bank*, 187 N.C. 1, 121 S.E. 185; *Muse v. Hathaway*, 193 N.C. 227, 136 S.E. 633. Whether considered fraud "in the broad sense," or "mistake," we construe G.S. 1-52(9) as applicable to an action to rescind an insurance policy on the ground of false material statements in the application therefor.

The burden was on defendant to show that it instituted its action to rescind within the period prescribed by statute. *Shearin v. Lloyd,*

246 N.C. 363, 367, 98 S.E. 2d 508, and cases cited. To repel the bar of the statute of limitations, the burden was on defendant to show that it *did not* acquire knowledge of the falsity of the statements in Swartzberg's application and *was not* put on notice thereof until a time within the period of three years next preceding the filing of its cross action to rescind the policy. *Hooker v. Worthington,* 134 N.C. 283, 46 S.E. 726; *Tuttle v. Tuttle,* 146 N.C. 484, 59 S.E. 1008, 125 Am. St. Rep. 481; *Sanderlin v. Cross,* 172 N.C. 234, 90 S.E. 213; *Taylor v. Edmunds,* 176 N.C. 325, 97 S.E. 42; *Latham v. Latham,* 184 N.C. 55, 113 S.E. 623; *Johnson v. Insurance Co.,* 217 N.C. 139, 7 S.E. 2d 475; S. c., 219 N.C. 202, 13 S.E. 2d 241; *Vail v. Vail,* 233 N.C. 109, 116, 63 S.E. 2d 202. The North Carolina rule is in accord with the "almost unanimous concensus of judicial opinion." Annotation: 118 A.L.R. 1002, and supplemental decisions. Defendant failed to establish facts sufficient to repel the bar of the three-year statute of limitations.

To resolve crucial factual issues raised by the pleadings, it was necessary to determine when defendant acquired knowledge or notice of the falsity of the statements in Swartzberg's application. As to this, the stipulations are silent. As indicated, with reference to estoppel and waiver, the burden of proof was on plaintiff to show that defendant had paid claims or accepted premiums after it acquired such knowledge or notice; but to repel the bar of the three-year statute of limitations, the burden of proof was on defendant to show that it did not acquire such knowledge or notice until within a period of three years next preceding the filing of its cross action to rescind the policy.

Thus, the stipulations do not provide the answers to crucial factual issues raised by the pleadings. The question arises: When the stipulations are silent as to such facts, are the respective issues to be decided by the court adversely to the party upon whom rests the burden of proof? This was done in *Brinson v. R. R.,* 169 N.C. 425, 86 S.E. 371. However, the question was not discussed; and the *Brinson* case has not been cited as authority on that point. The better view, in our opinion, is this: When a case is submitted for decision on stipulated facts, and no evidence is offered, the court should not proceed to determine the cause unless *all facts* essential to a determination of the crucial issues raised by the pleadings are included in the stipulations. Rather, in such case, the court should proceed to trial to determine upon evidence the crucial factual issues not covered by the stipulations. In the instant case, the court erred in failing to follow this procedure.

In *New Bern v. White,* 251 N.C. 65, 110 S.E. 2d 446, and cases cited, the cause was remanded because the facts stipulated did not

answer the crucial issues raised by the pleadings. While, as stated above, the case was not submitted as a controversy without action, yet when a case is submitted on stipulated facts there is equal reason to require that the stipulations contain "the facts upon which the controversy depends." G.S. 1-250. "An agreed statement must contain every essential element without any omission, . . ." 83 C.J.S., Stipulations § 10(f)(9), p. 22.

Accordingly, the judgment is vacated and the cause remanded to the end that there may be a determination, in the light of the principles of law stated herein, of the facts necessary to a determination of the issues relating to (1) waiver and estoppel and (2) the statute of limitations. This course seems particularly appropriate when, as here, it appears that the court's decision was based on a misapprehension as to the applicable principles of law.

Judgment vacated, cause remanded.

CLIFFORD G. BISHOP v. M. JOHN DUBOSE.

(Filed 16 March, 1960.)

1. Contracts § 12—

Where the language of a contract is plain and unambiguous it is for the court and not a jury to declare its meaning and effect.

2. Deeds § 26—

Standing timber is realty and can be conveyed only by an instrument sufficient to convey realty.

3. Deeds § 27—

An instrument sufficient to convey standing timber is an executed contract and passes title to the timber as of the time of its execution, with reversion, to the vendor, where there is a time limitation, of the timber not cut within the time specified.

4. Same—

The term "logs" does not include growing trees, and a contract under which the vendor agrees to sell and the vendee agrees to buy "logs on the stump" at a specified price per thousand feet, to be paid before removal of the logs from the land, is an executory contract for sale of "logs," and title does not pass until after the logs are severed, measured and paid for.

5. Deeds § 28—

While under certain circumstances there may be a lease of standing timber and timber rights, it is essential to the validity of such lease that it be for a specified period of time.

6. Contracts § 5—

Unless forbidden by the statute of frauds, a contract may be partly written and partly oral, in which event the unwritten part of the agreement may be shown by parol, provided that the parol evidence does not contradict the written terms but merely supplements them.

7. Appeal and Error § 51—

Incompetent evidence admitted without objection must be considered in passing upon motion to nonsuit.

8. Deeds § 28—

A contract for the sale of logs to be cut by the purchaser within specified boundaries, the purchaser to pay for same before removal, together with evidence that the vendor orally stipulated the point at which the cutting was to be begun and the direction in which the purchaser was to cut, does not amount to a designation of all merchantable timber on the vendor's land and is insufficient to specify any particular area to be cut, or constitute a contract for the sale of any specific logs, and therefore the vendor's termination of the purchaser's license to go upon the land does not give the purchaser a right of action for damages for breach of the contract for the sale of logs then uncut.

9. Same—

A contract for the sale of unspecified logs to be cut by the purchaser and to be paid for before removal from the land gives the purchaser a license to go upon the land for the purpose of cutting the timber but, there being no direct promise on the part of the purchaser to sever and pay for all the timber on the tract and no designation of any particular trees to be cut, the license may be revoked at any time as to uncut timber, the license not being coupled with an interest and there being no contention that the licensee had made expenditures in reliance upon the license.

APPEAL by defendant from *Fountain, J.*, November 1959 "A" Civil Term, of BUNCOMBE.

This is an action for breach of timber contract.

The complaint alleges that by contract dated 11 January 1958 "defendant sold to plaintiff all ripe trees or trees that should be cut then on the defendant's Avery Creek farm," plaintiff began immediately to cut and remove trees from defendant's land in accordance with the contract and continued his logging operations until August 1958 when defendant demanded "that the plaintiff get off his farm and stay off of it" and threatened plaintiff with arrest if he failed to comply, and plaintiff has been damaged thereby in the sum of $23,947.00.

Plaintiff's evidence tends to show:

On 12 December 1955, plaintiff and defendant entered into a written contract whereby defendant agreed to sell and plaintiff agreed to buy "certain timber and pulpwood" on defendant's Avery Creek farm.

The contract applied only to "such boundaries, or portions, of said farm as may be agreed upon, from time to time." ". . . only marked trees, or those specifically agreed upon" should be cut. Plaintiff was to cut tops, limbs and other suitable portions into pulpwood. Logs were to be bunched, measured and paid for, at the rate of $20.00 per thousand board feet, using international log scale, before removal from the land. Method and rate of payment for pulpwood was agreed upon. The contract was to remain in force as long as mutually satisfactory and plaintiff was to proceed with reasonable diligence as long as the contract remained in effect.

Plaintiff "cut some" pursuant to this contract, "that was very little," he kept no record of the amount he cut. On 1 January 1958 plaintiff informed defendant he "could not go under the conditions of the contract" due to the condition of his back, he would "like to have the logs" but wished to be relieved from cutting and hauling pulpwood.

Another contract was executed by the parties on 11 January 1958, as follows:

"M. John DuBose, Seller, hereby agrees to sell, and Clifford Bishop, Buyer, hereby agrees to buy logs on the stump and pay for same before removal from Seller's Avery Creek farm, regular logs to be $20.00 per thousand (M) Board feet, International Log measure, and to be cut in specified boundaries, ahead of pulp wood men; only ripe trees or trees that should be cut, or those agreed on, to be taken. Provided that Buyer may cut selected White Oak, to be agreed on with Seller, for Barrel Staves, and pay $40.00 per Thousand Board feet or equivalent for same, provided Buyer has the suitable limbs and tops made into pulp wood and Seller is paid at the rate of $3.50 per cord for same.

"Buyer to oversee pulp wood haulers, and also a road out over Murry's from the North East part of Seller's land. Buyer to oversee pulp wood cutting and cut his logs ahead of them, so they can make pulpwood out of tops and limbs he leaves.

"And Buyer hereby waives any pulpwood rights he had in prior contracts with Seller."

The day after the signing of the last agreement the following transpired. Plaintiff's version: plaintiff "and Mr. DuBose and his lady and Slagle went to the lower end of the place, that is the east part of his place, joining Mr. Johnson . . . and defendant said, 'you know the boundaries of my property, begin here and cut back . . . I want you to cut from here back. You know what to cut.' " Slagle, plaintiff's witness, gave this version: Mr. DuBose said, "You know the line

and you will cut from here back, motioning toward the house." Defendant's version: "He and his wife did go with Mr. Bishop up there to his line that is adjacent to Johnson's line and showed Bishop the boundary he was to cut from Walnut Hill east of Johnson's line and north of Avery's Creek."

Thereafter, plaintiff cut 30,000 to 40,000 feet of timber on defendant's land. The area in which the cutting took place does not appear. For awhile plaintiff cut ahead of the pulpwood workers and supervised them. Defendant changed the pulpwood men and after this plaintiff did not cut ahead of them or oversee them. In August 1958 defendant contracted with Glen Baker and Ray Baker to cut trees on the land in question. On 15 August 1958 defendant ordered plaintiff to stay off his land. At this time there was 700,000 feet of merchantable timber on the land from which plaintiff could have made a profit of $23,947.00.

This action was instituted 24 December 1958. There was verdict for plaintiff in the amount of $500.00. From judgment in accordance with the verdict defendant appealed and assigned error.

Sanford W. Brown and Mitchell T. King for plaintiff.
James S. Howell and M. John DuBose for defendant.

MOORE, J. Defendant assigns as error the refusal of the court to allow his motion for nonsuit.

The basis of the action and theory of the trial is that defendant conveyed to plaintiff all merchantable timber on his Avery Creek farm, wrongfully dispossessed plaintiff and permitted another to remove the timber from the land. In determining the rights of the parties it is first essential that we examine the contract of 11 January 1958. It is plain and unambiguous. Accordingly, it is for the court and not the jury to declare its meaning and effect. *Young v. Mica Co.*, 237 N.C. 644, 648, 75 S.E. 2d 795; *Sellars v. Johnson*, 65 N.C. 104, 105.

"Standing trees are a part of the realty, and can be conveyed only by such instrument as is sufficient to convey any other realty." *Chandler v. Cameron*, 229 N.C. 62, 64, 47 S.E. 2d 528; *Williams v. Parsons*, 167 N.C. 529, 531, 83 S.E. 914. ". . . (T)imber deeds . . ., as ordinarily drawn, carry an estate of absolute ownership, defeasible as to all timber not cut and removed within the specified period." *Timber Co. v. Wells*, 171 N.C. 262, 264, 88 S.E. 327. Our decisions hold that standing timber is realty, "as much a part of the realty as the soil itself," that deeds and contracts concerning it must be construed as affecting realty and that in instruments conveying the growing and

standing timber to be removed within a specified time the title to all timber not severed within the time shall revert to the vendor. *Midyette v. Grubbs,* 145 N.C. 85, 88-9, 58 S.E. 795. The conveyance in writing, upon a valuable consideration, of specified standing timber with right to cut and remove within a definite time is an executed contract and passes title to realty. *Wilson v. Scarboro,* 163 N.C. 380, 387, 79 S.E. 811; *Lumber Co. v. Corey,* 140 N.C. 462, 465-7, 53 S.E. 300; *Hawkins v. Lumber Co.,* 139 N.C. 160, 162, 51 S.E. 852.

The contract in the case at bar is not a conveyance of standing timber. Defendant "agrees to sell" and plaintiff "agrees to buy . . . logs on the stump" from defendant's Avery Creek farm at a specified price per thousand feet to be paid before removal of the logs from the land. This is an executory contract for sale of "logs," title to pass after logs are severed, measured and paid for, with license to enter the land, sever and remove the logs.

"A log is a trunk of a tree cut down and stripped of its branches, or the stem or trunk of a tree cut into different lengths for the purpose of being manufactured into timber of various kinds. The word 'logs' does not include trees . . ." 54 C.J.S., Logs and Logging, sec. 1(a), p. 671. "Logs on the stump," as that expression is used in the contract under consideration may not be construed as referring to the growing tree but merely imports the necessity of severance by the vendee as part of the transaction in purchasing the "logs." Indeed other portions of the tree were to be cut into pulpwood by others. At the time of payment and passing of title it is contemplated that the subject of sale is logs, not growing trees.

A similar contract is construed in *Tremaine v. Williams,* 144 N.C. 114, 56 S.E. 694. There the seller agreed that buyer might place a sawmill on seller's land and pay seller by the thousand feet for pine timber, to be measured at the mill and paid for as cut. In this case there was a time limit. Subsequently, seller conveyed the timber and trees on his land to a third party, the plaintiff. Plaintiff sued to restrain further cutting by the buyer under the first contract. The Court said: "Standing trees are a part of the realty, and can be conveyed only by such an instrument as is sufficient to convey other realty. (Citing cases). The agreement between J. M. Williams (landowner) and defendant is not sufficient to convey the timber. It contains no operative words or words of conveyance. This defect is fatal, and as to the realty cannot be helped out by parol nor by prior registration of the defective instrument. . . . We cannot understand how the defendant can assert any right to it by virtue of his agreement . . ." (Parentheses ours).

The holding in *Gatlin v. Serpell,* 136 N.C. 202, 48 S.E. 631, is in accord. There plaintiff contracted to sell timber to defendant at $1.50 per thousand feet to be paid for as cut and a stipulated amount to be paid before the cutting began. The Court held: "It does not amount to an absolute sale of the timber on the land, the title to the timber did not pass at once to the defendant. No one can . . . arrive at the conclusion that the defendant had the right to take possession of the timber and dispose of it to others as he might see fit to do. . . . He had only the right to cut it and pay for it as he cut it, at a stipulated price per thousand feet."

Under certain circumstances there may be a lease of standing timber and timber rights, but "an indispensable legal requirement to the creation of a lease for a term of years is that it shall have a certain beginning and a certain end." *Manufacturing Co. v. Hobbs,* 128 N.C. 46, 47, 38 S.E. 26. This element is lacking in the contract *sub judice.*

But plaintiff insists that his contract with defendant is a personal covenant for breach of which he may recover damages. *Tremaine v. Williams, supra.* In other words, plaintiff contends that his contract, if not a conveyance or lease of standing timber, is a simple executory agreement for purchase of logs and execution on his part has been prevented by the wrongful conduct of defendant, which entitles him to damages for loss of profits. *Perkins v. Langdon,* 237 N.C. 159, 171, 74 S.E. 2d 634; *Pappas v. Crist,* 223 N.C. 265, 268 25 S.E. 2d 850.

We next inquire as to whether or not the quantity and location of the trees to be cut by plaintiff were sufficiently certain and definite to support an action for damages. As to the trees actually cut and the logs actually sold to plaintiff there is no question. *Tremaine v. Williams, supra; Gatlin v. Serpell, supra.* Nowhere in the contract is it stated that plaintiff may purchase *all* the merchantable logs which might be cut from defendant's land. It is provided that logs are to be cut "in specified boundaries, ahead of pulpwood men; only ripe trees and trees that should be cut, or those agreed on, to be taken." The contract itself is too indefinite to establish a right to cut and remove any particular logs. The specification of the areas to be cut over and the logs to be taken is left to subsequent agreements between the parties.

"Where a contract does not fall within the statute (of frauds), the parties may, at their option, put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing and the whole

constitutes one entire contract." *Wilson v. Scarboro, supra,* at page 384 (quoting from Clark on Contracts).

The day following the execution of the written contract plaintiff and defendant went to the east part of the land at Johnson's line and defendant said: "You know the boundaries of my property, begin here and cut back . . . I want you to cut from here back. You know what to cut. You know the line and you will cut from here back, (motioning toward the house)." According to plaintiff's evidence, these are all of the directions given by defendant. Plaintiff, in his testimony and brief, construes these directions as embracing all the merchantable timber on defendant's land. Defendant's construction is otherwise. We do not agree that these statements by the defendant are sufficiently specific and inclusive to embrace all the merchantable timber on the land. The terms "cut from here back" and "motioning toward the house" are entirely too vague and indefinite to specify any particular area or logs. It specifies nothing more than a beginning point. Since plaintiff knew all the boundaries, it is strange indeed that the parties felt it necessary to go to a particular point on the land to give and receive instructions if it was their intention that plaintiff take all the merchantable timber. The contract provides for taking logs in "specified boundaries, ahead of pulpwood men." It is manifest that plaintiff was not to be permitted to roam the entire tract and choose such trees as were most desirable and accessible and leave the less desirable, but was to cut logs within a particular boundary before he moved to another and was to cut ahead of the pulpwood workers so that tops and limbs might be more conveniently gathered and cut into pulpwood while green. The fact that selected white oak was to be specifically agreed upon further indicates that the contract did not contemplate the sale of all merchantable timber. If plaintiff's contention is correct, defendant's instructions did not supplement the written contract but varied, altered and contradicted it. "When parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or vary it; and this is so, although the particular agreement is not required to be in writing, the reason being that the written memorial is considered to be the best, and therefore is declared to be the only evidence of what the parties have agreed, as they are presumed to have inserted in it all provisions by which they intended or are willing to be bound." *Wilson v. Scarboro, supra,* at page 385.

It is true that plaintiff's evidence relating to the oral agreement and plaintiff's interpretation thereof was admitted without objection. Therefore, it must be considered on the question of nonsuit. *Lambros*

v. Zrakas, 234 N.C. 287, 289, 66 S.E. 2d 895. But the oral instructions of defendant, if effective at all, are a part of the contract and the construction of the contract is for the court. *Young v. Mica Co., supra.* It is our opinion that the directions given by defendant do not amount to a designation of all the merchantable timber on defendant's land and are insufficient to specify any particular area to be cut. The record is silent as to the area plaintiff actually cut over.

Furthermore, the contract here is a mere license. A contract to remove timber, providing for measurement of logs before removal from the premises and for payment at the time the logs are measured, and containing no direct promise on the part of the buyer to sever or pay for the timber in any event, lacks mutuality to pass present title and is a mere license revocable at any time by the landowner without liability. *Beckman v. Brickley* (Wash. 1927), 258 P. 488; *McCastle v. Scanlon* (Mich. 1953), 59 N.W. 2d 114; *Anderson v. Moothart* (Ore. 1953), 256 P. 2d 257; *Blair v. Russell & Co.* (Miss. 1919), 81 S. 785. "A license to enter on land and cut timber, while it remains executory, is revocable at any time. It is revocable at the will of the licensor, and terminates when he gives notice not to cut the timber further or refuses permission of the licensee to perform." 54 C.J.S., Logs and Logging, sec. 29 (d), p. 731. However, there are exceptions to this rule: (1) a license coupled with an interest may not be revoked; (2) "a license cannot be revoked as to acts done under it; the revocation is prospective not retrospective"; (3) ". . . Where the licensee has made expenditures upon the faith of the license, . . . it cannot be revoked at the will of the licensor unless the licensee can be placed in *statu quo.*" *Sorensen v. Jacobson* (Mont. 1951), 232 P. 2d 332, 26 A.L.R. 2d 1186.

Plaintiff's evidence fails to bring him within either of the enumerated exceptions. We have not overlooked the plaintiff's contention that by terms of the written contract he waived "any pulpwood rights he had in prior contracts with seller" and that this constituted a valuable consideration. According to plaintiff's evidence he asked to be relieved of the duty of cutting pulpwood on account of the condition of his back. This was the reason for making the new contract of 11 January 1958. The waiver was at his instance and for his benefit. The contention is without merit.

Defendant by giving notice to plaintiff to cease cutting revoked the license. On plaintiff's showing, he is not entitled to recover damages in this action and the trial court erred in denying defendant's motion for nonsuit.

The judgment below is

Reversed.

LUTHER F. BENTON v. C. G. WILLIS, INC.

(Filed 16 March, 1960.)

1. Appeal and Error § 24—

An assignment of error to the charge will not be considered when it is not based upon an exception duly noted in the record.

2. Trial § 48½—

A motion to set aside a verdict is addressed to the discretion of the court and its action thereon is not reviewable.

3. Admiralty: Courts § 19—

In an action instituted in a State court to enforce rights arising under the Federal Merchant Marine Act of 1920, the Federal substantive law controls.

4. Same—

In an action under the Federal Merchant Marine Act of 1920, contributory negligence mitigates the damages but does not bar recovery.

5. Same—

In an action under the Federal Merchant Marine Act of 1920, the sufficiency of the evidence to go to the jury is to be determined according to the test laid down by the Federal courts.

6. Admiralty—

In an action to recover for an injury under the provisions of the Federal Merchant Marine Act of 1920, evidence justifying with reason the conclusion that employer negligence played any part, however slight, in producing the injury or death for which damages are sought takes the issue to the jury notwithstanding that the evidence may also support with reason a conclusion that the injury resulted from other causes, including the employee's contributory negligence.

7. Same— Evidence held sufficient to be submitted to the jury in action to recover under the Federal Merchant Marine Act.

Evidence tending to show that members of the crew of the vessel were provided no gangplank, ladder, or other means for boarding the vessel, that the gunwale was capped with a slick metal pipe rendering it dangerous for members of the crew to board the vessel, and that a member of the crew in attempting to board the vessel from a barge which he was helping to load, in stepping down some 24 inches to the gunwale of the vessel slipped and fell to his injury *is held* sufficient to go to the jury both as to unseaworthiness of the vessel and as to the negligence of the owner, a favorable finding on either question being sufficient to support a verdict in favor of the injured member of the crew.

8. Damages § 9—

Where the court instructs the jury that it should, in ascertaining the amount of damages, take into account wages paid the injured plaintiff subsequent to the injury, defendant may not contend that the amount of wages so paid should further be deducted from the award of the jury.

9. Trial § 55—

Where the parties stipulate that the court should determine the amount which should be awarded for maintenance and cure, the court's findings in regard thereto have the same force as a verdict of the jury.

APPEAL by defendant from *Mintz, J.*, August, 1959, Regular Civil Term, NEW HANOVER Superior Court.

Civil action to recover "consequential" damages in the amount of $75,625, and Eight Dollars per day for maintenance and cure under the Merchant Marine Act of 1920, known as the Jones Act, 46 USCA, §§ 688, *et seq.*, and under the general marine law.

The plaintiff, a member of the crew of the defendant's tugboat, Patricia, was injured in an accident while the vessel was being operated in interstate commerce. The plaintiff based his cause of action for damages upon the allegations that the injury resulted (1) from the unseaworthiness of the vessel, and (2) from the negligence of the owner in its maintenance and operation (a) by capping the gunwale with a slick metal pipe which rendered it dangerous and unsafe for the members of the crew to board the vessel, and (b) by failure to provide a gangplank, ladder, or other means necessary for the crew's safety. The accident occurred on March 15, 1956, at the Union Bag Company dock, Savannah, Georgia.

At the time of the accident the defendant's barge, C. G. Willis, was moored alongside the dock. Next to it, on its offshore side, was the barge Brien; and on its offshore side was the Patricia. The captain and the members of the crew were assisting in loading the Brien when lunch call sounded. While they were returning to the Patricia for the meal, the plaintiff attempted to step down from the deck of the Brien to the gunwale of the Patricia. In so doing he fell, and as a result sustained serious and permanent injuries.

The evidence in the light most favorable to the plaintiff tended to show the following: As he attempted to board the Patricia from the Brien it was necessary for him to step down 24 to 30 inches from the barge to the gunwale of the Patricia. A metal pipe, six or eight inches in diameter, had been placed along the gunwale of the Patricia to permit the mooring rope to slide along the gunwale without damaging the rope. The soles of plaintiff's shoes had become wet while he was assisting in loading the barge. The pipe on top of the gunwale was slippery, having recently been painted. The plaintiff's foot slipped, causing his fall. No ladder or gangplank, or other means of boarding the Patricia was provided or available.

The parties entered stipulations that the plaintiff was an employee

of the defendant, the amount of his wages, and that he received full payment from the date of the accident until February 15, 1958, and two-thirds pay from February 16, 1958, to September 15, 1958; that he received all his medical and hospital treatment at the expense of the defendant to date; that compensatory damages, if any, shall commence September 15, 1958. The parties stipulated, "the issue of maintenance and cure shall be withdrawn from the jury and submitted to the court . . . for its determination."

Additional stipulations were made for the consideration of the court alone, and not to be submitted to the jury, as follows: That the amount of the plaintiff's compensation already paid is $3,465 beginning March 16, 1956, and ending September 5, 1958; and that the United States Fidelity and Guaranty Company has incurred medical expenses on behalf of the plaintiff in the sum of $1,788.33.

The defendant introduced evidence which need not be repeated as it is not material to the questions now presented. The court, without objection, submitted the following issues:

"1. Were the plaintiff's accident and injuries proximately caused by any degree by the negligence of the defendant, as alleged in the Complaint?

"2. Were the plaintiff's accident and injuries proximately caused in any degree by any unseaworthiness of the tug 'Patricia,' as alleged in the Complaint?

"3. Did the plaintiff's negligence contribute in any degree to his injury, as alleged in the Answer?

"4. In what amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first three issues, "Yes," and the fourth, "$27,000.00." The judgment on the verdict and stipulations provided (1) for recovery of $27,000 with interest from date of the judgment, and for costs; (2) "By consent of parties that, on plaintiff's cause of action for maintenance and cure, plaintiff should have and recover of the defendant the sum of $1,000, without interest." From the judgment, the defendant appealed.

John J. Burney, Jr., Rountree & Clark, By: George T. Clark, Jr., for plaintiff, appellee.

R. L. Savage, James, James & Crossley, By: Murray G. James for defendant, appellant.

HIGGINS, J. During the trial the defendant entered four exceptions, all unnumbered. In sequence they are: (1) To the overruling of the

motion to nonsuit at the close of the plaintiff's evidence; (2) to the overruling of the motion repeated at the close of all the evidence; (3) to the refusal of the court to set the verdict aside; and (4) to the judgment. All other exceptions appear for the first time in the assignments of error, of which there are seven.

Assignment No. 1 is based on Exception No. 2, to the refusal to grant the nonsuit at the close of all the evidence. Assignments 2, 3, and 4 relate to the court's charge. The record fails to disclose any exception to the charge, or to mark out any part thereof which is deemed objectionable. The fifth assignment is to the refusal of the court to set the verdict aside. The sixth is to that part of the judgment which refers to matters submitted to the court under the stipulations relating to maintenance and cure, and the seventh is to the entry of the judgment.

Assignments 2, 3, and 4, not being supported by previously noted exceptions designating the objectionable parts of the charge, must be disregarded. Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 554, and annotations thereunder. *Bulman v. Baptist Convention*, 248 N.C. 392, 103 S.E. 2d 487; *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118; *Rigsbee v. Perkins*, 242 N.C. 502, 87 S.E. 2d 926; *Fuquay v. Fuquay*, 232 N.C. 692, 62 S.E. 2d 83.

Assignment No. 5, based on the refusal to set the verdict aside, was addressed to the discretion of the court and is not reviewable.

Assignment No. 1, based on the court's refusal to nonsuit at the close of all the evidence, and Assignments Nos. 6 and 7, relating to the entry of the judgment, properly present the only questions which need be considered on this appeal.

The plaintiff brought this action in the State court. However, its purpose is to enforce rights arising under Federal law. See Merchant Marine Act of 1920, 46 USCA, § 688, known as the Jones Act; The Federal Employers' Liability Act, 45 USCA, §§51-60, made applicable to the Jones Act cases; Article III, Section 2, United States Constitution, as to admiralty and maritime jurisdiction. The Federal substantive law must control decision in this case. *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 87 L. ed. 1444; *Maynard v. R. R.*, 251 N.C. 783, 112 S.E. 2d 249.

Contributory negligence mitigates the damages but does not bar recovery. The sufficiency of the evidence to go to the jury is determined according to the test laid down by the Federal courts. The Federal Employers' Liability Act applicable to merchant marine cases has been the subject of repeated decisions by the Supreme Court of the United States. A recent decision gives us the following rule: "Un-

der this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. . . . The law was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. . . . The employer is stripped of his common law defenses and for all practical purposes the inquiry in these cases today rarely presents more than the single question whether the negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." *Rogers v. Missouri Pacific R. R.*, 352 U. S. 500, 1 L. ed. 2d 493.

In *Butler v. Whiteman*, 356 U.S. 271, 2 L. ed. 2d 754, the court, on evidence not as strong as presented here, nevertheless held it sufficient to present a case for the jury. In that case the negligence principally relied on was failure to provide a gangplank for use of the crew in boarding and leaving the vessel. See also, *Schulz v. Pennsylvania R. R.*, 350 U.S. 523, 100 L. ed. 668; *Davis v. Virginian R. R. Co.*, decided by the U. S. Supreme Court on January 25, 1960, 4 L. ed. 2d 366, 80 S.Ct. 387.

Application of Federal rules, therefore, compels us to hold the evidence presented in this case was sufficient to go to the jury, both as to unseaworthiness of the vessel and as to the negligence of the owner. A favorable holding on either issue will support the verdict. The unseaworthiness complained of consisted of the placing of the pipe on the gunwale and the failure to provide gangplank, ladder, or other device by which the crew might board and leave the vessel in safety. These matters are, also, alleged as owner negligence. The evidence was sufficient to go to the jury and to sustain its findings.

The parties, by consent, withdrew from the jury other matters involved in the case. They made stipulations as to facts which were withheld from the jury and submitted to the court for its determination. The parties appear now to be in dispute as to the meaning of these stipulations. The defendant contends that the payment of wages of $3,488 should be deducted by the court from the jury's award. This contention is not supported by the record. The jury took into account the stipulation as to payments. The court charged as follows: "It is stipulated that the plaintiff has received the following wages: From the date of the accident, March 15, 1956, until February 15, 1958, full wages or salary, and further that he received two-thirds

wages or salary from February 16, 1958, to September 15, 1958. You will take that into consideration when you fix such damages as you may fix for loss of past earning power." At first this was treated as a compensation case.

Insofar as the jury was concerned, no amount was stipulated as having been received. The amount was the basis of a stipulation for the court and not for the jury. The parties, by stipulation, left to the court decision of the cause of action for maintenance and cure. The court made its findings and rendered a judgment for $1,000. We have no more right to disturb that finding than we do to disturb the jury's finding. By reason of the stipulation to leave the matter to the court, the court's findings have the same force as a verdict of the jury.

There seems to be a conflict in the stipulations as to final date on which wages were paid. Stipulation 6 says two-thirds wages were paid to September 15, 1958. Stipulation 11 says compensation ended on September 5, 1958. The court, in its charge, gave the defendant the benefit of having paid wages to the later date.

The record as presented to us fails to show anything of which the defendant may justly complain.

No error.

ROBERT P. MILLER AND WIFE, BETTY W. MILLER, PETITIONER v. VIRGINIA M. McLEAN (WIDOW); T. R. WARD AND WIFE, JANE GOODE WARD; HELEN GOODE GOLDEN (WIDOW); LILLIAN VANOY GOODE (WIDOW); JANE ANN COCHRAN AND HUSBAND, DEALE B. COCHRAN; HELEN GOODE CAMERON AND HUSBAND, DONALD CAMERON, CORITA EDWARDS MILLER, AND ROBERT A. LITTLE AND T. R. WARD, TRUSTEES, RESPONDENTS.

(Filed 16 March, 1960.)

1. Fiduciaries—

Trustees and other fiduciaries must act in good faith and can never paramount their personal interest over the interest of those for whom they have assumed to act.

2. Estoppel § 4— Trustee held estopped from denying that realty was part of the trust fund.

The trust imposed the duty upon the trustees to manage the estate and pay a stipulated sum monthly to the widow of trustor, with further provision empowering the trustees to advance money to the children of trustor, the ultimate beneficiaries, as their necessities might require. A child of trustor, who was also a trustee of the estate, collected rents

from a parcel of land and placed the rents in the trust fund and induced his co-trustees to make advancements to him and his sister upon representations that adequate property would remain in the estate to provide the allowance to the widow, specifically calling to their attention that the realty was a part of the trust fund. *Held:* The trustee is estopped from denying that the realty is a part of the trust fund.

3. Wills § 31—

The intent of testator is his will and must be effectuated if not in contravention of some well-settled rule of law.

4. Wills § 33d— Under terms of trust in this case corpus might be used to provide annuity to life beneficiary.

The will in question set up a trust fund with direction that testator's wife be paid out of the net income a specified sum monthly during her life or as long as she remained a widow, with further provision that the trustees might sell, exchange, or reinvest any or all of his personal estate in order to carry out this provision. *Held:* The trustees are not limited to income as a source of payment of the annuity but have the power and duty, if necessary, to use the corpus of the fund to make the monthly payments, and therefore what will be left for division to the ultimate beneficiaries cannot be determined until the trust estate terminates, and no part of the estate may be sold for advancement to the ultimate beneficiaries until the termination of the trust estate.

APPEAL by petitioners from *Froneberger, J.*, September 1959 Term, of LINCOLN.

Petitioners instituted this action on 14 March 1959 to have a lot in Lincolnton sold for partition. Plato Miller owned 64% of the lot immediately prior to his death. The remaining 36% is owned by respondents Ward, Golden, Goode, Cochran, and Cameron.

Plato Miller died testate in October 1954, leaving a widow, Corita Miller, and two children, petitioner Robert P. Miller and respondent Virginia McLean. The widow and children are the testamentary beneficiaries. Petitioners allege the father devised his interest to his children Robert and Virginia.

Respondents denied that Robert Miller was vested with such an estate or interest in the property as to give him the right to partition. As a further defense they alleged that Robert Miller was one of the three executors and trustees of a trust fund created by the will of Plato Miller for the benefit of his widow and as such executor and trustee had so interpreted the will and administered the trust fund for his benefit as to imperil the widow's rights if the lot was sold. The widow and other trustees, Robert A. Little and T. R. Ward, were thereupon made respondents. They asserted that by proper interpretation of the will of Plato Miller the lot was a part of the trust estate created to provide income to Mrs. Miller for life or widow-

hood. They further asserted that petitioner was by his interpretation of the will and administration of the trust fund estopped from claiming any present right in the property.

The parties waived a jury trial, stipulated certain facts, and agreed the court might find other facts from admissions made by the parties. The court made findings including the facts stipulated, set out in the opinion to the extent necessary for a determination of the appeal. Based on its findings it concluded petitioners were estopped to deny the lot was part of the trust fund and adjudged petitioners were not entitled to have the lot sold. Petitioners excepted to the conclusion and appealed.

Redden, Redden & Redden for petitioner appellants.

W. H. Childs, Sr., for Corita Edwards Miller, Kemp B. Nixon and George Hopkins for original respondents, and McDougle, Ervin, Horack & Snepp for Robert A. Little and T. R. Ward, remaining trustees and executors.

RODMAN, J. Sec. 2 of Plato Miller's will devises to his wife in fee and absolutely his home place and household and kitchen furniture. Her right to this property is not involved in this litigation.

Sec. 3 gives to his wife the sum of $325 to be paid monthly "during her natural life or as long as she remains my widow, and paid directly to her monthly by said trustees out of the net income of my estate as fully set out hereinafter in this will."

Sec. 4 appoints petitioner Robert P. Miller and respondents Robert A. Little and T. R. Ward as trustees to provide payment of the monthly allowance fixed by sec. 3. The trustees are directed to take charge of all the cash on hand, stocks, bonds, bank deposits, and other personal property "and the income derived from all these sources from said properties shall be assets in the hands of said Trustees to pay the $325.00 monthly allowance. . .and that the remainder of said income shall be used for the payment of taxes and other necessary expenses of my said estate, and after this is carried out, I will that the remainder of my income shall be equally divided annually between my son Robert P. Miller and his sister Virginia Miller McLean, or to such as legally represent them. . ." The trustees were given power "to sell, exchange, re-invest or change. . .any or all of my personal estate. . .in order to carry out the monthly payment to my wife . . .I further give my three trustees. . .the full power and authority to advance to my son Robert P. Miller and my daughter Virginia Miller McLean, as their necessities may require and the best judg-

ment of said three trustees may dictate, and (sic) part of said bonds, stocks, cash on hand, securities, etc. . . .This trust requirement of said three Trustees. . .shall exist during the natural life or as long as she remains my widow, and at her death or remarriage, the said three Trustees. . .shall divide all the remaining or present stocks, bonds, money, etc. . . .and pay. . .the same equally between my son Robert P. Miller and my daughter Virginia Miller McLean, share and share alike or to such as legally represent them, equalizing any advancements made to either or both of them. . ."

The concluding paragraph of sec. 4 of the will recites that testator owns 64% of the lot now sought to be partitioned, and the remaining 36% was owned by the original respondents.

Sec. 5 devises to his son and daughter "and to such as legally represent them, equally share and share alike" all of his other real estate.

The trustees named in the will were likewise appointed as executors. They qualified and acted as trustees until January 1959 when petitioner Robert P. Miller was permitted to resign as trustee because of his health.

The court found: Those named as executors and trustees, until the resignation of Robert Miller, collected the rents for the lot here sought to be partitioned and deposited the rents so received as part of the trust fund. Robert P. Miller, while acting as executor and trustee, prevailed upon his co-trustees to distribute part of the *corpus* of the trust estate to himself and his sister, representing to them that adequate property would remain after such distributions to fullfill the purposes of the trust "and on such occasions would specifically call the attention of the other Trustees that the property which is the subject of this proceeding was included in the Trust Estate. . ." Based on these representations, the trustees paid over to petitioner and Mrs. McLean substantial parts of the *corpus* of the trust estate. "(S)uch liquidation and distribution was made without the consent or approval of the primary beneficiary Corita Edwards Miller, and a further liquidation of the *corpus* of said Trust could seriously impair the Trust and might render it impossible for the Trustees to carry out the express provisions of the Trust concerning the support and maintenance of Corita Edwards Miller."

Trustees and other fiduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act. *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832; *Hatcher v. Williams,* 225 N.C. 112, 33 S.E. 2d

617; *Carter v. Young,* 193 N.C. 678, 137 S.E. 875; *Freeman v. Cook,* 41 N.C. 373; 54 Am. Jur. 246.

The interpretation of the will made by petitioner-trustee, by placing the rents from the real estate in the trust fund coupled with his assurance to his co-trustees that the realty was part of the trust fund, thereby inducing them to distribute to him and his sister a substantial part of the *corpus* of the fund, so diminishing it as to create doubt as to its sufficiency to pay the widow the monthly sum provided in the will, estops him from now denying that the property is a part of the trust. *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114; *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489; *Auto Co. v. Rudd,* 176 N.C. 497, 97 S.E. 477; *Holloman v. R. R.,* 172 N.C. 372, 90 S.E. 292.

Because petitioner's conduct has estopped him from denying the lot is a part of the trust fund, we must determine if he is entitled, as a remainderman, to partition the trust estate. G.S. 46-23. The answer is to be found by ascertaining testator's intent, for his intent will, if not in violation of some well-settled rule of law, be given effect. *Entwistle v. Covington,* 250 N.C. 315, 108 S.E. 2d 603. Did testator intend to give the income not to exceed $325 per month to his widow, or did he mean to provide her with a fixed monthly amount for widowhood to be paid from the income of the fund, if sufficient, but if not, from the *corpus?*

It is, we think, apparent that testator intended that a fixed sum be paid each month. True, he estimated the income from the fund would provide more than enough to pay this amount, the cost of administering the trust, and leave surplus income. But he likewise foresaw that it might not. He gave to the trustees the power to sell parts of the trust estate. The trustees are not limited to income as a source of payment. If the income should prove insufficient, the trustees have the power and would be under a duty to use the *corpus* of the fund to make the monthly payments. What will be left for division cannot be determined until the trust estate terminates. *Moore v. Langston,* 251 N.C. 439; *Shepard v. Bryan,* 195 N.C. 822, 143 S.E. 385; *University v. Borden,* 132 N.C. 476; *Erwin v. Erwin,* 115 N.C. 366.

Since petitioners have no vested right to any part of the trust fund, they cannot have a sale of the lot in question. *Makely v. Shore,* 175 N.C. 121, 95 S.E. 51.

Affirmed.

JAMES W. STARBUCK, ALBERT CIANCIOSE, WILLIAM E. SINGLETON, DONALD G. GARDNER AND VERNON A. CARPENTER AND ALL OTHER CITIZENS, TAXPAYERS, QUALIFIED ELECTORS OR RESIDING OR OWNING PROPERTY IN THAT PARTICULAR AREA OR TERRITORY HEREINAFTER DESCRIBED AS THE TOWN LIMITS OF THE TOWN OF HAVELOCK WHO WILL COME IN, MAKE THEMSELVES PARTIES AND CONTRIBUTE TO THE EXPENSE OF THIS ACTION, v. THE TOWN OF HAVELOCK; GEORGE GRIFFIN, MAYOR; CLAY WYNN, COMMISSIONER; JESSE LEWIS, COMMISSIONER, AND NORWOOD SANDERS, COMMISSIONER; REUL LEE, COMMISSIONER, AND IRVING BECK, COMMISSIONER.

(Filed 16 March, 1960.)

1. Elections § 7—

An action challenging the corporate existence of a municipality on the ground of fatal irregularities in the election pursuant to statute at which the creation of the corporation was approved is not an action to determine a right to a public office nor one to prevent the exercise of a franchise by a *de facto* municipal corporation, and therefore it is not required that the question be presented by *quo warranto*.

2. Municipal Corporations §§ 1, 4: Elections § 1—

The Legislature has full and complete power to create a municipal corporation and to determine when and how the corporation may come into existence, the powers which it may exercise, the area in which the corporation may act, the number of officials, and other incidental matters. Chapter 952, S.L. 1959, is within the power of the General Assembly in these respects.

3. Municipal Corporations § 1: Public Officers § 4a—

Provision of an act that any qualified elector who had resided in the area for not less than one year should be eligible to be nominated for mayor or a member of the board of commissioners of a proposed municipality, places a statutory qualification for office in conflict with Article VI, Sections 2 and 7 of the State Constitution and is void.

4. Municipal Corporations § 1: Elections § 1—

Where a statute provides for an election to determine whether an area should be incorporated as a municipality and further provides for the qualification and election of officers of the municipality, the fact that the provision for the election of the municipal officers is void and unconstitutional in prescribing qualification of office in conflict with the Constitution does not render void the provisions for the election to determine whether the area should be incorporated, the two parts of the statute being independent and separable.

5. Statutes § 6—

Where one part of a statute is valid and another part thereof is invalid, but the two parts are independent and separable, the valid portion of the act will stand.

6. Municipal Corporations § 1: Elections § 10—

In an election pursuant to a statute to determine whether a specified area should be incorporated as a municipality, neither a minority vote at a legal election nor a majority vote at an election held in such manner as to deprive the citizens of full opportunity to vote could produce corporate existence. While such election could not produce a *de facto* corporation, it could present an opportunity for a *de facto* corporation to arise if there be colorable compliance with the statute and also an exercise of corporate power pursuant thereto.

7. Elections § 7—

Where a statute provides for an election to determine whether a specified area should be incorporated as a municipality, persons within the area may challenge the validity of an election under the statute without leave of the Attorney General, since a *de facto* corporation might arise from such election which would subject their property to obligations and liabilities of municipal government.

8. Injunctions § 2—

Injunctions may not issue if there is no allegation that plaintiff's rights were imminently threatened.

PARKER, J., concurs in result.

APPEAL by defendants from *Bundy, J.*, at Chambers in CRAVEN, on 4 December 1959.

Plaintiffs by this appeal challenge the corporate existence of the municipality and the right of the individual defendants to serve as mayor and commissioners of the Town of Havelock conditionally created by c. 952, S.L. 1959. As the basis for the asserted invalidity they allege (1) the Act is wholly void because of the qualifications prescribed for nominees for office, and (2) the election required by the Act as a condition to corporate existence was not called and held as required by the Act, thereby depriving numerous citizens of their suffrage.

Judge Bundy issued a temporary order restraining defendants from exercising any of the powers of a municipality. On plaintiffs' motion to continue this order in force, he heard the evidence, both parol and affidavits, offered by the parties. Based on this evidence he found as a fact that the election required by the Act had not been properly held, because (1) the notice of the election failed to give any information with respect to the election officials and failed to designate any polling place in the described area, and (2) the place actually provided for electors to cast their ballots was outside of the area to be incorporated. Based on his findings he concluded the election was void for want of authority to call it and for defects in the call and the manner of conducting the election. He continued the restraining

order to the final hearing. Defendants excepted to the findings and order and appealed.

Charles L. Abernethy, Jr., for plaintiff appellees.
A. D. Ward and Kennedy W. Ward for defendant appellants.

RODMAN, J. The appeal, supplemented by the demurrer *ore tenus* made here, raises two questions: (1) Must the challenge of corporate existence be by *quo warranto?* (2) Is there any allegation in the complaint entitling plaintiffs to injunctive relief?

The wrongs which may be corrected by *quo warranto* are specified by statute. G.S. 1-515 and 516, G.S. 55-122 and G.S. 55A-50. None of these statutes apply to this action. This is not an action to determine a right to a public office nor to prevent the exercise of a franchise by a *de facto* corporation. This is an action to determine whether a *de jure* municipal corporation has been created.

The Legislature has full and complete power to create a municipal corporation. It may determine when and how the corporation may come into existence, the powers which it may exercise, the area in which the corporation may act, the number of officials to perform its corporate functions, and other incidental matters. *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E. 2d 411; *Saluda v. Polk County*, 207 N.C. 180, 176 S.E. 298; *Starmount Co. v. Hamilton Lakes*, 205 N.C. 514, 171 S.E. 909.

Sec. 1, c. 952, S.L. 1959, upon the condition of elector approval as provided in sec. 4, creates the area described in sec. 2 a municipal corporation under the name of the Town of Havelock, possessed of the powers given to municipal corporations by c. 160 of the General Statutes.

Sec. 3 of the Act declares the municipality shall be governed by a mayor and five commissioners.

Sec. 4 commands the Craven County Board of Elections to call and hold on 25 July 1959 an election within the area described as the corporate limits "to determine whether or not the area herein described shall be incorporated as a municipal corporation, and to elect the members of the governing body if said area is incorporated." This section further provides that the call for the election shall be published and shall (1) describe the territory, (2) state the question to be determined and the number of officials to be elected, (3) "name the registrars and judges of election, location of polling places, time for registration, date of election and hours of voting." The sec-

tion specifically fixes the days on which the books shall be open for registration.

Sec. 5 requires the ballots used at this election to be marked "for incorporation" and "against incorporation" and provides that the area should be a municipal corporation if a majority vote "for incorporation."

Sec. 6 of the Act requires the Board of Elections, at the time it calls the election to determine the question of incorporation to issue a call for an election for mayor and five commissioners to serve if the area is incorporated. All of these provisions are within the power of the Legislature.

As a qualification for the officials to be selected, sec. 6 provides: "Any qualified elector who has resided in the area to be incorporated for a period of not less than one year immediately preceding the date of election shall be eligible to be nominated for mayor or a member of the board of commissioners by petition of any five electors of the area, who shall be designated as his sponsor."

This statutory qualification for office is in conflict with the provisions of sec. 2 and 7, Art. VI of our Constitution. The Legislature was without power to so limit the class which could qualify for office. But the qualification necessary to serve as an official of the community is totally unrelated to the question of whether the area should or should not be incorporated. The quoted provision with respect to qualification is in our opinion independent and separable from the remainder of the Act and, when rejected, does not impair but permits the exercise of Legislative power to accomplish the prime purpose of the Act, that is, permitting the inhabitants to determine whether the area should or should not become a town. We apply to this Act the law so frequently declared with respect to partially invalid legislative acts. *Constantian v. Anson County,* 244 N.C. 221, 93 S.E. 2d 163; *Banks v. Raleigh,* 220 N.C. 35, 16 S.E. 2d 413; *Bank v. Lacy,* 188 N.C. 25, 123 S.E. 475; *Commissioners v. Boring,* 175 N.C. 105, 95 S.E. 43; *Smith v. Wilkins,* 164 N.C. 135, 80 S.E. 168. The election is not void for lack of authority to hold it for the purpose of determining whether the Town of Havelock should come into being and who should be mayor and commissioners.

A majority vote for incorporation automatically created a municipal corporation with power to tax and all of the other powers granted by c. 160 of the General Statutes if the election was called and conducted so as to afford each citizen in the area a full and free opportunity to express his wishes on the question of incorporation as required by the Act.

Neither a minority vote at an election properly called and held nor a majority vote at an election held in such manner as to deprive the citizens of full opportunity to exercise the right which the Legislature intended to make available could produce corporate existence.

The election either created or failed to create a corporation. It could not produce a *de facto* corporation, but it could present an opportunity for a *de facto* corporation to arise. *De facto* corporate existence requires not only colorable compliance with a law authorizing its creation but the exercise of corporate power. *Wood v. Staton,* 174 N.C. 245, 93 S.E. 794; 1 McQuillin Municipal Corporations, 3rd ed. p. 588.

A delay in challenging compliance with the statutory requirements might permit a *de facto* corporation to arise, thereby subjecting plaintiffs and their property to obligations and liabilities of municipal government. This gave plaintiffs a right to have the validity of the election determined without seeking authority from the Attorney General. *Jones v. Commissioners,* 107 N.C. 248; *Barbee v. Comrs. of Wake,* 210 N.C. 717, 188 S.E. 314, and cases cited.

The demurrer based on the assertion that *quo warranto* is the exclusive remedy is overruled.

Plaintiffs pray for injunctive relief, but the prayer is not based on any allegation of fact entitling them to an injunction. There is no allegation that defendants or any of them have done or threatened to do any act which will result in damage to plaintiffs. The court, in the absence of requisite allegations of threatened damage, should not have issued the restraining order nor should it have continued the order in effect when its attention was directed to the absence of the requisite factual allegations. *Adams v. College,* 247 N.C. 648, 101 S.E. 2d 809; *Rheinhardt v. Yancey,* 241 N.C. 184, 84 S.E. 2d 655; *Porter v. Armstrong,* 132 N.C. 66; 2 McIntosh, N.C. P. & P. 2nd ed. 406. This erroneous holding requires a reversal, but this result is without prejudice to plaintiffs' right to apply for and obtain permission to amend so as to incorporate such additional factual allegations as they may deem necessary for their protection.

Reversed.

PARKER, J., concurs in result.

QUEEN CITY COACH COMPANY, A CORPORATION v. JAMES S. CURRIE, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 16 March, 1960.)

1. Statutes § 5a—

A statute must be interpreted to effectuate the legislative intent.

2. Taxation § 29—

Where the net operating income of a bus carrier is ascertained in accordance with the statutory formula after State taxes other than income taxes have been included in computing its operating expenses, such carrier is not entitled under the provisions of G.S. 105-136 (prior to its repeal by Chapter 1340, S.L. 1957) to deduct again from its net operating income allocated to its business within this State the amount of State taxes other than income taxes, the proviso of the act applying only when the net operating income is ascertained without deducting State taxes other than income taxes.

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

This is a civil action, seeking a refund of income taxes for the year 1955 paid by the appellant to the Commissioner of Revenue, hereinafter called Commissioner.

This cause arises under the provisions of section 105-136 of the General Statutes of North Carolina. This statute was repealed by Chapter 1340, section 4, of the Session Laws of 1957; therefore it applies only to questions which arose prior to 1 July 1957.

The plaintiff filed its corporate income tax return for the calendar year 1955 with the Commissioner in apt time. The return as filed showed no taxes due for the year. Subsequently, the Commissioner issued a proposed assessment against the plaintiff for alleged income taxes due for said year in the amount of $9,588.04, with interest in the sum of $1,246.45, a total of $10,834.49. Following a protest and hearing the Commissioner ruled against the taxpayer and declared that the tax and interest were due and owing. On or about 9 July 1958 the plaintiff paid the alleged tax and interest under protest and made proper demand for refund. Upon failure of the Commissioner to refund the amount paid, the plaintiff instituted this action.

Pursuant to a stipulation of the parties, the trial judge heard the matter on an agreed statement of facts without a jury. Judgment was rendered in favor of the defendant. The plaintiff appeals, assigning error.

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

Coble & Behrends for plaintiff.

DENNY, J. The provisions of G.S. 105-136 which are essential to an understanding of the question involved in this appeal, are as follows: "The basis of ascertaining the net income of every corporation engaged in the business of operating a steam, electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the interstate commerce commission to keep records according to its standard classification of accounting, shall be the 'net revenue from operations' of such corporation as shown by their records, kept in accordance with that standard classification of accounts when their business is wholly within this state, and when their business is in part within and in part without the state, their net income within this state shall be ascertained by taking their gross 'operating revenues' within this state, including in their gross 'operating revenues' within this state the equal mileage proportion within this state of their interstate business, and deducting from their gross 'operating revenues' the proportionate average of 'operating expense' or 'operating ratio' for their whole business, as shown by the interstate commerce commission standard classification of accounts:

"Provided, that if the standard classification of operating expenses prescribed by the interstate commerce commission for railroads differs from the standard classification of operating expenses prescribed by the interstate commerce commission for other public-service corporations, such other public-service corporations shall be entitled to the same operating expenses as prescribed for railroads. From the net operating income thus ascertained shall be deducted 'uncollectible revenue' and taxes paid in this state for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this article. * * *"

There is also included in the foregoing statute a formula for ascertaining net operating income of a public service corporation.

It was stipulated by the parties that during the calendar year 1955 plaintiff had a total operating revenue of $4,341,549.91, and total operating expenses, as computed under the Uniform System of Accounts prescribed by the Interstate Commerce Commission, of $4,129,343.64, resulting in an operating ratio for plaintiff's entire business, as shown by the Interstate Commerce Commission's Standard Classification of Accounts, of 95.10 per cent. That all taxes paid to the State of North

Carolina by the plaintiff for the calendar year 1955 (except income taxes) were included in the total operating expense of $4,129,343.64. That such taxes were proper deductions as operating expenses under the Interstate Commerce Commission's Standard Classification of Accounts for Class I common and contract motor carriers of passengers in effect in 1939 and in 1955.

The plaintiff conducted business partly within and partly without this State in 1955. Therefore, the statutory formula had to be followed for ascertaining the plaintiff's gross "operating revenues" within the State. The mileage proportion figure for 1955 in this State was 75.11 per cent. Applying this mileage proportion to the total revenues, resulted in a gross operating revenue within this State of $3,261,238.57.

Applying the operating ratio, or proportionate average of operating expenses of 95.10 per cent, to operating revenues within the State of $3,261,238.57, results in operating expenses in this State of $3,101,437.88. Subtracting the proportionate average of operating expenses from the gross operating revenues within the State, leaves a balance of $159,800.69. This amount was plaintiff's net operating income in North Carolina for the year 1955.

There is no disagreement with respect to the accuracy of these figures or the method by which they were ascertained.

It was further stipulated in the court below that in the year 1955 the plaintiff paid taxes in North Carolina (other than income taxes), in the sum of $250,890.40. In making its income tax return for 1955, the plaintiff took the position that it was entitled to deduct the $250,890.40 as an offset against the net operating income of $159,-800.69, thus leaving no amount on which it was required to pay an income tax.

The plaintiff contends that the provisions of G.S. 105-136 in effect at that time not only authorized the deduction but directed it to be made. We do not concur in this view.

It was also stipulated by the parties that the Standard Classification of Accounts prescribed by the Interstate Commerce Commission in 1939 and for the calendar year 1955 for Class I railroads, did not authorize the deduction of taxes by such railroads in computing their net revenue operations. There is a sound reason for not allowing the railroads to deduct the taxes (other than income taxes) paid in any particular state until the operating revenues of the road is ascertained exclusive of such taxes. By such method, a given state is favored or penalized with respect to the amount on which income taxes must be paid, depending on whether these taxes (other than income taxes) are higher or lower than in other states in which the railroad operates.

For the same reason it would seem that such method should also be applied to motor carriers of passengers. However, such method, it appears, was not followed with respect to common and contract motor carriers of passengers in 1955.

In our opinion, when G.S. 105-136 is interpreted aright, it simply means that every public service corporation "shall be entitled to the same operating expenses as prescribed for railroads." Then the statute further provides: "From the net operating income thus ascertained shall be deducted 'uncollectible revenue' and taxes paid in this state for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this article." We interpret the phrase, "From net operating income *thus ascertained*," to mean, when the net operating income of a public service corporation is required to be ascertained exclusive of taxes paid, other than income taxes, then the deductions provided for in the proviso shall be made. (Emphasis added)

This Court said in *Watson Industries v. Shaw*, 235 N.C. 203, 69 S.E. 2d 505, "The legislative intent is the essense of the law and the guiding star in the interpretation thereof."*Midkiff v. Granite Corp.*, 235 N.C. 149, 69 S.E. 2d 166; *Mullen v. Louisburg*, 225 N.C. 53, 33 S.E. 2d 484; 50 Am. Jur., Statutes, section 223, page 200.

It is clear that a railroad could not obtain a double deduction of such taxes under the provisions of G.S. 105-136. Therefore, in our opinion, the proviso was intended to put railroads and other public service corporations on a parity with respect to the deduction of legitimate items of expense and not to create unfair discrimination between the railroads and other public service corporations.

We hold that the proviso in G.S. 105-136 does not authorize the deduction of any item which was properly included and deducted in ascertaining the net income under the required system of accounting by the Interstate Commerce Commission for common and contract motor carriers of passengers, which requirement was in effect in 1955. As pointed out hereinabove, the taxes paid to this State in the year 1955 (other than income taxes), in the sum of $250,890.40, were deducted as an operating expense in arriving at the plaintiff's total operating expenses for the year 1955. Hence, the judgment of the court below is

Affirmed.

BETTY ROBINSON v. CHARLOTTE MEMORIAL HOSPITAL AUTHORITY OF CHARLOTTE, NORTH CAROLINA, A CORPORATION, AND DR. WALDEMAR C. A. STERNBERGH.

(Filed 16 March, 1960.)

1. Hospitals § 3: Trial § 21—

Whether a charitable hospital is immune from liability for negligence as a matter of law is not presented in the lower court by motion to nonsuit.

2. Appeal and Error § 1—

Where a question is not presented to or ruled upon in the lower court, it is not presented for decision on appeal.

3. Master and Servant § 32—

In the absence of any evidence of negligence on the part of the asserted employee, nonsuit in favor of the employer sought to be held under the doctrine of *respondeat superior* is properly allowed.

APPEAL by plaintiff from *Campbell, J.*, 21 September "A" Term 1959, of MECKLENBURG.

This is a civil action instituted by the plaintiff against the defenddants, Charlotte Memorial Hospital Authority and Dr. Waldemar C. A. Sternbergh, for personal injuries sustained while she was a patient in the Charlotte Memorial Hospital.

It is alleged in the complaint that plaintiff fell from an X-ray table as a result of the negligence of the individual defendant, Dr. Sternbergh.

The plaintiff's alleged cause of action against the corporate defendant is based upon the doctrine of *respondeat superior*. It is alleged that the individual defendant was on the occasion in question the defendant Hospital's agent, servant and employee.

The plaintiff alleges in her complaint that the defendant Hospital is "a public body, * * * a body corporate and politic duly organized pursuant to the laws of the State of North Carolina * * *." The defendant Hospital admitted this allegation in its answer.

In a further answer and defense the defendant Hospital alleged that it was issued its charter under and pursuant to the Hospital Authorities Law, Article 12, Chapter 131, of the General Statutes of North Carolina. The answer further alleged that the Hospital was not liable to the plaintiff for the reason that it was an eleemosynary institution, and since its organization it had been operated as a charitable, nonprofit, nonstock corporation. It further admitted that the individual defendant was a duly licensed and practicing physician in charge of its Department of Radiology.

The plaintiff introduced evidence tending to show that on 27 March 1957 the City of Charlotte submitted a bond issue to the voters, authorizing the City to issue hospital bonds in a sum not to exceed $4,000,000, and to make the proceeds therefrom available to the Charlotte Memorial Hospital Authority of Charlotte to provide additional buildings and other physical equipment at said Hospital. The evidence further tends to show that the bonds were approved and were to be issued as needed, and that $3,000,000 of the bonds have been issued.

The only other evidence offered by the plaintiff was her own testimony to the effect that she was a paying patient while she was in the Charlotte Memorial Hospital. At the close of plaintiff's evidence each of the defendants moved for judgment as of nonsuit. The motions were denied.

The defendant Hospital introduced in evidence its charter and offered evidence with respect to its operation, tending to show that the institution was a charitable, nonprofit, nonstock corporation.

At the close of all the evidence the defendants renewed their motions for nonsuit. The court denied the motion made by the individual defendant but allowed it as to the corporate defendant.

Judgment was accordingly entered. The plaintiff appeals, assigning error.

Weinstein, Muilenburg, Waggoner & Bledsoe for plaintiff.
B. Irvin Boyle, J. J. Wade, Jr., for defendant Hospital.

DENNY, J. It is apparent from the briefs filed herein by the respective parties that they desire a determination of the question whether or not the corporate defendant is, on the facts disclosed by the record, immune from liability as a matter of law. *Williams v. Hospital*, 237 N.C. 387, 75 S.E. 2d 303; *Williams v. Hospital Ass'n.*, 237 N.C. 395, 75 S.E. 2d 308; *Williams v. Hospital Ass'n.*, 234 N.C. 536, 67 S.E. 2d 662; *Herndon v. Massey*, 217 N.C. 610, 8 S.E. 2d 914; *Barden v. R. R.*, 152 N.C. 318, 67 S.E. 971, 49 L.R.A. (N.S.) 801. See also *Hoke v. Glenn*, 167 N.C. 594, 83 S.E. 807, Ann. Cas. 1916E 250.

There is nothing in the record on this appeal to indicate that the above question was passed upon by the court below.

A matter not ruled upon in the lower court is not presented for decision in the Supreme Court. *Collier v. Mills*, 245 N.C. 200, 95 S.E. 2d 529; *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242; *Burton v. Reidsville*, 240 N.C. 577, 83 S.E. 2d 651; *Bank v. Caudle*, 239 N.C.

270, 79 S.E. 2d 723; Strong, North Carolina Index, Volume I, Appeal and Error, § 1, and cases cited.

Furthermore, if it should be conceded (which it is not) that the defendant Hospital is liable for the negligence of its agents, servants and employees, there is not a scintilla of evidence on the record before us tending to support the allegations of the complaint with respect to such negligence. Therefore, the judgment as of nonsuit entered by the court below must be upheld.

Affirmed.

ELEANOR DEMORET v. LAWRENCE H. LOWERY, ORIGINAL DEFENDENT, AND CASADY A. DEMORET, ADDITIONAL DEFENDANT.

(Filed 16 March, 1960.)

Abatement and Revival § 8—

In an action between the respective drivers of the cars involved in a collision, each driver sought to recover damages to his vehicle upon allegations that the collision was the result of the negligence of the other. Thereafter, the passenger in one of the vehicles sued the driver of the other vehicle to recover for personal injuries. *Held:* The defendant in the second action, joined for contribution, is not entitled to set up as a counterclaim the identical matter asserted by him in the prior action.

APPEAL by original defendant from *Bundy, J.*, November-December, 1959 Term, CRAVEN Superior Court.

Civil action to recover damages for personal injury alleged to have been negligently inflicted. This appeal is from an order refusing to allow the original defendant's plea in abatement to the additional defendant's cross action against him.

Barden, Stith & McCotter for defendant, appellant, Lawrence H. Lowery.

Williams, Williams & Morris, By: William C. Morris, Jr., for defendant, appellee, Casady A. Demoret.

HIGGINS, J. As gathered from the pleadings, this controversy grew out of a rear-end collision on U. S. Highway No. 70 near Old Fort in McDowell County. Involved in the accident were a 1950 Chevrolet owned and driven by Lawrence H. Lowery of McDowell County, and a 1954 Chevrolet owned and driven by Casady A. Demoret of Craven County. The accident occured on November 24, 1958. Eleanor Demoret, wife of Casady A. Demoret, was a passenger in her husband's vehicle at the time of the accident.

On March 23, 1959, Lowery instituted a civil action against Demoret in the Superior Court of McDowell County to recover property damage which he alleged was caused to his automobile by the negligence of Demoret in ramming it from behind as both were driving west. Demoret filed answer, denied negligence, pleaded contributory negligence, and set up a counterclaim for the damages to his own vehicle which he alleged were caused by the negligence of Lowery in entering the highway from a parking space without warning and without giving Demoret time to avoid the collision. Each driver alleged the other's negligence caused the accident.

On November 16, 1959, Eleanor Demoret instituted the present action in the Superior Court of Craven County against Lowery to recover for personal injuries she suffered in the accident. Lowery filed an answer, denied negligence, and had Demoret brought in as an additional party defendant for purposes of contribution. G.S. 1-240. Demoret filed an answer denying negligence and set up as a cross action against the original defendant the identical matters which were the subject of his counterclaim in the original defendant's action in McDowell.

The question of law presented is this: Does the cross action here abate on the ground the same cause of action is already pending in the Superior Court of McDowell County? "If the fact of the pendency of such prior action appears on the face of the complaint, it is ground upon which defendant may demur . . . But if the fact does not so appear, objection may be raised by answer, G.S. 1-133, and treated as a plea in abatement." *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892. When there is a prior action pending, a plea in abatement must be sustained to a second cause of action involving the same matters. *Seawell v. Purvis*, 232 N.C. 194, 59 S.E. 2d 572. "Where an action is instituted, and it appears to the court by plea, answer or demurrer, that there is another action pending between the parties and substantially on the same subject matter, and that all the material questions and rights can be determined therein, such action will be dismissed." *Dwiggins v. Bus Co., supra; Brothers v. Bell Bakeries, Inc.*, 231 N.C. 428, 57 S.E. 2d 317, citing many cases.

A plea in abatement is good if "(1) the plaintiff herein could obtain the same relief by counterclaim in said prior action, and (2) a judgment in favor of the plaintiff in said prior action (defendant herein) would operate as a bar to plaintiff's prosecution of this action." *Hill v. Spinning Co.*, 244 N.C. 554, 94 S.E. 2d 677.

In this case Demoret's cause of action against Lowery on his counterclaim was pending in the Superior Court of McDowell. His attempt

to reassert it as a cross action in Craven has the effect of making him a plaintiff in the cross action. *Norris v. Johnson,* 246 N.C. 179, 97 S.E. 2d 773. Lowery and Demoret are involved in a dispute as to whose negligence caused the damage to the other's vehicle. Lowery's prior action in McDowell fully presents this question. Mrs. Demoret is not interested (in a legal sense) in the damage to the vehicles. For a discussion as to what actions may be asserted by one defendant against another, see *Morgan v. Brooks,* 241 N.C. 527, 85 S.E. 2d 869; *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232; *Horton v. Perry,* 229 N.C. 319, 49 S.E. 2d 734.

The plea in abatement in the Craven County action should have been sustained under the authorities herein cited, and the court's order denying the plea must be

Reversed.

BARBARA P. HOUSE v. THE STATE HOSPITAL INSURANCE ASSOCIATION, INC.

(Filed 16 March, 1960.)

Appeal and Error § 3: Trial § 49—

Where the court sets aside the verdict in the exercise of its discretion there is no judgment from which an appeal can lie, and appellant may not present the correctness of the court's ruling on its motion to nonsuit by challenging the exercise of the court's discretion in setting aside the verdict.

APPEAL by defendant from *Bone, J.,* November 1959 Term, of EDGECOMBE.

Plaintiff brought this action to recover payments alleged to be owing under a retirement contract with defendant. Defendant denied liability, asserting the alleged contract was without consideration, was *ultra vires* and void.

At the conclusion of plaintiff's evidence defendant moved for nonsuit. Its motion was denied. It offered no evidence. The court submitted issues arising on the pleadings. The jury answered the issues in accord with defendant's contention. Defendant tendered a judgment based on the verdict. The court refused to sign the judgment tendered and in the exercise of its discretion set the verdict aside and ordered another trial. Defendant excepted to the order setting the verdict aside and appealed.

John Hill Paylor, Fountain, Fountain, Bridgers & Horton for plaintiff, appellee.

Owens & Langley, Herbert H. Taylor, Jr., and Z. Creighton Brinson for defendant, appellant.

PER CURIAM. Defendant argues the court erred in setting the verdict aside because, as it contends, there was no evidence on which the jury could have returned a verdict in favor of plaintiff. In this manner it seeks to review the court's ruling in overruling the motion to nonsuit. No judgment has been rendered against defendant. It may not, by challenging the exercise of the court's discretion in setting the verdict aside, present for determination the correctness of the court's ruling on the motion to nonsuit. *White v. Keller,* 242 N.C. 97, 86 S.E. 2d 795; *Byrd v. Hampton,* 243 N.C. 627, 91 S.E. 2d 671.

Appeal dismissed.

WILLIAM H. BONDURANT, ADMINISTRATOR OF THE ESTATE OF CHARLES RAY BAKER, DECEASED, v. JOHN MASTIN, INDIVIDUALLY, AND TRADING AND DOING BUSINESS AS "HOLLAND, MASTIN AND SALE COMPANY," AND AS "H. M. & S. REFRIGERATED SERVICE;" AND JOHN RALPH SLOOP AND EDWARD ELLIS PREVETTE.

(Filed 23 March, 1960.)

1. Automobiles § 6—

G.S. 20-140 relating to reckless driving, G.S. 20-141 (b) (3), relating to speed limit of vehicles other than passenger cars, G.S. 20-141(c), relating to reduction of speed when special hazards exist, and G.S. 20-146 and G.S. 20-148, relating to driving on the right side of the highway, prescribe legislative standards of care, which are absolute.

2. Automobiles § 41c— Evidence held sufficient on question of whether negligence of one driver, in creating emergency, was proximate cause of collision between two other vehicles.

Evidence tending to show that defendant driver was operating his tractor-trailer recklessly and at excessive speed across a narrow bridge, that as he cleared the bridge his vehicle was some four feet to his left of the center of the highway, forcing an approaching motorist, in attempting to avoid a collision, to drive his automobile off the highway to his right, resulting in his losing control so that in attempting to get back on the highway he crashed into a following vehicle, *is held* sufficient to be submitted to the jury on the question of the negligence of the driver of the lead vehicle as the proximate cause of the collision even though there was no, or only slight, contact between the car and

the lead vehicle, since the driver of the lead vehicle might reasonably foresee that some injury would result to the driver of the automobile in being forced off the road.

3. Negligence § 7—

Although foreseeability is an essential element of proximate cause it is not required that the injury in the exact form in which it occurred be foreseeable but only that consequences of a generally injurious nature might have been expected.

4. Automobiles § 19—

A motorist confronted with an emergency created by the negligence of another is not held to the wisest choice of conduct but only to such choice as a person of ordinary prudence similarly situated would have made.

5. Automobiles § 42a—

Evidence tending to show that a vehicle approached from the opposite direction on its left of the center of the highway, and that plaintiff, to avoid colliding with it, ran off the road to his right, lost control, and, in attempting to get back on the highway, collided with a following vehicle, *is held* not to disclose contributory negligence on the part of the plaintiff as a matter of law, plaintiff being confronted with a sudden emergency.

6. Negligence § 24a—

Nonsuit on the ground of contributory negligence is proper only when the facts necessary to show contributory negligence appear so clearly that no other conclusion can be reasonably drawn from the evidence.

APPEAL by defendants John Mastin and John Ralph Sloop from *Froneberger, J.*, 7 September 1959 Term, of LINCOLN.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate, Charles Ray Baker, and for the destruction of plaintiff's intestate's automobile.

The jury found by its verdict that plaintiff's intestate was not killed and his automobile was not damaged by the joint and concurrent negligence of the defendants as alleged; that his intestate was killed and his automobile damaged by the sole negligence of defendant John Ralph Sloop, agent of John Mastin; that his intestate was not killed and his automobile was not damaged by the sole negligence of defendant Edward Ellis Prevette, agent of John Mastin; that plaintiff's intestate was not guilty of contributory negligence; and awarded damages in the amount of $25,000.00 for the death of plaintiff's intestate, and damages in the amount of $2,000.00 for the destruction of the automobile of plaintiff's intestate.

From a judgment entered in accord with the verdict, defendants John Mastin and John Ralph Sloop appeal.

C. E. Leatherman and Harvey A. Jonas, Jr., for plaintiff, appellee.
Kennedy, Covington, Lobdell & Hickman and R. Cartwright Carmichael, Jr., for defendants, appellants.

PARKER, J. The three defendants filed a joint answer, in which it is admitted that defendant John Mastin does business under the name of both Holland, Mastin and Sale Company and of H. M. & S. Refrigerated Service, of which he is sole owner. The answer also alleges that defendant John Mastin was engaged in the business of transportation by tractors and trailers of commodities and foodstuffs, and on 16 November 1958 Holland, Mastin and Sale Company was the registered owner of a 1956 Mack tractor and John Mastin was the registered owner of a 1955 Mack tractor. The answer also admits that at the times referred to in the complaint defendant John Mastin's 1956 Mack tractor and 1957 Dorsey trailer combination was being operated by defendant John Ralph Sloop as the agent, servant and employee of defendant John Mastin, operating under his firm name, in the course of his employment and in furtherance of the business of his master and codefendant John Mastin. The answer has a similar admission as to the defendant Edward Ellis Prevette, except that he was operating a 1955 Mack tractor and 1956 trailmobile trailer combination.

Defendants have three assignments of error: one, the denial of their motion for judgment of nonsuit made at the close of plaintiff's evidence, two, the denial of their motion for judgment of nonsuit renewed at the close of all the evidence, and three, the entry of the judgment.

Defendants' contentions are, that if the defendants John Ralph Sloop and John Mastin were negligent, such negligence was not the proximate cause of the death of plaintiff's intestate and of damage to his automobile, and two, that if defendants are guilty of actionable negligence, then plaintiff should have been nonsuited because of the contributory negligence of his intestate.

Plaintiff's evidence, and defendants' evidence favorable to him, or which tends to explain and make clear that which has been offered by plaintiff, tends to show the following facts: The time was about 3:30 p. m. Sunday, 16 November 1958. The scene was on U. S. Highway # 321 about one mile north of the town of Dallas near Little Long Creek Bridge. This bridge is 47 feet long and its roadway is 20 feet wide. About 600 feet north of this bridge is a State Highway sign marked "Narrow Bridge." The asphalt pavement of the highway at this point is 22 feet wide. Robert M. Wingo, a surveyor and witness for the defendants, testified: "I measured the width of the

highway on the south side of the bridge just before it goes onto the bridge. . . . The highway varies in width from 22 feet coming around the curve down to 19 feet on approach to the bridge." This highway had been resurfaced about 6 months prior to 16 November 1958, which raised the pavement 3 or 4 inches above the shoulder or dirt portion of the highway, and this extends to where the guardrails come to the edge of the bridge. Approaching the bridge from the south and going north to Lincolnton, the highway curves to the right, then turns to the left going down hill, then straightens and makes another left curve and approaches and leads up to the south edge of the bridge. When the road was built, an embankment was constructed about 10 feet high to afford an approach to the south end of the bridge, and the highway is about 10 feet higher than the adjacent land. On the south side of the bridge are guardrails, and on the eastern side of the highway these guardrails extend south about 48 feet from the abutments of the bridge. From the bridge to the end of the guardrails the dirt shoulder is very narrow, varying from one to four feet. From the end of the guardrails south the dirt shoulders widen out several feet. Approaching this bridge from the north and going south to Dallas the highway goes straight down a long hill and on to the bridge.

The defendant John Ralph Sloop driving south his codefendant John Mastin's 1956 Mack tractor and 1957 Dorsey trailer combination entered on this bridge travelling at a speed of 60 to 65 miles an hour. Following Sloop at a distance of about 80 feet was a 1955 Mack tractor and 1956 trailmobile combination owned by defendant John Mastin and driven by defendant Edward Ellis Prevette at about the same speed. Approaching this bridge at the same time and travelling north was a 1957 Buick automobile driven by William H. Bondurant at a speed of 40 to 45 miles an hour up to within 200 feet of the bridge. Following Bondurant's automobile was a 1957 Mercury automobile owned and driven by plaintiff's intestate, Charles Ray Baker, at a similar speed. In Baker's automobile as passengers were his wife, his two children, his sister and her son. The Bondurants and the Bakers were relatives. On this Sunday they had visited in Lowell the father of Mrs. Bondurant and Charles Ray Baker, had left there about 3:10 p. m., and were returning to Lincolnton. When the automobile driven by Bondurant was about 100 feet from the bridge, and going north, the tractor-trailer combination driven by Sloop at a speed of about 60 to 65 miles an hour going south was coming off the bridge weaving and straddling all three of the highways lines in the center of the highway. Bondurant pulled his automobile off the highway for Sloop to pass, got back on the highway, entered the bridge,

and on about the middle of the bridge passed the tractor-trailer combination driven by Prevette at a speed of about 60 to 65 miles per hour going south. As Bondurant was going off the bridge north, he heard Prevette "hit his brakes."

As the tractor-trailer combinations coming south approached the bridge, Charles Ray Baker travelling north and following Bondurant slowed down his automobile. Mrs. Bernice Baker Stafford, a sister of Charles Ray Baker and a passenger in his automobile on the front seat, testified as follows, as a witness for plaintiff: "The Bill Bondurant car was off of the highway to keep from being hit by the first tractor-trailer as it came off of the bridge. Naturally, our car was proceeding on down the highway at a slower rate of speed all the time. My brother went to the right side of the road, the east side, with the right front wheel. The Sloop tractor-trailer at that time was coming directly at us over on our side of the road. He was 4 or 5 feet over the center line on our side. The tractor was headed directly at us. Mr. Sloop was driving the first tractor-trailer. He was trying to pull it back on his side of the road. The trailer part of that tractor was leaning toward us. I don't remember the tractor part, but the trailer just loomed up at us, and I felt this terrific jolt and a loud squishing of air, and I looked up and the second tractor-trailer hit us. In my opinion, the first Sloop tractor-trailer was making 60 or 65 miles an hour when it passed us. As we were slung back into the highway, the Prevette tractor-trailer was coming off the bridge. The next thing I remember was that I got up off of the road. I was partly on the highway and partly on the shoulder on the west side. The right front wheel of the car of Charles Ray Baker was leaving the highway on the east side, and we were a little better than 125 feet from the south edge of the bridge as he left the highway."

When Bondurant drove his automobile on the bridge, he saw through his rear view mirror Charles Ray Baker's automobile leave the highway on the east side at a point 100 or 115 feet south of the bridge. He did not look further as he was meeting the Prevette tractor-trailer on the bridge. When Bondurant drove his automobile off of the bridge, he looked again in his rear view mirror, and saw the Baker automobile coming back into the highway at about a 90-degree angle toward the center line.

The tractor-trailer combination driven by Sloop did not stop, and left the scene. Bondurant went back to the wreck. When he arrived, the Prevette tractor-trailer was over in a field west of the highway. The Baker automobile was at an angle headed north about 8 feet on the west side of the trailer. Charles Ray Baker was lying in the cen-

ter of the highway dead. Also killed in the wreck were Mrs. Stafford's son, and Charles Ray Baker's daughter.

W. L. Garrison, a state highway patrolman and a witness for plaintiff, arrived at the scene of the wreck shortly after it occurred. He testified without objection in substance: that he determined the point of impact between the Baker automobile and the Prevette tractor-trailer combination to be about 42 feet from the end of the bridge, and when he arrived, the Prevette tractor-trailer combination was about 85 feet from the point of impact, and off the highway. Baker's automobile was down the embankment 8 feet north of the drive wheel of the tractor. The front part of the Prevette tractor was badly damaged, mostly on the right side. The Baker automobile was extensively damaged, and beginning at the rear seat was badly damaged and mashed in, and the top was mashed in and pinched together. The tractor-trailer combinations driven by Sloop and Prevette were about 47 feet long and the weight of each combination was in excess of the one-ton limit. At the scene defendant Prevette told Garrison he was the only tractor-trailer involved, and that he was not following another tractor-trailer. The patrolman carried him from the scene to a hospital. There, in the presence of Mrs. Bernice Baker Stafford, he said to Garrison he was following another tractor-trailer driven by Sloop. At the scene Prevette told Garrison the Baker automobile made a turn or whipped right in front of him and was skidding sideways, and he could not avoid hitting him. When Prevette testified as a witness for himself, he said: "When the truck and the car collided or came into contact, it seemed like the front of my tractor reared up in the air and went over the car, and the car skidded off to the right, and my truck went off the bank to the right."

Patrolman Garrison testified on direct-examination for plaintiff: "In relation to where the debris on the road and the 1957 Mercury were, I saw skid marks extended from the debris area here, extending in a southerly direction, and they came down the right side of the highway, and off of the roadway, similar to that (marker pointing to a point on the diagram), and the dirt was dug up here, and gravel, leading up to the Mercury automobile:" Garrison testified on cross-examination: "On plaintiff's Exhibit K, certain skid marks that were made on the easterly side of the highway and went along the highway as I have described by saying that it hooked over into the westerly lane do show on that photograph as being partially on the shoulder of the road." The day after the wreck Garrison saw and walked around the Sloop tractor-trailer combination. He found it had no appreciable damage.

Plaintiff has alleged, and offered evidence tending to show, that defendant Sloop at the time and place where the wreck occurred was guilty of negligence in the operation of his tractor-trailer combination as follows: One, he was operating it carelessly and heedlessly in violation of G.S. 20-140. Two, he was operating it in violation of the speed limit prescribed for such a motor vehicle by G.S. 20-141(b)(3). Three, he failed to decrease the speed of his tractor-trailer combination when a special hazard existed in respect to approaching automobiles by reason of a narrow bridge and curve in violation of G.S. 20-141(c). Four, he drove his tractor-trailer combination, when he was meeting and passing the automobile driven by plaintiff's intestate, some 4 or 5 feet to the left of the center of the highway in the direction he was travelling in violation of G.S. 20-146 and G.S. 20-148. *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115; *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676; *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598. These statutes prescribe a standard of care for a motorist, "and the standard fixed by the Legislature is absolute." *Aldridge v. Hasty, supra.*

Plaintiff's evidence permits a jury's making the legitimate inference that Sloop, by his negligent operation of his tractor-trailer combination, as above set forth, in the exercise of ordinary care might have reasonably foreseen that plaintiff's intestate meeting him on the highway would have to turn in whole or in part off the highway to avoid being struck by the tractor-trailer combination, might lose control of his automobile, and that by losing control of his automobile some injury to plaintiff's intestate would result from such operation of his tractor-trailer combination, or that consequences of a generally injurious nature might have been expected. "Foreseeability as an essential element of proximate cause does not mean that the defendant is required to have been able to foresee the injury in the exact form in which it occurred. *Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894. 'All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in "the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."' *Hart v. Curry,* 238 N.C. 448, 78 S.E. 2d 170." *White v. Dickerson, Inc.,* 248 N.C. 723, 105 S.E. 2d 51.

These were the facts in *Cotton Co. v. Ford,* 239 N.C. 292, 79 S.E. 2d 389; Plaintiff's automobile was proceeding south. Proceeding in the same direction, in front of plaintiff's automobile, was the tractor-trailer truck of defendants Ford. As the truck approached the north-

ernmost bridge, defendant Brigman driving an automobile was coming from the opposite direction, going north. Brigman crossed the southernmost bridge and drove on across the northernmost bridge just before the truck reached it. After crossing the bridge, just ahead of the truck, Brigman drove to the right onto the shoulder, nearly into the ditch, then righted his automobile but skidded into and collided with plaintiff's automobile which was in the rear of the truck. As a result, both automobiles were damaged, and Brigman sustained a personal injury. Neither automobile came in contact with the truck of the defendants Ford, which proceeded on south. Plaintiff and Brigman contended that the truck of the defendants Ford was being driven at an unlawful speed and to the left of the center of the highway, making it necessary for Brigman to turn to his right off the pavement to avoid being struck. The jury found by its verdict that both the damage to plaintiff's automobile and damage to Brigman's person and automobile was caused by the negligence of the defendants Ford, and awarded substantial damages. The Court held that the motion of defendants Ford for judgment of nonsuit was properly overruled. No error was found in the trial.

The facts in *MacIntyre v. Waggoner and Inland Motor Co.,* 171 Wash. 191, 18 P. 2d 15, were very similar to the facts in our case of *Cotton Co. v. Ford,* and the result was the same as in our case. The Court held: One, the truck driver's negligence in driving partly on left side of highway, forcing driver from opposite direction to drive on shoulder and skid into car following truck driver while attempting to get back on pavement was proximate cause of collision. Two, motorist forced to drive on shoulder by truck driver in opposite direction encroaching on left side of highway held not contributorily negligent in skidding into car following truck while attempting to get back on pavement.

This is said in 60 C.J.S., Motor Vehicles, pp. 741-2: "Ordinarily, where a driver turns onto or remains on his own lefthand side of the road, or fails to yield one half of the main traveled portion of the roadway as nearly as possible, notwithstanding the approach of a vehicle proceeding in the opposite direction, he or the one responsible whether caused by an actual collision or by the other vehicle being forced off the road in the effort to avoid danger. However, liability for his acts may be held liable for any injury resulting therefrom, may exist where, and only where, the operator's negligence in driving or turning to the left or in failing to yield one half of the way was the proximate cause of the injury, as in the case of a collision between

the approaching vehicle and a following vehicle, or injury to a pedestrian."

We are of opinion that plaintiff's evidence would warrant a finding by the jury that his intestate's automobile to avoid an impending collision was forced in whole or in part off the pavement of the highway by Sloop's negligence in the operation of his tractor-trailer combination, and that his intestate's driving or skidding back upon the pavement of the highway with his automobile, and the resulting collision with the Prevette tractor-trailer combination followed so quickly and is so connected with the negligence of Sloop, that it constituted a direct chain of events resulting from the negligence of Sloop in the operation of his tractor-trailer combination, and that such negligence on the part of Sloop was the proximate cause of plaintiff's intestate's death.

Considering plaintiff's evidence, and defendants' evidence favorable to him, as we are required to do on a motion for judgment of nonsuit, defendants' contention that such evidence does not show that plaintiff's intestate's automobile was forced off the pavement of the highway by Sloop is not tenable: such evidence tends to show otherwise.

Plaintiff's evidence tends to show that his intestate was confronted by a sudden emergency by Sloop's tractor-trailer combination meeting him on a curve, driven at a speed of 60 to 65 miles an hour some 4 or 5 feet over the center line of the pavement. If the jury should so find, plaintiff's intestate was confronted with a sudden emergency not of his own making and to which he did not contribute, and he cannot be held responsible or liable for errors of judgment committed by him in the emergency where he was compelled to act instantly in an effort to avoid an impending collision. In such circumstances plaintiff's intestate cannot be said to be guilty of contributory negligence if he made such a choice as a person of ordinary prudence similarly situated would have made, even though it appear later that he did not make the wisest choice. He is not held to the same coolness, accuracy of judgment or degree of care that is required of him under ordinary circumstances. *Lamm v. Gardner,* 250 N.C. 540, 108 S.E. 2d 847; *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593; *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562; *Hinton v. R. R.,* 172 N.C. 587, 90 S.E. 756.

In the following cases where a driver confronted with another car approaching on the wrong side of the road turned to his right and successfully avoided a collision with the approaching car, but in do-

ing so struck a third car or a pedestrian, it has been held that a finding that he acted with reasonable care under the circumstances was justified. *Webb v. Hardin,* 53 Ariz. 310, 89 P. 2d 30; *Scaletta v. Silva,* 52 Cal. App. 2d 730, 126 P. 2d 898; *Rzeszewski v. Barth,* 324 Ill. App. 345, 58 N.E. 2d 269; *Moreland's Adm'r. v. Stone,* 292 Ky. 521, 166 S.W. 2d 998; *MacIntyre v. Waggoner and Inland Motor Co., supra;* Annotation 47 A.L.R. 2d 123 *et seq.* See *Hart v. Ruduk,* 253 N.Y.S. 615, 233 App. Div. 453; *Hogge v. Anchor Motor Freight,* 277 Ky. 460, 126 S.W. 2d 877.

In *Journigan v. Ice Co.,* 233 N.C. 180, 63 S.E. 2d 183, the Court said: "The fact the impact occurred slightly over the center line and on the western side, which was to the plaintiff's left, is not controlling or conclusive on the issue of contributory negligence. It is the position of plaintiff that the truck looming up over the hill on its left side of the road and speeding up in order to get around the parked cars before returning to its right side of the road, forced the driver of the Journigan car to apply his brakes and thus produced the collision." See also *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Patterson v. Ritchie,* 202 N.C. 725, 164 S.E. 117.

In our opinion, a study of plaintiff's evidence does not establish facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom. Such being the case, a judgment of nonsuit on the ground of contributory negligence would have been improper. *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.

The trial court was correct in overruling the motion for judgment of nonsuit renewed by the defendants Sloop and Mastin at the close of all the evidence, and correctly submitted the case against them to the jury.

In the trial below, we find

No error.

RUFUS J. PICKETT v. A. M. RIGSBEE AND MRS. LELIA R. REZNER.

(Filed 23 March, 1960.)

1. Bills and Notes § 7—

Persons who execute an instrument in writing to secure the payee of a series of notes for loans made or any advances which the payee might make to the maker, recognizing "this indebtedness as if it were our own" become jointly liable with the maker and are sureties and not guarantors, but the instrument cannot change the obligation of the maker from liability on the series of notes to liability on a single debt in the aggregate amount of the notes, and the statute of limitations runs in favor of the maker and such sureties on each note separately.

2. Bills and Notes § 15—

Where notes are not under seal the fact that a subsequent instrument, constituting strangers to the notes sureties of payment, is executed under seal does not make the ten-year statute applicable, G.S. 1-47, since by the express terms of that statute it is applicable only to principals, and the three-year statute, G.S. 1-52, applies to the sureties.

3. Same: Limitation of Actions § 13—

Payments made on a note prior to the effective date of Chapter 1076, S.L. 1953 by one person primarily liable has the same legal effect as a written promise and starts the statute of limitations running anew as to all persons primarily liable thereon as of the date of such payment, action on the note not being barred at the time of the payment.

4. Payment § 3—

Where payments are made by the maker of a series of notes under an agreement that such payments were to be applied to all the notes, such payments being held by the payee without application to any specific note, such payments will be applied by the law rateably to each of the notes so as to start the statute of limitations running anew as to each note, since neither the debtor nor the creditor having directed application of payment, the law will make such application as will best protect and maintain the rights of the interested parties.

5. Bills and Notes § 15—

Where the evidence discloses that more than three years elapsed subsequent to the last payment by the maker, allocated by the law to each of a series of notes executed by the maker, a peremptory instruction that the payee's action against the sureties was barred cannot be held for error.

6. Bills and Notes § 15: Limitation of Actions § 13— Under 1953 statute, payment by maker without knowledge or ratification of sureties does not bind sureties.

Payments made on a series of notes by the maker prior to 1 July 1953, the effective date of Chapter 1076, S. L. 1953, start the statute running anew as to all persons primarily liable, but payments made by the maker subsequent to that date starts the statute running anew as

to sureties only if they authorize or ratify such payments, and therefore where the evidence discloses without contradiction that one surety arranged a payment by the maker less than three years prior to the institution of the action, a peremptory instruction that as to such surety the action was not barred is without error, but such instruction must be held for error as to another surety when there is no evidence that such other surety had any knowledge of or ratified such payment.

APPEALS by plaintiff and defendants from *Carr, J.*, March Civil Term, 1959, of DURHAM. This cause was docketed and argued at the Fall Term 1959 as No. 668.

This action was begun 18 September 1957. Plaintiff bases his right to recover from defendants on a written instrument reading as follows:

"Durham, N. C.
June 1, 1937.

Mr. Rufus J. Pickett
Durham, North Carolina
Dear Sir:

In recognition of the fact that our father, Mr. R. H. Rigsbee, is indebted to you on account of certain funds which you have loaned or advanced for him, and it being our desire to secure you for said loans or advances or for any advances which you might make, we the undersigned do hereby recognize this indebtedness as if it were our own and do assume full responsibility and liability for same.

Yours very truly,
A. M. RIGSBEE (SEAL)
LELIA R. REZNER (SEAL)"

When this instrument was signed and delivered, R. H. Rigsbee, father of defendants, was indebted to plaintiff on six promissory notes dated and in amounts as follows:

(a) Note for $7,139.84 dated 2 July 1928 payable six months after its date. Interest had been credited on this note to 2 January 1933.

(b) Note for $9,500 dated 30 July 1931 payable 90 days after its date. No credits appear on the face of this note.

(c) Note for $3,000 dated 29 September 1931 payable 90 days after its date. No credits appear on the face of this note.

(d) Note for $4,500 dated 27 November 1931 payable 90 days after its date. No credits appear on the face of this note.

(e) Note for $1,229.65 dated 16 December 1931 payable 90 days after its date. No credits appear on the face of this note.

(f) Note for $14,205.19 dated 11 August 1931 payable 60 days after

its date. Payment of this note was partially secured by an obligation of Zoa L. and Charles L. Haywood. Semi-annual credits of $195 beginning 3 July 1946 and continuing until 9 July 1954, dividends on bank stock which was substituted as collateral for the Haywood obligation, were entered on the back of this note. These credits are followed by the statement: "Interest on Principal $4862.03 including prior Int. payments as settlement in full on the Haywood note & deed of trust." On the face of the note is a credit of $4,205.19 on the principal, made 24 September 1954, leaving on that date a principal balance of $10,000.

R. H. Rigsbee paid plaintiff $2,000 in 1933, $2,700 in 1934, $200 in 1935, $1,100 in 1937, $800 in 1938, $1,400 in 1939. In 1940 payments aggregating $1,600 were made during the months of January, February, March, April, May, July, August, and September. On 16 April 1943 R. H. Rigsbee paid plaintiff $1,000. These payments were not credited on the notes. Plaintiff made a record of each of them in a memorandum book kept by him. Debtor gave no direction as to how they were to be applied, nor did plaintiff make any specific application. He held them by agreement as applicable to the entire debt owing to him.

In 1941 R. H. Rigsbee substituted for the Haywood deed of trust, which was collateral to the note of 11 August 1931, stock in the Citizens National Bank of Durham. At the same time he directed the bank to pay the dividends thereon to plaintiff. The bank complied. The first dividend payment was made 1 July 1941; semiannual payments were thereafter made until 8 July 1954. The aggregate of the dividends so paid amounted to $4,873.60. In September 1954, with the consent of R. H. Rigsbee, the stock was sold and the note credited on 24 September 1954 with $4,205.19.

Plaintiff now seeks to recover the debt evidenced by the six notes.

Defendants denied liability. They pleaded the three-and ten-year statutes of limitations and *laches* to defeat plaintiff's claim. Defendants offered no evidence. Plaintiff's right to recover was, by the theory of the trial, made to depend on the lapse of time and the statutes of limitations. Being of the opinion that the ten-year statute of limitations was applicable to that part of the debt evidenced by the first five notes, Judge Carr peremptorily instructed the jury to answer the issue as to the ten-year statute in the affirmative. Being of the opinion that the debt evidenced by the sixth note, that is, the note for $14,205.19 dated 11 August 1931, was not barred by the statute of limitations or by *laches*, he gave a peremptory instruction on these issues favorable to plaintiff, directing the jury to fix the amount due

at $23,625 in accordance with the stipulation of the parties. The jury answered the issues in accordance with the instructions given. Judgment was entered in conformity with the verdict, and the plaintiff and defendants each appealed.

Basil M. Watkins and Charles B. Nye for plaintiff.
Gay, Midyette & Turner and Spears, Spears & Powe for defendants.

RODMAN, J. Plaintiff's appeal.

The parties agree their rights and obligations are measured and must be determined by the instrument dated 1 June 1937. Is it, as plaintiff contends, an obligation of defendants to pay R. H. Rigsbee's debt to plaintiff, not as distinct items evidenced by the separate notes but as a single debt for which they and R. H. Rigsbee are jointly liable; or is it, as defendants contend, a contract of guaranty by which defendants guarantee payment of the separate and distinct items evidencing R. H. Rigsbee's indebtedness to plaintiff; or does it make defendants sureties on each of the notes of R. H. Rigsbee?

No act of defendants could make them joint obligors with R. H. Rigsbee for a single debt. R. H. Rigsbee was liable to plaintiff, not for an aggregate debt, but for the several items constituting the debt. When the statute ran against any item of the debt, R. H. Rigsbee had a right to assert it as to that item. The instrument recognizes the debt consists of separate items to which others might be added. Defendants could not, by any contract which they made with plaintiff, affect R. H. Rigsbee's obligations or his rights. The interpretation which plaintiff gives to the instrument is not permissible.

The agreement shows an intent to become a debtor to plaintiff. By express language defendants "do hereby recognize this indebtedness as if it were our own and do assume full responsibility and liability for same." Here is a manifest intent to become primarily liable, to make R. H. Rigsbee's obligations their own. There is no agreement to protect plaintiff if R. H. Rigsbee defaults. Plaintiff could hold defendants, not because of a default of R. H. Rigsbee, but because defendants had become his debtors. They were jointly liable *with* R. H. Rigsbee, not collaterally liable *for* his default. They were sureties, not guarantors. *Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E. 2d 413; *Casualty Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826; *Dry v. Reynolds*, 205 N.C. 571, 172 S.E. 351; *Trust Co. v. Clifton*, 203 N.C. 483, 166 S.E. 334; *Dillard v. Mercantile Co.*, 190 N.C. 225, 129 S.E. 598.

R. H. Rigsbee did not seal the instruments evidencing his indebtedness. Without some binding acknowledgment, the right of action

against him was barred at the expiration of three years from the date the instrument became due. G.S. 1-52. The instrument executed by defendants was sealed, but affixing of a seal did not make the ten-year statute, G.S. 1-47, applicable. By its express terms, that statute is applicable only to principals. The statute of limitations barring actions against defendants as sureties is G.S. 1-52, notwithstanding the seal appearing after their names. *Davis v. Alexander,* 207 N.C. 417, 177 S.E. 417; *Barnes v. Crawford,* 201 N.C. 434, 160 S.E. 464; *Coffey v. Reinhardt,* 114 N.C. 509. The statute begins to run on the date the promise is broken. A new promise to pay fixes a new date from which the statute runs, but such a promise, to be binding must be in writing. G.S. 1-26. A payment made before the obligation is barred has the same legal effect as a written promise. *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51; *McDonald v. Dickson,* 87 N.C. 404. A payment or other valid acknowledgment made by one joint obligor binds his co-obligors. "The decisions of this Court adhere to the principle that a part payment by one joint debtor before the statute of limitations has run against the demand will start the statute anew as well against the co-obligor as against him who made the payment." *Saieed v. Abeyounis,* 217 N.C. 644, 9 S.E. 2d 399, and cases there cited.

A principal and surety are joint or co-obligors. A written acknowledgment or payment by one is binding on the other. *Trust Co. v. Clifton, supra; Dillard v. Mercantile Co., supra; Barber v. Absher Co.,* 175 N.C. 602, 96 S.E. 43; *Houser v. Fayssoux,* 168 N.C. 1, 83 S.E. 692; *Garrett v. Reeves,* 125 N.C. 529.

Were it not for the payments made in 1933 and subsequent thereto, as shown by plaintiff's red memorandum book, the three-year statute of limitations would have barred plaintiff's right prior to 1 June 1937 to collect from R. H. Rigsbee on any of the six notes. But the payments made by R. H. Rigsbee beginning in 1933 and continuing through 1937 kept each of these instruments alive. The debtor did not at the time of making payment direct application to any note. Plaintiff testified that the payments were to be applied to all of the notes. Without specific application by the debtor or creditor, the law would and did apply the payments rateably to prevent any note from being barred by the statute of limitations.

As stated by *Walker, J.,* in *French v. Richardson,* 167 N.C. 41, 83 S.E. 31: "(T)he doctrine as to the application of payments is now a familiar one. The debtor, at or before the time of the payment, has the right to direct its application. If he fails to do so, the creditor may apply it at his option to any existing debt, and in case he fails to exercise his right thus acquired, the law will make the application

to the most precarious debt, or, as is sometimes said, the court will make the application in such manner, in view of all the circumstances of the case, as is most in accord with the justice and equity, and will best protect and maintain the rights and interest of the parties." *Baker v. Sharpe,* 205 N.C. 196, 170 S.E. 657; *Supply Co. v. Plumbing Co.,* 195 N.C. 629, 143 S.E. 248; *Stone v. Rich,* 160 N.C. 161, 75 S.E. 1077; *Young v. Alford,* 118 N.C. 215; *Standard Surety & Casualty Co. v. United States,* 164 A.L.R. 935.

The unallocated payments made by R. H. Rigsbee in 1938, 1939, 1940, and 1943 were applicable rateably to each of the six notes, starting the statute anew as to each of the joint obligors from the date of each payment.

No specific payments were made on the first five notes nor were any unallocated payments made subsequent to 16 April 1943. The statute therefore began to run on these notes from that date. These notes were barred by the three-year statute of limitations 17 April 1946. Plaintiff, having failed as to these notes to repel defendants' plea of the statute of limitations, cannot complain of the peremptory instruction which was given.

Defendants' appeal.

All of the notes were due and payable on 1 June 1937 when defendants wrote to plaintiff. Plaintiff does not allege nor does the evidence establish an extension of time for payment to a day certain. Plaintiff's right of action against defendants accrued on 1 June 1937, the date they addressed and delivered their letter. If, as defendants assert, the letter was a guaranty of payment, the right of action against them terminated on 1 June 1947 unless they made a payment or did some act which fixed a new date from which the statute would run. There is no suggestion that defendants made any payment between 1 June 1937 and 1 June 1947. Payments made by R. H. Rigsbee, the debtor, on his contract would not suspend the running of the statute of limitations against guarantors for payment. *Trust Co. v. Clifton, supra; Davis v. Alexander, supra.* There is no evidence of any payment by defendants subsequent to 1 June 1947 unless the payment made on 24 September 1954 from the sale of the bank stock can be treated as such a payment.

But the relationship of defendants to plaintiff by virtue of the letter of 1 June 1937 became that of sureties and not guarantors of payment as held in plaintiff's appeal. A debtor and his sureties are in the same class. Payments made prior to 1 July 1953 by R. H. Rigsbee the principal, even if made without the knowledge of the defendants, sureties, fixed a new date from which the statute of limitations began

to run. *Green v. Greensboro College,* 83 N.C. 449. Each payment made by R. H. Rigsbee between 1937 and 3 January 1953 started the running of the statute from the date of the payment. There was a payment on 3 January 1953. The statute began to run anew from that date. Plaintiff had until 3 January 1956 in which to sue the sureties.

By c. 1076, S.L. 1953, effective 1 July 1953, the Legislature rewrote the statute relating to admissions by partners and joint obligors on promissory notes. (G.S. 1-27) The statute as rewritten in effect reverses *Green v. Greensboro College, supra,* and the cases which have applied the law as there declared. A payment by a joint obligor does not now fix the date of such acknowledgment or payment as a new date from which the statute begins to run unless such payment is authorized or ratified.

We find nothing in the evidence tending to establish any knowledge on Mrs. Rezner's part with respect to the dividend payments made on 7 July 1953, 7 January 1954, and 8 July 1954, nor do we find any evidence that she had any knowledge of or ratified the payment which was made on 24 September 1954 from the sale of the bank stock owned by R. H. Rigsbee. In the absence of such authorization or ratification, the action as to her was barred by the statute of limitations on 4 January 1956.

The payment of principal and interest credited on the note on 24 September 1954 came as a result of the sale of the bank stock belonging to R. H. Rigsbee. The sale of this stock and all other details with respect to the credit entries were handled by A. M. Rigsbee. The evidence is plenary to establish ratification of this payment by A. M. Rigsbee. There is no evidence to the contrary. Plaintiff was entitled to a peremptory instruction on the issue of the statute of limitations pleaded by A. M. Rigsbee. But the court was in error in giving such an instruction as to Mrs. Rezner. As to her there must be a new trial with opportunity to plaintiff to establish, if he can, authorization or ratification of these payments by Mrs. Rezner.

On plaintiff's appeal—Affirmed.

On defendant A. M. Rigsbee's appeal—Affirmed.

On defendant Lelia Rezner's appeal—New trial.

CARL F. BLADES AND RALPH W. BLADES, TRUSTEES UNDER THE LAST WILL OF LEVIN CARL BLADES, DECEASED, AND MARGARET BLADES BATEMAN *v.* FRANK BLADES SPITZER AND WIFE, RETTA HOOPER SPITZER; GILBERT LEVIN SPITZER AND WIFE, BARBARA O'NEAL SPITZER; EVANGELINE BATEMAN, INFANT; SHARON BATEMAN, INFANT; STEPHEN CARL SPITZER, INFANT; GILBERT LEVIN SPITZER, JR., INFANT; LINDA CAROL SPITZER, INFANT; AND ANY UNBORN CHILDREN OF MARGARET BLADES BATEMAN, FRANK BLADES SPITZER, GILBERT LEVIN SPITZER, EVANGELINE BATEMAN, OR SHARON BATEMAN.

(Filed 23 March, 1960.)

1. Estates § 7—

The life beneficiary of a trust estate has a vested equitable estate therein so as to entitle her to institute proceedings for the sale of lands of the estate for reinvestment, and the trustees are proper parties to the proceeding.

2. Wills § 33c—

A devise of an estate in trust with provision that the income therefrom should be paid to a designated beneficiary for life and, upon her death, the corpus should be divided among her children, with further provision that the child or children of any deceased child of the life tenant should take such child's share, requires that the remaindermen be ascertained upon the falling in of the life estate, who then take under the will and not as heirs of the life tenant.

3. Estates § 7—

The provisions of the statute for sale of estates for reinvestment must be strictly complied with.

4. Appeal and Error § 22—

An exception to the judgment, without exception to the findings of fact, presents the sole question whether the facts found support the judgment.

5. Estates § 7—

While the court may not order the sale of an estate for reinvestment unless the interest of all parties require or would be materially enhanced by such sale, findings that the price offered by a proposed purchaser is fair and adequate and that sale would be to the best interest of the trust estate, the life tenant and the contingent remaindermen, together with other findings as to lack of income from the lands of the trust and recurring expenses, etc., are sufficient to show that the sale would materially enhance the interest of all parties even if not actually required to protect their interest.

6. Same—

The fact that sale of a trust estate for reinvestment would vary the terms of the trust does not preclude the court from decreeing sale for reinvestment, since a court of equity has the power to grant relief against limitations of a trust which work an injury to the trust estate.

7. Same—

Even if the answer of a guardian *ad litem* in proceedings to sell lands of an estate for reinvestment raises issues of fact as to whether the price offered is adequate and whether sale is to the best interest of all parties, the statute requires the clerk to make inquiry and determine these very matters before ordering sale, and in any event, where the parties appeal to the Superior Court and agree that the judge should hear the evidence and find the facts, the court has power to determine the issues of fact without intervention of a jury.

8. Courts § 6—

Where proceedings before the clerk are brought before the Superior Court in any manner the Superior Court acquires jurisdiction to hear and determine all matters in controversy. G.S. 1-276.

9. Infants § 6: Insane Persons § 10—

A guardian *ad litem* and his attorney may waive jury trial and agree that the Superior Court may hear the evidence and find the facts in a proceeding affecting the estate.

10. Estates § 7: Trusts § 15—

Where the court decrees a sale of trust property for reinvestment the trustee should be required to give bond or other legal provision should be made to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustee should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. G.S. 1-407, G.S. 1-407.2.

APPEAL by Guardian *ad litem* from *Parker, J.*, at Chambers 13 February 1960, in Windsor, BERTIE County.

This is a special proceeding for sale of woodlands for reinvestment of proceeds, pursuant to G.S. 41-11.

Levin Carl Blades, a resident of Pasquotank County, died testate 10 January 1950. His will was admitted to probate and recorded in the office of the Clerk of Superior Court of Pasquotank County on 13 January 1950. A copy is duly recorded in Book of Wills "O", page 18, Clerk's office, Bertie County.

The residuary estate, including real and personal property, was devised and bequeathed to testator's sons, Carl F. Blades and Ralph W. Blades, and cousin, L. S. Blades, Jr., in trust for ten years. The beneficiaries of the income of the trust are testator's widow, Estelle F. Blades, two sons named above, and daughters, Margaret Blades Bateman and Annie Blades Spitzer. At the termination of the ten-year period, the four children share equally in the corpus of the trust. This ten-year trust terminated 10 January 1960 and Carl F. Blades, Ralph W. Blades and Annie Blades Spitzer each came into possession

of a one-fourth undivided interest in the corpus in fee, free and discharged of the trust.

The will provided further: ". . . should my daughter, Margaret Blades Bateman be living at the termination of this trust, then, in that event, I hereby will, devise and bequeath unto the Trustees above named, Carl F. Blades, Ralph W. Blades, and L. S. Blades, Jr. as Trustees, that share of this residuary trust which is herein devised to Margaret Blades Bateman on this special trust to continue under the terms of the residuary trust the management of my daughter Margaret's share to serve for the term of her life and upon her death this trust shall terminate and the property vest in fee simple, share and share alike, in her children, the child or children of any dead child of my daughter Margaret taking that child's share." Margaret Blades Bateman is entitled to the income for life, subject to special provisions set out in the will for the management of the trust property.

L. S. Blades, Jr. has declined to serve as trustee and filed renunciation in writing with the Clerk of Superior Court of Pasquotank County. The two sons have served as trustees and are still acting in this capacity.

Margaret Blades Bateman is living and is 48 years of age. She has four living children, Frank Blades Spitzer, Gilbert Levin Spitzer, Evangeline Bateman and Sharon Bateman. Evangeline and Sharon are minors. Frank Blades Spitzer and his wife, Retta Hooper Spitzer, have two minor children, Stephen Carl Spitzer and Linda Carol Spitzer. Gilbert Levin Spitzer and his wife, Barbara O'Neal Spitzer, have a minor child, Gilbert Levin Spitzer, Jr. Barbara O'Neal Spitzer is incompetent.

Among the assets of the residual estate of the testator are tracts of woodland aggregating 8,519.05 acres situate in Bertie County. A one-fourth undivided interest in these lands is a part of the corpus of the trust for the life of Margaret Blades Bateman.

The Halifax Timber Company has entered into a contract in writing with the present owners of the woodlands in question, including Margaret Blades Bateman, to purchase the entire property at the price of $2,200,000.00, to be paid $400,000.00 in cash and the balance in annual installments of $120,000.00 for 15 years, to be secured by deed of trust or mortgage deed on the *locus in quo*, and the deferred balance to bear interest at 5¾% per annum. The contract provides for progressive cutting of timber upon a proper accounting and proportionate reduction of the mortgage indebtedness. A copy of the contract is attached to the petition in this cause.

Margaret Blades Bateman and the two trustees instituted this spe-

cial proceeding 20 January 1960 for sale in fee for reinvestment of proceeds the one-fourth undivided interest held in trust. The petition alleges *inter alia* that the lands in their present condition are only suitable for growing timber, a number of prospective purchasers have made offers but none have offered as much as Halifax Timber Company, a sale under the terms of the contract "would be to the best interests of the trust estate . . . in as much as said land in its present state is unproductive and the timber thereon is subject to hazards from fire, windstorm, disease or insect infestation, and would require policing and management, at some expense . . ." to prevent trespassing, the trust will obtain from the sale one-fourth of the purchase price set out in the contract, the sale at approximately $258.00 per acre is an extremely advantageous sale, payment in installments is a tax advantage, the value of the trust estate will be enhanced by the sale, and the best interests of the life tenant and remaindermen will be promoted.

Summons was duly served on the four children and three grandchildren of Margaret Blades Bateman. The wives of Frank and Gilbert were served. All were personally served in North Carolina except Frank, his wife and his two children; these were served in the Panama Canal Zone in accordance with the provisions of the statutes for personal service outside the State.

After all summonses were served, guardian *ad litem* and attorneys were duly appointed to represent the minors, the incompetent and persons not *in esse*. The guardian *ad litem* accepted service of summons and filed answer. The answer states that the guardian *ad litem* has no knowledge of the fair value of the property, denies that the price offered is fair and reasonable and denies that an acceptance of the offer would be for the best interest of the trust estate and the contingent remaindermen.

All adult defendants answered and admitted the allegations of petition.

On 13 February 1960 the Clerk of Superior Court found facts and entered judgment decreeing sale of the one-fourth undivided interest in said lands and providing for reinvestment of the proceeds. The findings of the Clerk are in part as follows: ". . . that the lands which are the subject of this proceeding are undeveloped timber lands, not cleared for agricultural purposes, and only suitable, in their present condition, for the growing of timber and trees and that some ambiguity and uncertainty exists as to the right of the Trustees for Margaret Blades Bateman to sell any of said timber or otherwise cause said lands to be productive during the lifetime of the said Margaret Blades

Bateman; that said timber lands in their present condition are not producing any income but are incurring liability for taxes and are subject to hazards from fire, windstorm, disease, insect infestation, and pilferage, and would require the actual expenditure of a considerable sum of money to police, care for, manage, and protect said lands; . . . that said price is fair and adequate and is as much as or more than said lands would bring from any other purchaser if sold at public auction and that a sale of the same to Halifax Timber Company upon the terms and conditions set out in the contract attached to the petition herein would be to the best interest of the trust estate created by the will of Levin Carl Blades, deceased, for the benefit of Margaret Blades Bateman and her children and descendants . . ." These findings are supported by four affidavits set out in the record.

The guardian *ad litem* excepted and appealed. Attorneys for petitioners and guardian *ad litem* agreed in writing that the resident Judge "may hear and determine all matters of law and fact without a jury, a jury trial being specifically waived, and that said hearing may be held at chambers."

The resident Judge heard the matter *de novo*. His findings of fact are in substantial accord and to the same effect as the findings of the Clerk. It was ordered that the land be sold that the proceeds be reinvested. The judgment of the Clerk was "approved, ratified and confirmed."

The guardian *ad litem* appealed and assigned error.

Pritchett & Cooke for Guardian ad litem, appellant.
LeRoy, Goodwin and Wells for appellees.

MOORE, J. "In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are," the land may be sold for reinvestment in real estate to be held upon the same contingencies and, pending such reinvestment in land, the proceeds may be loaned or invested in approved securities. G.S. 41-11. Under the provisions of this statute the action for sale authorization is a special proceeding and must be instituted by one having a vested interest. *Barnes v. Dortch*, 245 N.C. 369, 372, 95 S.E. 2d 872.

Margaret Blades Bateman has a vested equitable estate for life in the *locus in quo* and is entitled to institute this proceeding. The trustees as holders of the legal title for the life of the trust beneficiary are proper parties plaintiff. Under the pertinent provisions of the will

of Levin Carl Blades the remaindermen must be ascertained upon the falling in of the life estate, and the remaindermen as then ascertained take from the testator and not as heirs at law of the life tenant. *Barnes v. Dortch, supra; Latham v. Lumber Co.*, 139 N.C. 9, 51 S.E. 780. The situation here presented makes the provisions of G.S. 41-11 applicable.

In order that a valid conveyance of the land in fee simple be made pursuant to this proceeding it is essential that the provisions of the statute be strictly complied with.

Appellant excepts to the judgment but not to the findings of fact. The exception presents the one question whether the facts found are sufficient to support the judgment. *James v. Pretlow*, 242 N.C. 102, 104, 86 S.E. 2d 759. The court may not order a sale of the land unless "the interest of all parties require or would be materially enhanced by it." The findings of the court are not expressed in these exact terms but the meaning and effect include these requisites. There is a finding that the price offered is "fair and adequate" and that a sale under the terms of the offer "would be to the best interest of the trust estate" and the life tenant and contingent remaindermen. The specific findings with reference to the land, the trust limitations in dealing with the timber, the risk of loss, lack of income and recurring expenses, are sufficient to show that a sale at an adequate price, if not actually required to protect the interest of all parties, would materially enhance it. We conclude that the findings are sufficient to support the judgment.

That the judgment in this proceeding would seem to vary the terms of the trust with respect to the *locus in quo* does not render the judgment invalid. It is the duty of the court, in the exercise of its equity jurisdiction, to protect the trust corpus and advance the interest of the beneficiaries; the court will not hesitate to exercise its equity powers where the limitations of the trust work injury to the trust estate. *Bank v. Hendley*, 229 N.C. 432, 50 S.E. 2d 302; *Trust Co. v. Rasberry*, 226 N.C. 586, 39 S.E. 2d 601.

The answer of the guardian *ad litem* may seem to raise issues of fact by denying that the price offered is fair and reasonable and further denying that the sale would be for the best interest of all parties. Ordinarily if issues of fact are raised before the Clerk he must transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the Superior Court. G.S. 1-273. But in this instance the statute (G.S. 41-11) requires the Clerk, whether such issues are raised or not, to make inquiry and determine these very matters before ordering a sale. This the Clerk did. Even so, the guardian *ad litem*

appealed and the matter was heard *de novo* by the resident Judge, with the same result. "Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty upon the request of either party, to proceed to hear and determine all matters in controversy . . ." G.S. 1-276. The plaintiffs and guardian *ad litem* waived jury trial and agreed that the Judge might hear and determine the matter at chambers. A guardian *ad litem* and his attorney may waive jury trial. *White v. Morris,* 107 N.C. 92, 101, 12 S.E. 80. The Judge heard the cause, found facts and entered judgment. He also approved and affirmed the judgment of the Clerk.

Appellant insists that the court should have required the trustees to give bond assuring the safety of the funds arising from the sale. In this the appellant is correct. G.S. 1-407. *Poole v. Thompson,* 183 N.C. 588, 600, 112 S.E. 323. But, of course, the court may receive and administer the fund. G.S. 1-407.2. The judgment should be amended to comply with the indicated statutes. It is true that the will provides that the trustees shall not be required to give bond in administering the trust. But in so far as they may be required to act under the judgment in this cause, they are commissioners of the court and not necessarily trustees under the will.

We have carefully examined each step in the proceeding and, except for the matter referred to in the preceding paragraph, we find that there has been substantial compliance with all the provisions of G.S. 41-11 and other applicable legal requirements. We find no error in the judgment of sale and the proceedings preliminary thereto.

This cause is remanded to Superior Court that it may in turn be recommitted to the Clerk of Superior Court for amendment requiring that commissioners give bond in accordance with G.S. 1-407 or that other legal provision be made for protection of the fund. Thereupon the Clerk shall retain the cause for consummation of the sale and the lending and reinvestment of the proceeds as the law provides.

Modified, affirmed and remanded.

GAY H. ROGERS, ADMINISTRATOR OF ESTATE OF G. HAROLD ROGERS v. PERCY ALLEN GREEN AND GORDON WARD BALLOU

(Filed 23 March, 1960.)

1. Death § 3—

In an action for wrongful death, plaintiff must show both a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff's intestate under the circumstances in which they were placed, and that such negligent breach of duty, acting in continuous sequence, produced the injury resulting in death, and without which it would not have occurred, under circumstances from which any man of ordinary prudence could have foreseen that such result was probable.

2. Trial § 23a—

There must be legal evidence of every material fact necessary to support a verdict, and a verdict may not be based upon mere speculation or possibility.

3. Negligence § 23—

What is negligence is a matter of law, and where the facts are admitted or established it is for the court to say whether negligence exists and if so whether such negligence was the proximate cause of injury.

4. Automobiles § 41l—

Evidence tending to show that two pedestrians were walking in sand on the edge of a highway on their right side thereof, that one of the pedestrians slipped and accidentally struck the other with his hand, and that immediately thereafter the other pedestrian was struck by a vehicle, without evidence that the vehicle ever left the hardsurface, but with evidence to the contrary tending to show that it was travelling at a lawful speed in its lane of travel with its lights burning, and was stopped some 75 feet after the impact, *is held* insufficient to be submitted to the jury on the question of the driver's negligence.

APPEAL by plaintiff from *Craven, S. J.*, at Regular December 14, 1959 Civil Term, of BUNCOMBE.

Civil action to recover for alleged wrongful death of intestate of plaintiff.

At the time of trial the parties stipulated that the admissions in the answer of defendants constitute solemn judicial admission for all the purposes of the trial without the necessity of introduction of portions of either pleading. The admissions in so far as pertinent to this appeal are substantially these:

G. Harold Rogers, hereinafter referred to as plaintiff's intestate, died on 2 April, 1958; and that on said date, at approximately 8:50 P. M., defendant Percy Allen Green hereinafter referred to as Green, was operating a 1955 Chevrolet truck, bearing N. C. license No. 4583

SW for 1958, owned by defendant Gordon Ward Ballou, hereinafter referred to as Ballou, with his consent and permission, in a southerly direction on Atlantic Beach Road, a public highway, about 1500 feet south of Atlantic Beach Bridge in Carteret County, North Carolina.

And upon the trial Raymond Edward Gartman, hereinafter referred to as Gartman, as a witness for plaintiff, testified in pertinent part substantially as follows: "* * * On April 2, 1958, I was stationed aboard the Coast Guard Cutter Conifer. I knew Harold Rogers on that date. On the afternoon and evening of April 2, 1958, Rogers and I went to the movie uptown, and after the movie we was (were) going back to the ship, and we caught a ride with * * * * * * * * * one of the guys * * * by the name of Willis, and he put us out. We walked on the bridge, got to the bridge, crossed over to the right-hand side of the road in order that the guys from the ship going back to the ship would stop and give us a ride. After we crossed the bridge, we stepped into the sand, which was beginning to get in our feet, and we walked over further away from the road in order to get in the grass, which was filled with spurs; you know, the spurs and stuff, and they began to get in our socks and stick in us, so we decided to make it back towards some hard surface which was of felt on the side of the road. Before we reached back to the felt I remember that I was walking in the sand.

"Anyway, before we made it back to this place, we were walking in some sort of deep sand, I would say, and I remember slipping, sort of or kind of turning my ankle like, and as I did I bumped Harold with my left hand, and right after that is when I heard the impact of the truck that hit him, but at the time I didn't know that was what happened. I turned to see if somebody threw something out trying to scare us, or something, and as I looked over my right shoulder I didn't see anything of Rogers either. I turned back and looked. At this time I saw Harold laying face down 10 or 15 feet from the side of the road.

"After this, I looked and saw the fellow driving the pickup truck, he was doing, I would say, approximately 40 miles an hour somewhere, and he went on down the road and stopped and backed up. He came back to where Harold was laying, and said 'My God' * * *."

And the witness continued: "* * * At the time I heard the impact I was walking about 3 or 4 feet from the edge of the pavement. Rogers was walking on my left side closer to the pavement. Before I heard the impact, and as I slipped, I remember slinging my hand back and bumping his. I did not hear or see anything of the truck before I heard the impact. At that time, or right about then, Harold was sing-

ing a song that was sung in the show, and they had cars coming toward us * * * I did not hear any sound of an automobile horn."

And the witness continued: "When I saw Mr. Rogers on the ground, he was in front of me and off to the right. He was about 10 or 12 feet in front of me and about 10 to 15 feet. I would say, off to the right of the highway. I later determined that the defendant Green was the person who was driving the truck * * *."

The witness continued: "As you step off the bridge in a southerly direction, there was no speed signs there— at the place where this impact happened there were only two buildings: Fleming's Restaurant on the left-hand side of the road going south, and a bread building, some sort of thing, on the right-hand side of the road going south. There was a roadway going into the bread building and that is where they had that felt I was talking about on the road * * * We were walking in a southerly direction * * * Rogers and I were both wearing our navy blue uniforms with white hat that night."

And again: "The right front fender was bent so the light would angle off to the side of the road. That was the right-hand light."

And under cross-examination: As to "the right-hand side of the road after you cross the bridge" the witness said: "was made of sand and grass. The grass was about ankle high, and maybe in places it got up to your knees. It had a lot of sand spurs in it * * * ."

And as to traffic on the road, the witness said, "There were some cars coming from the opposite direction * * * not a continuous line as we were walking. These cars had their lights on * * *."

"I testified at Coroner's inquest. I was asked at that time about Mr. Rogers 'You don't know whether he was walking on the hard surface portion of the road or not?' At the time he was hit, I do not. I do not know that * * * I slung my hand back, and bumped his hand as I slipped with the sand * * * I might have slipped one or two times while walking the 1500 feet on the sand * * * Before that we were walking on concrete."

Patrolman W. J. Smith testifying as witness for plaintiff gave narrative in substance as follows: "On April 2, 1958 * * * I investigated a collision between a truck and a pedestrian at about 8:50 in the evening. The highway at that point is a macadam road approximately 24 feet in width. The shoulders at that time had just been seeded * * * It is rye grass they put on in that area. It had grown up fairly high in spots * * * just the rye grass grown up in some places 18 inches to two feet high in spots on the shoulder. It is a perfectly straight road * * * At that time the grass was grown up * * * it hadn't been cut, I don't believe * * * since it was planted * * * I don't re-

member any traffic signs in that area. I know it is a 55-mile an hour zone now and I don't remember whether legally it has always been a 55-mile zone."

And the witness continued: "When I went out on that evening of April 2, 1958, I found a pedestrian had been struck apparently by a pick-up truck * * * Percy Allen Green said that he had been driving the truck, and * * * told me that he was headed south on the Atlantic Beach Road, at about 40 miles per hour, 35 to 40 miles per hour, and that he did not see anything until he was right on top of these two pedestrians. He said the right front of his truck struck one of the pedestrians and that he applied his brakes and stopped in his right lane of traffic. He told me that he backed up some few feet and stopped and jumped out of his pick-up truck and ran back to where the pedestrian was lying on the right shoulder of the road. At the time I got there the pedestrian * * * Rogers was lying approximately five feet, four or five feet, west of the paved portion of the road * * * I began questioning Percy Green again and along in the company with Gartman we went to a point that Percy told me his truck stopped after striking the pedestrian and Mr. Gartman agreed that this was approximately the vicinity of where the truck stopped. I stepped the distance from the point to where the body was lying and it was approximately 75 feet, 30 steps, * * * I asked Mr. Green if he ran on the shoulder of the road and he said he did not. I took Mr. Gartman and Mr. Green, and with the aid of a flashlight and the light of the oncoming cars, we went back to the approximate area that Gartman pointed out to us as being the spot where they were at the time of the collision. We searched thoroughly and were unable to find any tire tracks whatsoever on the shoulder of the road, off the pavement, and the only disturbance I could find there was a scuff mark just a few inches off the pavement of the road * * * one other thing I overlooked. At that time, when I arrived * * * I could see shadows * * * it is not a skid mark, but it is a mark that a tire makes just before it skids on the pavement, fades away I will say within a couple of hours after it is made, and I could see that in the right lane of traffic headed south, which led to the approximate point of the pickup truck. The shadows were south of and past the point of impact * * * I looked carefully and was unable to find any sand, dirt or debris on the hard surface of the highway at and along as to where I determined the impact to be. Mr. Green told me that he was meeting oncoming traffic from Atlantic Beach headed north and he was headed south. He said his lights were in low beam. I checked the truck * * * the brakes were good * * * both headlights were burn-

ing * * * although one of them was knocked at a crazy angle * * * There were clumps of weeds, most of it rye grass 18 to 24 inches high, where I discovered Mr. Rogers. It grew up fairly close to the edge of the road, 8 or 10 inches off the shoulder of the road. Those weeds had sand spurs on them. When I got there I got them in my shoes and socks * * * I found no tire marks whatsoever on the sand * * * The tire marks which I did find were right in the center of the lane * * * in the proper place. The terrain on the side of the road is uneven. There were no paths along the shoulder on April 2, 1958 * * * The speed limit at that area on April 2, 1958 was 55 miles per hour * * *."

And there was evidence tending to indicate that the 1500 feet referred to in the testimony was a part of the causeway leading from Morehead City to Atlantic Beach; that the men on the ship had been cautioned about walking along the causeway; that it was generally known that they should walk on the side facing the oncoming traffic; and that deceased had been stationed on the ship about four months.

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

Elmore & Martin for plaintiff, appellant.
Uzzell & DuMont for defendant, appellee.

WINBORNE, C.J. When the evidence shown in the record of case on appeal here involved is taken in the light most favorable to plaintiff, giving to him the benefit of every reasonable inference to be drawn therefrom, as is done in considering demurrer to the evidence, this Court is of opinion that plaintiff fails to make out a case of actionable negligence for alleged wrongful death of plaintiff's intestate.

In an action for recovery of damages for wrongful death resulting from actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed plaintiff's intestate under the circumstances in which they were placed; and, Second, that such negligent breach of duty was a proximate cause of the injury which produced the death,— a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Whitt v. Rand,* 187 N.C. 805, 125 S.E. 84; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406, and cases cited. Also *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d, 326; *Mills v. Moore,* 219 N.C. 25 12 S.E.

2d 661, and cases cited. *White v. Chappell,* 219 N.C. 652, 14 S.E. 2d 843; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Luttrell v. Mineral Co.,* 220 N.C. 782, 18 S.E. 2d, 412; *Morgan v. Coach Co.,* 225 N. C. 668, 36 S.E. 2d 263; *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d, 849, and cases cited. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670; *Wall v. Trogdon,* 249 N.C. 747, 107 S.E. 2d, 757; *Grant v. Royal,* 250 N.C. 366, 108 S.E. 2d 627.

There must be legal evidence of every material fact necessary to support a verdict, and the verdict "must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C.J. 52. *Mitchell v. Melts, supra,* and cases cited.

If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. *Mitchell v. Melts, supra.*

And the principle prevails in this State that what is negligence is a matter of law, and when the facts are admitted or established, the court may say whether it does or does not exist. "This rule extends and applies not only to the question of negligent breach of duty but also the feature of proximate cause." *Hicks v. Mfg. Co.,* 138 N.C. 319, 50 S.E. 703; *Russell v. R. R.,* 118 N.C. 1098, 24 S.E. 512; *Clinard v. Elec. Co.,* 192 N.C. 736, 136 S.E. 1; *Murray v. R. R., supra.*

In the light of these principles applied to the factual situation in hand, however regrettable the death of plaintiff's intestate may be, the evidence is wholly insufficient to make out a case of actionable negligence against defendants. Negligence is not to be presumed from the mere fact of injury or that the intestate was killed.

The judgment of nonsuit must be

Affirmed.

JOHN MAVROLAS v. EARL GREGORY AND VISSIE R. GREGORY.

(Filed 23 March, 1960.)

Automobiles § 42g—

Plaintiff's evidence, considered in the light most favorable to him, tending to show that before entering an intersection with a dominant street, he stopped at a point from which he could see along the dominant highway, and did not move into the intersection until he saw no traffic approaching, and that upon entering the intersection he saw defendant's vehicle some 150 feet away, approaching from his left at a high rate of speed along the dominant highway, that he then stopped his car and was hit by defendant's car, *is held* not to disclose contributory negligence as a matter of law.

APPEAL by plaintiff from *Mintz, J.*, at September 1959 Civil Term, of NEW HANOVER.

Civil action to recover for personal injury and property damages allegedly resulting from actionable negligence of defendants arising out of an automobile collision at the intersection of Eighth and Castle Streets in the city of Wilmington, North Carolina.

In their brief filed on this appeal defendants, appellees, concede, for the purposes of the appeal, that the testimony of plaintiff makes out a *prima facie* case of actionable negligence against the defendants. But they aver in their answer and upon trial contend that plaintiff was contributorily negligent in the operation of his automobile in bringing about his injury and damage; that Castle Street, approximately fifty feet wide, runs east and west and is a paved through street, and Eighth Street approximately thirty feet wide, runs north and south and is a subservient street, in said city of Wilmington, with 'Stop' signs duly erected at the northwest and southeast corners of Eighth and Castle Streets, requiring all traffic moving north and south on Eighth Street to come to a complete stop before entering or attempting to cross Castle Street. (It being stipulated and agreed that the stop signs referred to in the testimony were placed there by the proper ordinances of the city of Wilmington, controlling traffic on Eighth Street.)

And upon trial in Superior Court plaintiff, testifying in behalf of himself, gave this narrative of the incident in question: "* * * I came to the intersection of Eighth and Castle Streets and stopped because there was a Stop sign there. I came to a complete stop. Two cars passed in the opposite direction * * * east and west. After the two cars passed, I looked and there were no cars there and I started slowly into the intersection and when I went about 10 or 15 feet in the intersection I heard some noise and I saw the car coming so fast that I

stopped. When I saw the car it was about 150 feet from me and when I saw it I stopped. It did not slow up or stop and while I was waiting for him to pass he ran into me. He did not stop when he got in the intersection, nor did he slacken his speed. In my opinion he was traveling over 50 miles per hour. When he struck the front wheels of my car it spun and threw me on the northwest sidewalk * * *."

Then on cross-examination plaintiff continued: "* * * Eighth Street intersects at right angles with Castle Street * * * I imagine Eighth Street is 28 feet wide and Castle Street about 50 feet. There is a red store building on the west side and on the northwest corner of the intersection of Eighth and Castle Streets. The northwest corner is a large store building that comes up to the sidewalk on Castle; and on the left of Eighth Street there is a large two-story white house on the northeast corner and that house is right jam up against the sidewalk on Castle Street and almost to the sidewalk on Eighth Street. I don't recall there were any cars parked on Eighth Street as I approached Castle Street, right or left * * * My car was the only car there when I came to the intersection * * * I stopped before I hit the Stop sign. I stopped in front of the street. Yes, the Stop sign is 15 or 20 feet north of the northern line of this street. I went to the sign * * * I said while I was stopped two cars came by— one east and the other west, and I stayed right there. When it was clear, I looked both sides again and got out into the street * * * I heard a noise from a car running fast * * * I was in low gear, going from the standstill * * * at the time I saw the car it was about 150 feet away; that is, I don't know exactly if it is half a city block. You asked me if it is not a fact that when I saw the other car it was entering the intersection just as I pulled out. I answer you 'Yes, sir, I stopped.' You asked me if just as I pulled my Jeep out I heard this car right at the intersection, and I answered 'The first time I seen it, yes, sir.'"

And plaintiff upon recall continued: "I testified yesterday that I stopped at the Stop sign at Castle Street. At that point I could see to my left down Castle Street. Castle Street East, to my left, is level for several blocks and I see there were no cars parked to my left along the left side of Castle Street. After I stopped I pulled into the intersection and I heard the noise and looked and saw Mr. Gregory's car. I said the car was about 100 feet away and I said that I had then stopped. Castle Street there is a little hill and you can't see all the way down. Yes, I can see all the way of the block. After I looked both sides I got in the intersection and I did say I stopped, and the car was 100 feet away. In answer to your question— 'Why didn't you go on across the intersection?'— I say, I can't go across the intersection be-

cause he was going so fast. I didn't want him to hit me in the center. The accident happened in the middle of Castle Street. My car was 10 or 15 feet inside the intersection when it was hit. I did not go back and look at the debris in the street after the accident. I saw the policeman look at it. I heard him testify it was about two feet from the center line of Castle Street. I heard the policeman say that yesterday. The policeman looked in the street, yes, sir. * * * * I did not try to back up or go through the intersection. I did say that when I first saw the car it was 150 feet away and I didn't back up or go forward to get out of the street. * * * 'Q. Is it not a fact that this car was coming into this intersection when you first saw it and you tried to stop, and your car was hit when you stopped? A. When I saw his car? Yes, sir, I was in the intersection—when I saw his car, I stopped. Q. Was not Mr. Gregory's car right there going into the intersection, on top of you, when you first saw it? A. Yes, sir.' "

Then C. E. Merritt, a member of the Wilmington Police Force, as witness for plaintiff testified in pertinent part, substantially as follows: "* * * On the 19th of March, 1958 * * * about 2 o'clock in the afternoon, I investigated a collision at the intersection of Eighth and Castle Streets." The witness then testified in detail in substantial accord with the narrative given by plaintiff as to the happening of the event. And then the witness continued: "I questioned Mr. Gregory, and he stated * * * Mr. Mavrolas didn't stop, or he didn't see him stop * * *."

Then the witness continued: "* * * from the dirt and debris, I found this accident happened entirely in the westbound traffic lane on Castle Street. It was on the right of the center line of the intersection; the center line of Eighth Street to the north of the center line of Castle Street. It was nearer the center line of Eighth Street than the center line of Castle * * * There is a Stop sign just north of the northern line of Castle Street and one on the southeast corner. Castle Street has been denominated as a through street."

Plaintiff, being recalled, testified: "I testified yesterday that I stopped at the Stop sign at Castle Street. At that point I could see to my left down Castle Street. Castle Street east to my left is level for several blocks and I see there were no cars parked to my left along the left side of Castle Street."

Then plaintiff, the witness, summarized in substantial accord testimony theretofore given by him.

When plaintiff rested his case motion of defendants for judgment as of nonsuit was allowed, to which plaintiff excepts and gives notice of appeal and appeals to Supreme Court, and assigns error.

Aaron Goldberg for plaintiff, appellant.
Poisson, Campbell & Marshall for defendants, appellees.

WINBORNE, C. J. Much has been written on the law pertaining to the subject of this action. *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17; *Matheny v. Coach Co.*, 233 N.C. 673, 65 S.E. 2d 361; *Batchelor v. Black*, 232 N.C. 314, 59 S.E. 2d 817; and on petition to rehear 232 N.C. 745, 61 S.E. 2d 894; *Badders v. Lassiter*, 240 N.C. 413, 82 S.E. 2d 357; *Jackson v. McCoury*, 247 N.C. 502, 101 S.E. 2d 377 and others.

But conceding, as is done for the purpose of this appeal, that the evidence taken in the light most favorable to plaintiff makes out a *prima facie* case of actionable negligence against the defendants, the pivotal question is whether the evidence shown in the record of case on appeal, taken in the light most favorable to plaintiff, and giving to him the benefit of every reasonable intendment and inference to be drawn therefrom, tested by pertinent statutes of this State and decisions of this Court, is so clear in meaning as to sustain the defendants' contention that plaintiff was contributorily negligent as a matter of law in the operation of his motor vehicle at and in the intersection, and that such negligence was a proximate cause of the collision.

The Court is constrained to hold that the evidence presents a case for the jury on the issue of contributory negligence. Hence there is error in the judgment as of nonsuit. Cases relied upon by appellee are distinguishable in factual situation from those in the case in hand.

Therefore since in the light of this holding there must be a new trial, the Court refrains from a discussion of the evidence.

Reversed.

BARBARA E. CASE v. CATO'S OF NORTH CAROLINA, INC.

(Filed 23 March, 1960.)

1. Negligence § 37f—

Evidence tending to show that the floor upon which a customer fell had been waxed the previous night, without any evidence that the waxing was done other than in the usual and customary manner with material approved and in general use, and without any evidence of any accumulation of wax at the spot where plaintiff fell or any evidence of negligence in the application of the wax, is insufficient to be submitted to the jury on the issue of the proprietor's negligence.

2. Same—

Evidence tending to show that a customer slipped and fell when she stepped on a coat hanger lying partly in the waxed aisle and partly hidden by a display of dresses, without any evidence as to who was responsible for the hanger being on the floor or how long it had been there, is insufficient to be submitted to the jury on the issue of the proprietor's negligence.

3. Negligence § 37b—

The proprietor of a store is not an insurer of the safety of his customers but owes them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by him from reasonable inspection and supervision.

APPEAL by defendant from *Clarkson, J.*, September 28, 1959, "B" Civil Term, MECKLENBURG Superior Court.

Civil action to recover for personal injuries to plaintiff alleged to have been proximately caused by defendant's negligence in maintaining its ladies clothing and accessories store in an unsafe condition in that it placed, or permitted a plastic garment or dress hanger to remain on the floor partially concealed from plaintiff's view. The floor was freshly waxed and slippery. When plaintiff stepped on the hanger it slipped, causing her to fall, as a result of which she sustained serious and permanent injuries. Defendant denied negligence and pleaded contributory negligence. Both parties offered evidence. The defendant's timely motions for nonsuit were overruled. The court submitted issues of negligence, contributory negligence, and damages. The jury answered all in favor of the plaintiff. From the judgment on the verdict, the defendant appealed.

Carpenter & Webb, By: William B. Webb for defendant, appellant.
Leon Olive and W. Faison Barnes for plaintiff, appellee.

HIGGINS, J. The evidence disclosed the accident occurred on Saturday afternoon, May 31, 1958, in the defendant's ladies wearing apparel and accessories store in Mount Airy. At the time of her fall and injuries the plaintiff was one of 15, 20, or more customers in the store. The main store room is approximately 50 feet long and 20 feet wide. Along the walls, throughout most of its length, racks were maintained on which were displayed coats and dresses. Each garment was on a separate dress hanger with the hook over a long metal rod parallel to the wall. In the middle of the floor there was a display counter, about four feet high, for accessories. On either side of this counter there was a narrow aisle, about five feet wide, extending from the front to a point near the rear. In the rear, to the left of the center, was located the cashier's desk. To its right was a small clothes rack containing ladies coats and desses. The customers walked up and down the two aisles to examine coats and dresses on the hangers near the walls and the accessories on the counter in the center.

The plaintiff testified: "In my hand I had this purse . . . and also . . . my aunt's handbag. . . . After I looked through the clothes at the rack, I started to the back of the store, . . . I started down the left aisle . . . back towards the right at the desk, . . . I started around the rack of dresses . . . I stepped on something and began to slide. . . . I was walking at a normal rate of speed. . . . I was most certainly looking where I was going. . . . I was more interested in what was in front than what was on the floor. . . . I saw the object I fell on. . . . Exhibit No. 1 is like the hanger I fell on."

The hanger was described as being about three-eighths-inch thick, 18 inches wide, curved, with a metal hook at the apex. The garment hanger, at the time plaintiff stepped on it, was partly concealed under the clothes rack and partly exposed in the passageway. The plaintiff's evidence disclosed the tile or terrazzo floor had been waxed the previous night. It was "clean and slick." The evidence also disclosed that the store maintained a small rack near the cashier's desk which was provided for garment hangers not in use.

Decision on this appeal turns on the question whether the evidence, in the light most favorable to the plaintiff, is sufficient to permit a reasonable inference the defendant breached its duty to the plaintiff in the manner alleged. Admittedly the plaintiff was an invitee in the defendant's store. It is likewise admitted she fell on the garment hanger and as a result of the fall sustained injury.

The evidence, in its most favorable aspect to the plaintiff, fails to show the floor was negligently constructed, or that its previous waxing was other than in the usual and customary manner with mater-

ials approved and in general use. There is a total lack of evidence of any accumulation of wax on the floor at the place where the plaintiff fell, or elsewhere. "The fact that a floor is waxed does not constitute evidence of negligence. Nor does the mere fact that one slips and falls on a floor constitute evidence of negligence." *Barnes v. Hotel Co.*, 229 N.C. 730, 51 S.E. 2d 180.

Examination of the cases in which this Court has held evidence sufficient to go to the jury will disclose the oil, grease, wax, or similar substance, was negligently applied and a spot accumulation was permitted by the proprietor, or that the substance was placed on the floor by a third party and permitted to remain after actual or constructive notice to the proprietor. *Waters v. Harris*, 250 N.C. 701, 110 S.E. 2d 283; *Anderson v. Amusement Co.*, 213 N.C. 130, 195 S.E. 386, and cases cited.

Negligence is also alleged in that the defendant placed or permitted to remain in its aisle, or near thereto, the garment hanger over which the plaintiff fell. There is no evidence any agent or employee of the store placed it there, or knew of its position. In fact there is no evidence it was discovered until the plaintiff fell. For all that appears, some one of the 15, 20, or more customers examining dresses on the racks and removing some to the dressing room for a try-on, may have dropped it or caused it to fall from the rack. In fact, the plaintiff's companion had already carried four dresses from the racks to the dressing room. So far as the evidence discloses, the plaintiff was the first to discover the hanger on the floor. "The proprietor of a store is not an insurer of the safety of customers while on the premises. But he does owe to them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to 'give warning of hidden perils or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision.'" *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154; *Waters v. Harris, supra; Barnes v. Hotel Co., supra; Ross v. Drugstore*, 225 N.C. 226, 34 S.E. 2d 64; *Anderson v. Amusement Co., supra.*

We conclude that under the uniform holdings of this Court the evidence was insufficient to permit a reasonable inference of the defendant's negligence in either of the particulars alleged. The defendant's Assignment of Error No. 1, based on Exception No. 6, (refusal to nonsuit) must be sustained. In view of this disposition, other assignments need not be considered. The judgment entered in the superior court is

Reversed.

STATE v. JAMES EDWARD MUMFORD.

(Filed 23 March, 1960.)

1. Criminal Law § 94—

The statement of the court upon objection by defendant's counsel to the solicitor's smiling and laughing while cross-examining defendant's witness, "Look sour, Mr. Solicitor" cannot be held prejudicial when the record fails to show what occasioned the mirth and pleasantry complained of, since in the absence of such showing it cannot be ascertained that the occurrence had the effect of discrediting the witness.

2. Criminal Law § 160—

The burden is on appellant to show that the error complained of was prejudicial and amounted to a denial of a substantial right.

3. Automobiles § 75: Criminal Law § 134—

Where, in a prosecution for operating a vehicle on a public highway while under the influence of intoxicating liquor, defendant admits in his testimony that he had theretofore been convicted of a similar offense, the court may assume the truth of the admission and instruct the jury peremptorily that if it should find the defendant guilty the verdict should show that it was for a second offense.

APPEAL by defendant from *Frizzelle, J.*, October-November 1959 Term, of LENOIR.

Defendant was tried in the Municipal-County Court of Kinston and Lenoir County on charge of operating a vehicle on the public highway while under the influence of intoxicating liquor, this being "the second such offense." From adverse verdict and judgment he appealed to Superior Court and trial was had *de novo*.

Plea: Not guilty. Verdict: "Guilty as charged, second Offense."

Judgment: Prison sentence, 3 months.

Defendant appealed and assigned errors.

Attorney General Bruton and Assistant Attorney McGalliard for the State.

Clarence E. Gerrans for defendant, appellant.

PER CURIAM. During cross-examination of a defense witness by the Solicitor, counsel for defendant objected "to the Solicitor smiling and laughing when cross-examining the witness." Thereupon the trial judge reproved: "Look sour, Mr. Solicitor." Defendant insists that the conduct of the Solicitor and the admonition of the court interjected such levity as to "totally discredit and impeach the witness."

A careful reading of the record in context fails to disclose what occasioned the mirth and pleasantry complained of. The content of the

testimony gives no clue. "The burden is on the appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right." *Taylor Co. v. Highway Commission*, 250 N. C. 533, 539, 109 S.E. 2d 243. The record fails to show that the statement of the trial judge tended to cast doubt upon the testimony of the witness or to impeach his credibility.

Defendant excepted to the charge of the court with reference to a prior conviction of defendant on a similar charge. During the course of the trial defendant, in open court, admitted a prior conviction. After such judicial admission, the court had the right to assume that it was true and to peremptorily instruct the jury to so consider it. *Miller v. Mateer*, 172 N.C. 401, 406, 90 S.E. 435.

The State's evidence was sufficient to take the case to the jury. The charge is free of prejudicial error. In the conduct of the trial we find nothing that justifies a new trial.

No error.

LITTLE *v.* TRUST CO.

JUNE CARTER LITTLE, ADMINISTRATOR CUM TESTAMENTO ANNEXO OF THE ESTATE OF ZEB GRUBB LITTLE AND INDIVIDUALLY, PLAINTIFF V. WACHOVIA BANK AND TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF ZEB V. GRUBB, ALMA LEE GRUBB, W. B. HUNT, ADMINISTRATOR OF THE ESTATE OF ROBERT LAY GRUBB, LILLIAN HUNT GRUBB, ROBERT LAY GRUBB, JR., ROCHELLE T. GRUBB, MARY LOUGENIA GRUBB, W. B. HUNT, GUARDIAN OF MARY LOUGENIA GRUBB, EDNA GRUBB LITTLE, BEULAH GRUBB FITZGERALD, R. C. FITZGERALD, EULA (EULAH) GRUBB BECK, R. T. BECK, ZETTA GRUBB WALSER, H. O. WALSER, THEO GRUBB, MIRIAM S. GRUBB, AND JEANE H. LITTLE, DEFENDANTS.

(Filed 6 April, 1960.)

1. Declaratory Judgment Act § 1—

If the complaint alleges facts constituting a cause of action cognizable under the Declaratory Judgment Act, the action will be so determined, notwithstanding the failure of the complaint to make specific reference to the statute, since the facts alleged determine the nature of the relief to be granted. G.S. 1-253, *et seq.*

2. Same—

A person claiming under the will of a beneficiary of a testamentary trust may maintain an action under the Declaratory Judgment Act to determine the estate taken by his testator under the trust.

3. Same—

The Declaratory Judgment Act enables courts to take cognizance of disputes at an earlier stage than permitted by ordinary legal procedure, and while the Act does not confer jurisdiction on the courts to determine purely speculative matters and does not authorize anticipatory judgments or advisory opinions, a party claiming a vested and presently determinable interest under a will, controverted in good faith by other interested parties, so that it appears that adjudication thereof will prevent future litigation, the courts have jurisdiction to determine the matter even though the enjoyment of the estate claimed must be postponed until the termination of a prior trust.

4. Wills § 31—

A will must be construed to ascertain the intent of the testator as gathered from the four corners of the instrument, read in the light of all facts and circumstances surrounding and known to the testator.

5. Wills § 33c— Beneficiaries held to take vested interest defeasible in the event of death without issue prior to termination of trust.

Under the terms of a will setting up a trust estate for a period of twenty years and directing that the entire income from the trust be paid to designated beneficiaries in stipulated percentages and that at the termination of the trust the *corpus* should be divided among them in like percentages, with further provision that upon the death before termination of the trust of any beneficiary without issue him surviving his share should be added to the residue of the estate, *held*, the bene-

ficiaries each take an interest in the income and *corpus* vested as of the date of the death of testator, which interest is defeasible upon his death without issue him surviving prior to the termination of the trust, so that the interest of a beneficiary dying without issue prior to the termination of the trust cannot be transmitted by his will or descend to his heirs.

6. Wills § 32—

The presumption against partial intestacy is a rule of construction employed to ascertain the intent of testator.

7. Wills § 33c—

The law favors the early vesting of estates, and an estate vests as of the death of testator if there is no condition precedent to its present enjoyment save the termination of a preceding estate, unless the will itself provides a later time by express language or necessary implication, and adverbial clauses designating time do not ordinarily indicate such intent but will be construed as designating the time when the enjoyment of the estate is to begin.

8. Same— Share of ultimate beneficiary held exempt from clause providing for defeasance upon death without issue prior to termination of trust.

Under the terms of a will setting up a trust estate and directing that the income therefrom be paid to designated beneficiaries in stipulated percentages with provision for distribution of the *corpus* in like percentages upon the termination of the trust, with further provision that the share of any beneficiary dying without issue prior to the termination of the trust should be added to the residue of the estate, but with further provision that the share of the widow should be paid to her for life and after her death that part of the estate should go in fee simple to a designated nephew, who was regarded as a son and was a primary object of testator's bounty, *held*, the share of the nephew was not subject to the defeasance clause, and upon his death without issue during the life of the widow, his interest in remainder passd under his will to the beneficiary designated by him.

9. Wills § 33e— Under the terms of the trust in this case, share of income of beneficiary dying without issue should be added to income for distribution.

Under the terms of a will setting up a trust estate and directing that the entire income therefrom be paid out in designated percentages (amounting to 48%) to specified beneficiaries, except for the widow, who was to receive the residue of the income, with further provision that if any beneficiary should die without issue him surviving, prior to the termination of the trust, his share should be added to the residue, *held*, upon the death of one of the beneficiaries without issue him surviving his share of the income should not be added to the *corpus* of the trust, since the will directed that all the income should be disbursed, but such share of the income should be added to the residue of the income estate and paid to the widow during the term of her life.

10. Wills § 38— Under terms of this trust, lapsed legacy of person who was also residuary legatee held not to pass under residuary clause.

Under the terms of a will setting up a trust and directing that the income therefrom be paid to designated beneficiaries in specified percentages, with the widow to receive the income from the residue for life, and that the *corpus* of the trust should be divided in like percentages twenty years after testator's death, except for the share of the widow, which should go in fee to one of the beneficiaries theretofore named, with further provision that if any beneficiary should die without issue him surviving his share should be added to the residue of the estate, *held* upon the death without surviving issue of the beneficiary who was also the residuary beneficiary of the widow's share, his share of the percentage of the *corpus* of the estate is divested and cannot go to his legatees or distributees even though such beneficiary was also the ultimate beneficiary in fee of that part held for the widow for her life, and as to such share the testator died intestate.

11. Wills § 32—

The presumption against partial intestacy is merely a rule of construction, and cannot have the effect of transferring property in the face of contrary provisions of the will.

12. Wills § 33e—

Under the terms of a will bequeathing a business interest to testator's brother, with a further bequest of a percentage of the income from a trust estate from which was to be deducted the net value of the business interest theretofore bequeathed, *held*, the deductions from the brother's share of the income in the amount of the specific bequest was properly added to the *corpus* of the trust, and was not income to be disbursed to the income beneficiaries.

13. Trusts § 19—

Where discretion is vested in the trustees in determining what items should be considered income and what items *corpus* of the estate, the exercise of such discretion will not be disturbed unless in contravention of the intent of testator as expressed in the instrument or unless the discretion is manifestly abused.

14. Wills § 39: Costs § 4—

Under the provisions of G.S. 6-21, the court properly directs in the exercise of its discretion that the costs of an action to construe a will, including reasonable counsel fees, be paid out of the *corpus* of the estate.

APPEALS by defendants (other than Alma Lee Grubb, Edna Grubb Little and Jeane H. Little) from *Thompson, S. J.*, July 1959 Special Term of DAVIDSON. Docketed and argued as case No. 382 at Fall Term, 1959.

This action was instituted pursuant to the Declaratory Judgment Act, G.S. 1-253 *et seq.*, for construction of certain trust provisions of the will of Zeb Vance Grubb, deceased.

Zeb Vance Grubb died testate 31 August 1949. His will, dated 5 March 1946, and a codicil dated 30 April 1946, were admitted to probate 8 September 1949. The codicil is not involved here. Specific devises and bequests, valued at $51,844.28, are not in controversy.

The pertinent provisions of the will are:

"Article VI. I give and bequeath to my brother, Robert Grubb, all of my stock in the Grubb Motor Lines, Inc., together with any and all indebtedness due me by Grubb Motor Lines, Inc."

"Article XIV. I give, bequeath and devise all of the residue and remainder of my property and estate, of every nature whatever and wheresoever situated, to Wachovia Bank and Trust Company and Zeb Grubb Little, as Co-Trustees, in trust for the following uses:

"(1) The entire net income derived from my trust estate shall be paid monthly, or quarterly, after the expiration of three years from the date of my death and probate of this will, to the following:

"(a) Edna Grub Little, four per cent.
(b) Beulah Grubb Fitzgerald, four per cent.
(c) Eula Grubb Beck, four per cent.
(d) Theo Grubb, four per cent.
(e) Emma Grubb, four per cent.
(f) June Carter Little, four per cent.
(g) Zeb Grubb Little, four per cent.
(h) Robert Grubb, twenty per cent, from which is to be deducted the net value of the bequest in Article VI.
(i) The residue, or remainder, to my wife, Alma Lee Grubb, for and during the term of her natural life, and after her death to my nephew, Zeb Grubb Little. In the event that my wife, Alma Lee Grubb shall not be living at the time of my death, then the said residue is to go to the said Zeb Grubb Little.

"This trust to remain and continue for the period of twenty (20) years from and after my death and probate of this will. I hereby direct that payment, or payments, under this paragraph shall be made to the ones designated herein, in person, and shall not be assigned, transferred or conveyed.

"(2) If either of the above named, Edna Grubb Little, Beulah Grubb Fitzgerald, Eula Grubb Beck, Theo Grubb, June Carter Little, Zeb Grubb Little, or Robert Grubb, should die prior to the full and final termination of the trust herein created, and if he or she shall leave lawful issue surviving him or her, said parties' share, or the undistributed portion thereof, shall inure to the benefit of his or her surviving issue. And in the event that either of said

parties shall die without leaving lawful issue surviving him or her, their respective shares shall be added to the residue of my estate. In the event that Emma Grubb should die prior to the termination of this trust, her share shall go to my niece, Lou Grubb.

"Article XV. At the expiration of twenty (20) years from the date of my death or probate of this will, this trust shall thereupon terminate and the title to said remaining property shall immediately vest as follows:

(1) Edna Grubb Little, four per cent.
(2) Beulah Grubb Fitzgerald, four per cent.
(3) Eula Grubb Beck, four per cent.
(4) Theo Grubb, four per cent.
(5) Emma Grubb, four per cent.
(6) June Carter Little, four per cent.
(7) Zeb Grubb Little, four per cent.
(8) Robert Grubb, twenty per cent.
(9) To Wachovia Bank and Trust Company and Zeb Grubb Little, as Co-Trustees for Alma Lee Grubb, for and during the term of her natural life, the remainder, and after her death, the same shall immediately vest in Zeb Grubb Little, in fee simple forever. In the event that my wife, Alma Lee Grubb shall not be living at the time of my death, then the said residue is to go to the said Zeb Grubb Little. In the event that either of the above parties should die prior to the final termination of the trust herein created, and if he or she shall leave lawful issue surviving him or her, such parties' share shall inure to the benefit of his or her surviving issue, with the exception of Emma Grubb, whose share shall go to my niece Lou Grubb. The other share, or shares, of either of the parties who should die before the termination of this trust without leaving lawful issue, shall inure to the residue or remainder of this trust estate.

"Article XVI. This trust is to continue as to the share of Alma Lee Grubb for and during the term of her natural life, and at her death to be terminated and said interest to vest in Zeb Grubb Little, in fee simple.

"Article XVII. I nominate and appoint Wachovia Bank and Trust Company . . . and Zeb Grubb Little, to be Co-Executors of this will. I also authorize the said Trust Company and Zeb Grubb Little, acting in its and his capacity either as Executors or as Trustees, in the exercise of their discretion, . . . to determine what is principal and what is income and what expenses or other charges shall be charged against income and what against principal . . ."

The beneficiaries named in the articles of the will above set out are mother, wife, brothers, sisters, niece and nephews of testator. He died without issue.

Emma Grubb was testator's mother and predeceased him.

The executors and trustees withheld from the income share of Robert Grubb in the twenty year trust the sum of $20,803.28 as payment of the value of the bequest in Article VI of the will, and placed this sum of $20,803.28 in the *corpus* or principal of the trust.

Robert Grubb died intestate on 24 April 1950 leaving issue. His heirs and next of kin are his widow, Lillian Hunt Grubb, and children, Robert Grubb, Jr. and Lou Grubb. Lou Grubb is a minor. W. B. Hunt is administrator of the estate of Robert Grubb and general guardian of Lou Grubb.

Zeb Grubb Little died testate on 20 November 1954, leaving no widow or issue surviving. His brother, June Carter Little, is administrator, c. t. a., of his estate and the sole beneficiary under his will. June Carter Little, individually and as administrator, c. t. a., of Zeb Grubb Little's estate, is plaintiff in this action. Edna Grubb Little is mother and Jeane H. Little is wife of June Carter Little.

Since the death of Zeb Grubb Little the surviving trustee under the will of Zeb Vance Grubb has kept in a separate account and undistributed the four per cent share of Zeb Grubb Little in the trust income which has accrued since his death. On 8 May 1959 there was in this separate account $3,500.00 in United States Treasury bonds and $1,137.01 in cash.

On the date of the judgment in this action all the beneficiaries named in Articles XIV, XV and XVI were living except Emma Grubb, Robert Grubb and Zeb Grubb Little.

The matters in controversy are indicated in the following summaries of the pleadings.

COMPLAINT: "This action involves the construction of the will of Zeb Vance Grubb and the disposition of his residuary estate." Zeb Grubb Little died on 20 November 1954, leaving no issue and he willed all his property to the plaintiff, June Carter Little, and June Carter Little now owns whatever devisable interests Zeb Grubb Little had under the will of Zeb Vance Grubb. After the death of Zeb Grubb Little without issue, his four per cent share in the trust income was distributable to Alma Lee Grubb, widow of Zeb Vance Grubb during the term of her natural life. Should she die before the termination of the twenty year trust, this four per cent share of income will be distributable to plaintiff from the time of her death to the termination of the trust. Plaintiff is the owner of the remainder interest in the

corpus of the Alma Lee Grubb share of the trust as set out in Article XV, paragraph (9) and Article XVI of the will, together with any additions thereto by reason of beneficiaries named in Article XV, paragraphs (1) to (8) dying without issue. The interests of Zeb Grubb Little under the will of Zeb Vance Grubb vested at the death of Zeb Vance Grubb and were descendible and devisable and are now owned by plaintiff as sole legatee under the will of Zeb Grubb Little. Plaintiff has right to have his interest in the estate of Zeb Vance Grubb declared. It is necessary in his business that he know with certainty the extent of his property in making financial statements and arranging credit. Without certainty in this respect he cannot plan the disposition of his property during his lifetime or by will. He is administrator, c. t. a., of the estate of Zeb Grubb Little and cannot file proper accounts with the Clerk of Superior Court without this information. The trustee needs direction for disposal of the four per cent income account and plaintiff is interested in the disposition thereof since it affects his remainder interest.

ANSWER of W. B. Hunt, administrator of Robert Grubb estate, W. B. Hunt, guardian of Lou Grubb, Lillian Hunt Grubb, Robert Grubb, Jr., Rochelle T. Grubb and Lou Grubb: Upon the death of Zeb Grubb Little without issue, all his interests, principal and income, under Articles XIV, XV and XVI of the will lapsed, they were not descendible or devisable, became a part of the *corpus* of the residuary estate and augmented the shares of the other legatees *pro tanto* (except that of Lou Grubb). The money withheld from the income share of Robert Grubb in payment of the value of the bequest in Article VI is a part of the *corpus* of the trust estate.

ANSWER of Beulah Grubb Fitzgerald, R. C. Fitzgerald, Eula (Eulah) Grubb Beck, R. T. Beck, Zetta Grubb Walser, H. O. Walser, Theo Grubb and Miriam S. Grubb: When Zeb Grubb Little died without issue, all his interests, principal and income, under Articles XIV, XV and XVI of the will lapsed, they were not descendible or devisable, and are distributable by intestate succession to the heirs at law and next of kin of Zeb Vance Grubb. The sum deducted from the income share of Robert Grubb to pay the value of the bequest in Article VI is a part of the *corpus* of the residuary estate.

ANSWER of Alma Lee Grubb: She is entitled to receive the four per cent income share of Zeb Grubb Little which has accrued since his death, is entitled to receive this share of the income which shall hereafter accrue during her lifetime, and is entitled to have the corresponding four per cent of the trust *corpus* placed in the residue from which her income share is computed. She is entitled to the funds with-

held from the income share of Robert Grubb in the amount of the value of the bequest in Article VI, since it is a part of the residue and remainder of income to which she is entitled under the will. Attorneys' fees should not be taxed as a part of the costs of the action and paid from the residuary estate, since this would require her to pay an inequitable portion; the parties should pay their respective attorneys individually.

ANSWER of Wachovia Bank and Trust Company, surviving trustee under the will of Zeb Vance Grubb: It has an honest doubt as to the proper distribution of the four per cent share of income, formerly payable to Zeb Grubb Little, which has accumulated since his death and will continue to accrue until the termination of the twenty year trust in 1969; it desires a proper declaration as to this item. The $20,803.28 withheld from the income share of Robert Grubb is properly a part of the *corpus* of the trust estate, and this has been determined by this trustee, in its discretion, under authority given in the will. All other issues are remote, premature and unnecessary for the present guidance of the trustee and the court is without jurisdiction to determine them. Costs should be taxed only against the shares in the trust about which there is a present controversy.

All interested parties and their spouses are parties to this action.

The findings of fact and judgment exclusive of facts stated hereinabove, are as follows:

"This cause coming on to be heard . . . and being heard by the Court, with the consent of all parties, without a jury, upon a consideration of the evidence, both oral and documentary and the arguments of counsel, the Court makes the following findings: . . .

"5. . . . The plaintiff and the defendants are all persons who have any interest in the subject of this action. All of the defendants have been served, all of them have filed answers, and all of them were represented by counsel at the hearing of the cause, with the exception of the defendant Edna Grubb Little, the mother of the plaintiff, who did not file answer, and Jeane H. Little.

. . . . .

"8. The defendant, Edna Grubb Little, was the oldest of the testator's brothers and sisters. On August 19, 1936, she was living with her husband, Andrew Jackson Little, in Pine Hall, North Carolina, where her husband was engaged in business. She had two sons, the plaintiff, June Carter Little, who was born June 5, 1922 and Zeb Grubb Little, now deceased, who was born August 23, 1926. On August 19, 1936 her husband was killed in an accident, leaving her with her two sons, ages fourteen and ten. At this time, the testa-

tor made available to her a house and lots owned by him and located near his own home west of Lexington, North Carolina. She moved into this house with her sons, and the testator gave her a fee simple deed to the property in 1937, . . . She still occupies this property as her home. She had some property of her own which she acquired from her husband, but, beginning about 1940 she found it necessary to supplement her income by obtaining work in Lexington, North Carolina. The two sons went to school in Lexington. The sons had visited the testator and his wife in the summers prior to the time that they moved, but after they moved to Lexington, both of them spent a great deal of time in the home of the testator and his wife. In the afternoon after school, Zeb Grubb Little frequently went to his uncle's office in Lexington and stayed with him until time to go home, running errands and doing small jobs for which he was qualified. About 1940, Zeb Grubb Little moved into the home of the testator and his wife and lived there, first with his uncle and aunt, and then with his aunt until his death on November 20, 1954. In 1942, the testator sent his nephew to North Carolina State College and he was a student there about one and one-half (1 ½) years prior to his entry into the United States Army. After the war, he was discharged and came back to Lexington in the fall of 1945. After Christmas, he re-entered the University of North Carolina and graduated in June, 1949. His uncle paid all of his expenses and otherwise maintained him except for government assistance which he obtained for his education after the war. His uncle kept him supplied with an automobile while he was a student at Chapel Hill, and on his twenty-first birthday, in 1947, gave him a new Oldsmobile convertible. When Zeb Grubb Little was not in the Army or in school, he worked for his uncle, doing such tasks as he was capable of, including working in filling stations which were owned and operated by his uncle. After his graduation at Chapel Hill in 1949, he began to work regularly for his uncle, for which he was paid a salary of $50.00 per week. This continued for a short time only, since the testator died on August 31, 1949. The testator was interested in flying and flew his own airplane. Zeb Grubb Little learned to pilot airplanes also, using airplanes belonging to his uncle. Prior to his death, the testator made a number of gifts to Zeb Grubb Little in addition to the Oldsmobile convertible already referred to. About 1948, he gave him a diamond ring and two hundred (200) shares of the common stock of General Motors Corporation. He also gave him a one-half interest in a tract of land which he, the testator, acquired from the other heirs of his

mother. The other one-half interest in the land which had been owned by the testator jointly with his mother was given to the testator's wife.

"9. In July, 1947, a little more than a month prior to the twenty-first birthday of Zeb Grubb Little, the testator and his wife had prepared by Mr. J. Giles Hudson, a lawyer of Salisbury, North Carolina, a petition for the adoption by them of Zeb Grubb Little. Mr. Hudson prepared also an interlocutory order in the adoption proceeding. The petition was duly verified by both the testator and his wife and it was filed in the office of the Clerk of the Superior Court of Davidson County, North Carolina, on July 17, 1947, and the interlocutory order was entered by the Clerk on the same day. The testator told Mr. Hudson that his nephew was almost twenty-one years of age and that he wanted to get the papers filed before his twenty-first birthday. The testator told Mr. Hudson that he considered Zeb Grubb Little as his son and that that was the reason he wished to adopt him. This was assigned both in the petition and in the interlocutory order as the reason for the adoption. The testator never completed the proceeding. He did not give Mr. Hudson any direction to discontinue it. The evidence, which was undisputed, discloses that the testator had for his nephew, Zebb Grubb Little, the love and affection of a father for his son, and the Court so finds.

"10. The adjusted gross estate of Zeb Vance Grubb as of the date of his death as finally agreed upon between the Executors and the Federal Income Bureau Service was $787,931.21. Adjusted gross estate means the net estate after deducting debts, costs of administration and other charges against the estate but before deducting the federal estate tax and the North Carolina inheritance tax. The federal estate tax paid was $146,908.67. The North Carolina inheritance tax paid was $34,351.69. The book value of the net residuary estate as of December 1952, but without reflecting any increase in value or depreciation, was approximately $407,000.00. The net residuary estate now exceeds $500,000.00 in value, but there was no other evidence as to its value at the present time.

. . . . .

"12. The first distribution of income to the beneficiaries under Article XIV of the will was made on November 26, 1952, after the Supreme Court of North Carolina had construed Article XIV, Paragraph (1) of the will holding that the income beneficiaries were entitled to the income from the date of death. At that time, except for the provisions of Article XIV, Paragraph (1), subparagraph (h), Robert Lay Grubb would have been entitled to $16,465.89. The

Executors at that time, the defendant Wachovia Bank and Trust Company, and Zeb Grubb Little, added this amount to the principal of the residuary estate. Thereafter, the Executors withheld income which would otherwise have been payable to Robert Lay Grubb until the entire amount of $20,803.28 had been withheld. None of this income was distributed to beneficiaries. All of it was withheld and held in the principal of the trust. This fund has not been segregated from the other assets of the trust. All net income derived from the investment thereof has been paid to beneficiaries under Article XIV of the will, except as hereinafter set forth in regard to the share of Zeb Grubb Little.

"13. Since the death of Zeb Grubb Little on November 30, 1954, Wachovia Bank and Trust Company, as Trustee, has distributed none of the income accruing under Article XIV, Paragraph (1), subparagraph (g) of the will, but has held that income in a separate account. On May 8, 1959, it held $3,500.00 in United States Treasury Bonds and $1,137.01 in cash. The Bonds and the cash are segregated on the books of the Trustee from the other assets of the estate and are identifiable.

"14. The court has considered the evidence, the entire will of Zeb Vance Grubb, the positions of the parties as set forth in their pleadings, in the arguments of counsel, and in briefs filed with the Court. Its conclusions of law upon the issues raised and decided are hereinafter set forth in that part of this judgment which adjudicates the rights of the parties.

"NOW, THEREFORE, upon the foregoing findings,

"It is hereby ORDERED, ADJUDGED AND DECREED:

"(A) The Court has jurisdiction of this cause and of all the issues which are adjudicated herein.

"(B) Upon the death of Zeb Grubb Little on November 20, 1954, and thereafter, the four per cent (4%) of the income of the trust originally payable to him under Article XIV, Paragraph (1), subparagraph (g) of the will became a part of the residue or remainder of the income of the trust under Article XIV, Paragraph (1), subparagraph (i) of the will. The amount accumulated in the hands of the Trustees since the death of Zeb Grubb Little, with all income earned from the investment thereof, is payable to the defendant Alma Lee Grubb. All of such four per cent (4%) of the income payable shall constitute a part of the residue of the income under subparagraph (i) and shall be payable to Alma Lee Grubb so long as she shall live or until the termination of the trust. The right to receive the income of the residue or remainder of the trust

under the said subparagraph (i) after the death of Alma Lee Grubb, including additions thereto upon the death of a beneficiary prior to the termination of the trust without leaving issue surviving him or her, was vested in Zeb Grubb Little at the death of Zeb Vance Grubb, and such right was descendible and devisable and is now owned by the plaintiff June Carter Little, as sole legatee under the will of Zeb Grubb Little.

"(C) The right of Zeb Grubb Little to receive four per cent (4%) of the *corpus* of the trust under Article XV, Paragraph (7) of the will terminated so far as that paragraph is involved upon his death without issue on November 20, 1954, and the said four per cent (4%) interest in the *corpus* became a part of the residue or remainder of the *corpus* under Article XV, paragraph (9).

"(D) The right to receive the residue or remainder of the *corpus* of the trust under Article XV, Paragraph (9) of the will, including additions thereto upon the death of a beneficiary prior to the termination of the trust without leaving issue surviving him or her, upon the death of Alma Lee Grubb, or at the termination of the trust if Alma Lee Grubb should die prior to the termination of the trust, was vested in Zeb Grubb Little at the death of Zeb Vance Grubb, and such right was descendible and devisable and is now owned by the plaintiff, June Carter Little, as sole legatee under the will of Zeb Grubb Little.

"(E) The right to receive four per cent (4%) of the income of the trust under Article XIV, Paragraph (1), subparagraph (e) and four per cent (4%) of the *corpus* of the trust under Article XV, Paragraph (5), at the termination of the trust, originally given by the will to Emma Grubb, the mother of Zeb Vance Grubb, lapsed by reason of the death of Emma Grubb prior to the death of Zeb Vance Grubb, and the right to receive the said income and the said *corpus* was vested in Mary Lougenia Grubb, the alternative beneficiary at the death of Zeb Vance Grubb, and such right in both the income and *corpus* is descendible and devisable.

"(F) The right to receive twenty per cent (20%) of the income of the trust under Article XIV, Paragraph (1), subparagraph (h) and twenty per cent (20%) of the *corpus* of the trust under Article XV, Paragraph (8), at the termination of the trust, originally given by the will to Robert Lay Grubb, the brother of Zeb Vance Grubb, lapsed by reason of the death of Robert Lay Grubb on April 24, 1950, and the right to receive the said income and the said *corpus* was immediately vested in his surviving issue, Robert Lay Grubb,

Jr. and Mary Lougenia Grubb, in equal shares, and the right of each such beneficiary to receive the said income and the said *corpus* is descendible and devisable.

"(G) Under Article XIV, Paragraph (1), subparagraph (h), the Trustees were required to withhold from the twenty per cent (20%) of the income payable to Robert Grubb during his life and payable to Robert Lay Grubb, Jr. and Mary Lougenia Grubb after his death the amount of the net value of the bequest to Robert Lay Grubb under Article VI of the will, and the income so withheld retained its character as income, became a part of the residue or remainder of the income from the trust under Article XIV, Paragraph (1), subparagraph (i) and is payable to the defendant Alma Lee Grubb. No finding or adjudication has been made as to the amount the Trustees were required to withhold and this judgment is limited solely to the construction of the provisions of the will, but without prejudice to any right which the parties, or any of them, may have, either in this action or in some other action brought for the purpose, to fix the amount to which Alma Lee Grubb is entitled, by whom or out of what property it shall be paid, whether interest or income shall be allowed thereon and any defenses which any party may have, including, but not limited to, the defenses of *laches* or the statute of limitations.

"(H) The direction given to the Executors and Trustees by the last sentence of Article XII of the will relating to leasing filling stations to Zeb Grubb Little was personal to Zeb Grubb Little and lapsed at his death, and Wachovia Bank and Trust Company is under no obligation by reason of the provisions of Article XII to lease the said filling station to June Carter Little.

"(I) The date fixed by Articles XIV and XV of the will for the termination of the trust is 20 years from the probate of the will, namely September 8, 1969.

"(J) The costs of this action, including the compensation of counsel allowed by separate order on this date, shall be paid by the defendant, Wachovia Bank & Trust Company, Trustee, out of the *corpus* of the trust, and such costs shall be allowed to it in its accounting.

"(K) This cause is retained for further orders."

From the foregoing judgment all defendants, except Alma Lee Grubb, Edna Grubb Little and Jeane H. Little, appealed and assigned errors.

Charles W. Mauze and Womble, Carlyle, Sandridge & Rice for defendant Wachovia Bank and Trust Company, Executor and Trustee, appellant.

Stoner & Wilson and DeLapp & Ward for defendants Beulah Grubb Fitzgerald, Eula (Eulah) Grubb Beck, R. T. Beck, Zetta Grubb Walser, H. O. Walser, Theo Grubb and Miriam S. Grubb, appellants.

Walser and Brinkley and Gaither S. Walser for defendants W. B. Hunt, Administrator of the Estate of Robert Lay Grubb; Lillian Hunt Grubb, Robert Lay Grubb, Jr., Rochelle T. Grubb, Mary Lougenia Grubb, W. B. Hunt, Guardian of Mary Lougenia Grubb, appellants.

Vaughn, Hudson, Ferrell & Carter for plaintiff, appellee.

Frank P. Holton, Jr., for defendant Alma Lee Grubb, appellee.

MOORE, J. All the diverse interests agree that there are at least two presently subsisting controversies affecting the trust estate of Zeb Vance Grubb which should be resolved for the guidance of the trustee in administering the trusts: (1) the correct disposition of the four per cent income share willed to Zeb Grubb Little which has accrued since his death and will continue during the existence of the trust, and (2) the proper disposal of the sum of $20,803.28 which was retained from the twenty per cent income share of Robert Grubb as the net value of the bequest in Article VI of the will of Zeb Vance Grubb. The other controversies involving construction of provisions of the will are, according to the contention of Wachovia Bank and Trust Company, trustee, remote, premature and unnecessary for the present management of the trust and the court lacks jurisdiction to determine them at this time.

This action was instituted pursuant to the Declaratory Judgment Act, G.S. 1-253 *et seq.* The complaint makes no specific reference to the Act, but there is no statutory requirement that such reference be made. "It is the facts alleged that determine the nature of the relief to be granted." *Bolich v. Insurance Company,* 206 N.C. 144, 150, 173 S.E. 320; *Wright v. McGee,* 206 N.C. 52, 55, 173 S.E. 31.

Plaintiff is sole devisee and legatee of Zeb Grubb Little. And Zeb Grubb Little is a named beneficiary in the testamentary trust of Zeb Vance Grubb's estate. Plaintiff claims property rights and interests in the trust estate. "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." G.S. 1-254. "Any person interested as or through (a) . . . devisee, legatee . . . in the adminis-

tration of a trust, or of the estate of a decedent . . . may have a declaration of rights or legal relations in respect thereto . . . to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings." G.S. 1-255.

The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions. *Finch v. Honeycutt,* 246 N. C. 91, 101, 97 S.E. 2d 478; *Trust Co. v. Schneider,* 235 N.C. 446, 454, 70 S.E. 2d 578; *Light Co. v. Iseley,* 203 N.C. 811, 819, 167 S.E. 56; *Reid v. Alexander,* 170 N.C. 303, 304, 87 S.E. 125. "The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Lide v. Mears,* 231 N.C. 111, 117, 56 S. E. 2d 404. An order directing distribution of *corpus* in the event of the death of the contingent beneficiary prior to the time fixed by the will must be vacated. *Trust Co. v. Schneider, supra.* But "this act is remedial; its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." *Walker v. Phelps,* 202 N.C. 344, 349, 162 S.E. 727. "Where, . . . it appears from the allegations of the complaint in an action instituted under the authority and pursuant to the provisions of the act, (1) that a real controversy exists between or among the parties to the action; (2) that such controversy arises out of opposing contentions of the parties, made in good faith, as to the validity or construction of a . . . will . . .; and (3) that the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy, the court has jurisdiction, and on the facts admitted in the pleadings or established at the trial, may render judgment, declaring the rights and liabilities of the respective parties, as between or among themselves, and affording the relief to which the parties are entitled under the judgment." *Light Co. v. Iseley, supra,* at page 820. It has been held by this Court that the question as to whether or not adopted children are contingent remaindermen under the provisions of a testamentary trust is justiciable even though the contingency has not happened and the children may not be living at the time the contingency arises. *Trust Co. v. Green,* 238 N.C. 339, 344, 78 S.E. 2d 174. There it is said: "It is purely a question of law, now determinable, and nothing except the death of all three of the adopted children . . . prior to the death of the last survivor of the niece and nephew of the

testator can obviate the necessity for its determination. This contingency, in our opinion, does not justify the postponement of a decision thereon. . . . The adoptive parents are entitled to know whether or not these children will share . . . Doubtless, plans for the future of the children will be governed somewhat by the answer to this question." The court has jurisdiction if the judgment will prevent future litigation. *Bradford v. Johnson,* 237 N.C. 572, 577, 75 S.E. 2d 632. The validity of the assignment of an interest by a legatee may be adjudicated. *Trust Co. v. Henderson,* 226 N.C. 649, 39 S.E. 2d 804. The Act enables courts to take cognizance of disputes at an earlier stage than that permitted by ordinary legal procedure, if the controversy is real and actually exists between parties having adverse interests. *Lide v. Mears, supra,* at page 118.

Plaintiff contends, as the sole devisee and legatee of Zeb Grubb Little, he has a vested estate and interest in fee in a substantial portion of the *corpus* of the trusts created by the will of Zeb Vance Grubb and has certain rights with respect to the trust income. He asks that his rights be declared. His contentions are strongly controverted. It is our opinion that plaintiff is entitled to have his rights and interests determined, though his enjoyment thereof, if any he has, must of necessity be postponed. It is a controversy which must in any event be determined at this or a future date. Plaintiff asserts that his rights are not contingent but vested, he is the ascertained owner thereof, and his ownership is indefeasible. He insists further that, as administrator, c. t. a., of the Zeb Grubb Little estate, he is entitled to know with certainty of what that estate consists in order to make correct accounting and proper tax returns. He also contends that as a business man it is important that he know with reasonable accuracy the extent of his property in making financial statements and establishing credit rating, and, further, that without this information he cannot plan the proper disposition of his property during his lifetime or by will.

In any event, it is necessary to construe the pertinent provisions of the will in order to determine the matters which all agree are presently in controversy. While the cause is here, we have jurisdiction and ought to determine those matters in controversy which of necessity must be ultimately determined in any event, whether the declaration of rights is needful to the trustee presently or not. This course will prevent litigation and save the expense of a multiplicity of suits. Of course, we do not undertake and have no jurisdiction to resolve all possible contingencies and we do not anticipate the happening of

events which in the course of administering the trust may never transpire.

It must be conceded, in the light of occurrences since the death of the testator, that the trust provisions of the will of Zeb Vance Grubb contain ambiguities and apparent contradictions. Questions for judicial construction are presented. In such circumstance, the fundamental object in construing the will is to discover and effectuate testator's intention. This intention must be arrived at by an examination of the will, from its four corners, when read in the light of all surrounding facts and circumstances known to the testator. *Entwistle v. Covington,* 250 N.C. 315, 318, 108 S.E. 2d 603; *Van Winkle v. Missionary Union,* 192 N.C. 131, 134, 133 S.E. 431.

From the uncontroverted findings of fact and the will itself we reach the following conclusions which bear on the intent of the testator: (1) Zeb Vance Grubb was an experienced, successful and discriminating man of affairs, had various business interests and left a substantial estate; (2) the net value of his residuary estate at the time of his death in 1949 was approximately $400,000.00; (3) he had no children and was survived by his wife, brother, sisters, nieces and nephews; (4) he had taken his nephew, Zeb Grubb Little, into his home, educated him and had for him "the love and affection of a father for his son"; (5) he desired his residuary estate to be held in active trust for twenty years, in any event, and all income therefrom to be paid to specified beneficiaries, all of whom are family connections; (6) he provided that these income gifts should be personal to the beneficiaries, not to be assigned, transferred or conveyed; (7) at the termination of the twenty year trust the *corpus* is to be divided among the beneficiaries in the same proportion as the income gifts, except that in case of the widow the trust is to continue until her death should she live beyond the twenty year term, and at her death the *corpus* to go to Zeb Grubb Little, and (8) the primary objects of testator's bounty were the widow, Alma Lee Grubb, and nephew, Zeb Grubb Little.

In construing the provisions of the will, we find the problem less difficult if the several phases are considered separately and are reduced to their simpliest terms without omission of essentials.

In Articles XIV and XV it is provided that six of the beneficiaries, including Zeb Grubb Little, shall each receive four per cent of the income from the trust estate for twenty years, then, as to all of these, the trust shall terminate and each shall receive four per cent of the *corpus* of the trust absolutely. Should any of them die before the termination of the trust, the interest and *corpus* shall go to their re-

spective surviving issue, but if any die without issue surviving, "their respective shares shall be added to the residue of (the) estate." Testator's brother, Robert Grubb, was given a twenty per cent share of income and *corpus* on the same terms.

Under the foregoing provisions, each of the seven beneficiaries, at the death of Zeb Vance Grubb, had a vested interest, subject to the twenty year trust, in his or her respective share in fee, defeasible upon dying without issue before the termination of the trust. G.S. 41-4; *Ziegler v. Love,* 185 N.C. 40, 42, 115 S.E. 887; *Love v. Love,* 179 N. C. 115, 117, 101 S.E. 562; *Bizzell v. Building Association,* 172 N.C. 158, 160, 90 S.E. 142; *Smith v. Lumber Co.,* 155 N.C. 389, 392, 71 S. E. 445; *Elkins v. Seigler,* 154 N.C. 374, 375, 70 S.E. 636; *Dawson v. Ennett,* 151 N.C. 543, 545, 66 S.E. 566. Zeb Grubb Little died in 1954 at the age of twenty-six without surviving widow or issue. By reason of his death, without issue, prior to the termination of the trust, his estate and interest in the four per cent share of income and *corpus* of the trust was divested and as to him was neither devisable or descendible. *Seawell v. Cheshire,* 241 N.C. 629, 638, 86 S.E. 2d 256. The question as to the vesting of this share of the trust estate upon the death of Zeb Grubb Little will be discussed herein in proper order.

In Articles XIV and XV of the will testator's widow, Alma Lee Grubb, takes the "residue and remainder" of the income of the trust estate "during the term of her natural life and after her death to . . . Zeb Grubb Little." At the time of the death of Zeb Vance Grubb this income amounted to fifty-two per cent of the total income, the other beneficiaries having been specifically allotted a total of forty-eight per cent. Should Alma Lee Grubb die before the termination of the twenty year trust, her income share for the remainder of the trust term and the corresponding *corpus* at the termination of the twenty year trust is given to Zeb Grubb Little; and should she live beyond the termination of the twenty year trust, she is to have her income share for life and at her death the corresponding share of the *corpus* is given to Zeb Grubb Little. Without more, there was vested in Alma Lee Grubb, at the death of Zeb Vance Grubb, an estate for life in this residual share, and an indefeasible estate in fee in remainder in Zeb Grubb Little. *Trust Co. v. McEwen,* 241 N.C. 166, 168, 84 S.E. 2d 642; *Pinnell v. Dowtin,* 224 N.C. 493, 497, 31 S.E. 2d 467.

At this point serious controversy arises. It is contended that the further provisions of the Articles by express terms prevented the vesting of the remainders in Zeb Grubb Little at the death of testator, the remainders could not vest until the death of the widow and since Zeb Grubb Little predeceased the widow the remainders never

vested in him and go elsewhere. It is further asserted that, if the remainders did vest upon the death of the testator, the gifts in remainder were subject to the defeasance clauses of the Articles and were divested when Zeb Grubb Little died without issue surviving.

After naming the beneficiary of each share of income, including that of Alma Lee Grubb with remainder to Zeb Grubb Little, in section (1), Article XIV provides in section (2) that "if either of the above named (naming all beneficiaries except Alma Lee Grubb, Emma Grubb and Lou Grubb) . . . should die before the full and final termination of the trust herein created," then the shares of the ones so dying shall inure to the benefit of their respective issue, and if "either of said parties shall die without leaving lawful issue surviving . . . their respective shares shall be added to the residue of my estate." Substantially the same provision, in the same sequence, appears in Article XV with respect to the devolution of the *corpus* of the estate upon termination of the trust.

Plaintiff contends that the defeasance clauses do not apply to the remainder interests of Zeb Grubb Little after the life estate of Alma Lee Grubb. He insists that it was the intention of the testator to vest in Zeb Grubb Little an indefeasible estate in fee in remainder. Defendants, on the other hand, contend that testator intended that the defeasance clauses apply with the same force to the remainders as to the four per cent share given to Zeb Grubb Little in the first instance. They point out that the testator made a specific exception in respect to Lou Grubb's share. They also call attention to the provisions of Article XIV making the gifts of income personal to the beneficiaries. It is true that the Articles provide that in case of the death of Emma Grubb, mother of testator, before the termination of the twenty year trust, her share, both income and *corpus,* is to go to Lou Grubb. Lou Grubb is specifically excluded from the defeasance clauses. Defendants, therefore, contend that if testator had also intended to exclude Zeb Grubb Little he would have specifically so provided.

Nevertheless, from a consideration of the will as a whole and the circumstances affecting and known to testator at the time of its execution, it is our opinion, and we so hold, that the testator did not intend to include the remainder interests of Zeb Grubb Little in the defeasance clauses. In the first place, Alma Lee Grubb is excluded from the defeasance clause of Article XIV. And it goes without saying, with respect to Article XV, testator did not intend that his widow remarry and leave issue. Testator provided for distribution of widow's income share, should she die before termination of the twenty year trust, in a different manner from that of the other beneficiaries. In her case,

just as in the case of Emma Grubb, a definite remainderman is named. It is too obvious to be ignored that the defeasance clauses were intended to apply to first takers rather than remaindermen, and Alma Lee Grubb, for the reason above stated, was excluded from the clauses. In making the gifts of income and requiring that they be paid to the beneficiaries in person and not to be assignable, it seems clear that testator had in mind the persons first named in each instance, that is, the first takers. Furthermore, in providing for the defeasances, the language used seems to emphasize the shares. This clause in Article XIV provides, in case of beneficiaries dying without issue surviving, "their *respective shares* shall be added to the residue of my estate." Article XV is substantially the same — "the . . . *share* or *shares* . . . shall inure to the residue or remainder of my estate." Alma Lee Grubb's shares were in each instance either expressly or by irresistable implication excluded. Again, it will be observed that testator gave "the residue, or remainder (of the income estate) to . . . Alma Lee Grubb" and "the remainder (of the *corpus* of the trust), after her death, the same shall immediately vest in Zeb Grubb Little, in fee simple forever." Therefore, it is clear that all defeasances of income go to the widow, together with the "residue" she is already receiving, and at her death the remainder of the income, if the twenty year trust has not terminated, and the corresponding share of the *corpus* to Zeb Grubb Little. In other words, the testator intended that the ultimate residue and remainder of the residuary estate should go to Zeb Grubb Little, for whom he had "the love and affection of a father for his son." Had the testator intended otherwise, he would have contemplated intestacy as to the major portion of his residuary estate. It is not suggested by us that he expected Zeb Grubb Little would predecease the widow. But had he intended to include him in the defeasance clauses as to the ultimate remainders, he must, of necessity have given thought to Little's early death and the consequences. In this case, it would seem that the testator would have made substitute provisions for the ultimate disposition of these substantial remainders. It is generally held that in seeking to discover the intent of the testator there is a presumption against intestacy. *Seawell v. Seawell*, 233 N.C. 735, 740, 65 S.E. 2d 369.

A careful reading of Articles XIV and XV also leads to the conclusion that testator intended the defeasance clauses to apply to the twenty year trust only and not to the trust for the life of the widow. The references most certainly seem to be to the twenty year trust. Article XV, dealing with the distribution of the *corpus*, refers to the disposition "at the expiration of twenty years." That the defeasance

clauses do not apply to the remainders to Zeb Grubb Little, Article XVI is strongly persuasive. It contains the following unqualified language: "This trust is to continue as to the share of Alma Lee Grubb for and during the term of her natural life, and at her death to be terminated and said interest to vest in Zeb Grubb Little, in fee simple." This is also strong argument for the position that the defeasance clauses applied only to the gift strictly involved in the twenty year trust.

But defendants contend that by the express terms of the will it was testator's intention that the remainders not vest until the death of Alma Lee Grubb. In Article XV are these words: ". . . and after her death, the same shall immediately vest in Zeb Grubb Little, in fee simple forever." We do not agree that this expression prevented the vesting of the remainders upon the death of Zeb Vance Grubb. ". . . the court inclines to that construction which will make the title to property left in remainder vested, rather than contingent." *Freeman v. Freeman,* 141 N.C. 97, 98, 53 S.E. 620. " 'The remainder is vested, when, throughout its continuance the remainderman and his heirs have the right to the immediate possession whenever and however the preceding estate is determined; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate.' It is the general rule that remainders vest at the death of the testator, unless some later time for vesting is clearly expressed in the will, or is necessarily implied therefrom. It is likewise a prevailing rule of construction with us that adverbs of time, and adverbial clauses designating time, do not create a contingency but merely indicate the time when the enjoyment of the estate will begin." *Trust Co. v. McEwen, supra; Priddy & Co. v. Sanderford,* 221 N.C. 422, 424-5, 20 S.E. 2d 341. In determining the intent of a testator greater regard must be given to the dominant purpose of the testator than the use of any particular words. *Trust Co. v. Waddell,* 234 N.C. 454, 461, 67 S.E. 2d 651. Furthermore, the intervention of an active trust will not ordinarily have the effect of postponing the gift itself, but only its enjoyment. *Van Winkle v. Berger,* 228 N.C. 473, 478, 46 S.E. 2d 305; *Coddington v. Stone,* 217 N.C. 714, 719, 9 S.E. 2d 420. We hold that the expression, ". . . after her death, the same shall immediately vest . . .," fixes the time for the enjoyment of the *corpus* of the gift and not the vesting of title. Title to the remainders in Articles XIV, XV and XVI vested in Zeb Grubb Little upon the death of the testator, were devisable

and descendible and passed to plaintiff under the will of Zeb Grubb Little. As will hereinafter appear, the *quantum* of ownership is, as of the date of the judgment below in this case, the original share of the widow at the death of the testator, or fifty-two per cent.

We next consider the question: Who is entitled to receive the Zeb Grubb Little four per cent share of trust income which has accrued since his death and will continue to accrue? A phase of the twenty year trust was formerly before this Court for interpretation. *Trust Co. v. Grubb,* 233 N.C. 22, 62 S.E. 2d 719. Article XIV provides, "the entire net income derived from my trust estate shall be paid monthly, or quarterly, after the expiration of three years from the date of my death and probate of this will, to the following: (named beneficiaries)." The holding: "The payment of anything less than the entire net income accruing from the trust property from and after the date of the death of the testator would not suffice to meet the express directions of the testator. The beneficiaries must receive all, undiminished and unimpaired by any deduction or by application, in whole or in part, to other purposes." From this former decision, it is clear that the income arising from Zeb Grubb Little's four per cent share is absolutely payable and may not be placed in the *corpus* of the trust, notwithstanding the provision of the trust that if beneficiary die without issue surviving his share "shall be added to the residue of my estate." In the sense used, "to the residue of my estate" does not mean to the *corpus.* Such meaning would be repugnant to the absolute direction that all income be distributed. Article XIV deals only with the disposition of the income of the trust estate, therefore, "to the residue of my estate" of necessity refers to the residue of the income estate. Testator gave to Alma Lee Grubb "the residue and remainder" of the income "for and during the term of her natural life." It is significant that at no place in the will is the exact *quantum* of her share specified. At the outset of the trust, her share, by computation, was fifty-two per cent, but the testator consistently avoided any statement specifically designating or limiting the percentage the widow should receive. It follows logically that he intended that she should receive not only the original remainder but also the additions or "residue" arising by reason of other beneficiaries dying without issue. Alma Lee Grubb is entitled to receive the income from the four per cent share of Zeb Grubb Little which has accrued since his death and which will continue to accrue during her lifetime, even if she lives beyond the termination of the twenty year trust.

The disposition of the *corpus* of the Zeb Grubb Little four per cent share, or the income and *corpus* if the widow dies before the termina-

tion of the twenty year trust, presents greater difficulty. In the first place, as already indicated, it is not devisable and descendible as to Zeb Grubb Little and June Carter Little did not acquire it as sole devisee and legatee of Zeb Grubb Little. The case of *Van Winkle v. Berger, supra,* is in point and controlling. There testator set apart $90,000.00, in trust, the income of which was to be paid semi-annually in equal shares to testator's three daughters during the terms of their respective natural lives, and at the death of each her share of the principal to go to her issue, if any, and if no issue survived such share to go into the residuary estate and be distributed as such. Ella, one of the daughters, died without issue. She had a vested one-sixth interest in the residuary estate without contingent limitation, and this one-sixth interest was devisable. She left a will disposing of all her property. Her devisees and legatees claimed one-sixth of that part of the trust fund which went into the residuary estate by reason of Ella's death without issue. In holding that they were not entitled to share in this part of the residuary estate, this Court said:

"The answer to our problem lies in the nature of the contingency upon the happening of which the partial termination of the trust takes place, and the designated part of its principal, or *corpus,* is thrown into the residuary estate.

"That event is to be regarded as the termination of a particular estate, that of the trustees, and also the disappointment of an intervening estate, contingently limited to the issue, if any, of Ella Buchanan. The death of Ella, involved in the contingency, is not merely an event, but a condition to be consummated before the principal should lose its character as a particular legacy and become part of the residuary estate.

The chronology, if we may use that term, contemplated in the will, *the time element,* is a vital consideration in its construction. That Ella Buchanan could take an interest in the will virtually created by the contingency of her own death, involves a formidable legal paradox which appellants seem to circle but not surmount.

"Ninety thousand dollars was separated from the estate and put into a trust fund, dealt with *in particularis,* and made the subject of an intervening contingent bequest. Both in point of law and under the expressed phraseology of the will it was not then a part of the residuary estate, the subject of disposition under Article 6. As a matter of law it could not be in the trust fund and under obligation to a particular legacy, however contingent, and in the residuary estate at the same time; and we find no suggestion of an intent that its inclusion in that category was, or could be, retro-

active. *At that time only was the residuary clause activated and clothed with testamentary authority with respect to the distribution of this fund.* (Citing authorities) Or, to put it more bluntly, it came under the operation of the residuary clause at a time when Ella Buchanan must be, and was dead and unable to take.

"It is true, of course, that the intervention of a trust does not necessarily postpone the title or prevent the vesting of an interest where the person who must ultimately take is certain; although it may postpone enjoyment. That was the situation in *Coddington v. Stone*, 217 N.C., 714, 719, 9 S.E. (2d), 420, but not here. It is the contingent disposition of the *corpus* of the trust and the nature of that contingency with which we are dealing. And here the contingency renders the ultimate taker uncertain.

"If we could dismiss the ever-haunting paradox to which we have referred, it still remains that the passing of the *corpus* of the trust fund into the residuary estate is itself a contingency depending upon the failure of issue, to whom it is first limited, and is, therefore, a contingency involving uncertainty of the beneficiaries, and no interest could vest in Ella Buchanan under such contingency. (Citing authorities)."

The principles stated in the *Van Winkle* case are equally applicable here. To hold that plaintiff acquired, as sole devisee and legatee of Zeb Grubb Little, any title or right to any of the principal or interest of the four per cent share in question, would be to overrule the *Van Winkle* case. This we are not disposed to do.

Having applied the presumption against intestacy in another phase of this case, we now find a situation in which it may not consistently be applied. It is only a rule of construction and must yield when outweighed by logic and general intent. *Entwistle v. Covington, supra.* It is our opinion, and we so hold, that after the death of Alma Lee Grubb, the principal of the four per cent share in question, and the interest, if the twenty year trust has not then terminated, shall be distributed as in case of intestacy. It is seriously contended by certain of the defendants that this share should pass into the residuary trust estate and enlarge pro rata the shares of those entitled to take thereunder, in accordance with the holding in *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625. It is our opinion, however, that the *Buffaloe* case is factually distinguishable and has no application here. It is true that Articles XIV and XV provide that if any of the specified beneficiaries die without issue the income or *corpus* share or shares "shall be added to the residue of my estate" and "shall inure to the residue or remainder of this trust estate." But, as already

stated, these references to "residue" and "remainder" apply to the remainder of the trust funds after distribution of the specified shares thereof to beneficiaries entitled, that is, to the remainder or portion of income to be received by the widow and to the remainder or portion of the principal from which widow's income is derived. Indeed, all of the questions of construction involved on this appeal are more easily resolved and better understood if the gifts in the twenty year trust set out in section (1), subsections (a) to (h), inclusive, of Article XIV, and sections (1) to (8), inclusive, of Article XV are considered specific bequests, which they really are, and the gifts set out in section (1), subsection (i), of Article XIV, section (9) of Article XV and Article XVI are considered the residuary estate, which they actually are. So, the intent of the testator is not to place this four per cent share in the general residue so as to enlarge the shares of those for whom specific provision was made. Since the estate of Zeb Grubb Little, for the reasons hereinbefore stated, has no right to this share, it of necessity must go intestate. Had a beneficiary, or beneficiaries, other than the one who is also ultimate remainderman, died without issue, another question would be here presented, which we do not now decide. It may never arise.

Article VI of the will is as follows: "I give and bequeath to my brother, Robert Grubb, all of my stock in the Grubb Motor Lines, Inc., together with any and all indebtedness due me by Grubb Motor Lines, Inc." Article XIV wills to Robert Grubb a twenty per cent share of the income of the trust estate "from which is to be deducted the net value of the bequest in Article VI." The trustees valued the bequest in Article VI at $20,803.28. There is apparently no controversy as to the amount involved and, as explained by the court below, "No finding or adjudication has been made as to the amount the Trustees were required to withhold and this judgment is limited solely to the construction of the provisions of the will. . . ." The trustees deducted from the twenty per cent income share of Robert Grubb the full amount of $20,803.28 and placed the same in the *corpus* of the trust estate, that is, the general residue of the estate. Defendant, Alma Lee Grubb, contends that this fund is a part of the income of the estate and under the former decision of this Court must be distributed. *Trust Co. v. Grubb, supra.* She further contends that since, under the terms of the will, it cannot be paid to Robert Grubb or his surviving issue, it goes into the residue of income and is payable to her. The trustee insists that the fund was properly disposed of. In Article XVII of the will, it is provided: "I also authorize (trustees) . . . in the exercise of their discretion, to . . . determine what is prin-

cipal and what is income and what expenses or other charges shall be charged against income and what against principal . . ." Trustee contends that the discretion thus given has not been abused, but disposition of the fund has been made after due consideration of the provisions of the will and the factual situation presented, and that trustees acted impartially and in the exercise of their best judgment.

We agree that the allocation of this fund to the *corpus* of the trust estate was proper. "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." Restatement of the Law of Trusts, sec. 187, p. 479. ". . . (I)n general, where a will or trust instrument purports to confer upon an executor or trustee the power to determine what is income and what is principal, the courts . . . have sustained the exercise of the power by such executor or trustee, in the absence of fraud or arbitrary action . . ." Annotation: 118 A.L.R., Income or Principal, p. 843. Of course the trustee will not be given "unlimited power to make allocations as between income and principal in contravention of the intent of the settlor as indicated by the terms of the trust instrument as a whole." Annotation: 27 A.L.R., 2d, Income and Principal, p. 1325. Construing Articles VI and XIV together, it seems clear that the testator desired his brother, Robert Grubb, to have the stock and credits in question, but, in balancing the dispositive provisions of the will, did not intend an outright gift, but made provision for payment therefor from the income gift in Article XIV. Had Robert Grubb renounced the bequest in Article VI, which he had the right to do, he would have been entitled to and would have received the total income bequeathed to him in Article XIV and the property referred to in Article VI would have, without question, become a part of the *corpus* of the residuary trust estate. Robert Grubb, however, elected to take the bequest in Article VI and in so doing elected to pay for same from the income gift of Article XIV. To all intents and purposes, the income in question was distributed and paid out to Robert Grubb and applied by him (after his death, by his surviving issue) to discharge of the obligation imposed by electing to take the bequest in Article VI. The allocation by the trustees was logical, reasonable and in accordance with the intent and meaning of the will.

Trustee and Alma Lee Grubb except to the allowance of attorneys fees as part of the costs of the action to "be paid by (trustee) out of the *corpus* of the trust." Substantial fees were allowed and it is true that the manner of payment places a large proportion of the burden upon the widow. G.S. 6-21 provides: "Costs in the following mat-

ters shall be taxed against either party, or apportioned among the parties, in the discretion of the court: . . . 2. Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or to fix the rights and duties of parties thereunder. . . . The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow." In the case *sub judice* the taxing of costs, the inclusion therein of attorneys fees and the fixing of reasonable counsel fees are matters within the sound discretion of the trial court. The careful, discreet and learned trial judge who presided in this case was in position to make reasonable appraisal of services rendered by attorneys and the proper assessment of costs. There is nothing in the record to indicate that the fees allowed are unreasonable or that the judge in any way abused his discretion. The cause is fraught with unusual difficulties. The scholarly and exhaustive briefs furnished this Court by all participating counsel are indicative of splendid legal services rendered. We find no grounds upon which to disturb the orders of the court with respect to costs and attorneys fees.

The matters adjudicated below and not discussed here are not the subject of assignments of error, are not in controversy and are affirmed.

We do not undertake to deal with contingencies which have not and may not happen.

The cause is remanded and it is ordered that the judgment be modified in accordance with this opinion.

Modified, affirmed and remanded.

GEORGE W. GAINEY, ORIE M. VALENTINE, JUNIOUS HAYWOOD, JAMES H. LOLLIS, NEWLAND D. LATTIMORE, PAUL L. TEEM, NATHAN O. ANDREWS, WILLIAM FRED EVITT, WAYNE M. BARNES, THERON A. WOFFORD, HARRY B. CHASE, O. K. TOWELL, WRISTON L. DEESE, JAMES H. LEWIS, SR., HERSHELL H. DARNELL, EARNEST E. CLEMONS, JOE SCHLAGENHAUF, JAMES A. LIMBAUGH, HENRY A. REED, HARRY B. UPRIGHT, AND HARRY K. CRESS, v. LOCAL 71, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

(Filed 6 April, 1960.)

1. Courts § 2—

If a court is without jurisdiction of a proceeding it must dismiss the case.

2. Process § 10—

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. G.S. 1-69.1; G.S. 1-97(6).

3. Master and Servant § 15—

A union member is entitled to judicial relief from a union's attempting to deprive him, or depriving him, of seniority rights secured by contract with an employer, when such union action is arbitrary, fraudulent, illegal, or in excess of the union's powers.

4. Courts § 18: Constitutional Law § 1: Master and Servant § 14—

The National Labor Relations Act does not deprive our courts of jurisdiction to hear and determine an action by union members against the union upon allegations that in negotiating the collective bargaining agreement with the employer the union acted arbitrarily and unjustly in depriving plaintiff members of their proper seniority rights.

5. Pleadings § 28—

Plaintiffs may recover, if at all, only upon the cause of action set up in their complaint, and *allegata* and *probata* must concur to establish a cause of action.

6. Master and Servant § 15— Evidence held insufficient to show that plaintiffs' seniority rights were adversely affected by the labor contract attacked.

Plaintiffs were owner-operators of vehicles leased by a carrier, and were employees of the carrier in respect to their driving of the vehicles leased. Plaintiffs had no seniority rights under the labor contract between the carrier and the union, of which they were members, and those who had been employees with seniority lost such seniority upon becoming owner-operators. Thereafter the union negotiated a new contract precluding by economic sanction the employment of owner-operators, and in the new contract the former owner-operators remaining in

the employment were given seniority only from the effective date of the new contract. This action was instituted against the union for mandatory injunction to compel revision of the new contract so as to give plaintiffs seniority from the date of their first employment. *Held:* Nonsuit should have been entered, since at the time of the negotiation of the new contract plaintiffs had no seniority and therefore the new contract could not have deprived them of any seniority rights.

APPEAL by defendant from a judgment entered against it by *Clarkson, J.,* 18 May 1959 Civil Term, of MECKLENBURG — argued as Case No. 261 at Fall Term, 1959.

Pierce, Wardlow, Knox & Caudle for plaintiffs, appellees.
Robert S. Cahoon for defendant, appellant.

PARKER, J. This is a summary of the parts of plaintiffs' complaint necessary for decision:

The 21 plaintiffs are now over-the-road drivers and employees of Akers Motor Lines, Inc., a common carrier by truck of commodities in interstate commerce — hereafter called Akers. Originally there were 28 plaintiffs, but Dan W. Martin and six others have removed themselves as plaintiffs, as they are no longer employees of Akers. Plaintiffs, as a group, constitute some of the oldest drivers in point of service with Akers.

The employees of Akers, including the 21 plaintiffs, have been unionized and represented for many years by the defendant, an unincorporated labor union, as their exclusive bargaining representative under the National Labor Relations Act, as amended, but until 1955 the defendant did not bargain for the owner-operators with respect to various matters.

Through the years plaintiffs were permitted to purchase, drive and maintain their own equipment, and were called owner-operators. Akers hired them as drivers, and rented their equipment.

Defendant, in order to have greater control over Akers' employees and to force Akers, and similar common carriers, to cease using owner-operators, negotiated and imposed on Akers a collective bargaining contract beginning 1 September 1955 and ending 31 August 1961, which made it economically impossible for Akers to continue its owner-operator contracts with plaintiffs. This collective bargaining contract applicable to all employees of Akers gave to plaintiffs, owner-operators, seniority as drivers from 1 September 1955, and seniority in all other respects, e. g., vacation rights, from the date of their employment by Akers. The effect of this contract, in not giving to plain-

tiffs as drivers credit for all the years they had been employees of Akers, deprived them, owner-operators, of their true seniority rights as drivers, based on the dates of their employment by Akers, in respect to lay-offs and bidding on runs and new equipment. If the plaintiffs were placed on the seniority list of drivers according to the dates of their employment by Akers, they would be near the top of the list, but having seniority as drivers only from 1 September 1955 by virtue of the 1955 collective bargaining contract, they are now near the bottom of the list. On 1 June 1956 Akers had 424 over-the-road drivers; on 1 June 1957, 360. Should there be many more lay-offs by Akers, plaintiffs will be laid off, since lay-offs are determined by seniority.

Defendant in negotiating the 1955 collective bargaining contract was required to act for all the employees of Akers, whom it represented, when in fact the interests of plaintiffs were contrary and hostile to the interests of the 322 over-the-road drivers of Akers, and defendant could not be the bargaining representative of both groups of employees. That in negotiating and consummating the 1955 collective bargaining contract with Akers, defendant arbitrarily and discriminatively and in utter disregard of the minority rights of these plaintiffs deprived them of their true seniority rights as drivers and of their constitutional rights. Akers is willing to give plaintiffs credit for their length of service with it in preparing a seniority list of drivers, but is powerless to act by virtue of the 1955 collective bargaining contract with defendant.

Plaintiffs are entitled to have the seniority list of drivers revised to give them seniority as drivers from the dates of their employment by Akers, and will be irreparably damaged if such is not done. Wherefore, plaintiffs pray for injunctive relief requiring defendant to revise its seniority list of drivers immediately, in accordance with plaintiffs' rights, and prohibiting defendant from enforcing the 1955 collective bargaining contract so long as the discrimination against plaintiffs in respect to their seniority as drivers continues.

Akers filed with the court a Bill of Intervention stating that it has no objection to the court granting to plaintiffs the relief they request, and that it stands ready and willing to carry out any order or judgment of the court in respect to the seniority rights as drivers of plaintiffs. The court entered an order allowing Akers to intervene so as to be bound by any order or judgment of the court in the case.

Plaintiffs' evidence relevant for a decision of this appeal — defendant offered none — is in substance:

Akers had owner-operators prior to its unionization by defendant

about 17 years ago. Before its unionization its employees had no seniority — seniority rights came with the union. After it was unionized defendant negotiated with it as the exclusive bargaining representative of its drivers. During this period of 17 years Akers and defendant entered into various collective bargaining contracts in respect to Akers' drivers. Prior to the 1955 collective bargaining contract between Akers and defendant, the contracts between Akers and defendant had no provision in respect to the payment by Akers to the owner-operators for the lease of their equipment — the rentals of leased equipment was set forth in individual leases between Akers and the owner-operators. The owner-operators were employees of Akers, were members of the defendant union, and paid union dues. The owner-operators were paid as drivers by Akers according to the prevailing union contract for drivers.

During the negotiations between Akers, and similar carriers, and defendant leading up to the execution of the 1955 collective bargaining contract, Akers, and other similar carriers, objected to the insertion in the 1955 contract of a provision covering the rentals to be paid for leased equipment owned by the owner-operators. James R. Hoffa, a member of the negotiating committee for defendant, said such a provision was going into the 1955 contract regardless of the objections of Akers, and the other carriers, and such a provision was incorporated in the 1955 contract as Article 28. Prior to the 1955 contract the owner-operators had no seniority as drivers — when the 1955 contract became effective on 1 September 1955, the owner-operators had seniority as drivers for Akers as of 1 September 1955. The over-the-road drivers of Akers, who were not owner-operators, had seniority as drivers before the 1955 contract — the 1955 contract did not change their seniority. After the execution of the 1955 contract Akers ceased using leased equipment owned by owner-operators, because of the added expense under the 1955 contract for the use of such equipment, except in the instance of a negro owner-operator called big Major, an employee of long years.

When Akers discontinued the use of owner-operators, these men, including the plaintiffs, chose to remain with Akers as over-the-road drivers. As far as their wages as drivers are concerned, these men make as much now as they did as owner-operators.

The men at the top of the seniority list as drivers have the choice over those beneath them on the list of trucks to drive, of preferred runs, etc.

Only five plaintiffs testified in the case. One of these, O. K. Towell, testified in substance: He was first employed by Akers as an over-

the-road driver in 1947, then became a member of defendant union, was given seniority as such a driver from that date, and has paid union dues since. In about six months he became an owner-operator. When he voluntarily became an owner-operator, he had a copy of the union contract that provided that under no circumstances can an owner-operator hold seniority. He did not understand when he became an owner-operator he would lose his seniority, though he knew his name was taken off the seniority list when he became an owner-operator. When he became an owner-operator, he did not vote in union meetings. "I knew during the ten years that I did not have seniority." His understanding was that when he gave up his truck, he would get his seniority back, but he can't "point out" where he got the assurance, it is not in the union contracts. Under the 1955 contract he now has seniority as an over-the-road driver from 1 September 1955.

Wayne M. Barnes, another plaintiff, testified in substance: He began work for Akers as an over-the-road driver in 1944, became a member of the union, paid dues, and was placed on the seniority list. Five years later he became an owner-operator. "I knew owner-operators were not on the seniority roster. I did not know that a driver lost his seniority by becoming an owner-operator." He testified on redirect-examination: "Plaintiffs' Exhibit #4, which is the 1952 contract, says that an owner or part-owner under no circumstances can hold company seniority rights. I can find nothing in the contract dealing with what are the seniority rights of an owner-operator when he ceases to be an owner-operator and drives regular company equipment."

Theron A. Wofford, another plaintiff, testified in substance: He began work for Akers as a driver in 1937. He became an owner-operator in 1951. "According to the way the contract was set up there, the union said we couldn't have any seniority during the time we owned our trucks." There were a number of union contracts. He can read, and had copies of them. It is written in the contracts that an owner-operator had no seniority. "It was in the contract. I didn't put it in there. I knew it was there." He testified on cross-examination: "Finally, in 1955 the union succeeded in getting them put owner-operators in the contract. That was the first time owner-operators got seniority. They got part of it. As a union member I think I should have seniority from the first time I went to work for the company."

Joe Schlagenhauf, another plaintiff, testified in substance: He began work as an owner-operator with Akers in 1948. He was a union member, and paid his dues. He was not permitted to vote at union

meetings. The 1952 contract stated owner-operators had no seniority. On cross-examination he testified: "I went to work for Akers at the beginning as an owner-operator. I worked for Akers, not as a leased, not as an owner-operator, back years ago and then came back in 1948. I believe that was in 1937 and 1938. There was no union then and I had no seniority because nobody had any seniority until the union came in. I quit and came back about ten years later as an owner-operator. I didn't have seniority as an owner-operator; I never did have any. I haven't lost any seniority. . . . The 1955 contract gave me seniority but I would like to say this: For years I have been there and paid my union dues and they didn't give me anything. I feel I should receive the date back to 1948."

James H. Lollis, another plaintiff, testified in substance: He was employed by Akers as an over-the-road driver in 1941. Later he voluntarily became an owner-operator. The owner-operators did not have their names on the seniority list. He testified on cross-examination: "The September 1, 1955 contract did not take anything away from me on the seniority deal. That had been taken away sometime earlier. I don't remember when. . . . If I had stayed a regular driver I would have my seniority right on down until now."

On 19 August 1957 defendant Local 71 had more than 2,600 members, each of whom was paying at least $5.00 per month dues. An initiation fee of $50.00 is collected from each member.

The following issue was submitted to the jury, and answered as appears:

> "1. Did the defendant act arbitrarily, discriminately, in bad faith, or in reckless disregard of the rights of the plaintiffs in negotiating the signing the 1955 Collective Bargaining Contract for the over-the-road drivers with Akers Motor Lines, Inc., and without any reasonable basis in fact for the plaintiffs to be given seniority under the 1955 Collective Bargaining Contract on a different basis from the other over-the-road drivers of Akers Motor Lines, Inc., as alleged in the Complaint?
>
> ANSWER: Yes."

The trial court entered a judgment ordering and decreeing as follows: One, the defendant is restrained from abiding by or carrying out the present seniority list of Akers, insofar as it affects the seniority of plaintiffs as drivers; two, the defendant is restrained from carrying out in any way the provisions of the 1955 collective bargaining contract, insofar that it does not give to plaintiffs a seniority date for all purposes as of the first date of their last continuous employment by Akers; three, defendant is required immediately to revise the

seniority list with Akers, so far as to show the seniority dates of plaintiffs for any and all purposes, to be the dates on which plaintiffs were first continuously employed by Akers, the said revised seniority list to remain in effect, and all actions based on seniority to be based thereon; four, defendant is required immediately to enter into an agreement with Akers revising the seniority list, so as to make the seniority dates of plaintiffs to be based upon the first day of their last continuous employment by Akers, instead of on 1 September 1955. The judgment further orders and decrees that the above ordered revision of the seniority list shall not in any way affect any provisions of the 1955 collective bargaining contract, except to the extent necessary to give plaintiffs full seniority rights for any and all purposes from the first date of their last continuous employment by Akers.

Defendant assigns as error the overruling of its demurrer to the complaint. Its demurrer is based, primarily, on two grounds: one, the court has no jurisdiction of the subject matter of the action, for the reason, that if the complaint sets forth any legal claim at all, it is within the exclusive jurisdiction of the National Labor Relations Board and the federal courts; and two, the complaint does not state facts sufficient to constitute a cause of action. Defendant also assigns as error the denial of its motion for judgment of nonsuit made at the close of plaintiffs' evidence. Defendant's argument and citation of authorities in its brief in respect to the overruling of its demurrer to the complaint are by reference repeated, with no more, where, in its brief, it has brought forward the denial of its motion for judgment of nonsuit.

It is a universal principal as old as the law is that the proceedings of a court without jurisdiction are a nullity. If a court has no jurisdiction, it can only dismiss the case. *Branch v. Houston,* 44 N.C. 85; *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757; 14 Am. Jur., Courts, §167. The first question presented for decision is to determine whether the trial court had power to enter upon the inquiry, and to render a judgment or decree binding upon the litigant parties.

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. G.S. 1-69.1; G.S. 1-97(6); *Martin v. Brotherhood,* 248 N.C. 409, 103 S.E. 2d 462, (a former appeal in this case concerned alone with alleged service of process on defendant); *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 98 S.E. 2d 852; *Stafford v. Wood,* 234 N.C. 622, 68 S. E. 2d 268.

In *International Asso. Machinists v. Gonzales,* 356 U.S. 617, 2 L. Ed. 1018, a labor union member, claiming to have been expelled from membership in the International Association of Machinists and its Local 68 in violation of his rights under the constitution and by-laws of the union, was ordered reinstated, and awarded damages for lost wages and physical and mental suffering. The judgment was affirmed by the California District Court of Appeal, First District, Division One (142 Cal. App. 2d 207, 298 P. 2d 92), and the Supreme Court of California denied rehearing. On *certiorari* to the California District Court of Appeal, the U. S. Supreme Court affirmed the judgment below. The majority opinion of the Court has covered the question confronting us so comprehensively that we quote from it *in extenso:*

"As *Garner v. Teamsters C. & H. Local Union,* 346 U.S. 485, 98 L. Ed. 228, 74 S. Ct. 161, could not avoid deciding, the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. But the other half of what was pronounced in *Garner* — that the Act 'leaves much to the states,' — is no less important. See 346 U.S., at 488. The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation. See *Weber v. Anheuser-Busch, Inc.* 348 U.S. 468, 474-477, 99 L. Ed. 546, 554, 555, 75 S. Ct. 480.

"Since we deal with implications to be drawn from the Taft-Hartley Act for the avoidance of conflicts between enforcement of federal policy by the National Labor Relations Board and the exertion of state power, it might be abstractly justifiable, as a matter of wooden logic, to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded. In such a suit there may be embedded circumstances that could constitute an unfair labor practice under § 8(b) (2) of the Act. In the judgment of the Board, expulsion from a union, taken in connection with other circumstances established in a particular case, might constitute an attempt to cause an employer to 'discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . .' 61 Stat. 141, 29 U.S.C. § 158(b) (2). But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been

undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .' 61 Stat. 141, 29 U.S.C. § 158(b) (1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Constr. Workers v. Laburnum Constr. Corp.* 347 U.S. 656, 98 L. Ed. 1025, 74 S. Ct. 833.

"Although petitioners do not claim that the state court lacked jurisdiction to order respondent's reinstatement, they do contend that it was without power to fill out this remedy by an award of damages for loss of wages and suffering resulting from the breach of contract. No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although if the unions' conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See *International Union, United A.A.A.I. W. v. Russell,* 356 U.S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932. If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater

than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b) (2). This important distinction between the purposes of federal and state regulation has been aptly described: 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands-off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the *nexus* between union action and employer discrimination, examines the ouster from membership in entirely different terms.' Isaacson, Labor Relations Law: Federal Versus State Jurisdiction, 42 ABAJ 415, 483."

A collective bargaining agent certified by the National Labor Relations Board is authorized to negotiate questions of seniority. *Ford Motor Co. v. Huffman*, 1953, 345 U.S. 330, 97 L. Ed. 1048. In that case petitioner, an employee-union member, sought to have declared invalid a collectively bargained agreement whereby his employer allowed employees seniority credit for both pre-employment and post-employment military service. In the course of its opinion for a unanimous Court holding the agreement was in all respects valid, the Court stated:

"That the authority of bargaining representatives, however, is not absolute is recognized in *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 198, 199, 89 L. Ed. 173, 180, 181, 65 S. Ct. 226, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an appro-

priate unit requires them to make an honest effort to serve the interests of all of those members without hostility to any. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. . . . Nor does anything in that Act (National Labor Relations Act) compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees."

Coley v. R. R., 1942, 221 N.C. 66, 19 S.E. 2d 124, was an action by a number of employees of the A. C. L. R. R. Co., for mandatory injunction to compel revision of seniority roster or to restrain defendants from putting into effect roster as published. On the final hearing the restraining order, theretofore temporarily issued and continued to the hearing, was dissolved, and the action dismissed as in case of nonsuit. The judgment was upheld by this Court, and in the course of its opinion it said:

"The Brotherhood had the power, by agreement with the Railroad Company, to create seniority rights for 'the craft or class of carmen, their helpers and apprentices, employees of the Atlantic Coast Line Railroad Company.' Citing authority. By the same token, and in like manner, it had the power, in good faith, to modify these rights in the interest of the larger good. Annotation 117 A.L.R. 823. In an action, as here, by individual beneficiaries of the original contract to restrain any such modification, it is necessary to allege and to prove that the Brotherhood acted arbitrarily or in reckless disregard of the plaintiffs' rights. The present record falls short of the prerequisites in this respect."

These decisions are to the effect that a union member is entitled to judicial relief from a union's attempting to deprive him, or depriving him, of seniority rights secured by contract with an employer, when such union action is arbitrary, fraudulent, illegal, or in excess of the union's powers. *Piercy v. Louisville & N. R. Co.*, 198 Ky. 477, 248 S.W. 1042, 33 A.L.R. 322; *George T. Ross Lodge v. Brotherhood of R. Trainmen*, 191 Minn. 373, 254 N.W. 590; *McCoy v. St. Joseph Belt R. Co.*, 229 Mo. App. 506, 77 S.W. 2d 175; *Dooley v. Lehigh Valley R. Co.*, 130 N.J. Eq. 75, 21 A. 2d 334, (affirmed in 131 N.J. Eq. 468, 25 A. 2d 893); *Evans v. Louisville & N. R. Co.*, 191 Ga. 395, 12

S.E. 2d 611; *Grand International Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P. 2d 971. See 31 Am. Jur., Labor, §71; Anno. 142 A.L.R. 1067, 1068; 175 A.L.R. 520.

It is our opinion, and we so hold upon the authority of the reasoning and statements in the majority opinion *International Asso. Machinists v. Gonzales, supra*, that the trial court had jurisdiction over the parties and the subject matter of this action.

We now come to a consideration of defendant's motion for judgment of nonsuit, the denial of which by the trial court is assigned as error by defendant.

Plaintiffs' action, as alleged in their complaint, is to compel by injunction defendant to revise its seniority list of over-the-road drivers with Akers so as to give them seniority as drivers from the date of their last continuous employment by Akers, instead of from 1 September 1955 as provided for in the 1955 collective bargaining contract, and to enjoin defendant from enforcing its seniority list of over-the-road drivers with Akers until such revision by it in plaintiffs' favor is made.

Plaintiffs' evidence clearly shows these facts: When the 1955 collective bargaining contract was made between Akers and the defendant as the exclusive bargaining representative of its members, all of the over-the-road drivers employed by Akers had seniority rights as drivers fixed by prior union contracts with Akers. Prior to the execution of the 1955 collective bargaining contract, none of the plaintiffs, owner-operators, had any seniority rights according to the union contract with Akers then in force, and also according to prior union contracts with Akers effective as soon as they became owner-operators. Wayne M. Barnes, one of the plaintiffs, testified: "Plaintiffs' Exhibit #4, which is the 1952 contract, says that an owner or part-owner under no circumstances can hold company seniority rights. I can find nothing in the contract dealing with what are the seniority rights of an owner-operator when he ceases to be an owner-operator and drives regular company equipment." Joe Schlagenhauf, another plaintiff, began work with Akers as an owner-operator. He testified: "I didn't have seniority as an owner-operator; I never did have any. I haven't lost any seniority. The 1955 contract gave me seniority." James H. Lollis, another plaintiff, testified: "The September 1, 1955 contract did not take anything away from me on the seniority deal. That had been taken away sometime earlier. I don't remember when. . . . If I had stayed a regular driver I would have my seniority right on down until now." O. K. Towell, another plaintiff, testified in substance that when he voluntarily became an owner-operator, he had a copy of the

union contract that provided that under no circumstances can an owner-operator hold seniority. Towell testified: "I knew during the ten years" (i. e., when he was an owner-operator) "that I did not have seniority." Theron A. Wofford, another plaintiff, testified: "According to the way the contract was set up there, the union said we couldn't have any seniority during the time we owned our trucks." Wofford also testified in substance: There were a number of union contracts. He can read, and had copies of them. It is written in the contracts that an owner-operator had no seniority. There is no evidence in the record that defendant union prevented any of the plaintiffs from reading the union contracts prior to 1955, or misled its members in any way in respect to those contracts stating that under no circumstances could any owner-operator have any seniority. When plaintiffs became owner-operators, or began as an owner-operator with Akers, their names were not on the seniority roster under the union contracts. Every plaintiff, so far as the evidence shows, who began work as an over-the-road driver with Akers, had proper seniority rights by union contracts, after Akers was unionized, and when such an over-the-road driver voluntarily chose to become an owner-operator with Akers, he lost all seniority rights under the union contracts. The loss of all of his seniority rights was his voluntary and free choice. Before Akers was unionized its employees had no seniority rights — seniority rights for its employees came with defendant union, and existed solely by virtue of union contracts made between the defendant union and Akers. If the defendant union had negotiated the 1955 contract with Akers so as to have given plaintiffs, who according to union contracts with Akers had no seniority rights as drivers with Akers, seniority rights as drivers with Akers from the date of their last continuous employment with Akers, as plaintiffs contend it should have, or if this Court should uphold the judgment of the trial court, as plaintiffs contend should be done, this would be to deprive the great majority of over-the-road drivers of Akers of their seniority rights to the extent that plaintiffs would have been or are given seniority rights as drivers ahead of them, which seniority rights of these over-the-road drivers are fixed by the 1955 contract and prior union contracts between Akers and defendant union.

If plaintiffs are to succeed at all, they must do so on the case set up in their complaint. *Sale v. Highway Commission,* 238 N.C. 599, 78 S.E. 2d 724, and the cases there cited. *Allegata* without *probata* is insufficient. Both must concur to establish a cause of action. *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911; *Coley v. R. R., supra.*

The 1955 collective bargaining agreement made between defendant

union and Akers deprived plaintiffs of no seniority rights, for the reason that their evidence clearly shows that at the time this contract was executed, plaintiffs had no seniority rights. The trial court erred in denying defendant's motion for judgment of nonsuit.

The judgment below is

Reversed.

EASTERN STEEL PRODUCTS CORPORATION v. JAMES F. CHESTNUTT AND B. S. HARRISON T/A SAMPSON MASTER SWITCH COMPANY.

(Filed 6 April, 1960.)

1. Appeal and Error § 16—

The granting of *certiorari* to review an order denying motion to strike certain paragraphs from a pleading in effect grants the right of immediate appeal, which is governed by the Rules of Practice in the Supreme Court, and the failure of the record to contain assignments of error is ground for dismissal. Rule 19 (3).

2. Appeal and Error § 2—

The Supreme Court, in the exercise of its supervisory jurisdiction, may decide questions on the merits even though the procedure prescribed by the Rules of Practice as necessary to present such questions has not been followed.

3. Pleadings § 34—

Allegations relating to matters which the pleader is precluded from showing in evidence because of the parol evidence rule should be stricken upon motion.

4. Fraud § 5—

An essential element of actionable fraud is that the party to whom the alleged false and fraudulent representation is made must reasonably rely thereon and be deceived thereby to his injury.

5. Fraud § 8—

It is not sufficient to allege the elements of fraud in general terms, but it is required that the pleader allege facts, which if true, would constitute fraud.

6. Cancellation and Rescission of Instruments §§ 2, 8—

Defendants' allegations to the effect that they were induced to sign a novation because of false and fraudulent representations by plaintiff in regard to a certain item which defendants disputed prior to and at the time of the execution of the agreement, is insufficient to state a cause of action to rescind the novation contract, since in such instance defendants could not have been deceived by and could not have relied upon such representations.

7. Accord and Satisfaction § 1: Compromise and Settlement—

A compromise and settlement must be based upon a disputed claim; an accord and satisfaction may be based on an undisputed or liquidated claim.

8. Contracts § 19—

Where, after differences between the parties to a contract, they execute a new agreement prescribing the rights and liabilities of the parties in regard to the entire subject matter of the original agreement, the new agreement amounts to a novation and precludes the assertion of any rights under the original agreement so long as the novation stands.

9. Evidence § 27—

Whether the rule precluding parol evidence in contradiction of or at variance with a written agreement of the parties be regarded as a rule of evidence or a rule of substantive law, allegations in a pleading relating to matters which the pleader is precluded from establishing because of the rule should be stricken on motion.

On writ of *certiorari*, treated as appeal, to review order of *Bone, Resident Judge*, signed August 4, 1959, in Chambers, in action pending in NASH Superior Court.

The writ of *certiorari* was allowed September 30, 1959. This Court, upon application, permitted counsel then representing defendants to withdraw. Thereafter, defendants retained their present counsel. Upon their application, the case was continued to and argued at Spring Term, 1960.

The questions presented relate solely to the pleadings.

Defendants, after answering the eight paragraphs of the complaint, alleged (1) a further answer, consisting of thirty-one paragraphs designated I through XXXI, and (2) a gross action and counterclaim consisting of four paragraphs designated I through IV.

The hearing was on plaintiff's motion (eighteen paragraphs) to strike from the answer all or portions of fourteen designated paragraphs of the further answer and all or portions of the four paragraphs of the cross action and counterclaim.

Treating each paragraph as a separate motion, the court entered an order allowing "motions numbered 1, 5, 6, 8, 9 and 11," thereby striking the allegations to which these motions related, but denying "motions numbered 2, 3, 4, 7, 10, 12, 13, 14, 15, 16, 17 and 18." Plaintiff's exception to Judge Bone's order is in these words: "The PLAINTIFF excepts to that portion of the foregoing order which denies the plaintiff's motions numbered 2, 3, 4, 7, 10, 12, 13, 14, 15, 16, 17 and 18."

The relevant portions of the pleadings will be set forth in the opinion.

Battle, Winslow, Merrell, Scott & Wiley for plaintiff, appellant.

Nance, Barrington & Collier and Rudolph G. Singleton, Jr., for defendants, appellees.

BOBBITT, J. The issuance of our writ of *certiorari,* in effect, granted to plaintiff the right of immediate appeal from the order of Judge Bone. In perfecting such appeal, Rules of Practice in the Supreme Court, 221 N.C. 544, apply. *Collier v. Mills,* 245 N.C. 200, 95 S.E. 2d 529. The record before us contains no assignment(s) of error. This is ground for dismissal for failure to comply with Rule 19(3). As to what is required in respect of assignments of error, see *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294, and *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405.

Even so, this Court, in the exercise of its general supervisory jurisdiction (N. C. Constitution, Article IV, Section 8), has decided to consider and pass upon the questions raised by plaintiff's exceptions. Hereafter, it should be clearly understood that the rules applicable to an appeal apply to a review upon *certiorari* where such review, permitted under Rule 4(a) (242 N.C. 766), is in effect an appeal.

It was alleged and admitted that plaintiff and defendants entered into a contract whereby plaintiff would manufacture switches in accordance with a model switch furnished by defendants, for distribution by defendants.

Plaintiff, in substance, alleged: Differences arose between plaintiff and defendants, defendants contending they had been damaged on account of delays in delivery and defects in the switches manufactured by plaintiff and suggested "the arrangement be terminated." Plaintiff asserted a claim for $20,670.07 for the manufacture of dies and switches "in accordance with the arrangements between the parties." "Extended negotiations were had between the parties and finally all their differences were compromised and settled by execution of a contract, prepared by the defendants, on the 28th day of July 1958," as per copy attached to and made a part of the complaint.

Plaintiff, alleging that it performed its obligations under the contract of July 28, 1958, seeks to recover a balance of $11,725.00, with interest, allegedly owing by defendants under the terms of said contract.

The contract of July 28, 1958, in which plaintiff is designated party of the first part and Sampson Master Switch Company is designated party of the second part, in substance, provides: The party of the first part has sold and delivered to the party of the second part "the

goods and chattels following, namely: All of the dies and jigs in its possession for the manufacture of Sampson Master Switches and also approximately 3,300 Sampson Master Switches." Title to the said goods and chattels "is reserved by and remains vested in the said party of the first part until the payment in full of the sum of FOURTEEN THOUSAND DOLLARS ($14,000), which amount is unpaid on the purchase price of the said goods and chattels, and will become payable as follows: $3.50 per switch as delivered to the party of the second part, with purchase price of switches to be secured by notes executed by B. S. Harrison payable thirty (30) days after delivery date of varying numbers of switches until all of switches manufactured by party of the first part have been delivered to party of the second part." Provision is made, in the event of default, for the repossession of said goods and chattels by the party of the first part and for a foreclosure sale thereof. The contract contains these provisions: (1) "It is mutually agreed that the party of the second part may return to party of the first part all switches that are not in a saleable condition and that said switches will be put in a saleable condition by party of the first part." (2) ". . . upon delivery of approximately 3300 switches we (plaintiff) shall collect $1.50 for tooling cost on all switches sold by Sampson Master Switch Company whether made by Eastern Steel Products Corporation or not, until such time as the full amount of $14,000 is paid." The contract of July 28, 1958, contains no reference to a prior contract or prior dealings between the parties.

Answering, defendants admitted that "650 switches were delivered and paid for"; that defendants had sold "approximately 150 switches since July 28, 1958"; and that plaintiff's demand for payment had been refused. Except as stated, the answer proper denies the material allegations of the complaint, alleging "that the true facts relative thereto will appear in the further answer, defense, and counterclaim of these answering defendants."

In their further answer (considering only the portions thereof not stricken by Judge Bone's order), defendants alleged that plaintiff had breached its original contract with defendants in that it did not make delivery as required by the contract and that the switches when delivered were defective. They alleged, *inter alia*, that "it soon became apparent that the plaintiff neither had the knowledge, personnel or quality control to produce a product in conformity with the specifications furnished it by the defendants," and that "the plaintiff and defendants agreed that the contract should be rescinded, and they entered into negotiations to adjust and settle their differences"; and that, "although the defendants were not compelled to do anything

further, they agreed to reimburse the plaintiff for the actual and reasonable costs incurred up to the date of rescission to the extent these costs were properly proven." Defendants admitted execution of the contract of July 28, 1958, but alleged they did so under the following circumstances: Plaintiff submitted "a large ledger sheet, on which were listed the alleged actual and reasonable expenses of plaintiff. The defendants again requested supporting evidence of the correctness of the figures, but plaintiff stated that they were still not available. The figures on the ledger sheet totaled $20,670.07. The defendants informed the plaintiff that the charges were excessive and incorrect. In a spirit of compromise the defendants executed the alleged contract sued upon, (on the express condition that the plaintiff submit to the defendants sworn proof of the correctness of the figures upon which the compromise was based and on the absolute assurance of the plaintiff to the defendant(s) of the truthfulness and correctness of said figures. The defendants have repeatedly requested that the plaintiff submit the sworn proof of the figures as agreed, but the plaintiff has refused and failed to submit said sworn proof, and continues to do so.)"

Plaintiff's motion No. 2 is directed to that portion of paragraph XV of the further answer indicated above by parentheses.

Plaintiff's motion No. 3 is directed to paragraph XVI of the further answer wherein defendants alleged generally that they were induced to sign the contract of July 28, 1958, by the false and fraudulent representations of plaintiff in respect of the amount of its costs.

Plaintiff's motion No. 4 is directed to paragraph XVII of the further answer, *viz.:* "That the defendants have no means of discovering the true costs incurred by the plaintiff in tooling and for dies and jigs, but they are informed and believe that the reasonable cost therefor is $5,000, and upon such information and belief allege that the plaintiff should not be entitled to any larger sum, if it is entitled to any sum at all."

In defendants' allegations of the further defense, to which plaintiff's motions numbered 7, 10, 12, 13 and 14 are directed, and in the four paragraphs wherein defendants assert a cross action for damages of $105,042.50, to which plaintiff's motions numbered 15, 16, 17 and 18 are directed, defendants allege breaches by plaintiff of the *original* contract between the parties and consequential damages.

Defendants, in their prayer for relief, in addition to the recovery of damages, ask that the court adjudge that "the title to the dies and jigs hereinbefore referred to be vested in the defendants." However, no facts are alleged which would entitle defendants to such

adjudication apart from the provisions of the contract of July 28, 1958. This portion of defendants' prayer would seem to be at cross-purposes with other allegations of their pleading.

True, the burden of proof was on plaintiff to establish its allegation that the written contract of July 28, 1958, was executed as a compromise settlement of the dispute between the parties as to their rights and liabilities arising out of the original contract. *Winkler v. Amusement Co.*, 238 N.C. 589, 79 S.E. 2d 185. Even so, it appears affirmatively from defendants' allegations, quoted above, that the negotiations leading up to the execution of the written contract of July 28, 1958, were for the purpose of adjustment and settlement of the differences that had arisen between the parties.

It is noted that, under the contract of July 28, 1958, plaintiff agreed to sell and deliver to defendant some 3,300 Sampson Master Switches and also all of the dies and jigs in its possession for the manufacture of the Sampson Master Switches, for which defendants agreed to pay $14,000.00. Defendants, after alleging they had no means of discovering the true costs incurred by plaintiff in tooling and for dies and jigs, alleged in paragraph XVII of the further answer that "they are informed and believe that the reasonable cost therefor is $5,000." It is noted that no reference is made to plaintiff's costs in connection with the manufacture of the 3,300 Sampson Master Switches, nor do defendants allege any other fact relevant to their general allegations as to false and fraudulent representations.

If, disregarding the written contract of July 28, 1958, the actual agreement was as alleged by defendants, it would seem that defendants would be obligated to pay plaintiff under the terms thereof "the actual and reasonable costs incurred up to the date of rescission," whether such costs amounted to $20,670.07, or $14,000.00, or a lesser amount; and no benefit would accrue to defendants unless plaintiff's costs were less than $14,000.00.

While defendants alleged they signed the contract of July 28, 1958, *upon the express condition, etc.* (compare *Bailey v. Westmoreland*, 251 N.C. 843, 112 S.E. 2d 517, and cases cited), the sole ground on which they assert the invalidity of said written contract is that the figure of $20,670.07, then asserted by plaintiff to be the amount of its actual and reasonable costs and then disputed by defendants, was excessive. The agreement, *as alleged by defendants*, was that they were "to reimburse the plaintiff for the actual and reasonable costs incurred up to the date of rescission to the extent these costs were properly proven." Defendants' allegations come to this: The writing obligated them to pay $14,000.00 in the event plaintiff's actual and

reasonable costs were $20,670.07. Defendants' allegations are silent as to what they agreed to pay if plaintiff's actual and reasonable costs were less than $20,670.07. Mindful of the fact that defendants alleged the negotiations were for the purpose of adjustment and settlement of their differences with plaintiff, it would appear that $14,000.00 was adopted as a compromise figure. In any event, the oral agreement alleged by defendants is in direct conflict with the provisions of the written contract of July 28, 1958.

"When the terms of a (written) contract are established, the negotiations which produced the contract cannot enlarge or restrict its provisions and are therefore not competent as evidence in an action to enforce it." *Bank v. Slaughter,* 250 N.C. 355, 108 S.E. 2d 594, and cases cited.

There is much authority for the proposition that the so-called parol evidence rule is not a rule of evidence but a rule of substantive law. Wigmore on Evidence, Third Edition, Vol. IX, § 2400; Williston on Contracts, Revised Edition, Vol. 3, § 631; Stansbury, North Carolina Evidence, § 251. There are North Carolina decisions which treat it solely as a rule of evidence. *Miller v. Farmers Federation,* 192 N.C. 144, 134 S.E. 407. See "The Parol Evidence Rule in North Carolina," Chadbourn and McCormick, 9 N.C.L.R. 151, footnote 4 on page 152. However, in *Williams v. McLean,* 220 N.C. 504, 17 S.E. 2d 644, cited with approval in *Bost v. Bost,* 234 N.C. 554, 67 S.E. 2d 745, this Court said: "This written designation of the terms of the contract was executed by the defendants and accepted by the plaintiff. It is established, not only as a rule of evidence, but also as one of substantive law, that matters resting in parol leading up to the execution of a written contract are considered merged in the written instrument. 2 Williston on Contracts, secs. 613-632."

Whether the so-called parol evidence rule is a rule of evidence or a rule of substantive law or both need not be explored further on this appeal. One of the rules applicable when passing upon a motion under G.S. 1-153 to strike allegations of a pleading is this: "An allegation in a pleading is irrelevant and immaterial whenever it is of such nature that evidence in support thereof would be incompetent at the hearing. Nothing ought to remain in a pleading, over objection, which is incompetent to be shown in evidence." *Penny v. Stone,* 228 N.C. 295, 45 S.E. 2d 362; *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. Absent sufficient allegations that the execution of the written contract of July 28, 1958, by defendants, was induced by plaintiff's false and fraudulent representations, defendants' allegations as to a contemp-

oraneous oral agreement in conflict with the terms thereof should have been stricken.

An essential element of actionable fraud is that the party to whom the alleged false and fraudulent representation is made must reasonably rely thereon and be deceived thereby to his injury. *New Bern v. White,* 251 N.C. 65, 110 S.E. 2d 446, and cases cited. Here, the alleged fraud is based solely on plaintiff's representation during settlement negotiations that its actual and reasonable costs were $20,670.07. Defendants alleged they disputed and challenged the truthfulness of this representation prior to and contemporaneously with the execution of the written contract of July 28, 1958. The fact that the written contract obligated defendants to pay $14,000 negatives defendants' allegation that it relied upon plaintiff's representation that its actual and reasonable costs (which defendants alleged they agreed to pay) amounted to $20,670.07.

It is not sufficient to allege the elements of fraud in general terms. It is required that facts be alleged which, if true, would constitute fraud. *Calloway v. Wyatt,* 246 N.C. 129, 97 S.E. 2d 881, and cases cited. Since no facts are alleged by defendants as a basis for their allegations as to fraud except the alleged falsity of the representation that plaintiff's costs amounted to $20,670.07, a matter disputed by defendants prior to and at the time of their execution of the written contract of July 28, 1958, providing for the payment by defendants of $14,000.00, defendants did not allege facts sufficient to support their general allegations as to fraud.

There is discussion in the briefs bearing upon the subject of accord and satisfaction. This distinction is noted: "Compromise is distinguished from accord and satisfaction by the fact it must be based on a disputed claim, while an accord and satisfaction may be based on an undisputed or liquidated claim." 1 Am. Jur., Accord and Satisfaction § 2; 11 Am. Jur., Compromise and Settlement § 2. *Bizzell v. Bizzell,* 247 N.C. 590, 601, 101 S.E. 2d 668. Here, the allegations of both plaintiff and defendants are to the effect that the agreement of July 28, 1958, was entered into by way of adjustment and settlement of their then existing differences. "Where the arrangement of compromise remains purely executory and there has been a previous contractual relation existing among the parties, the compromise itself amounts to a new contract or novation." 11 Am. Jur., Compromise and Settlement § 2.

For the foregoing reasons, plaintiff's motions numbered 2, 3 and 4 should have been allowed. It follows that plaintiff's motions numbered 7, 10, 12, 13, 14, 15, 16, 17 and 18 should have been allowed

since, unless and until the written contract of July 28, 1958, is set aside, defendants may not allege facts relevant solely to alleged breaches by plaintiff of their original contract. Moreover, if the agreement of compromise and settlement was as alleged by defendants, defendants would not be entitled to recover damages for breaches of the original contract but rather would be required to pay no more than the amount established as plaintiff's "actual and reasonable costs incurred up to the date of rescission." It is noted that defendants have made no allegation as to the correct amount thereof, their allegation being that $20,670.07 is incorrect and excessive. Defendants' allegations, challenged by plaintiff's said motions, are deemed prejudicial and should be stricken. It is so ordered.

Nothing stated herein is intended to preclude defendants from asserting all rights available to them under the written contract of July 28, 1958. Defendants, if so advised, may apply under G.S. 1-163 for leave to amend their pleading and so, perchance, clarify their position.

The ruling of the court below in respect of all of plaintiff's said motions is reversed.

Reversed.

JACK B. HEFNER, EMPLOYEE, v. HEFNER PLUMBING COMPANY, INC., EMPLOYER, AND UNITED STATES FIDELITY & GUARANTY COMPANY, INSURANCE CARRIER.

(Filed 6 April, 1960.)

Master and Servant § 85—

Where an injured employee has made settlement with the third person tort-feasor in an amount in excess of the liability of the employer under the Compensation Act, he may not thereafter maintain a proceeding against the employer and the insurer under the Compensation Act for the purpose of recovering one-half his attorneys' fees incurred in the proceeding against the third person tort-feasor, since the statutory provisions for the proportionate charge of the attorney's fee between the employer and employee does not apply when there is no recovery under the Compensation Act and the attorney's fee is not approved by the Commission. G.S. 97-10 prior to the 1959 amendment.

APPEAL by plaintiff from *Sharp, S. J.*, at December 7, 1959 Special Civil Term, of MECKLENBURG.

Proceeding under North Carolina Workmen's Compensation Act, G.S. 97-1, *et seq.*

The record of case on appeal reveals the following: Plaintiff was injured on 2 May 1957, in a collision between an automobile being operated by him and belonging to defendant employer and one being operated by a person not a party to this action. At the time of the collision plaintiff was employee of the defendant employer. And on 14 May 1957, plaintiff, through his attorney, advised the representative of the defendant insurance carrier that he was proceeding against the third party and was making no claim for Workmen's Compensation benefits at that time. Through subsequent and periodic correspondence plaintiff's attorney kept the defendant carrier informed of the status of plaintiff's injuries, and of developments in the negotiations with the third party.

In March 1958 plaintiff settled his claim against the third party. Release was executed on 9 April 1958. Thereafter plaintiff filed claim with the N. C. Industrial Commission. The case was heard before Deputy Commissioner Thomas. Claimant contended, and contends, that the injury sustained by him in the automobile collision as hereinabove set forth was an injury by accident arising out of and in the course of his employment with defendant employer. And claimant contends that, although he chose to settle with the third party tortfeasor and then make his claim with the Industrial Commission, defendant carrier should now be made to pay a proportionate part of attorney's fee in the third party matter.

The claim was heard before Deputy Commissioner Thomas, where and when the parties stipulated:

"1. That on and prior to May 2, 1957, Jack B. Hefner and the Hefner Plumbing Company, Inc., were subject to and bound by the provisions of the Workmen's Compensation Act.

"2. That the United States Fidelity & Guaranty Company was at such times the compensation carrier.

"3. That at such times the employer-employee relationship existed between the claimant and defendant employer.

"4. That while so employed claimant's average weekly wage was $230.77."

And based upon all the competent evidence adduced at the hearing, the Deputy Commissioner makes the following additional Findings of Fact:

1. Claimant, at the time of the hearing, and at the time of the accident was president of the defendant employer * * *

3. The injury sustained on May 2, 1957, was an injury by accident arising out of and in the course of claimant's employment with defendant employer.

"4. Claimant was hospitalized following the injury until May 6, 1957, and returned to work on a limited basis shortly thereafter and was paid his regular salary at all times since May 2, 1957, and sustained no wage loss because of his injuries.

"5. Claimant reached the end of the healing period on December 15, 1957, and as a result of the injury in question has ten per cent permanent loss of use of his back and ten per cent permanent loss of use of each arm.

"6. Under date of May 14, 1957, claimant's attorney, Mr. Robert L. Scott, wrote a letter (claimant's Exhibit 1) to defendant carrier stating, among other things: 'This is to advise that we are proceeding against the responsible third party, and Mr. Hefner is making no claim for Workmen's Compensation benefits at this time.' * * *

"10. On March 25, 1958, claimant, with the advice and consent of his attorney, Mr. Scott, reached a settlement with McNeill, the third party tort-feasor. On April 9, 1958, the sum of $10,600 was paid to claimant and Mr. Scott by or on behalf of McNeill.

"11. On April 23, 1958, Mr. Scott disbursed the $10,600 as follows: $287.00 to Dr. John A. Powers; $7,663.00 to the claimant, and Mr. Scott retained the sum of $2,650.00 as his fee. Payment of $287.00 to Dr. Powers was not approved by the Industrial Commission. The attorney fee of $2,650.00 retained by Mr. Scott was not approved by the Industrial Commission.

"12. On June 18, 1958, claimant made claim with the Industrial Commission * * * and requested a hearing."

The Deputy Commissioner then made the following conclusion of law:

"Claimant waived and abandoned any right he may have had under the Workmen's Compensation Act and his claim for benefits and that defendants be assessed with a proportionate part of the attorney fee in the third party matter must therefore be denied. G.S. 97-10. *Ward v. Bowles,* 228 N.C. 274."

From the award entered by the Deputy Commissioner denying the claim, claimant, the plaintiff, appealed to the Full Commission upon alleged error that:

"1. He failed to find as a fact that the letter of May 14, 1957, referred to in finding of fact #6 contained a specific reservation of right on the part of employee to file claim for compensation within time allowed by G.S. 97-24.

"2. Conclusion of law #1 is in error in holding that claimant waived and abandoned his claim for benefits.

"3. The award denying plaintiff's claim for compensation is contrary to law.

"4. He failed to award compensation as provided by and to apply G.S. 97-10 thereto."

The case, coming on for review, the Full Commission, after reviewing all the competent evidence, findings of fact, conclusion of law and award, theretofore made, being of opinion that the record would not support a finding of fact other than the facts found by Hearing Deputy Commissioner, overruled each and every one of plaintiff's exceptions and adopted as its own the findings of fact and conclusions of law of the Hearing Deputy Commissioner, together with the award based thereon, and ordered that the result reached by him be, and the same was affirmed.

The plaintiff, claimant, in compliance with G.S. 97-86 gave notice of appeal and appealed therefrom to Superior Court of Mecklenburg County alleging error on the part of the Full Commission in that "(1) the Full Commission adopted as its own the findings of fact and conclusion of law contained in the opinion and award filed by Deputy Commissioner Thomas on November 12, 1958.

"(2) the Full Commission failed to find as a fact that the letter of May 14, 1957, referred to in finding of fact #6 of Deputy Commissioner Thomas' opinion contained a specific reservation of right on the part of the employee to file claim for compensation within the time allowed by G.S. 97-24.

"(3) the Full Commission directed that the award based on the opinion of the Deputy Commissioner be, in all respects, affirmed.

"(4) the Deputy Commissioner and the Full Commission concluded as a matter of law that the plaintiff waived and abandoned his rights under the Workman's Compensation Act by making a settlement with the third party *tort-feasor* after the lapse of more than six (6) months from the date of the injury giving rise thereto and at a time when neither the employer nor the insurance carrier had filed any written admission of liability with the Industrial Commission, which ruling is contrary to the provisions of G.S. 97-10, G.S. 97-6, G.S. 97-5 and G.S. 97-3.

"(5) the Full Commission failed to award compensation as provided by law and to apply the provisions of G.S. 97-10 thereto."

The matter coming on for hearing before Judge of Superior Court, and the court being of opinion that the assignments of error, numbered 1 through 5, set forth in the notice of appeal from the Full Commission to the Superior Court as above set forth, and each of them, should be overruled, and judgment entered in accordance with

the award of the Full Commission, so ordered, and affirmed the award.

Claimant excepted thereto and appealed therefrom to Supreme Court, and assigns error.

Robert L. Scott for plaintiff, appellant.
Robinson, Jones & Hewson for defendant, appellee.

WINBORNE, C. J.: This is the determinative question on this appeal: May an employee injured in the course of his employment by the negligent act of a third party, after settlement with the third party for an amount in excess of his employer's liability, and after disbursement of the proceeds of such settlement, recover compensation from his employer in a proceeding under the Workman's Compensation Act. In the light of the provisions of the Act as interpreted by this Court, the answer is "No."

An action under the North Carolina Workman's Compensation Act, where a third party *tort-feasor* is involved, is governed by Section 10 of Chapter 97 of the General Statutes. While this section was deleted by Chapter 1324 of the 1959 Session Laws and new provisions inserted in lieu thereof, the new provisions were expressly made inapplicable to any injury occurring before the ratification of said chapter, which was 20 June, 1959. Therefore the provsions of G.S. 97-10 as they existed prior to the 1959 Act will be applied.

G.S. 97-10 provided in pertinent part as follows: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee * * * as against his employer at common law, or otherwise, on account of such injury * * * Provided, however, that in any case where such employee * * * may have a right to recover damage for such injury * * * from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter: Provided, further, that after the Industrial Commission shall have issued an award, or the employer or his carrier has admitted liability in writing and filed same with the Industrial Commission, the employer or his carrier shall have the exclusive right to commence an action in his own name and/or in the name of the injured employee * * * for damages on account of such injury or death, and any amount recovered by the employer shall be applied as follows: First, to the payment of actual court costs, then to the payment of attorneys' fees when approved by the Industrial Commission; the remainder or so

much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the Industrial Commission; if there then remain any excess, the amount thereof shall be paid to the injured employee or other person entitled thereto: Provided further, that the amount of attorneys' fees paid out in the distribution of the above recovery shall be a charge against the amount due and payable to the employer and employee in proportion to the amount each shall receive out of the recovery. If, however, the employer does not commence such action within six months from the date of such injury or death, the employee, or his personal representative, shall thereafter have the right to bring the action in his own name, and any amount recovered shall be paid in the same manner as if the employer had brought the action."

Under the language of the deleted statute, G.S. 97-10, it appears that several courses of action are open to an employee who is injured, in the course of his employment by the negligent act of a person other than his employer. Among the remedies, he may waive his claim against his employer and pursue his remedy against the third party. *Ward v. Bowles*, 228 N.C. 273, 45 S.E. 2d 354. This is the course taken by plaintiff here. But he argues that he had no intention of giving up his right to file claim under the Act, and therefore that there was no waiver. This argument is untenable because his own actions have placed him outside the purview of the statute whose protection he seeks. He received $10,600 in his settlement with the third party, which amount was disbursed prior to the filing of his claim. This is approximately $2600 more, according to his argument, than his injury would have entitled him to in an award from the Commission. If he had received compensation under the Act and made a settlement with the third party, he would have been required to reimburse his employer for such compensation. Apparently the only relief sought by him and the only gain that could accrue to him in his proceeding against his employer was a proportionate payment of attorney's fee by the employer. However, the provision for proportionate charge of the attorney's fee against the employer and employee applies only in the distribution of the amount recovered in an action against the third party by the employer or employee, and where the amount of recovery is applied in accordance with the terms of the statute, including approval of attorney's fees by the Industrial Commission. Here, there being no such amount recovered requiring distribution, nor possibility of such, the provision is inapplicable. Indeed the applicable statute contemplates that where

employee pursues his remedy against the employer and against the third party, a determination of benefits due under the Act must be made prior to the payment of funds recovered from the third party. G.S. 97-10. *Lovette v. Lloyd,* 236 N.C. 663, 73 S.E. 2d 886.

Other points raised by the appellant have been duly considered, and are found to be not in conflict herewith.

The judgment below is

Affirmed.

LEONARD AUSTIN, JR., ADMINISTRATOR OF THE ESTATE OF GILBERT J. AUSTIN, DECEASED v. RICHARD C. AUSTIN.

AND

LEONARD AUSTIN, JR., ADMINISTRATOR OF THE ESTATE OF MARCIA HESS AUSTIN, DECEASED, v. RICHARD C. AUSTIN.

(Filed 6 April, 1960.)

1. Automobiles § 21, 41r— A person who lends his car to another with knowledge express or implied of defective brakes may be liable for accident resulting from brake failure.

Evidence tending to show that defendant owned an automobile equipped with hydraulic brakes, that he had the brakes checked before a long trip, that on the trip the brakes worked well at first but later the brake pedal had to be depressed excessively before the brakes applied, that he then had brake fluid put in the master cylinder, and finished the trip, that after the trip he lent the car to another without advising such other person of the trouble with the brakes and without making or having made any inspection of the brake system, and that shortly thereafter the person driving the vehicle had a fatal accident as a result of the total failure of the brakes, with further evidence that defendant understood the mechanics of hydraulic brakes, and that after the accident the master cylinder was empty of fluid and that *indicia* that the brake system was leaking around the wheels was discoverable by reasonable inspection, *is held* sufficient to raise the issue of whether defendant was negligent in turning over his car to be driven by another when he knew, or in the exercise of reasonable care, should have known that the brakes were defective, and failed to warn the prospective driver of such defect. G.S. 20-124(a).

2. Negligence § 24c—

It is not required that negligence be proven by direct evidence, but proof of facts and circumstances establishing negligence and proximate cause as the more reasonable probability is sufficient to take the issue to the jury.

AUSTIN *v.* AUSTIN.

APPEAL by plaintiff from *Campbell, J.*, November 9, 1959 Regular Civil Term, MECKLENBURG Superior Court.

Two civil actions for wrongful deaths growing out of an accident alleged to have been caused by defective brakes on defendant's automobile which he permitted Marcia Hess Austin to drive without warning her of the defects. The first action involved the injury to and death of Gilbert Austin, age one year. The second involved the death of Marcia Hess Austin, age 21. The two actions were consolidated and tried together. From judgments of nonsuit at the close of plaintiff's evidence, plaintiff appealed.

Coughenour & Coughenour, Helms, Mulliss, McMillan & Johnston, James B. McMillan, Larry J. Dagenhart for plaintiff, appellant.

Kennedy, Covington, Lobdell & Hickman, By: Hugh L. Lobdell, R. Cartwright Carmichael, Jr., for defendant, appellee.

HIGGINS, J. On the trial the plaintiff offered the adverse examination of the defendant. The following is his story in material substance: At the time of the accident, August 7, 1957, the defendant was a Staff Sergeant in the Marine Corps, stationed at Corps Headquarters, Washington, D. C. During "off hours" for five or six days each week for about two years he worked at a filling station, servicing automobiles. "My work in that filling station included putting brake fluid in cars from time to time; . . . My work did not include looking at the pipes that lead from the master cylinder to see if there might be leaks in the pipe. . . .I did know that wheel cylinders would leak. I did know that leaky wheel cylinders is one reason why the fluid level gets low in the master cylinder."

Two days before the trip to North Carolina, "I was working in the station . . . when it (the car) was gassed and put in shape for the trip to North Carolina. I checked the water . . . The mechanic checked the brakes." The vehicle was a 1951 Oldsmobile, equipped with hydraulic brakes. The defendant, speaking of hydraulic brakes, said: "It is a system in which the fluid that you put in the master cylinder is supposed to last for an indefinite time." The defendant had owned the Olds for about four months, having bought it second-hand.

In describing the trip to North Carolina, the defendant said: "We came through Danville on the way down. At or near Danville, I noticed my brake pedal was down. I mean when you put your foot on the brake pedal it would go down farther than it should . . . When I noticed the brake pedal was soft or going down, I stopped in a ser-

vice station in Danville and had the brake fluid checked. I did not have any other part of the car checked except the fluid in the master cylinder. I had the brake fluid checked because the brakes were low and naturally it came to my mind it would be low on brake fluid. When a car runs out of brake fluid, to the best of my knowledge, the brakes go out. I did not examine any of the pipes or linkage between the brake pedal and the wheels when I stopped at Danville. I had never had brake fiuid put in the car before that day. . . .This was the first time the brake pedal had gotten soft on me. I do not recall whether it was getting a little worse as I drove along. I did not make any inquiry of the mechanic at Danville or the filling station attendant as to why he thought the brake fluid was low."

"After I added brake fluid in Danville . . . I checked my brakes a time or two to see how they were operating. . . .They operated all right after we left the filling station."

The defendant drove from Danville to the home of his brother, Leonard Austin, near Salisbury. The defendant's wife and his one-year-old daughter made the trip with him. At the brother's home the two families decided to go to Charlotte. In order that the brothers might be together, it was agreed they would ride in Leonard's Chevrolet and that their wives and the little daughter and little son would ride in the defendant's Oldsmobile; and that Marcia Hess Austin would do the driving. The defendant made no disclosure to Marcia Hess Austin of the condition of his brakes or the trouble he had had with them. The trip to Charlotte was begun within less than five hours from the time brake fluid was added in Danville.

On the way to Charlotte, Leonard Austin and the defendant were in front. Both cars were proceeding south on the Rimertown Road. At a point where this road made a T intersection into the east and west Gold Hill Road, the men stopped. The approach to the intersection on the Rimertown Road is down-grade. On the south side of the Gold Hill Road, at the top of the T, there is a bank eight or ten feet high. As Marcia Hess Austin approached the intersection the automobile failed to reduce speed and crashed into the south bank of the Gold Hill Road. As she approached the intersection, she exclaimed, "The brakes are gone." In the accident Mrs. Austin was killed. The son suffered injuries from which he died two or three days later. Examination of the vehicle after the accident disclosed the master cylinder was empty. "The right rear wheel had been saturated with brake fluid, that is, the tire and inner tube," were wet. There was also evidence of partially dried brake fluid on the outside of the wheels.

Joseph P. Clark testified as an expert witness. He had spent two years in technical training study in the General Motors Institute at Flint, Michigan. He testified: "The brake system which the 1951 Olds 98 had . . . is the same on all hydraulic brakes consisting of a master cylinder . . . three flexible tubes and four wheel cylinders . . . there is a small piston or . . . actuating levers, and rubber synthetic tubes or rubber cups. It is assembled as a system which should have no air in it, it should be free from leakage at all times. . . .The principle of liquid hydraulics which makes it possible for pressure in the master cylinder to operate a lever in the wheel, . . . the pressure of all four wheels is equal; . . . the result if a hole develops in that system is the fluid will be squirted out under pressure. . . .you apply the brake until it went to the floor and you would have no brake . . . the presence of brake fluid outside of this system indicates . . . a leak in the system somewhere. If thereafter the brake fluid is replenished in the reservoir of the master cylinder, . . . The addition of the fluid would have the temporary effect to build up your brake as long as it had fluid in it. . . .If you have got a leak every time the brake is applied pressure is exerted in the system, there is going to be a loss of either minor or major part of the fluid in the system."

There was evidence the distance from Danville to Salisbury is about 100 miles. From the plaintiff's home to the scene of the accident is about five miles. The evidence does not disclose whether Mrs. Austin had occasion to apply the brakes prior to the approach to the intersection. At that time they were gone. It is not improbable, therefore, the defendant delivered to Mrs. Austin a vehicle totally without brakes.

The question is: Did the defendant breach his duty to the intestates of the plaintiff by delivering to Mrs. Austin an automobile when he knew, or by the exercise of ordinary care should have known, the brakes were defective and operation was dangerous? The defendant, while not a mechanic, had worked during "off-hours" for two years as an attendant at a filling station. On occasion he serviced automobiles by putting brake fluid in the master cylinder. Two days before the trip to North Carolina he had the brakes adjusted by a mechanic. "At or near Danville I noticed my break pedal was down. . . .When I noticed that the brake pedal was soft or going down I stopped in a service station in Danville and had brake fluid checked. I did not have any other part of the car checked . . . I had the brake fluid checked because the brakes were low and naturally it came to my mind it would be low on brake fluid. . . .When a car runs out of brake fluid, to the best of my knowledge the brakes go out. . . .I did not ex-

amine any other pipe or linkage between the brake pedal and the wheels when I stopped in Danville." Not once, either in Danville or Salisbury, or between these towns, did the defendant have the fluid lines examined. The brake trouble developed rather suddenly, yet he made no effort to remove, or even to ascertain the cause, though opportunities were numerous and immediately available. He admitted knowledge the brake fluid became low near Danville. Should he not have anticipated the same result from further use until the cause was removed? Inspection at Danville would probably have disclosed a leak in the system. Inspection at the brother's home near Salisbury would have shown both partially dried and wet brake fluid on the right rear wheel, or at least that was the condition shown by the examination after the wreck.

G.S. 20-124(a) requires that every motor vehicle operated upon the public highway of the State shall be equipped with brakes adequate to control its movement, and that such brakes shall be maintained in good working order.

No North Carolina case is found exactly in point. Resort must be had to the holdings in other jurisdictions and to the recognized rules of negligence in this State. The case of *Hudson v. Drive It Yourself, Inc.*, 236 N.C. 503, 73 S.E. 2d 4, gives the duties of a bailor for hire (not quite our case): "A bailor for hire, while not an insurer, may be liable for personal injuries to the bailee or third persons proximately resulting from the defective condition of a rented automobile while being used by the bailee for the purpose known to be intended, if the bailor was aware of the defective condition or by reasonable care and inspection should have discovered it. 131 A.L.R. 845; *Trusty v. Patterson*, 299 Pa. 469; *Ferraro v. Taylor*, 197 Minn. 5; *Milestone System, Inc., v. Gasior*, 160 Md. 131. . . . It is a breach of the bailor's duty to let out an automobile for hire for use on the highway with materially defective brakes when he is aware or by the exercise of due care by reasonable inspection should have known of such defective condition." See also *Jones v. Chevrolet Co.*, 217 N.C. 693, 9 S.E. 2d 395; *Harward v. General Motors Corp.*, 235 N.C. 88, 68 S.E. 2d 855.

In *Bush v. Middleton*, 340 P. 2d 474, the Supreme Court of Oklahoma said: "The general rule . . . appears to be that the owner of an automobile when entrusting a vehicle to a third person for operation . . . must use ordinary care to see that the automobile . . . is not in such a condition as to become dangerous . . . and his failure to use such care . . . constitutes negligence . . . rendering him liable for damages . . ."

In the case of *Nash v. Reed,* 59 S.E. 2d 259 (Ga.) the court held the complaint stated a cause of action which alleged the defendants Nash owned an automobile. Mrs. Nash could not drive. Mrs. Reed habitually drove to the grocery story for Mrs. Nash and herself. On the day of the accident Mrs. Reed was unable to stop the vehicle and was injured. The brakes were defective. This fact was not disclosed to Mrs. Reed.

The Supreme Court of Appeals of Virginia had before it the case of *Clark v. Parker,* 161 Va. 480, 171 S.E. 600, a case in some respects similar to the one now before us. The defendant, owner of the vehicle, permitted the plaintiff to drive. A collision occurred as a result of defective brakes. In the opinion the court said: "But this was a North Carolina accident, and in that State there are no degrees of negligence . . . It follows that ordinary negligence will support a recovery. It is, however, still necessary that the owner knew or should have known that it was unsafe to drive his car."

The case of *Honeycutt v. Bryan,* 240 N.C. 238, 81 S.E. 2d 653, stated the general rule: "He who puts a thing in charge of another which he knows, or in the exercise of ordinary prudence he should have known, to be dangerous, or to possess characteristics which, in the ordinary course of events, are likely to produce injury, owes a duty to such person to give reasonable warning or notice of such defects." See 61 A.L.R. 1336, *et seq;* 46 A.L.R. 2d 404, *et seq.*

"Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and . . . if the facts proved establish the more reasonable probability that the defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury, . . ." *Frazier v. Gas Co.,* 247 N.C. 256, 100 S.E. 2d 501; *Peterson v. Tidewater Power Co.,* 183 N.C. 243, 111 S.E. 8; *Fitzgerald v. R. R.,* 141 N.C. 530, 54 S.E. 391.

We express no opinion as to what, if anything, the evidence proves. All the Court decides is that the evidence in the light most favorable to the plaintiff presents an issue of fact for the jury rather than a question of law for the court. The judgment of nonsuit is

Reversed.

R. C. LYNN, ADMINISTRATOR OF THE ESTATE OF DAVID LEE LYNN, DECEASED, v. MILDRED M. CLARK, AND WILLIAM L. CLARK, ADMINISTRATOR OF CHARLES CLARK, DECEASED.

(Filed 6 April, 1960.)

1. Automobiles § 55—

Allegations that the car involved in the accident was a family purpose car owned by the driver's mother and driven by him with her consent, knowledge, and permission, are alone insufficient predicate for recovery under the family purpose doctrine.

2. Automobiles § 54d—

Allegations to the effect that the car involved in the accident was owned by the mother of the driver is insufficient to charge the mother with liability under G.S. 20-71.1, since the effect of the statute is solely to provide a ready means of proving agency and does not dispense with the necessity of allegations that the driver was the agent of the owner.

3. Pleadings § 25—

An amendment to make the allegations conform to the proof will not be allowed when the proof is insufficient predicate for liability upon the theory sought to be alleged.

4. Automobiles § 55—

Evidence that the car involved in the accident was owned by the mother of the driver, that she had permitted him to drive the car on occasions when accompanied by her, and had permitted him to drive on a private road, and that she had permitted him and a friend to use the car with the understanding that the friend alone was to drive, but that she had never permitted him to drive on the public highways, is insufficient evidence to invoke the family purpose doctrine.

5. Trial § 21½—

Where, in an action against two defendants, nonsuit is entered as to one and the trial proceeds against the other and results in a mistrial, plaintiff may not present his contention that the nonsuit entered in favor of the first defendant was erroneous by moving to set aside the ruling theretofore made.

APPEAL by plaintiff from *Farthing, J.*, October Term, 1959, of BURKE.

This is an action instituted by the plaintiff for the alleged wrongful death of his intestate, David Lee Lynn.

It is alleged in the complaint that on or about 14 June 1958, at approximately 11:15 p.m., plaintiff's intestate was riding as a guest passenger in a 1956 Chevrolet automobile owned by Mildred M. Clark, mother of Charles Clark, deceased, which automobile was being negligently, carelessly, and wrongfully operated at said time and place by Charles Clark, deceased, in a northern direction on the Old Shelby Road in southeastern Burke County, North Carolina.

The plaintiff further alleges in paragraph 5 of his complaint that Charles Clark was a minor, fifteen years of age, at the time of the wreck herein complained of, and that he was operating a 1956 Chevrolet automobile, which was owned by his mother, Mildred M. Clark, by and with her consent, knowledge, and permission; that at the time of the accident he was driving the automobile at a high and dangerous rate of speed; that he lost control of said automobile which ran off the road, turned over several times, injuring and killing both the driver, Charles Clark, and the plaintiff's intestate, David Lee Lynn.

The defendants filed a joint answer, denied the pertinent allegations in the complaint, and by way of further answer and defense they alleged, "That on the 14th day of June, 1958, Charles Clark was a minor fifteen years of age; that he did not have a driver's license and did not have the consent or permission of the defendant Mildred M. Clark to drive or operate her said automobile. On the contrary, the said Charles Clark had been admonished and strictly forbidden to operate said car * * *."

The plaintiff offered evidence tending to show that Charles Clark, deceased, was driving the car at the time of the aforesaid wreck.

The plaintiff testified, "I had seen the Clark boy prior to this night crank up his mother's car and maybe turn it around and drive it from his house to his grandfather's, which is on the same road. I had seen him drive the car several times but don't remember how frequently. On the night of this accident they were in a 1956 Chevrolet which belonged to Mildred (M. Clark)."

Shirley Lefler testified for the plaintiff, "I knew the Clark boy and the Lynn boy who were killed in the wreck. I was with them on the evening and night of June 14. I got with them about * * * 8:15. I had a date with David Lynn. They came to my house and picked me up. They were in a 1956 Chevrolet. When we left my home that night David was driving. * * * They took me home about 11:00 that night. When we arrived at my home David Lynn was driving. * * * Before the boys left my home Charles Clark was under the steering wheel, but I don't know whether he left driving or not."

On cross-examination this witness testified, "I was out with them about two hours and 45 minutes that night. All during that time David Lynn drove the car. The Clark boy at no time drove the car when I was with them."

The plaintiff called the defendant Mrs. Mildred M. Clark as a witness and she testified, "I am the mother of Charles Clark. I was the owner of this 1956 Chevrolet automobile which was involved in this wreck. * * * Charles and David had taken the car from my home that

night. On this particular night I didn't give them permission to take the car. I had company and my husband gave them permission to take it. I had given them permission before to drive the car. Charles had driven the car before. * * *"

On cross-examination Mrs. Clark testified, "He (Charles Clark) was under 16. He had no driver's license. I had never given him permission to drive this car at any time except from church on one or two occasions, when I was in the car. No, I had never given him permission to drive this car out on the road, alone or with someone else. Mr. Lynn stated that he saw him drive the car one time. That was on a private road. This car was not maintained * * * for the purpose of my minor son, Charles, driving it. I had told him he could not drive it, and admonished him not to drive it. I had let David and Charles have the car before, just the two boys with the understanding that David was to drive it, but not for Charles to drive it. I never at any time authorized Charles to drive David Lynn. Charles had driven the car by himself at times with my knowledge from our house to his grandfather's. That was on a private road."

At the close of plaintiff's evidence the defendant Mildred M. Clark moved for judgment as of nonsuit. The motion was allowed and the action dismissed as to Mildred M. Clark. The case was submitted to the jury against the defendant administrator of Charles Clark, deceased. The jury could not agree on a verdict; a juror was withdrawn and a mistrial ordered.

Thereafter, the plaintiff moved the court to set aside the judgment as of nonsuit previously entered as to the defendant Mildred M. Clark. From the denial of this motion and from the judgment as of nonsuit entered as to the defendant Mildred M. Clark, the plaintiff appeals, assigning error.

W. Harold Mitchell and John H. McMurray for plaintiff.
Patton & Ervin for defendant Mildred M. Clark.

DENNY, J. The plaintiff's first assignment of error is to the allowance of the motion of the defendant Mildred M. Clark for judgment as of nonsuit at the close of plaintiff's evidence.

In considering this assignment of error, we think it must be determined whether or not the allegations of the complaint, together with the evidence offered in support thereof, are sufficient to take the case to the jury without invoking the provisions of G.S. 20-71.1.

The complaint does not allege that Charles Clark was the agent, servant, or employee of the owner of the car involved in the fatal

accident, unless it does so in paragraph 7 of the complaint where it is alleged, "that said car was a 'family purpose' car."

In our opinion, the mere allegation that a car owned by a defendant is a family purpose car is an insufficient allegation upon which to recover under the family purpose doctrine.

Ordinarily, a cause of action based solely on the family purpose doctrine is stated by allegations to the effect that at the time of the accident the operator was a member of his family or household and was living at home with the defendant; that the automobile involved in the accident was a family car and was owned, provided, and maintained for the general use, pleasure, and convenience of the family, and was being so used by a member of the family at the time of the accident with the consent, knowledge, and approval of the owner of the car. 5A Am. Jur., Automobiles and Highway Traffic, section 893, at page 797. Allegations which, if proven, are sufficient to invoke the family purpose doctrine, are sufficient to establish agency. The very genesis of the family purpose doctrine is agency. *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603. We hold that the allegations of the plaintiff's complaint are insufficient to invoke such doctrine.

The only other allegation upon which the plaintiff relies for the establishment of agency is as follows: "That plaintiff is informed, believes and alleges that Charles Clark was a minor of the age of fifteen (15) at the time of the wreck herein complained of and that he was operating a 1956 Chevrolet, which was owned by his mother, Mildred M. Clark, by and with her consent, knowledge, and permission * * *."

We have held in numerous cases that under the provisions of G.S. 20-71.1, proof or admission of ownership by the defendant of the motor vehicle involved in an accident is sufficient to make out a *prima facie* case of agency which will support, but not compel, a verdict against the owner under the doctrine of *respondeat superior* for damages proximately caused by the negligence of the nonowner operator of the motor vehicle. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309; *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767; *Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644; *Elliott v. Killian,* 242 N.C. 471, 87 S.E. 2d 903; *Kellogg v. Thomas,* 244 N.C. 722, 94 S.E. 2d 903; *Scott v. Lee,* 245 N.C. 68, 95 S.E. 2d 89.

The statute G.S. 20-71.1, however, presupposes a cause of action based on allegations of agency and of actionable negligence. "The statute (G.S. 20-71.1) was designed to create a rule of evidence. Its purpose is to establish ready means of proving agency in any case where it is charged that negligence of a nonowner operator causes damage

to the property or injury to the person of another * * *. It does not have, and was not intended to have, any other or further force or effect." *Hartley v. Smith, supra.*

Therefore, if the complaint in such cases fails to allege agency or actionable negligence, it is demurrable and is insufficient to support a verdict for damages against the owner of the vehicle. *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765; *Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462.

In *Parker v. Underwood, supra,* the plaintiff alleged, " * * * that the collision occurred at the intersection of Hyde Park Avenue * * * and Liberty Street * * * in the city of Durham, North Carolina; that at the time of the collision plaintiff's automobile was being operated by his son, in an easterly direction along Liberty Street, toward the said intersection, and the truck of defendant Thomas Hugh Underwood was being operated in a southerly direction along Hyde Park Avenue toward the said intersection, by defendant James R. Underwood, eighteen-year-old son of defendant Thomas Hugh Underwood, 'with the express consent, knowledge and authority of the defendant Thomas Hugh Underwood'; and that the collision and resultant damage to plaintiff's automobile was caused by various acts of negligence of defendant James R. Underwood 'and as the sole and proximate results thereof.' "

The defendant Thomas Hugh Underwood demurred to the complaint, for that the complaint did not allege a cause of action against him, in that "there is no allegation that connects the driver of the motor vehicle in question at the time of the collision in question with said Thomas Hugh Underwood as servant, agent or employee acting within the scope of his employment." The demurrer was sustained in the lower court and affirmed upon appeal to this Court.

The plaintiff is relying on *Hartley v. Smith, supra,* to take his case to the jury, although he states in his brief that his allegations are sufficient against the defendant owner, Mildred M. Clark, to take the case to the jury without the benefit of G.S. 20-71.1.

An examination of the allegations of the complaint in the case of *Hartley v. Smith, supra,* and the admissions in the answer of the defendant owner of the motor vehicle involved therein, are so different from the allegations in the complaint and answer in the present case that the *Hartley* case is not controlling in this case.

The plaintiff herein filed a motion in this Court to amend his pleadings by adding in paragraph 5 of the complaint, after the clause, " * * * by and with her consent, knowledge, and permission," the words, "and as her agent and in furtherance of a family purpose." It

is stated in the motion that the case was tried below on the family purpose theory. In view of the conclusion we have reached with respect to the allegations of the complaint, we are of the opinion that this motion should be denied.

If it be conceded (which it is not) that the allegations of the complaint are sufficient to support a verdict, if supported by competent evidence, without the aid of G.S. 20-71.1, as contended by the plaintiff, in our opinion the plaintiff's evidence offered for the purpose of invoking the family purpose doctrine was insufficient to carry the case to the jury on that theory.

After the allowance of the motion of the defendant Mildred M. Clark for judgment as of nonsuit at the close of plaintiff's evidence, and after plaintiff's cause of action against the defendant William L. Clark, administrator of Charles Clark, deceased, was submitted to the jury and a mistrial ordered, the plaintiff moved to set aside the ruling theretofore made sustaining the motion of Mildred M. Clark for judgment as of nonsuit. The court denied the motion and the defendant assigns the denial thereof as error.

It is common practice in the trial of cases involving a nonowner operator of a motor vehicle that when there is an involuntary nonsuit as to the owner, for the plaintiff to take a voluntary nonsuit as to the defendant operator. However, when a plaintiff elects to go to trial against the operator of the motor vehicle, after the owner has procured a nonsuit, the trial judge is not required to reverse his ruling on the motion to nonsuit because there has been a mistrial as to the remaining defendant.

In our opinion, the rulings of the court below with respect to the judgment as of nonsuit of Mildred M. Clark should be upheld, and it is so ordered.

Affirmed.

LILLIE HILL; MARY FOSTER CHRISTINE WIGGINS; MRS. ZANNER SHIVER; HAYWOOD PHILYAW; HARPER PHILYAW; GRACE PHILYAW PHILLIPS; EDITH JENKINS AND PEGGY PHILYAW, BY HER NEXT FRIEND, LILLIE HILL v. LOUISE J. CAHOON, ADMINISTRATRIX OF THE ESTATE OF THELMA PHILYAW JONES; FIDELITY & CASUALTY COMPANY OF NEW YORK; U. S. FIDELITY & GUARANTY COMPANY.

(Filed 6 April, 1960.)

1. Master and Servant §§ 76, 82—

While the Industrial Commission has jurisdiction to amend its award in regard to persons entitled to receive compensation awarded by it, it has no jurisdiction to enter a judgment in favor of a party to recover compensation theretofore paid to another, but the Superior Court has jurisdiction to determine conflicting claims of persons in regard to compensation which has already been paid.

2. Master and Servant § 76—

Where a widow has been properly awarded compensation as the sole dependent of her deceased husband, her remarriage does not forfeit her right to receive further installments.

3. Same—

Where a widow properly awarded compensation as the sole dependent of her deceased husband dies before all the installments of compensation have been paid, the commuted value of such future installments is properly paid to her personal representative, and the next of kin of the deceased employee, who are not dependents, are not entitled thereto. G.S. 97-38(1).

APPEAL by plaintiffs from *Frizzelle, J.*, 12 October Term, 1959, of LENOIR.

This is a civil action instituted by the alleged heirs and next of kin of one Woodrow Philyaw.

The facts pertinent to an understanding and disposition of this appeal are as follows:

1. Woodrow Philyaw was formerly a resident and citizen of Lenoir County, North Carolina, and while employed by the DuBose Construction Company of Kinston was killed by accident on 10 June 1954. The DuBose Construction Company and its insurance carrier, U. S. Fidelity & Guaranty Company admitted liability under the provisions of our Workmen's Compensation Act. Whereupon, the North Carolina Industrial Commission (hereinafter called Commission) awarded compensation for the death of Woodrow Philyaw to his widow, Thelma Philyaw, as his sole dependent (no children having been born of the marriage).

2. Thelma Philyaw married David Rodolph Jones on 2 January 1957. She died thereafter on 10 April 1957.

3. The insurance carrier of the DuBose Construction Company paid the instalments pursuant to the award of the Commission to Thelma Philyaw until her death and thereafter paid the commuted balance of $2,440.13 to the administratrix of the estate of Thelma Philyaw Jones, the defendant Louise J. Cahoon. The defendant Fidelity & Casualty Company of New York executed the required bond for the administratrix of the estate of Thelma Philyaw Jones.

4. The administratrix of the estate of Thelma Philyaw Jones had in her hands, in cash, as of 9 February 1959, the sum of $2,198.58.

5. The plaintiffs seek to recover the sum of $2,198.58 from the administratrix and the difference between the above amount and the original sum of $2,440.13, paid to her by the insurance carrier of DuBose Construction Company, from the administratrix and her bonding company. They also seek to recover the sums paid to Thelma Philyaw Jones from the date of her marriage to David Rodolph Jones until her death, from the defendant U. S. Fidelity & Guaranty Company, the insurance carrier of the DuBose Construction Company, on the ground that, said payments were erroneously and illegally made after her remarriage; that upon her remarriage she ceased to be the widow of Woodrow Philyaw and that these plaintiffs are entitled to the balance due under the Commission's award after her remarriage on 2 January 1957.

The U. S. Fidelity & Guaranty Company demurred to the plaintiffs' complaint on several grounds, among them being (1) that it appears from the face of the complaint that the plaintiffs are seeking to recover from the defendants funds paid under the provisions of the Workmen's Compensation Act, and the Superior Court has no jurisdiction of the subject of said action, in that the Commission has exclusive original jurisdiction of all questions arising under the provisions of said Act; (2) that the complaint does not state facts sufficient to constitute a cause of action; and (3) that there is a misjoinder of causes of action.

Louise J. Cahoon and Fidelity & Casualty Company of New York demurred to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action against these demurring defendants. Both demurrers were sustained, and the plaintiffs appeal, assigning error.

Charles L. Abernethy, Jr., for plaintiff appellants.

Jones, Reed & Griffin for defendants Louise J. Cahoon and Fidelity & Casualty Company of New York, appellees.

Whitaker & Jeffress for defendant U. S. Fidelity & Casualty Company, appellee.

DENNY, J. The questions presented for determination on this appeal are: (1) Did the Superior Court have jurisdiction of the subject matter of this action? (2) Does a widow, upon her remarriage, forfeit her right to receive future compensation under an award of the Commission adjudging her to be the sole dependent and entitled to receive the full compensation awarded by reason of the death of her husband? (3) If a widow, who has been adjudged the sole dependent of her husband pursuant to the provisions of our Workmen's Compensation Act, dies before all the compensation awarded has been paid, is her estate entitled to the commuted balance or should such balance be paid to the next of kin of the deceased husband?

With respect to jurisdiction, it is clear that this action was instituted in the Superior Court by the plaintiffs to recover funds which they allege were erroneously and wrongfully paid by the defendant U. S. Fidelity & Guaranty Company, the insurance carrier of the DuBose Construction Company, to Thelma Philyaw Jones after her remarriage, and after her death the commuted balance of the compensation awarded to Louise J. Cahoon, the personal representative of the estate of Thelma Philyaw Jones.

In the case of *Green v. Briley*, 242 N.C. 196, 87 S.E. 2d 213, which was a proceeding before the Commission, evidence was admitted which clearly established the fact that the mother and brother of the deceased employee had knowingly and falsely testified in a previous hearing before the Commission that the deceased employee had never married and that he had no children. Evidence was further offered to the effect that his mother was partly dependent upon him. The insurance carrier of the employer paid the commuted value of the award to the mother of the deceased. The above proceeding was begun and thereafter heard before the Commission which found as a fact that the plaintiff, Fannie Ellis Green, was the wife of the deceased employee and awarded judgment in her favor against Hattie Green Young, the mother of the deceased employee. The Commission further found that the defendant employer and its insurance carrier had acted in good faith in paying the award of the Commission and that they were discharged from any further liability. G.S. 97-48 (c). On appeal to the Superior Court the rulings of the Commission were

affirmed. The plaintiff appealed to this Court. We approved the ruling of the court below insofar as it relieved the defendants of further liability but set aside the judgment over against Hattie Green Young in favor of Fannie Green, the plaintiff. We held that it was beyond the jurisdictional power of the Commission to grant such relief; that plaintiff's right to pursue her remedies against Hattie Green Young, if so advised, was by independent action in the Superior Court. On authority of that decision, we hold that the Superior Court did have jurisdiction of the subject matter of this action.

On the second question posed, the weight of authority is to the effect that a widow, upon her remarriage, does not forfeit her right to receive compensation awarded her pursuant to a workmen's compensation act in the absence of a statutory provision to the contrary. *Hansen v. Brann & Stewart Co.*, 90 N.J.L. 444, 103 A. 696; *Adleman v. Ocean Accident & Guarantee Corp.*, 130 Md. 572, 101 A. 529, Ann. Cas. 1918B 730; *Andersen-Nelson v. L. G. Everist, Inc.*, 65 S.D. 568, 276 N.W. 257; *Britten v. Berger*, 18 N.J. Misc. 215, 12 A. 2d 875; 58 Am. Jur., Workmen's Compensation, section 187, page 701; Anno: 72 A.L.R. 1325; 99 C.J.S., Workmen's Compensation, section 147, page 511, *et seq.* Therefore, since there is no provision in our Workmen's Compensation Act contrary to the general rule in this respect, the answer to the second question posed must be answered in the negative.

On the third and final question presented, the workmen's compensation statutes of the different states differ so materially, no general rule has evolved with respect to survival of the right to compensation upon the death of the person entitled to the award. Anno: — Workmen's Compensation — Survival, 87 A.L.R. 864. Consequently, our decision must be determined by the construction of our own statutes bearing thereon.

G.S. 97-38 (1) of our Workmen's Compensation Act provides: "Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable."

G.S. 97-39 provides, among other things, the following: "The widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled to receive the benefits of this article *for the full period specified therein.*" (Emphasis added)

In *Queen v. Fibre Co.*, 203 N.C. 94, 164 S.E. 752, J. Coleman Queen,

an employee of the Champion Fibre Company at Canton, North Carolina, lost his life while in the discharge of his duties as such employee. Thereafter, Roxana Henson Queen, his widow, found by the Commission to be his sole dependent, was awarded compensation at the rate of $13.41 per week for a period of 350 weeks. The original record in this case reveals that after the widow had drawn 56 instalments pursuant to the award, she died on 6 March 1931. Her duly appointed administrator was made a party to the proceeding before the Commission, and the Commission held the administrator of the deceased widow was entitled to recover of the Champion Fibre Company and its insurance carrier the weekly payments for the remainder of the 350 weeks. An appeal was taken to the Superior Court, which court affirmed the order of the Commission. The defendants appealed to this Court. This Court held that, where an employee lost his life in the course of his employment and thereafter an award was made by the Commission to his widow, as his sole dependent, and thereafter the widow dies before all the weekly payments have been made, her administrator is entitled to collect the remaining unpaid benefits.

Likewise, in the case of *Inman v. Meares,* 247 N.C. 661, 101 S.E. 2d 692, Howard Inman, while in the discharge of his duties as an employee of the defendant, was temporarily totally disabled by reason of an injury from 18 October 1954 until 13 June 1955, at which time he returned to work for the defendant employer. This employee died on 17 June 1955 from causes not connected with his injuries. Claim had been filed with the Commission for compensation but no compensation had been awarded at the time of his death. The question was then raised as to whether or not his personal representative was entitled to collect the amount of the award entered thereafter. The Commission held that he was so entitled, and upon appeal to the Superior Court the ruling of the Commission was affirmed. Upon appeal to this Court we affirmed the ruling below.

Since our General Assembly has provided in G.S. 97-38 (1) that, "Persons wholly dependent for support upon the earnings of the deceased employee *at the time of the accident shall be entitled to receive the entire compensation,*" and has not seen fit to place any limitation thereon by way of forfeiture if such beneficiary remarries or dies before the award is paid in full, we hold that the plaintiffs herein have alleged no cause of action against any of these defendants. (Emphasis added)

Therefore, the demurrers interposed in the court below were properly sustained.

Affirmed.

CALVIN GRADY MEECE v. JOHN HENRY DICKSON, JR., (AND C. WALTER ALLEN APPOINTED GUARDIAN AD LITEM BY THE COURT).

(Filed 6 April, 1960.)

1. Automobiles § 9—

To "park" means something more than a temporary or momentary stoppage on the highway for a necessary purpose, and neither G.S. 20-161 nor G.S. 20-129 are applicable to a mere temporary stop for a necessary purpose when there is no intent to break the continuity of travel.

2. Automobiles § 41e—

Where plaintiff's own evidence discloses that defendant's vehicle was stopped on a paved highway in its proper lane of travel because it had become disabled, and had been there for only a few minutes before plaintiff ran into its rear, and that the section of the highway was straight for more than four-tenths of a mile, nonsuit is proper for failure of evidence of negligence on the part of defendant in so stopping on the highway.

3. Evidence § 20: Pleadings § 29—

Where plaintiff offers in evidence allegations of the answer averring that the defendant's automobile was stopped in its proper lane of travel and had been in a disabled condition for several minutes prior to the time in question, plaintiff is bound by such averments which he himself has introduced in evidence.

APPEAL by plaintiff from *Morris, J.*, at September 1959 Civil Term, of BUNCOMBE.

Civil action to recover of defendant for personal injuries allegedly sustained by reason of actionable negligence of defendant in an automobile collision on Sweeten Creek Road in Buncombe County, North Carolina, when automobile of plaintiff came in contact with rear of automobile of defendant.

Plaintiff alleges in his complaint that defendant "had said automobile on said highway in the right-hand lane and travel portion of said highway in the nighttime without any lights at all on said motor vehicle"; that upon information and belief "defendant had said motor vehicle upon said highway" and "stopped on said highway * * * for a period of at least 10 or 15 minutes * * * immediately before the collision"; that the said defendant * * * "had failed to display red flares or lanterns at the rear of said motor vehicle and * * * to make any signals and give any warning to the other vehicles traveling upon said highway"; in all of which respects defendant was negligent—proximately causing injury and damage to plaintiff.

On the other hand, defendant, answering, denies that he was negligent in any respect, and by way of first further answer and defense

alleges in pertinent part * * * "that the defendant was driving said automobile carefully and prudently, at a reasonable rate of speed on his own right-hand side of the road, which was the east lane of the two lanes of traffic; that an animal ran across the road in front of the defendant, and in an effort to avoid striking the animal, the defendant applied his brakes and stopped the forward motion of his automobile, and also caused the motor of said automobile to stop or choke down; that although said automobile had been running satisfactorily up until this time and place, the car refused to start, although the signal lights of said automobile would burn; that said automobile was stopped in the right lane for northward traffic, or the east lane; that the defendant stationed two former passengers to the rear of said car to warn traffic traveling north of said car, and one former passenger to the south to warn traffic approaching from the north, traveling southwardly; that the said car driven by the defendant had been in this disabled condition for several minutes * * *" etc., describing in detail his primary defense.

And defendant also pleaded, briefly stated, insulated negligence, and contributory negligence on part of plaintiff.

Upon the trial in Superior Court plaintiff offered in evidence among other things not pertinent to questions raised on this appeal (1) paragraph 5 of the complaint which reads as follows: "That on said day at about 8:15 o'clock P. M., the said defendant had said automobile upon one of the public highways of the State of North Carolina, particularly upon U. S. Highway No. 25-A, which highway is also a public highway of the State of North Carolina and commonly known as Sweeten Creek Road, in Buncombe County, North Carolina," and the corresponding paragraph 5 of the answer which reads as follows: "That the allegations of paragraph 5 are admitted."

(2) "That part of the defendant's further answer and defense reading as follows: 'That at or about 8:15 P. M. on October 23, 1958, the defendant was driving a 1947 Chevrolet four-door sedan northward on U. S. Highway 25-A, which is commonly called Sweeten Creek Road, in Buncombe County, south of Asheville.' "

(3) "And that part of defendant's further answer and defense which reads as follows: 'That said automobile was stopped in the right lane for northbound traffic or the east lane.' "

(4) "And that part of the further answer and defense which reads as follows: 'That the said car driven by the defendant had been in this disabled condition for several minutes.' "

And the parties stipulated "that the automobile alleged to have

been operated by the defendant John Henry Dickson, Jr., was owned by John Henry Dickson, Sr."

And upon the trial plaintiff, testifying as witness for himself, gave substantially this narrative: "On October 23, 1958, I was involved in a collision with John Henry Dickson, Jr. * * * on Highway 25-A, commonly known as Sweeten Creek Road * * * just north of Edgewood Road * * * approximately a quarter of a mile south of the point of the accident * * * I was traveling north in the direction of Asheville. The collision occurred about 8:15 at night.

"With reference to curves or hills the highway has a curve in it here. You start downgrade in here and up around over, this is a fill over here. With reference to hills there is a light dip in the road right here. You start down a grade like this and goes up just like this. With reference to the dip the Dickson car was approximately 30 feet here. After I start up towards Asheville, north 30 feet from the dip, he was parked from this curve approximately 60 or 75 feet. The elevation of the hill toward Hendersonville, from the scene of the collision, or from the dip I will say, is about 25 degrees, something like that. The elevation of the highway from the dip as the highway proceeds toward Asheville, north, I would say is approximately 25 or 30 degrees. * * * The shoulder on the road immediately beside where the Dickson car was parked * * * was about 10 feet wide. * * * in this dip there is a big wide place 30 or 40 feet, a lot of times see tractors and trailers parked there. The pull-off area there, I would say is about 40 feet wide. From where the Dickson car was parked, that wide pull-off place, I would say was about 30 feet along here, back, downgrade; * * * it is upgrade from here to this curve. The shoulder of the highway from the point where the Dickson car was parked south to the wide pull-off area is about ten feet * * * and also all along the road where there is plenty of shoulder. I observed how wide the shoulder was north of the Dickson car * * * it was approximately ten feet wide all down through here * * *."

Then in answer to question as to when was the first time that he observed the Dickson car, plaintiff testified, briefly stated, "I had gone down the dip and started up the rise before I even seen it, about 30 feet from it * * * my headlights picked him up at that time." And plaintiff, continuing, said: "He didn't have any lights on his car. No lights at all. I never saw any flagman or no warnings of no kind. I have an opinion * * * as to what speed I was traveling before and at the moment of the collision with the Dickson car— about 50 miles per hour * * *."

Then under cross-examination plaintiff testified in pertinent part:

"I am very familiar with the Sweeten Creek Road. I have traveled it practically every day for five or six years. I knew the area which I was traveling at the time of this accident. I was driving a 1957 Chevrolet station wagon; that car was in good condition. It had good brakes. It had good headlights on it."

And plaintiff continued: "* * * I was traveling north * * * the road south of the point of collision is unobstructed for .3 of a mile, and toward * * * the north I would say .1 of a mile. For all intents and purposes that road is not level. It is straight * * * The way I was traveling from the south to the north I was going slightly downgrade — I estimate the grade to be 25 degrees * * * ."

And plaintiff concluded his testimony by saying: "As I drove down the highway that night * * * I did not see the flagman to the rear of the Dickson car. I did not cut my wheels in an attempt to pass to the left. I did not blow my horn. I did not apply my brakes."

At the conclusion of plaintiff's evidence defendant moved for judgment as of nonsuit, and the court being of opinion that same should be allowed entered judgment that plaintiff's action be, and the same was "nonsuited."

To the entry of judgment in accordance therewith plaintiff excepted and gave notice of appeal, and appeals to Supreme Court and assigns error.

James W. Regan, Oscar Stanton for plaintiff, appellant.
Meekins, Packer & Roberts, for defendant, appellee.

WINBORNE, C. J. Plaintiff assigns as error the ruling of the trial court in granting defendant's motion for judgment as of nonsuit.

In this connection it is appropriate to refer to two statutes, G.S. 20-161 and G.S. 20-134, each in pertinent part pertaining to the operation of motor vehicles upon the highways in this State.

G.S. 20-161 declares "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles there-

on, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in both directions upon such highway;

"Provided further (not pertinent here) * * *

"Provided further in the event that a truck, trailer or semi-trailer be disabled upon the highway that the driver of such vehicle shall display, not less than two hundred feet in the front and rear of such vehicle, a warning signal; that during the hours from sunup to sundown a red flag shall be displayed, and after sundown red flares or lanterns. These warning signals shall be displayed as long as such vehicle is disabled upon the highways."

(b) Not pertinent here.

And (c) declares that "*The provisions of this section* shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such an extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position." (Emphasis supplied)

To "park" means something more than a mere temporary or momentary stoppage on the highway for a necessary purpose. *Stallings v. Transport Co.*, 210 N.C. 201, 185 S.E. 643. Hence in *Skinner v. Evans*, 243 N.C. 760, 92 S.E. 2d 209, the Court held that the temporary stopping of the automobile upon the highway under the circumstances there portrayed was not violative of the provisions of G.S. 20-161(a) as amended pertaining to stopping on a highway. See among other cases *Peoples v. Fulk*, 220 N.C. 635, 18 S.E. 2d 147; *Leary v. Bus Corp.*, 220 N.C. 745, 18 S.E. 2d 426; *Pike v. Seymour*, 222 N.C. 42, 21 S.E. 2d 884; *Morgan v. Coach Co.*, 225 N.C. 668, 36 S.E. 2d 263; *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845.

Moreover, G.S. 20-161 has no reference to a mere temporary stop for a necessary purpose where there is no intent to break the continuity of travel. *Royal v. McClure*, 244 N.C. 186, 92 S.E. 2d 762. See also *Basnight v. Wilson*, 245 N.C. 548, 96 S.E. 2d 699.

Indeed plaintiff offered in evidence an uncontradicted extrajudicial declaration of defendant that the defendant's automobile was on the highway in disabled condition. In so doing plaintiff is bound thereby. *Sowers v. Marley*, 235 N.C. 607, 70 S.E. 2d 670.

Furthermore, G.S. 20-134 provides that "Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended during the times mentioned in G.S. 20-129, there shall be displayed upon such vehicle one or more lamps projecting a white light under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, and projecting a red light visible under

like conditions upon a distance of five hundred feet to the rear * * *." Thus it is seen that this section is inapplicable unless there be a parking in violation of G.S. 20-161.

In the light of the pleadings and the evidence offered by plaintiff it would seem that plaintiff exculpates defendant from negligence in respect of these statutes.

It appears that defendant's automobile was in disabled condition and was on the highway for only a few minutes before plaintiff ran head-on into the rear of it on a section of highway susceptible of being characterized as a straightaway, — that is straight for more than four-tenths of a mile.

The judgment is

Affirmed.

MARGARET JOLLY DRUM, JOHNNIE A. SHELTON, BY HER NEXT FRIEND, FLOYD K. DRUM, AND FLOYD K. DRUM, INDIVIDUALLY, v. JOHN BISANER, AND JAMES BISANER, T/A J. & J. ELECTRIC COMPANY.

(Filed 6 April, 1960.)

1. Appeal and Error § 51—

Upon appeal from denial of motions for judgment of involuntary nonsuit only the motion made at the close of all the evidence is to be considered. G.S. 1-183.

2. Negligence § 24a—

On motion to nonsuit in a negligence action the evidence must be considered in the light most favorable to plaintiffs and the motion overruled if the evidence, so considered, tends to support all essentials of actionable negligence.

3. Statutes § 3—

On July 13, 1957 the N. C. Building Code of 1953 had the force of law by virtue of G.S. 143-138(f).

4. Negligence § 1—

The violation of a statute which imposes upon a person a specific duty for the protection of others is negligence *per se*.

5. Electricity § 7—

The violation of the provisions of an electrical code in regard to the installation of electric wires, conduits, switches and terminal fittings, is negligence *per se*, the code having the force of law by virtue of statute.

6. Negligence § 24c—

Direct evidence of negligence is not required, but negligence may be

inferred from the facts and attendant circumstances, and if the facts proven establish negligence and proximate cause as the more reasonable probability nonsuit cannot be entered notwithstanding that the possibility of accident may also arise on the evidence.

7. Same—

Whether circumstantial evidence of negligence is sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts must be determined in relation to the attendant facts and circumstances of each case.

7. Electricity § 7— Evidence held sufficient to support inference that fire resulted from negligent installation of electrical equipment.

Plaintiffs' evidence tending to show that defendants, in installing an exhaust fan in plaintiffs' restaurant, violated the requirements of the applicable building code by failing to protect the non-metallic cable entering the metal electrical tubing at the fan housing with bushing to keep the insulated conductors from rubbing against the metal, that there was a space of about four feet between the ceiling of the kitchen and the rafters of the roof where the fan was installed, that the fan ran at irregular speeds, resulting in vibration, together with circumstantial evidence supporting the inference that the fire originated in the area of the fan housing and that a short-circuit occurred where the non-metallic cable entered the electrical metal tubing and that a fire broke out at this place, *is held* sufficient to be submitted to the jury on the question of whether the fire was proximately caused by defendants' negligence, nor is this result altered by testimony that the fan continued to run after the short-circuit, since the fan would continue to operate for a short period of its own momentum after the current had been cut off by the short-circuit.

APPEAL by defendants from *Crissman, J.*, August Civil Term, 1959, of GASTON.

Civil action to recover damages resulting from a fire allegedly caused by defendants' negligent installation of a fan over the roof of the kitchen of plaintiffs' restaurant.

Evidence was offered by both plaintiffs and defendants.

The court submitted, and the jury answered, these issues: "1. Was the property of the plaintiffs damaged by the negligence of the defendants, as alleged in the Complaint? ANSWER: Yes. 2. What damages, if any, are the plaintiffs entitled to recover of the defendants? ANSWER: $3,000.00."

Judgment for plaintiffs, in accordance with the verdict, was entered. Defendants excepted and appealed, assigning as error the denial of their motions for judgment of involuntary nonsuit.

Hollowell & Stott and Hugh W. Johnston for plaintiffs, appellees.
Mullen, Holland & Cooke for defendants, appellants.

BOBBITT, J. The only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. G.S. 1-183; *Spaugh v. Winston-Salem,* 249 N.C. 194, 105 S.E. 2d 610.

The question of law presented is whether the evidence, when considered in the light most favorable to plaintiffs, tends to support all essentials of actionable negligence. If so, it was sufficient for submission to the jury. *Lake v. Express, Inc.,* 249 N.C. 410, 106 S.E. 2d 518; *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406.

Uncontradicted evidence tended to show:

1. On Saturday, July 13, 1957, defendants installed an exhaust fan in plaintiffs' restaurant, "The New South Restaurant," located about two miles west of Gastonia on U. S. #29. The installation was made by defendant John Bisaner, assisted by an employee.

2. The exhaust fan was installed in the roof of the kitchen over the hood of the stove, to draw out the heat and fumes. A piece of one-half inch electrical metal tubing was connected by a lock nut to a disconnect switch located on the fan housing about twelve to eighteen inches above the roof. This electrical metal tubing, approximately two feet long, extended downward through a hole in the roof into the space of four feet between the ceiling of the kitchen and the rafters of the roof. An insulated #12 wire with two conductors, one for current and one for ground, was connected to the disconnect switch and run down through the electrical metal tubing to a toggle switch located on the kitchen wall. The wiring proceeded from the toggle switch down into the basement where it connected into a 30-amp. Square D fuse box.

3. Installation of the fan was completed about 8:20 a.m. and the fan was running when John Bisaner and his employee left the restaurant. The fan ran on 220 volts and turned 1140 revolutions per minute.

4. About 12:30 p.m., John Bisaner returned to the restaurant and repaired a wire leading to a switch that controlled the operation of the dough mixer.

Stinson, plaintiffs' cook, testified: "It (the fan) was running real fast; it was running awful fast; and after a while, it seemed like it would slow up a little bit. And after it slowed up, seemed like it'd jump back on running fast. . . . he (Mr. Bisaner) told me, said, 'I'll guarantee you'll be cool over the week-end, and I will be back Monday and complete the fan for you good.' "

According to plaintiffs' evidence: The gas stove was cut off at 2:00 p.m. About 3:30 p.m. when Stinson and Shelton (who worked "out front") were watching a ball game on television, a black streak

(jumping) came across the television screen. While Shelton was trying to fix the television, "there was a big pop in the kitchen." This is the substance of Stinson's testimony as to what he saw when he went into the kitchen: The fan was still running and jumping. Sparks were flying all over the fan and all over the kitchen. Fire was coming out of the hood (over the stove) into the kitchen. No other electrical equipment was operating.

As to conditions after the fire, there was evidence tending to show: The hood had dropped partly over the stove. The top of the hood was smoked black but underneath there was no smoke or fire damage. The most extensive damage was *over* the mixer and stove and about eight feet to "the side of the petition *(sic)* that goes into the kitchen." The sheathing and boards of the roof were burned black but not burned through.

Upon the foregoing evidence, we think it was permissible for the jury to infer that the fire originated in the area between the top of the hood and the fan.

Examination of the wiring, after the fire, disclosed that one of the conductors on the fan circuit had parted, leaving a "bead" on the end where it parted, rounded off as if melted. There was evidence that the wire was in two and beaded at the point "where the non-metallic cable entered the electrical metal tubing at the fan housing." There was expert testimony that the heat of the fire would not be intense enough to melt copper and that the bead was produced by a short-circuit within the wire. There was evidence that the short-circuit occurred at the lower end of the electrical metal tubing and that examination of all other wiring in the area failed to disclose that any other wire had parted or beaded.

To establish defendants' alleged negligence, plaintiffs offered evidence that there was no protective covering, such as a bushing, on the lower end of the electrical metal tubing, to protect the insulated conductors from rubbing against the metal. Indeed, John Bisaner's testimony contains an admission that this was true.

Plaintiffs offered in evidence the 1956 National Electrical Code. Plaintiffs had pleaded, *inter alia*, the provisions quoted below:

Article 300, section 3008: "Except as provided in section 3009, a box or terminal fitting having a separately bushed hole for each conductor shall be used wherever a change is made from . . . electrical metallic tubing . . . to open wiring . . ."

Article 300, section 3009: "A bushing may be used in lieu of a box or terminal fitting at ends of conduit or electrical metallic tubing where conductors leave the conduit or tubing behind a switchboard,

or where more than 4 conductors leave the conduit or tubing (under conditions not relevant here)."

The North Carolina Building Code of 1953, Article XVI, in pertinent part, provides: "Except as may be otherwise provided by rules promulgated by the Building Code Council, the electrical systems of a building or structure shall be installed in conformity with the 'National Electrical Code,' as approved by the American Standards Association and as filed in the office of the Secretary of State. The electric wiring of houses or buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as National Board of Fire Underwriters."

G.S. 143-138(a), effective July 1, 1957, authorized the Building Code Council to prepare and adopt a "North Carolina State Building Code." G.S. 143-138(f), effective July 1, 1957, provides: "Effect upon Existing Laws—Until such time as the North Carolina State Building Code has been legally adopted by the Building Code Council pursuant to this article, the North Carolina Building Code adopted by the Council and the Commissioner of Insurance in 1953 shall remain in full force and effect. Such Code is hereby ratified and adopted."

Thus, on July 13, 1957, the date of the fire, the North Carolina Building Code of 1953, by virtue of G.S. 143-138(f), had the force of law. See *Lutz Industries, Inc., v. Dixie Home Stores,* 242 N.C. 332, 339-341, 88 S.E. 2d 333, and *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189.

By adopting the North Carolina Building Code of 1953, the General Assembly "specifically set the standard of care in respect to the installing of the electrical system of a building and the electric wiring of buildings for lighting or for other purposes, and that is that the electrical system of a building shall be installed in conformity with the 'National Electrical Code' as approved by the American Standards Association and the electric wiring of buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as National Board of Fire Underwriters, . . ." *Lutz Industries, Inc., v. Dixie Home Stores, supra,* discussing the adoption of the North Carolina Building Code of 1936 by Chapter 280, Session Laws of 1941.

"It is well settled law in this jurisdiction, that when a statute imposes upon a person a specific duty for the protection of others, that a violation of such statute is negligence *per se.*" *Lutz Industries, Inc. v. Dixie Home Stores, supra.* Since Article 300, sections 3008-3009, of the National Electrical Code, for the reasons stated, had the force and effect of a statute, the failure to use a box or terminal fitting or bushing where the conductors left the electrical metal tubing was

negligence *per se*. Moreover, an expert witness testified: "Ordinarily, the end of a piece of electrical metal tubing of that kind would have a bushing on it."

There was evidence, that, due to excessive heat in the attic during the summer, the wood in the attic was dry, and that the fire occurred on a hot July day. Too, it may be inferred that vibrations of the electrical metal tubing were caused by the speed and irregular operation (jumping) of the fan.

Was there sufficient evidence to support a finding that such negligence of defendants proximately caused the fire? As to this, an expert witness, based upon facts in evidence, testified that in his opinion the vibrations of the fan and of the electrical metal tubing caused the insulation on the open wiring as it left the lower end of the electrical metal tubing to wear or rub off from contact with the metal of the tubing; that this caused the short-circuit; and that the short-circuit would generate sufficient heat to ignite combustible material.

"It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and it is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." *Hoke, J. (later C.J.)*, in *Fitzgerald v. R. R.*, 141 N.C. 530, 534, 54 S.E. 391. To like effect: *Austin v. Austin, ante*, 283, 113 S.E. 2d 553; *Frazier v. Gas Co.*, 247 N.C. 256, 100 S.E. 2d 501; 38 Am. Jur., Negligence § 334; 65 C.J.S., Negligence § 244(a), pp. 1089-1091. Cases involving proof of the origin of a fire by circumstantial evidence include the following: *McRainey v. R. R.*, 168 N.C. 570, 84 S.E. 851; *Lawrence v. Power Co.*, 190 N.C. 664, 130 S.E. 735; *Small v. Utilities Co.*, 200 N. C. 719, 158 S.E. 385; *Peterson v. Power Co.*, 183 N.C. 243, 111 S.E. 8; *Ashford v. Pittman*, 160 N.C. 45, 75 S.E. 943; *Simmons v. Lumber Co.*, 174 N.C. 220, 93 S.E. 736, and cases cited. See, also, 65 C.J.S., Negligence § 244(a), pp. 1099-1100.

Whether the circumstantial evidence is sufficient "to take the case out of the realm of conjecture and into the field of legitimate inference from established facts," must be determined in relation to the attendant facts and circumstances of each case. *Parker v. Wilson*, 247 N.C. 47, 53, 100 S.E. 2d 258, and cases cited; *Smith v. Hickory, post*, 316, 113 S.E. 2d 557. The applicable rules are easy to state, difficult to apply.

After careful consideration, we reach the conclusion that, when the evidence is considered in the light most favorable to plaintiffs,

and all legitimate inferences are drawn therefrom in plaintiffs' favor, it was for the jury to determine whether the fire was proximately caused by defendants' negligence.

Defendants contend, *inter alia,* the evidence shows the short-circuit occurred after the fire was under way. This contention is based largely on Stinson's testimony that the fan was running and jumping when he went to the kitchen; on evidence that, upon occurrence of the short-circuit, the current to run the fan was cut off; and on Stinson's testimony that either ten or five minutes elapsed between the appearance of the streak on the television screen and the time he heard the "big pop" and went to the kitchen. However, the evidence provides no satisfactory answer to these questions: What caused the streak across the television screen? Did the short-circuit occur when the streak crossed the television screen or when the "big pop" occurred? Moreover, as to the time interval between the streak and the "big pop," Stinson's testimony was at best an estimate. Immediately after the streak, Shelton got up to try to fix the television; and the "big pop" was heard while Shelton was so engaged. Too, while the evidence tended to show the current to the fan would be cut off by the short-circuit, it would seem that the fan would operate for some period thereafter by reason of its own momentum. These were matters to be resolved by the jury.

Defendants, contending the fire was of undetermined origin, have forcefully contested each premise upon which plaintiffs' case rests. While conceding the force of their contentions, our conclusion is that the case was for jury consideration and determination.

No error.

STATE v. M. H. POTTER, JR., AND JOE C. RANDOLPH.

(Filed 6 April, 1960.)

1. Conspiracy § 3—

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, and it is not necessary that the agreement be accomplished, the agreement itself being the offense.

2. Conspiracy § 5—

Testimony of declarations made by one conspirator in the absence of the other, which declarations are not made in furtherance of the conspiracy but contain a mere narration of past facts implicating the absent conspirator, is incompetent as against the absent conspirator.

3. Same: Criminal Law § 90—

Error in the admission against one conspirator of testimony of declarations made by the other conspirator in his absence, is not cured when only a part of such testimony later becomes competent for the purpose of corroborating the subsequent testimony of the declarant upon the trial, and it would seem that the admission of testimony of such declarations was prejudicial under the facts of this case.

4. Criminal Law § 106c—

An instruction to the effect that when the State relies on circumstantial evidence the jury should accept the hypothesis of innocence as much so as the hypothesis of guilt, is prejudicial error, since it is the duty of the jury to accept the hypothesis of innocence even though that of guilt is the more probable.

APPEAL by defendant Potter from *Burgwyn, Emergency Judge,* October 19, 1959 Term, of GREENE.

Criminal prosecution on indictment charging in substance that defendants Randolph and Potter, on or about March 16, 1959, "did unlawfully, wilfully, and feloniously agree, plan, combine, conspire and confederate, each with the other, to unlawfully, wilfully, and feloniously and wantonly set fire to, burn, and cause to be burned" a certain (designated) building owned by Potter and others, situated one-half mile north of Snow Hill on U. S. Highway #258, in which Randolph operated "a barbecue cafe."

The jury found the defendants guilty. Thereupon separate judgments, imposing prison sentences, were pronounced.

Defendant Potter excepted and appealed.

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

Jones, Reed & Griffin for defendant Potter, appellant.

BOBBITT, J. Appellant rightly concedes the evidence was sufficient for submission to the jury. Hence, the evidence will be stated only to the extent necessary to an understanding of the matters asserted by appellant as grounds for a new trial.

The State offered evidence tending to show that officers found Randolph inside the building, alone, about 1:30 a.m. on Tuesday, March 17th; that the "floor of the building was saturated in gas"; that there were four pasteboard containers and a lard bucket, at different locations, all containing gasoline; that gasoline had been and was leaking from these containers; and that there were "gas fumes all over the building."

There was no fire. Randolph, when testifying, gave this understandable explanation: "It occurred to me that if I lit the match I wouldn't have been anything but a cinder. That is why I didn't."

"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. Walker,* 251 N.C. 465, 468, 112 S.E. 2d 61.

To incriminate Potter, the State offered evidence tending to show the relationships, associations and activities of Randolph and Potter preceding the night of Randolph's arrest, *i.e.,* circumstances tending to show both motive and preparations for the burning of the building and its contents. In addition, the State offered as a witness a Deputy Insurance Commissioner who, on March 17th, in the course of his investigation, questioned Randolph, in Potter's absence, at the courthouse. Randolph then made statements, according to this witness, to the effect that he and Potter, pursuant to Potter's instigation, had made plans and preparations for Randolph to burn the building for the purpose of getting money from (excessive) insurance coverage.

This testimony, as to Randolph's statements or declarations to the Deputy Insurance Commissioner, was competent as to Randolph. Potter objected to the admission against him of Randolph's said statements or declarations, but his objections were overruled and the evidence was admitted as to both defendants. Potter excepted to these adverse rulings.

"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 con-

spiracy." *S. v. Benson,* 234 N.C. 263, 66 S.E. 2d 893, and cases cited. It is clear that the statements attributed to Randolph were not made in furtherance of the conspiracy but, as to Potter, were merely narrative as to what Potter had previously said and done. *S. v. Wells,* 219 N.C. 354, 13 S.E. 2d 613.

The said testimony as to Randolph's statements or declarations was incompetent as substantive evidence against Potter. Moreover, it was incompetent against Potter as corroborative of Randolph's testimony for the reason that Randolph had not testified. Thus, when offered and admitted, and when the State rested its case, the said testimony, as to Potter, was not competent for any purpose and had been erroneously admitted as to him. *S. v. Franklin,* 248 N.C. 695, 104 S.E. 2d 837.

After the State had rested its case, Randolph testified in his own behalf. His testimony, upon direct examination, tended to exculpate him and contained no reference to Potter. However, upon cross-examination, Randolph testified as to what Potter had said and done; and this testimony by Randolph tended to establish the alleged conspiracy. No motion was then made, either by Potter or by the State, that the court instruct the jury that the testimony of the Deputy Insurance Commissioner as to statements or declarations made to him by Randolph on March 17th previously admitted under the circumstances stated above, did not constitute substantive evidence but was for consideration only as it might corroborate the testimony given by Randolph on his said cross-examination. Such instruction was not given by the court either during the taking of evidence or in the charge.

The question arises: Was the erroneous admission of the said testimony during the presentation of the State's case cured by reason of Randolph's said testimony on cross-examination?

In a malicious prosecution action, *D'Armour v. Hardware Co.,* 217 N.C. 568, 9 S.E. 2d 12, it was held that the erroneous admission, during the presentation of the plaintiff's case, of testimony that Briggs, who signed the warrant, had stated that the defendant's president had authorized him to do so, was cured and became competent "for the purpose of contradiction and impeachment" when Briggs, as a witness for the defendant, testified that defendant's president had not authorized him to do so. However, the prior declaration of Briggs and the testimony of Briggs related to one specific subject. Here, the statements or declarations attributed to Randolph and erroneously admitted include matters not covered by Randolph's testimony and in general constitute a more coherent and detailed narrative of facts tending to establish the guilt of Potter.

In *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84, a different factual situation was involved. There, after the prosecutrix had testified, the court admitted, for the purpose of corroboration, a written statement made by the prosecutrix to the investigating officers. The defendants contended some parts of the written statement did not tend to corroborate the prosecutrix. It was held that, as against a general objection to the written statement as a whole, the admission thereof was not erroneous, *Barnhill, J. (later C. J.),* citing prior decisions, said: "If the defendants objected to the statement in part and not as a whole they should have so indicated by proper motion or exception."

Here, when the said testimony as to Randolph's statements or declarations was admitted against Potter, Potter could not then object to specific portions thereof on the ground that they did not tend to corroborate Randolph for the simple reason that Randolph had not testified. The incompetent evidence having been erroneously admitted, the question is whether the error was cured and its prejudicial effect removed when the testimony of Randolph, given on cross-examination, became a part of the evidence in the case. Under the factual situation here considered, it would seem that the error was not wholly cured; and a serious question is presented as to whether, under the circumstances stated, the erroneous admission of said testimony, standing alone, remained of sufficient prejudicial effect to warrant a new trial.

Defendant assigns as error this excerpt from the charge: ". . . the Court so charges you that while the State relies on circumstantial evidence for a conviction, that it is the duty of the jury to accept the hypothesis which points to his innocence *as much so* as the hypothesis that points to his guilt." (Our italics)

As stated by *Barnhill, J. (later C.J.),* in *S. v. Wood,* 233 N.C. 636, 65 S.E. 2d 142: "It is entirely possible that the record is not an exact transcript of the charge as actually given by the court below. But we are bound by the record as it comes to this Court and must decide the questions presented as they appear therein."

The correct rule for the guidance of the jury is this: "When the circumstances taken together are as compatible with innocence as with guilt there arises a reasonable doubt and it is the duty of the jury to adopt the hypothesis of innocence even though that of guilt is the more probable." *S. v. English,* 214 N.C. 564, 566, 199 S.E. 920; *S. v. Madden,* 212 N.C. 56, 58, 192 S.E. 859, and cases cited. Under this rule, it is for the jury to determine whether the circumstances taken together are as compatible with innocence as with guilt. As to the sufficiency of circumstantial evidence to withstand a motion for

judgment of nonsuit, see *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431; *S. v. Davis,* 246 N.C. 73, 97 S.E. 2d 444; *S. v. Horner,* 248 N.C. 342, 103 S.E. 2d 694.

Notwithstanding there was plenary evidence of Potter's guilt, we are constrained to hold that, for the reasons indicated, he is entitled to a new trial.

New trial.

MARTHA Z. SMITH v. CITY OF HICKORY.

(Filed 6 April, 1960.)

1. Municipal Corporations § 12—

A municipality is not an insurer of the safety of travelers on its streets and sidewalks and the doctrine of *res ipsa loquitur* does not apply in actions to recover for injuries received by a pedestrian in a fall on a sidewalk, nor does the existence of a hole in the sidewalk establish negligence *per se,* but plaintiff must show that the officers of the municipality knew or by the exercise of due care should have known of the defect and could have reasonably foreseen that such defect might cause injury to travelers using the sidewalk in a proper manner.

2. Same—

Evidence that plaintiff fell to her injury when she stepped into a hole in the sidewalk, some three inches deep and some six to seven inches long, is insufficient to be submitted to the jury on the issue of the municipality's negligence in the absence of evidence as to how long the hole had existed in the sidewalk prior to the injury, nor is this hiatus supplied by evidence that the sides of the hole were smooth in the absence of evidence that the edges of the hole were at any time jagged or sharp and had been worn smooth by pedestrian use.

3. Negligence § 24c—

The evidence must take the case out of the realm of conjecture and into the field of legitimate inference from established facts in order to be sufficient to be submitted to the jury, and nonsuit must be entered upon evidence which raises a mere conjecture or possibility of the existence of actionable negligence.

APPEAL by plaintiff from *Farthing, J.,* September Term, 1959, of CATAWBA.

Civil action to recover damages for personal injuries, resulting from plaintiff stepping in a hole on a sidewalk in the city of Hickory and falling.

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

Sigmon & Sigmon for plaintiff, appellant.
Emmett C. Willis for defendant, appellee.

PARKER, J. On the afternoon of 26 October 1957 plaintiff, a woman 40 years old, her husband, and her daughter, Mrs. Christine Dew, were shopping in the city of Hickory. Plaintiff had with her her eight-months-old baby. About 4:30 p. m. they came out of Murphy's Store, and started walking up Second Street N.W. At that time it was not raining, though it had been raining, was kind of dark, and the cement sidewalk was wet. Quite a few people were on the sidewalk. While plaintiff was walking between her husband and daughter and carrying her baby in front of B. C. Moore's store, she stepped with her right foot into a hole on the sidewalk, fell and was injured.

Plaintiff testified on direct-examination: "I had the baby over my left shoulder and naturally I was looking straight at the hole, but the water was the same color of the street and I didn't see the hole . . . it was level with the street - - - it was the same color. The hole was invisible when I stepped in it. It was enough water in it when I stepped in it with high heel shoes on, that you couldn't tell the hole was hardly there; my husband took his crutch and knocked the water out to see if it were a hole."

Plaintiff testified in part on cross-examination: "I was walking slowly and carefully. . . . The sidewalk was ordinarily flat. There wasn't a hill or anything. . . . I have been trading in Hickory all my life and walked back and forth across this spot many times but I never did see a hole there. I hadn't been in Hickory for about three months before that. . . . I did not see the hole when we passed it going to Murphy's."

The hole plaintiff stepped in was about three inches deep and six to seven inches long. It was more or less circular and irregular in size. The edges of the hole were rounded, not sharp, more or less slick or smooth. The water was full in the hole, and was dirty, and the same color as the sidewalk. At the time the whole cement sidewalk was a wet, dingy, black color. The puddle looked like dark, wet cement. Plaintiff's husband testified on cross-examination: "I had no difficulty seeing it after she fell." Plaintiff's daughter, Mrs. Christine Dew, examined the hole about a week after plaintiff stepped in it, and there was black dirt in it then, but no loose particles of cement or stone. The hole was a few steps from a parking meter.

This is said in *Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799: "The rule prevailing in this jurisdiction is well stated by *Hoke, J.,* in *Fitzgerald v. Concord,* 140 N.C. 110, as follows: 'The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that the defect existed and an injury has been caused thereby. It must be further shown that the officers of the town might have discovered the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated.' (A number of our other cases are cited). The happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive. (Citing cases). The existence of a condition which causes injury is not negligence *per se.* (Citing a case). The doctrine of *res ipsa loquitur* does not apply in actions against municipalities by reason of injuries to persons using its public streets. *City of Natchez v. Cranfield,* 124 Sou. Rep., 656." This quotation from *Fitzgerald v. Concord* is quoted with approval in *Welling v. Charlotte,* 241 N.C. 312, 85 S.E. 2d 379.

A municipality is not an insurer of the safety of travellers on its streets and sidewalks. *Welling v. Charlotte, supra; Walker v. Wilson,* 222 N.C. 66, 21 S.E. 2d 817; *Love v. Asheville,* 210 N.C. 476, 187 S. E. 562.

The governing authorities of a town or city have the duty imposed upon them by law of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who use them in a proper manner. Liability arises only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect in the street or sidewalk and the injury: he must also show that the officers of the town or city knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travellers using its street or sidewalk in a proper manner might reasonably be foreseen. Actual notice is not required. Notice of a dangerous condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it in the exercise of due care. This principle is firmly established in our decisions. *Welling v. Charlotte, supra; Klassette v. Drug Co.,* 227 N.C. 353, 42 S.E. 2d 411; *Walker v. Wilson, supra; Waters v. Belhaven,* 222 N.C. 20, 21 S.E. 2d 840; *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424; *Markham v. Improvement Co.,* 201 N.C. 117, 158 S.E. 852; *Bailey v. Winston,* 157 N.C. 252, 72 S. E. 966; *Revis v. Raleigh,* 150 N.C. 348, 63 S.E. 1049; *Kinsey v. Kin-*

ston, 145 N.C. 106, 58 S.E. 912; *Brown v. Durham,* 141 N.C. 249, 53 S.E. 513; *Jones v. Greensboro,* 124 N.C. 310, 32 S.E. 675.

There is no evidence in the record that the defendant created the hole in the sidewalk, or had actual notice of it prior to plaintiff's fall. There is no evidence as to what caused this hole in the cement sidewalk, or whether it extended through the cement. There is no evidence as to how long the hole had existed in the cement sidewalk before plaintiff stepped in it and fell, unless an inference as to the length of time it had existed prior to her fall can reasonably be drawn from the evidence. In respect to this question we have this testimony of plaintiff on cross-examination: "I have been trading in Hickory all my life and walked back and forth across this spot many times but I never did see a hole there. I hadn't been in Hickory for about three months before that."

Plaintiff's contention is that the reasonable inferences to be drawn from her evidence are that when the hole in the cement sidewalk was "young," its edges were jagged and sharp, that its edges were worn smooth by long continued "footwear" of pedestrian traffic, that it was a long time wearing smooth, because it was near a parking meter, and pedestrians would see the hole and avoid walking on it in dry weather, and that for pedestrian "footwear" to have worn the edges of the hole slick or smooth under these conditions permits the reasonable inference that the hole had existed for a period of time prior to plaintiff's fall so long that the officers of defendant should have discovered it in the exercise of due care.

There is no evidence in the record as to whether the hole in the cement was made at one time or by "footwear" over a period of time, as to whether its edges were ever jagged and sharp, and if the edges were ever jagged or sharp as to how long it would take "footwear" to wear the edges smooth, if it will do so. In *Welling v. Charlotte, supra,* which was nonsuited on the ground of contributory negligence, plaintiff fell in a hole on a cement or asphalt sidewalk. In that case the city had actual notice of the hole, and a witness for plaintiff, who was an expert engineer, made an examination of the hole three days after plaintiff's fall, and testified that, in his opinion, the hole had been there perhaps two or three years. Plaintiff's contention rests on conjecture and surmise and inference drawn from inference. To carry her case to the jury "the plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts." *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258. Such an inference cannot rest on conjecture or surmise, which raises a possibility of its existence. *Sowers v. Marley,* 235 N.C.

607, 70 S.E. 2d 670. A resort to conjecture or surmise is guesswork, not decision, and "a cause of action must be something more than a guess." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411.

Considering the evidence in the light most favorable to plaintiff, and giving her the benefit of every legitimate inference to be drawn therefrom, as we are required to do on a motion for judgment of compulsory nonsuit, we conclude that plaintiff has no evidence that defendant had any actual or constructive notice of the hole in its sidewalk in which plaintiff stepped and fell prior to her fall, or that defendant created the hole. For cases nonsuited for the same reason, see: *Gettys v. Marion, supra; Waters v. Belhaven, supra.*

The judgment of compulsory nonsuit entered below is

Affirmed.

W. I. SKINNER v. EMPRESA TRANSFORMADORA DE PRODUCTOS AGROPECUARIOS, S. A., DEFENDANT

AND

W. I. SKINNER AND COMPANY, INC., GARNISHEE.

(Filed 6 April, 1960.)

1. Parties § 2—

An action must be prosecuted in the name of the real party in interest. G.S. 1-57.

2. Contracts § 24—

In an action on a contract instituted by an individual, allegations that, although the contract was made in the name of plaintiff, the negotiations leading to the contract were carried on by a named corporation, that the contract was for the benefit of the corporation, and that plaintiff had assigned his interest in the contract to the corporation, without allegation that plaintiff was bringing the action as trustee for the corporation nor facts from which a trusteeship may be inferred, disclose that plaintiff is not the real party in interest and that he is without any right to maintain the action.

3. Appeal and Error § 2—

The failure of the complaint to state a cause of action in favor of plaintiff is a defect appearing on the face of the record of which the Supreme Court will take notice *ex mero motu.*

APPEAL by defendant Empresa Transformadora de Productos Agropecuarios, S. A., from *Paul, J.,* November, 1959 Term, MARTIN Superior Court.

SKINNER *v.* TRANSFORMADORA, S. A.

Civil action instituted on June 17, 1959, by the plaintiff, a resident of Martin County, North Carolina, against the defendant, a foreign corporation, an agency of the Government of Cuba. In the action the plaintiff seeks to recover $63,400 ($53,400 actual and $10,000 punitive) damages for breach of contract. The plaintiff sought to obtain jurisdiction of the defendant by attaching a debt of $47,796.19 due to the defendant by W. I. Skinner and Company, Inc., a Delaware corporation domesticated and doing business in North Carolina. Pursuant to summons and order of attachment duly served on it, W. I. Skinner and Company was brought in as garnishee and filed answer. Whereupon the plaintiff served, or attempted to serve, process on Transformadora by publication.

The plaintiff, in substance, alleged that in 1958 the Cuban Government, planning to expand its leaf tobacco business, invited W. I. Skinner and Company to send a representative to Cuba to supervise and construct a re-drying plant and to aid and advise in the production, processing and marketing of its tobacco products. As a result of protracted negotiations an agreement was entered into by "W. I. Skinner, in his own right, and . . . Antonio Gonzales Lopez, in his character of president and in the name and representing 'Empresa Transformadora de Productos Agropecuarios, S. A.' "

The duties and obligations of each party to the contract were detailed in the written instrument dated April 21, 1958. The contract was made a part of the plaintiff's complaint. Also made a part of the complaint was a letter dated the following day, April 22, 1958, in which W. I. Skinner reported to W. I. Skinner and Company the execution of the contract. "I will bring the contract when I come home but I can say that the features of it are substantially the same as those contained in letters and cables exchanged . . . I was more or less forced to sign as an individual. I reluctantly did so to avoid any further unpleasantness . . . I pointed out that everything having to do with the program so far was done by us in the name of W. I. Skinner and Company, Inc., and that we thought they understood that the contract would be in our company's name. . . . That was true, they said, but the Transformadora board preferred to deal with an individual rather than a company because a company . . . might not like the deal and send some incompetent . . . I want everyone in our company to understand that even though the contract is in my name it actually belongs to the Skinner Company, and I lay no claim to any part of its proceeds . . . So by means of this letter I hereby assign to W. I. Skinner and Company, Inc., any income resulting from the contract that I have signed as an individual with Transformadora.

. . . I am going to request that all checks be made to W. I. Skinner and Company but if they do not, I will endorse them over."

Subsequent to the execution of the contract the defendant Transformadora shipped tobacco on consignment to W. I. Skinner and Company to be sold on commission. Sales were made and W. I. Skinner and Company became and is now indebted to Transformadora in the sum of $47,796.19.

Transformadora instituted a civil action in the United States Court for the District of Delaware against W. I. Skinner and Company for recovery of the amount claimed to be due. The W. I. Skinner Company filed an answer, admitted its indebtedness, but asserted the funds were being held under the writ of attachment issued in the W. I. Skinner case pending in the Superior Court of Martin County. The W. I. Skinner and Company set up a counterclaim in the United States Court for the $63,400 — the identical claim which is the basis of the W. I. Skinner individual action. On motion of W. I. Skinner and Company, the Delaware action has been removed to and is now pending in the United States Court for the Eastern District of North Carolina. The pleadings in the Federal Court action, by amendment, were made a part of the affidavit for service by publication.

Transformadora entered a special appearance in the W. I. Skinner action in Martin County and moved to dismiss on the ground the court does not have and has not acquired jurisdiction over the person or property of the defendant Transformadora. After hearing, Judge Paul entered an order denying the motion to dismiss. To that order the defendant excepted and from it appealed.

John H. Hall, Gerald F. White for defendant, appellant.

Battle, Winslow, Merrell, Scott & Wiley, By: Francis E. Winslow, Robert M. Wiley for plaintiff, appellee.

HIGGINS, J. At the threshold of this case we are confronted with the question of law whether, in his complaint, the plaintiff, W. I. Skinner, has alleged a cause of action against Transformadora. It is fundamental that the real party in interest must prosecute the action. G.S. 1-57; *Sanitary District v. Lenoir,* 249 N.C. 96, 105 S.E. 2d 411; *Cotton Mills v. Duplan Corp.,* 246 N.C. 88, 97 S.E. 2d 449; *Watson v. Lee County,* 224 N.C. 508, 31 S.E. 2d 535; *Snipes v. Monds,* 190 N.C. 190, 129 S.E. 413; *Elam v. Barnes,* 110 N.C. 73, 14 S.E. 621. W. I. Skinner alleges the negotiations leading to the contract were carried on by the corporation; that the contract, though made in his name, was for the benefit of the corporation. In order to avoid any misun-

derstanding, he assigned his interest in the contract to the corporation.

After repeated allegations that W. I. Skinner and Company is the real party in interest, and never conceding otherwise, the plaintiff amended paragraph seven of his complaint to read: "It was well understood throughout the negotiations, and the understanding was followed through in operations under the contract . . . that the Cuban Government was to have the benefit of the personnel and facilities and the good name and credit in the trade of the Skinner Company, and that W. I. Skinner signed the contract as an individual to fix responsibility on him personally, but also as agent for the Skinner Company . . . On April 22, 1958, the plaintiff wrote a letter to this effect to the Skinner Company, a copy of which is hereto attached and marked Exhibit B. The Skinner Company is a real party in interest in the contract, but this the defendant denies. Therefore, plaintiff brings this action in his own name for the use and benefit of the Skinner Company."

In paragraph 13 of the complaint the plaintiff alleges the breach of the contract by the defendant "was willful, wanton and malicious, and that it is entitled to punitive damages in the sum of $10,000."

"14. That plaintiff and the Skinner Company have been damaged by defendant's breach of contract in compensatory damages in the sum of $53,400 as detailed in Exhibit C, attached and made a part hereof."

Exhibit B, which is a part of the complaint, contains the statement: "Even though the contract is in my name it actually belongs to the Skinner Company . . . I hereby assign to W. I. Skinner and Company, Inc., any income resulting from the contract."

The plaintiff's allegations, therefore, if true, state a cause of action in favor of W. I. Skinner and Company. They fail to show a cause of action in the plaintiff. Likewise they fail to show any right in him to maintain this action either for himself, for the W. I. Skinner and Company, or for both. He alleges neither that he is a trustee for W. I. Skinner and Company nor facts from which a trusteeship may be inferred as a matter of law. *Chapman v. McLawhorn,* 150 N.C. 166, 63 S.E. 721. He does not allege he and the corporation own the cause of action in partnership. Even if this were true, he could not maintain the action. One party may not proceed in his own name upon a partnership claim. *Godwin v. Vinson,* 251 N.C. 326, 111 S.E. 2d 721.

Finally, if the plaintiff offered plenary evidence of all he alleges, the effect would be to prove himself out of court. His cause of action is defective according to his own allegations. "When . . . the complaint fails to state a cause of action, that is a defect upon the face

of the record proper, of which the Supreme Court on appeal will take notice, and when such defects appear the Court will *ex mero motu* dismiss the action." *Fuquay Springs v. Rowland,* 239 N.C. 299, 79 S.E. 2d 774; *Woody v. Pickelsimer,* 248 N.C. 599, 104 S.E. 2d 273; *In re Davis,* 248 N.C. 423, 103 S.E. 2d 503; *Caldlaw, Inc. v. Caldwell,* 248 N.C. 235, 102 S.E. 2d 829; *Ice Cream Co. v. Ice Cream Co.,* 238 N.C. 317, 77 S.E. 2d 910; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911; *Dare County v. Mater,* 235 N.C. 179, 69 S.E. 2d 244; *Hopkins v. Barnhardt,* 223 N.C. 617, 27 S.E. 2d 644; *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136.

The foregoing authorities and the reasons heretofore assigned require that the action be dismissed for failure of the complaint to state a cause of action.

Reversed.

LITTLE PEP DELMONICO RESTAURANT, INC., ON BEHALF OF ITSELF, AND SUCH OTHER CITIZENS AND PLAINTIFFS OF MECKLENBURG COUNTY, N. C., AS AFFECTED BY ORDINANCE NO. 446 IN THE CITY CODE OF CHARLOTTE, N. C., AND LISTED IN THE COMPLAINT V. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 6 April, 1960.)

1. Injunction § 7—

While injunction will not ordinarily lie to restrain the enforcement of an ordinance, injunction will lie if an ordinance is arbitrary, discriminatory and based solely on aesthetic considerations, and compliance with the ordinance would necessitate the expenditure of a large sum of money by the property owners to make their buildings conform to its provisions, and thus result in irreparable injury.

2. Same: Injunction § 13: Municipal Corporations § 34—

Findings to the effect that a municipal ordinance prohibiting the maintenance of business signs over sidewalks in a designated area of the city was based solely on aesthetic consideration, discriminated without basis as between the area subject to the ordinance and the territory outside the area, and that it would cost the property owners a very large sum to make their properties conform to the ordinance, are sufficient to support an order issued upon notice enjoining the enforcement of the ordinance until the final hearing.

3. Appeal and Error § 50—

While the Supreme Court has the power to make findings at variance with those of the trial court upon an appeal in injunction proceedings, the Court will not disturb an order granting injunction to the hearing

on the merits when it is made to appear that the questions presented are grave and that the injury to movant will be certain and irreparable if the application for the interlocutory injunction should be denied, and that the injury to the opposing party from the granting of the order would be inconsiderable or subject to adequate indemnity by bond.

APPEAL by defendant from *Clarkson, J.*, at Chambers 30 December 1959, in MECKLENBURG.

Plaintiff, acting in its own behalf and for numerous other property owners named in the complaint, instituted this action on 11 December 1959. It challenged as arbitrary and discriminatory an ordinance adopted by the City Council prohibiting the maintenance of business signs over sidewalks in a designated area of the City. The ordinance fixed 1 January 1960 as its effective date. Violations of ordinances of Charlotte are punishable by a fine of $50. Each day a prohibited condition is permitted to continue is a separate offense. Plaintiff alleged and testimony by officials of defendant established an intent to require removal of the signs as soon as the challenged ordinance became effective. Plaintiff alleged such enforcement would result in irreparable damage and prayed for a determination of the validity of the ordinance and an order prohibiting enforcement pending such determination.

The court upon notice heard the motion for the injunction. On 30 December it made findings of fact and issued an order prohibiting enforcement until the final hearing. Defendant excepted to the findings and to the order and appealed.

Plumides & Plumides for plaintiff appellees.
John D. Shaw for defendant, appellant.

RODMAN, J. The question for decision is: Did the court err in granting injunctive relief pending a final determination of the validity of the ordinance, or must plaintiff and other interested parties await criminal prosecution to test its validity? The court found the action was instituted on behalf of 100 merchants in Charlotte who had erected signs in conformity with permits issued by the City as authorized by an ordinance in effect prior to the adoption of the challenged ordinance. It found that to remove and replace these signs would cost in excess of $200,000; hence enforcement of the ordinance, if invalid, would cause plaintiff and other interested parties irreparable damage. It further found there was no evidence for the City that the existing signs "in any way materially affect the health, morals, safety or general welfare of citizens of the City of Charlotte."

In addition to the findings summarized above, the court found:

"9. The Court further finds as a fact that the main and only consideration for the passage of said Ordinance No. 446 was that of improving the appearance of said named streets and was passed for aesthetic values only."

"11. The Court further finds as a fact that said Ordinance No. 446 is arbitrarily and oppressively discriminating in that it exempts from said ordinance persons in the immediate area of the included downtown area from said Ordinance No. 446, and that the character of business and width of the street are the same in said area as that area included in said Ordinance No. 446, and therefore said Ordinance No. 446 contains an unreasonable classification in that it takes a right given to the plaintiffs away from them and allows persons outside the prescribed area, as set forth in said Ordinance No. 446, to continue enjoying said rights."

Courts are properly hesitant to interfere with a legislative body when it purports to act under the police power, but the exercise of that power must rest on something more substantial than mere aesthetic considerations. If it appears that the ordinance is arbitrary, discriminatory, and based solely on aesthetic considerations, the court will not hesitate to declare the ordinance invalid. *S. v. Brown,* 250 N.C. 54, 108 S.E. 2d 74; *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189; *S. v. Staples,* 157 N.C. 637, 73 S.E. 112; *Barger v. Smith,* 156 N.C. 323, 72 S.E. 376; *S. v. Whitlock,* 149 N.C. 542; 37 Am. Jur. 967-968.

The court heard the parties and on the evidence submitted made its findings. The findings are sufficient to establish apparent invalidity and hence sufficient to warrant temporary injunctive relief. Plaintiff was not required to await criminal prosecution for a violation. *Speedway, Inc. v. Clayton,* 247 N.C. 528, 101 S.E. 2d 406; *Lanier v. Warsaw,* 226 N.C. 637, 39 S.E. 2d 817; *Advertising Co. v. Asheville,* 189 N.C. 737, 128 S.E. 149; *Crawford v. Marion,* 154 N.C. 73, 69 S.E. 763; *Pierce v. Society of Sisters of Holy Names,* 268 U.S. 510, 69 L.Ed. 1070.

In actions of this character we have the power to examine the evidence and make findings at variance with the findings made by the trial court; but when called upon to exercise the power, we do so in conformity with the rule given in *Ohio Oil Company v. Conway, Supervisor,* 279 U.S. 813, 73 L.Ed. 972, quoted with approval in *Castle v. Threadgill,* 203 N.C. 441, 166 S.E. 313: "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party,

even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted." The burden is on appellant to show error. The presumption is that the findings made by the trial court are correct. *Coffee Co. v. Thompson*, 248 N.C. 207, 102 S.E. 2d 783; *Aircraft v. Union*, 247 N.C. 620, 101 S.E. 2d 800. Upon a careful review of the evidence we find no reason which would justify us in vacating the findings or order made by the trial judge. The judgment is

Affirmed.

IN THE MATTER OF: THE APPLICATION AND APPEAL OF THOMAS H. HASTING, BEFORE THE CHARLOTTE PERIMITER ZONING BOARD OF ADJUSTMENT.

(Filed 6 April, 1960.)

1. Municipal Corporations § 25—

A zoning ordinance which permits the continuance of nonconforming uses subsisting at the time of the enactment of the ordinance may prohibit an enlargement of such nonconforming uses.

2. Same: Municipal Corporations § 34—

Under the zoning ordinance in question petitioner was permitted to continue a nonconforming use subsisting at the time of the enactment of the ordinance. Petitioner sought a permit for an additional construction upon contentions that the construction was merely to complete facilities under his original plan subsisting at the time of the enactment of the ordinance. *Held:* Whether the petitioner was seeking the right to complete facilities for the subsisting nonconforming use, or was seeking to enlarge a nonconforming use in violation of the ordinance, is a question of fact to be determined by the administrative board.

3. Administrative Law § 4—

The determination of questions of fact by an administrative board will not be disturbed when its findings are supported by evidence and are made in good faith.

APPEAL by petitioner from *Sharp, S. J.*, August 17, 1959 Civil Term, of MECKLENBURG.

Petitioner applied for and obtained a writ of *certiorari* to review an order of the Charlotte Zoning Board of Adjustment which order affirmed the refusal of the building inspector to issue a permit authorizing the increased use of petitioner's property adjacent to Charlotte as a house trailer park. Judge Sharp, on review of the record, sustained

the order of the Board of Adjustment. Petitioner excepted and appealed.

Blakeney, Alexander & Machen for petitioner, appellant.
John D. Shaw for respondent, appellee.

RODMAN, J. The authority given to municipalities in general to enact and enforce zoning ordinances by Art. 14, c. 160 of the General Statutes was, as to the City of Charlotte, enlarged by c. 123, S. L. 1955, to apply to a described area surrounding the city. The provisions of the 1955 Act applicable only to Charlotte are substantially the same as c. 1204, S. L. 1959, now G.S. 160-181.2. Pursuant to the authority given by the 1955 Act, Charlotte enacted a zoning ordinance which became effective 2 January 1956. One of the permissive uses of property zoned as "rural" is "dwellings except house trailers." The ordinance permits the continuance of an existing prohibited use. It provides: "The lawful use of any building or land existing at the time of the adoption of this ordinance may be continued, but not enlarged or extended, although the use of such building or land does not conform to the regulations of the district in which such use is maintained."

In 1951 petitioner purchased 6.37 acres of land outside of Charlotte but within the area described in c. 123, S. L. 1955, and in a part zoned as "rural." The operation of house trailer sites is not a permissive use under the ordinance for areas so zoned. There was a dwelling on the property when petitioner purchased. He occupies this as his home. Subsequent to his purchase and prior to 2 January 1956 he constructed some house trailer sites on his property. These, or at least some of them, were rented and occupied when the ordinance went into effect.

Subsequent to 2 January 1956 petitioner applied to the building inspector for a permit to provide additional house trailer sites. The building inspector declined to issue the permit. Petitioner appealed to the Board of Adjustment. It heard the evidence offered and found:

"4. On January 2, 1956, appellant had constructed or begun construction of sixteen trailer sites on said land and some of said sites had been rented.

"5. On January 2, 1956, appellant had done nothing toward the construction of any additional trailer sites other than the sixteen heretofore mentioned."

Based on its findings, it concluded: "The Building Inspector did not err in denying the appellant's application."

Petitioner excepted to the findings made by the Board, contending

the evidence established an original plan to provide 45 trailer sites on the property, the allotment of the necessary area to that plan, and the partial consummation of the plan by necessary construction in process on 2 January 1956 to make effective use of all of the area so allotted. The right to continue to use the 16 sites referred to in Finding # 5 is not controverted.

The city had the authority to prohibit an enlargement of a nonconforming use. *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189. Whether what petitioner sought was the right to complete construction of facilities for a nonconforming use to which property had been dedicated when the ordinance took effect or was an enlargement of a subsisting nonconforming use was a question of fact to be determined by the Board of Adjustment. The rule applicable is stated in *In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1, thus: "The duties of the building inspector being administrative, appeals from him to the board of adjustment present controverted questions of fact—not issues of fact. Hence it is that the findings of the board, when made in good faith and supported by evidence, are final. *Little v. Raleigh,* 195 N. C. 793. Such findings of fact are not subject to review by the courts."

Our examination of the evidence submitted to the Board of Adjustment discloses sufficient evidence to support its findings. Based on this evidence, the Board could have found the facts as contended by petitioner or contrary to his contention. In this situation its findings are conclusive. The court was correct in refusing to change or modify the findings of fact and in sustaining the order of the Board of Adjustment.

Affirmed.

HELEN T. WADE v. H. J. WADE.

(Filed 6 April, 1960.)

1. Husband and Wife § 10—

An unsigned deed of separation has no legal effect.

2. Pleadings § 34—

Allegations and an exhibit which the pleader could not support by or offer in evidence at the trial should be stricken on motion.

3. Divorce and Alimony § 18—

The allowance of alimony *pendente lite* rests in the discretion of the trial court and his order will not be disturbed in the absence of some error of law.

CERTIORARI to review two orders of *Frizzelle, J.*, refusing to strike parts of the complaint and awarding alimony *pendente lite.*

This civil action was instituted by the plaintiff for alimony without divorce, for allowance *pendente lite*, and for counsel fees. In paragraph 10 of her complaint she alleged the defendant agreed to execute a deed of separation "and cause the same to be reduced to writing, . . . the said defendant wrongfully failed and refused to execute the same." A copy of the unexecuted instrument was attached to and made a part of paragraph 10. Before answer, the defendant moved to strike paragraph 10, the attached exhibit, and all reference to the exhibit made in paragraph 11 of the complaint. On December 4, 1959, Judge Frizzelle made an order denying the motion. On December 14, 1959, Judge Frizzelle entered an order providing for alimony payments *pendente lite.* Our writ to the Superior Court of Lenoir County brought both orders here for review.

Jones, Reed & Griffin for plaintiff, appellee.
White & Aycock, C. E. Gerrans for defendant, appellant.

HIGGINS, J. From the allegations of the complaint it appears that during negotiations for a settlement prior to the institution of the suit the defendant had a deed of separation prepared. Both parties admit it was never signed by either. Therefore, it has remained a blank paper without legal effect. In the case of *Pearce v. Pearce,* 226 N.C. 307, 37 S.E. 2d 904, this Court had before it a deed of separation which had been signed, though "not executed in the manner required by G.S. 52-12 and 52-13." This Court said: "It must be noted at the threshold of this case that the asserted written agreement of separation is void *ab initio.*" (citing authority) "In law it does not exist."

The plaintiff on the trial could not offer the writing in evidence. The motion to strike should have been allowed. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. The motion to strike other parts of the complaint was properly denied. The order is modified by striking paragraph 10 (including Exhibit A) and all reference to the exhibit contained in paragraph 11. Otherwise, the order of December 4, 1959, is approved.

The order of December 14, 1959, providing for payments of alimony pending further hearing, related to matters within the sound discretion of the trial court, in which no error of law appears. *Hall v. Hall,* 250 N.C. 275, 108 S.E. 2d 487; *Cunningham v. Cunningham,* 234 N.C. 1, 65 S.E. 2d 375.

Modified and affirmed.

STATE v. HELEN STEVENS AND MILLARD STEVENS.

(Filed 6 April, 1960.)

1. Criminal Law § 25—

An assignment of error to the refusal of the court to dismiss the prosecution as of nonsuit is inapposite where the defendant has entered a plea of *nolo contendere*, since the law does not sanction a conditional plea of *nolo contendere*, and, upon acceptance of the plea, the court is clothed with the same authority to impose judgment as if defendant had been convicted by a jury or had entered a plea of guilty, and the introduction of evidence is ordinarily for the sole purpose of determining what punishment should be imposed.

2. Larceny § 10—

Larceny from the person in any amount is punishable for as much as ten years in the State's prison. G.S. 14-72.

APPEAL by defendants from *Sink, Emergency Judge,* November Term, 1959, of WILKES.

This is a criminal action in which the defendants entered a plea of *nolo contendere* of larceny from the person, upon a bill of indictment charging them with the larceny of $104.00 in cash.

The defendant Millard Stevens was sentenced to the State's Prison for a term of not less than three nor more than eight years. The defendant Helen Stevens was sentenced to the Women's Division of the State's Prison for a period of not less than three nor more than five years.

From these judgments the defendants appeal, assigning error.

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

J. H. Whicker, Sr., for defendants.

DENNY, J. The defendants assign as error the failure of the court below to dismiss as of nonsuit at the close of all the State's evidence.

Ordinarily, when evidence is introduced by the State after a plea of guilty or of *nolo contendere*, it is introduced for the purpose of determining what punishment should be imposed and not for the purpose of determining the guilt or innocence of the pleader. *S. v. Shepherd*, 230 N.C. 605, 55 S.E. 2d 79; *S. v. Crump*, 209 N.C. 52, 182 S. E. 716.

Moreover, the law does not sanction a conditional plea of *nolo contendere*. *S. v. Horne*, 234 N.C. 115, 66 S.E. 2d 665; *S. v. Thomas*, 236 N.C. 196, 72 S.E. 2d 525; *S. v. McIntyre*, 238 N.C. 305, 77 S.E. 2d 698. Therefore, when a defendant enters a plea of *nolo contendere* and such plea is accepted by the State, the court is clothed with the same authority to impose judgment as if such defendant had been convicted by a jury or had entered a plea of guilty. *S. v. Stone*, 245 N.C. 42, 95 S.E. 2d 77; *Mintz v. Scheidt*, 241 N.C. 268, 84 S.E. 2d 882.

The second and third assignments of error challenge the validity of the judgments entered below. The defendants contend that the judgments are void; that the law prescribes a sentence not in excess of twelve months for larceny from the person, citing *S. v. Brown*, 150 N.C. 867, 64 S.E. 775.

The last cited case states, "Larceny from the person, regardless of the value of the property, is neither a petty misdemeanor nor a felony, the punishment for which can not exceed one year, under section 3506 of the Revisal. The punishment for such offense, under sections 3500 and 3506, may be as much as ten years in the State's Prison."

The appellants have clearly misconstrued the language on which they are relying. Section 3506 of the Revisal, now G.S. 14-72, clearly points out that "if the larceny is from the person" the limitation in the statute does not apply. In the instant case the larceny was from the person, in the sum of $104.00. Therefore, as pointed out in *S. v. Brown, supra*, larceny from the person in any amount is punishable under section 3500 of the Revisal (now G.S. 14-70) and section 3506 of the Revisal (now G.S. 14-72) for as much as ten years in the State's Prison. Cf. *S. v. Surles*, 230 N.C. 272, 52 S.E. 2d 880.

These assignments of error are without merit and each of them is overruled.

The rulings of the court below and the judgments imposed will be upheld.

Affirmed.

STATE v. RUSSELL MACON.

(Filed 6 April, 1960.)

Automobiles § 59—

The evidence in this case, in any view, *is held* to show a violation of highway safety statutes and a heedless indifference to the safety and rights of others, proximately resulting in death, and was sufficient to be submitted to the jury and sustained a verdict of guilty of manslaughter.

APPEAL by defendant from *Hobgood, J.*, October 19, 1959 Term, of FRANKLIN.

Defendant was charged in separate bills of indictment with manslaughter for the killing of Louise Mitchell, Walter Robert Dunston, and William W. O'Neal. The cases were consolidated for trial. The jury returned verdicts of guilty. Prison sentences were imposed which run concurrently.

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

E. C. Bulluck for defendant, appellant.

PER CURIAM. The assignments present only one question: Was there sufficient evidence to overcome the motion to nonsuit?

It is conceded the three came to their death as a result of a collision between a Ford automobile operated by defendant and a Dodge station wagon driven by William W. O'Neal. Louise Mitchell and William Robert Dunston occupied the rear portion of the Ford. The collision occurred about 8:00 p.m. on 16 September 1959 about two miles from Louisburg on Highway 401, which lies in a north-south direction. The collision occurred about the east edge of the east shoulder. The automobiles were off the highway except for the rear wheels of the station wagon, which was near the east edge of the paved portion. The cars were at an angle approximating 45 degrees with the highway. The Baldy Wilson Hill crests a short distance from the place where the cars collided.

The evidence offered by the State consisted of a description of the

physical conditions at the scene of the wreck as observed a few minutes after the collision and a statement made to highway patrolmen by defendant on the day following the collision. This evidence is sufficient to show: The Ford was traveling southward. Just after passing the crest of the hill defendant ran off the paved portion and on the west shoulder. The shoulder and paved portion are level. Defendant does not know why he left the paved portion. After traveling some distance on the shoulder, he pulled to his left and on and across the paved portion of the road. As he pulled to his left to return to the highway he saw the lights of the station wagon which was traveling northwardly and then some 30 feet away. The Ford, after it left the shoulder, made skid marks on the paved portion for 120 feet before it reached the point of impact. There were skid marks on the east side of the paved portion leading to the station wagon. These skid marks extended approximately 50 feet. Both vehicles were badly damaged. The Ford was "just in pieces just like an explosion." The physical evidence tends to show the Ford was traveling at a high speed.

Defendant did not testify. He relied principally on the testimony of Fred Finch, who testified he saw the collision. Finch's testimony contradicts defendants statement with respect to the direction of travel by the two vehicles. They were not approaching, according to Finch, but were both traveling in a southwardly direction at a speed which he estimated at 80 to 85 m.p.h. The Ford attempted to pass the station wagon at this speed as they were approaching the crest of the hill. After passing the crest of the hill, the station wagon left the paved portion and went to its right on the west shoulder. The collision occurred as the station wagon attempted to return to the paved portion.

Whether the statement made by defendant, corroborated by physical evidence, or the testimony of Finch correctly portrays the situation, there is evidence of a violation of the highway safety statutes and a heedless indifference to the safety and rights of others proximately resulting in the three deaths as charged in the bills of indictment. The question of defendant's guilt was properly submitted to the jury. *S. v. Phelps*, 242 N.C. 540, 89 S.E. 2d 132; *S. v. Cope*, 204 N.C. 28, 167 S. E. 456.

No error.

STATE v. CLARENCE HENRY SEIPEL.

(Filed 6 April, 1960.)

Criminal Law § 97—

The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and in this case the remarks of the solicitor, apparently invited by remarks of the attorney for defendant in addressing the jury, *held* not to warrant a new trial.

APPEAL by defendant from *Olive, J.*, at October 1959 Term, of IREDELL.

Criminal prosecution upon bill of indictment charging defendant with murder in the first degree of one Coyt Arthur Cruse. The Solicitor for the State stated in open court that he would not ask or contend for a verdict in the first degree, but would ask for a verdict of murder in the second degree or manslaughter as the evidence may warrant.

Plea: Not guilty.

Verdict: Guilty of manslaughter.

Judgment: Confinement to the State Prison for not less than ten nor more than fifteen years.

To the judgment and signing thereof by the court, defendant excepted and in open court gave notice of appeal, and appeals to Supreme Court and assigns error.

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

John R. McLaughlin for defendant, appellant.

PER CURIAM. Careful consideration of matters to which assignments of error relate fails to reveal prejudicial error for which the judgment below should be disturbed. The evidence shown in the record of case on appeal makes a case for the jury sufficient to support the verdict of the jury, upon which the judgment below is predicated.

Indeed the principal error assigned relates to remarks made by the Solicitor in his argument to the jury to which defendant objected. In respect thereto the record discloses that the remarks of the Solicitor were apparently invited by remarks of the attorney for defendant in addressing the jury. As to such matter, the control of arguments of Solicitor and of counsel to the jury must be left largely to the discretion of the trial court. Such is the case here. A new trial is not justified.

No error.

LIZZIE SWAIM CREED v. SHERMAN ANDREW WHITLOCK.

(Filed 6 April, 1960.)

1. Trial § 49—

Motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court.

2. Appeal and Error § 42—

An exception to the charge will not be sustained when the charge, considered contextually, is without prejudicial error.

3. Appeal and Error § 24—

An assignment of error to the court's failure to charge the law and explain the evidence as required by statute is a broadside exception and will not be considered.

APPEAL by plaintiff from *Gambill, J.*, September Civil Term, 1959, of WILKES.

Personal injury action growing out of a collision that occurred January 12, 1958, about 12:30 p.m., on the Traphill Road, between a 1952 Chevrolet, operated by plaintiff, and a 1950 Chevrolet, owned and operated by defendant. Prior to the collision, both cars were proceeding in the same (north) direction, the car operated by defendant following the car operated by plaintiff. The collision occurred when plaintiff was in process of making a left turn into the driveway to her home and defendant was in process of overtaking and passing plaintiff.

Issues of negligence, contributory negligence and damages, raised by the pleadings, were submitted to the jury. The jury answered the negligence issue, "Yes," and answered the contributory negligence issue, "Yes," and did not reach the issue relating to plaintiff's alleged damages.

Judgment for defendant, in accordance with the verdict, was entered. Plaintiff excepted and appealed.

Parks G. Hampton and Whicker & Whicker for plaintiff, appellant.
W. G. Mitchell for defendant, appellee.

PER CURIAM. Plaintiff's motion that the court "set aside the verdict as being against the greater weight of the evidence, and for a new trial," was addressed to the court's discretion; and plaintiff's assignment of error No. 1, directed to the denial of said motion, is untenable.

Plaintiff's assignment of error No. 2, based on her exception to the signing of the judgment, is formal.

When the charge is considered contextually, the portions thereof

to which plaintiff's assignments of error Nos. 3, 4, 5, 6, 7, 8 and 9 are directed do not disclose prejudicial error. It is noted: Pertinent to the contributory negligence issue, the conflict in the evidence related to whether plaintiff did or did not give a signal of her intention to make a left turn, not to the sufficiency or insufficiency of such signal.

Plaintiff's assignment of error No. 10 is to the court's failure "to charge the law and explain the evidence required under General Statutes 1-180." This assignment is broadside and untenable. *S. v. Corl*, 250 N.C. 262, 265, 108 S.E. 2d 613, and cases cited; Strong, N. C. Index, Vol. 1, Appeal and Error § 24.

Upon conflicting evidence, the case was properly submitted for jury determination; and it appears "that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto." *Vincent v. Woody*, 238 N.C. 118, 121, 76 S.E. 2d 356.

No error.

CARRIE S. ELLEDGE v. PEPSI COLA BOTTLING COMPANY.

(Filed 6 April, 1960.)

Food § 1—

In an action to recover for injuries from a foreign and deleterious substance in a bottled drink, evidence tending to show that the drink was bottled under license from a particular company but failing to show that defendant bottler was responsible for bottling this particular drink, with evidence of only one other instance when a drink bought from the same retailer contained a foreign substance, is insufficient to make out a case.

APPEAL by plaintiff from *Johnston, J.*, November 3, 1959 Term, FORSYTH Superior Court.

Civil action for personal injuries to plaintiff alleged to have been caused by defendant's actionable negligence in dispensing a soft drink containing deleterious and harmful substance (bug). The complaint alleged the defendant, through its agent, sold and delivered to said Smitherman and Myers Grocery Store, a quantity of soft drinks produced and bottled by it, to be sold by said Smitherman and Myers Grocery Store, to its customers and patrons. The allegation is denied for lack of knowledge, information, or belief.

Mr. Myers, the grocer, testified he handled a number of different brands of soft drinks, including Suncrest, all of which he bought from a truck and paid the truck driver. The truck had "Pepsi Cola Bottling

Company" on it and the driver's uniform had "Pepsi Cola" on it. The plaintiff was a patron of his store and had bought the soft drink there.

Plaintiff introduced evidence that her husband, some 30 days before, discovered a small stick, apparently with the end chewed, in a bottle of Suncrest. The stick was about one and one-half inches long.

At the conclusion of plaintiff's evidence, judgment of nonsuit was entered, from which plaintiff appealed.

Buford T. Henderson for plaintiff, appellant.

Deal, Hutchins and Minor, By: John M. Minor for defendant, appellee.

PER CURIAM. The plaintiff has brought the action against Pepsi Cola Bottling Company of Winston-Salem, North Carolina. The evidence shows the plaintiff bought the drink from Smitherman and Myers. Mr. Myers testified he bought all the Suncrest he ever had from the Pepsi Cola Bottling Company. It was delivered off a truck. "I suppose it was a Pepsi Cola truck but I don't know. The truck had a driver who wore a uniform, I think; it had 'Pepsi Cola' on the uniform, I guess. . . . That is what they usually wear."

Assuming the evidence is sufficient to warrant the inference the purchase was made from some Pepsi Cola Company, that, certainly, is as far as the evidence goes. The evidence should permit the inference the drink was bottled and sold by the Pepsi Cola Bottling Company of Winston-Salem, North Carolina. This it does not do.

Evidence of only one other instance of deleterious substance in Suncrest was offered. The plaintiff's husband discovered a small stick about one and one-half inches long that had the appearance of having been chewed. This drink also came from Smitherman and Myers.

The evidence offered at the trial was not sufficient to go to the jury and sustain a verdict, and the judgment of nonsuit is

Affirmed.

THE FRANKLIN NATIONAL BANK v. SUDIE JEWELL RAMSEY; ROCKY MOUNT MOTORS, INC., AND PLANTERS NATIONAL BANK & TRUST COMPANY.

(Filed 13 April, 1960.)

1. Chattel Mortgages and Conditional Sales § 9—

The general common law rule of comity protecting the lien of a chattel mortgage or conditional sale contract duly executed and registered in another state upon the removal of the property to this State is subject to statutory modification by the laws of this State.

2. Same—

Where a conditional sale contract is not registered in the state in which the conditional sale was made until after the vehicle had been brought into this State, a *bona fide* purchaser without notice from the conditional sale vendee acquires title free from the lien of the conditional sale contract, irrespective of whether the vehicle acquired a *situs* here. G.S. 44-38.1(a), (b), (c).

3. Same—

Where a vehicle subject to a conditional sale contract executed in another state is brought into this State prior to the registration of the conditional sale contract in such other state, the fact that the conditional sale contract is thereafter registered in such other state within the time permitted by its laws, which provide that upon such registration the lien should relate back to the date of sale, cannot have the effect of rendering the lien of such conditional sale binding in this State contrary to the provisions of G.S. 44-38.1.

4. Courts § 20—

Comity will not be applied in this State when contrary to unambiguous provisions of our statutes.

5. Sales § 12—

Where personalty is acquired by a *bona fide* purchaser for value without notice, who thus obtains good title, every subsequent purchaser from him is entitled to the same protection, irrespective of notice, unless he was a former purchaser of the same property with notice.

APPEAL by plaintiff from *Bone, J.*, Second September Civil Term, 1959, of NASH.

Civil action for possession of an automobile, claimed under a conditional sale contract executed in the State of New York.

The parties waived jury trial, G.S. 1-184, and stipulated certain facts to be "considered by the Court to the same extent as if the facts had been found by the jury upon proper evidence." It was stipulated further: "Each party hereto reserves the right to introduce parol and other evidence not in contradiction of the above stipulations." The only testimony was given by John D. Langley, Jr., and John D. Lang-

ley, Sr., Vice-President and President, respectively, of defendant Rocky Mount Motors, Inc., who were called and examined by plaintiff as adverse witnesses.

Judgment was based on these findings of fact:

"1. That on June 11, 1957, Harry Levine bought from Bast Chevrolet, Inc., of Wantagh, N. Y., the Chevrolet automobile described in the complaint and, on the same date, to secure the balance of the purchase price executed and delivered to said company a conditional sales contract upon which there is a balance due of $2,577.92 as of January 22, 1958.

"2. That the said conditional sales contract was transferred and assigned by Bast Chevrolet, Inc. to the plaintiff, a New York banking corporation having a place of business at 41 Front Street, Rockville Centre, N. Y., and plaintiff is the owner and holder of the said instrument.

"3. That at all times material to this action Harry Levine was a resident of 155 Newport Street, Brooklyn, N. Y., and at 12:01 P. M. on June 14, 1957, the said conditional sales contract was filed for record in the Office of the New York City Registrar, Kings County, which was the proper office for the registration in the State of New York of conditional sales contracts executed by persons residing at 155 Newport Street, Brooklyn, N. Y.

"4. (That on June 13, 1957, Harry Levine brought the said Chevrolet automobile into the State of North Carolina for the purpose of selling same to the defendant Rocky Mount Motors, Inc.), and at about the hour of 8:00 o'clock a.m. on June 14, 1957, the said defendant purchased the same from him for a valuable consideration and without any knowledge or notice of the existence of the aforesaid conditional sales contract.

"5. That defendant Rocky Mount Motors, Inc. is a North Carolina corporation which has had its place of business in Nash County, N. C. continuously since 1947, and at all times material to this action has been engaged in the business of buying and selling automobiles.

"6. That defendant Rocky Mount Motors, Inc. kept said automobile at its place of business in Nash County, North Carolina, from June 14, 1957, until July 15, 1957, when it sold and delivered the same for a valuable consideration, to the defendant Susie Jewell Ramsey, with warranty of title.

"7. That on July 15, 1957, defendant Susie Jewell Ramsey executed to defendant Planters National Bank & Trust Company a chattel mortgage on said automobile securing the sum of $2,293.50,

which said instrument was duly recorded in the Office of the Register of Deeds of Nash County on January 9, 1959, and there is still due some amount on same.

"8. That defendant Susie Jewell Ramsey, at all times material to this action, has been a resident of Nash County, North Carolina, and has kept said automobile at her place of residence.

"9. That on July 15, 1957, defendant Rocky Mount Motors, Inc. executed an Owner's Application for Certificate of Title for said automobile showing that it purchased same from said Harry Levine on June 14, 1957, and there were no liens on it.

"10. That on July 15, 1957, defendant Susie Jewell Ramsey signed an Owner's Application for Certificate of Title for said automobile showing that she purchased same on the same date from Rocky Mount Motors, Inc., and that Planters National Bank & Trust Company had a lien thereon for $2,293.50.

"11. That both of the aforesaid applications were filed with the Department of Motor Vehicles of North Carolina at the same time and on July 22, 1957, said agency issued a certificate of title to defendant Susie Jewell Ramsey for said automobile showing said lien in favor of defendant Planters National Bank & Trust Company.

"12. That this action was commenced on October 7, 1958, and on the same date a writ of claim and delivery was issued and pursuant thereto the Sheriff of Nash County seized the said automobile but returned same to defendant Susie Jewell Ramsey upon her giving a replevin bond as required by law.

"13. That the plaintiff's said conditional sales contract was recorded in the Office of the Register of Deeds of Nash County on April 30, 1959.

"14. That the value of said automobile at the time it came into the possession of defendant Rocky Mount Motors, Inc., and, also, at the time it came into possession of defendant Susie Jewell Ramsey was $2,250.00. Its value at time of seizure under the writ of claim and delivery was $1,750.00.

"15. That on June 13, 1957, Harry Levine brought the said automobile into this State (with intent that it be permanently located in the State, within the meaning of G.S. 44-38.1, and on said date it acquired a situs in this State.)

("16. That, irrespective of whether Harry Levine brought said automobile into this State with the actual intent that it be permanently located in the State, the Court finds that it had acquired a situs in this State on August 14, 1957, after it had been kept here by defendants for two consecutive months.)

"17. That plaintiff's conditional sales contract was not registered in the State of New York at the time it was brought into North Carolina by Harry Levine as aforesaid.

"18. That plaintiff's conditional sales contract was not registered in this State within ten days from the date it had knowledge that said automobile had been brought into this State as aforesaid.

"19. That plaintiff's conditional sales contract was not registered within four months after said automobile was brought into this State as aforesaid."

Plaintiff excepted: (1) to the portions of the findings of fact indicated by parentheses; (2) to the failure to include in finding of fact #6 a finding "that the automobile was not licensed by Rocky Mount Motors, Inc., and was kept and used only for demonstration purposes and for the purpose of sale"; (3) to the failure to include in finding of fact #17 a finding "that the laws of the State of New York (in effect) dates the registration back to the date of the contract, which was June 11, 1957"; and (4) to all of the court's conclusions of law.

It was adjudged that plaintiff recover nothing; that defendants go without day; that the sureties on the replevin bond be discharged; and that the plaintiff pay the costs.

Plaintiff excepted, appealed and assigned errors.

L. L. Davenport and Roy A. Cooper, Jr., for plaintiff, appellant.

T. A. Burgess for defendant Sudie Jewell Ramsey, appellee.

W. S. Wilkinson for defendant Rocky Mount Motors, Inc., appellee.

Calvin W. Bell for defendant Planters National Bank & Trust Company, appellee.

BOBBITT, J. The briefs deal largely with whether the stipulated facts and testimony suffice to support Judge Bone's findings of fact to the effect that the automobile acquired a situs in this State within the meaning of Sections (a) and (b) of G.S. 44-38.1 (1959 Cumulative Supplement). In this connection, see *Finance Co. v. O'Daniel,* 237 N.C. 286, 74 S.E. 2d 717. The basis of decision, stated below, renders consideration and discussion of this question unnecessary.

In *Truck Corp. v. Wilkins,* 219 N.C. 327, 13 S.E. 2d 529, it was held that title retention contracts, properly executed, registered and indexed in the State of Florida, on personal property then located therein, had priority over the liens of attachments subsequently issued against the same property in this State. The basis of decision is stated by *Schenck, J.,* as follows: "The general rule of comity, in the absence of a modifying statute, protects the lien of a retention title

contract or chattel mortgage on personal property duly registered and indexed in the State wherein it was executed and the property was then located, after the removal thereof to another state without registration in the latter state." Also, see *Applewhite Co. v. Etheridge,* 210 N.C. 433, 187 S.E. 588; *Thrift Corp. v. Guthrie,* 227 N.C. 431, 42 S. E. 2d 601.

Under Chapter 1190, Session Laws of 1953, now codified as G.S. 47-20 in the 1959 Cumulative Supplement, "No . . . conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against . . . purchasers for a valuable consideration from the . . . conditional sales vendee, *but from the time of registration thereof* as provided in this Article." (Our italics) The 1953 Act, in substance, consolidated the provisions theretofore included in two statutes, to wit, G.S. 47-20 and G.S. 47-23 in G.S., Vol. 2A, recompiled in 1950. These statutes, in respect of conditional sales contracts, modified the rule of the common law. *Finance Corp. v. Quinn,* 232 N.C. 407, 61 S.E. 2d 192; *Credit Corp. v. Walters,* 230 N.C. 443, 53 S.E. 2d 520.

While G.S. 47-20 and G.S. 47-23 (G.S., Vol. 2A, recompiled 1950) did not relate expressly to a factual situation involving property moved into this State when subject to a chattel mortgage or conditional sale contract properly executed and filed for registration in the state from which the property was removed, the question was raised as to whether these statutes required registration in this State in the event the property *came to rest* or *acquired a situs* in this State. *Thrift Corp. v. Guthrie, supra; Discount Corporation v. McKinney,* 230 N.C. 727, 55 S.E. 2d 513.

The cases heretofore cited, except *Finance Corp. v. O'Daniel, supra,* were either decided or related to factual situations occurring prior to the enactment of Chapter 1129, Session Laws of 1949, thereafter codified as G.S. 44-38.1 (G.S., Vol 2A, recompiled 1950), which provided: "No mortgage, deed of trust, or other encumbrance created upon personal property while such property is located in another state is or shall be a valid encumbrance upon said property which has been, or may be, removed into this State as to purchasers for valuable consideration without notice to *(sic)* creditors, unless and until such mortgage, deed of trust, or other encumbrance is or was actually registered or filed for registration in the proper office in the state from which same was removed."

Chapter 251, Session Laws of 1951, effective July 1, 1951, provides in Section 1 thereof: "Chapter 1129 of the Session Laws of 1949 is hereby amended by rewriting Section 1 to read as follows:" The

1951 Act then sets forth the provisions which, as amended, are now codified in the 1959 Cumulative Supplement to the General Statutes as G.S. 44-38.1.

If the automobile here involved acquired a situs in this State within the meaning of Sections (a) and (b) of G.S. 44-38.1, plaintiff's conditional sale contract would be valid as against a purchaser for a valuable consideration from the conditional sale vendee "only upon fulfilling all of the following conditions: (1) That such encumbrance was properly registered in the state where such property was located prior to its being brought into this State; and (2) That such encumbrance is properly registered in this State within ten days after the mortgagee, grantee in a deed of trust, or conditional sale vendor has knowledge that the encumbered property has been brought into this State; and (3) That such registration in this State in any event takes place within four months after encumbered property has been brought into this State." The stipulations and unchallenged findings of fact disclose that plaintiff's conditional sale contract did not fulfill these conditions.

On the other hand, if the automobile did not acquire a situs in this State within the meaning of Sections (a) and (b) of G.S. 44-38.1, as plaintiff contends, Section (c) of G.S. 44-38.1 applies. Section (c) provides: "When personal property covered by a deed of trust, mortgage or conditional sale contract is brought into this State and no situs is acquired in this State, the encumbrance is valid as against lien creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only from the date of due registration of such encumbrance in the proper office in the state from which the property was brought."

When Rocky Mount Motors, Inc., purchased the automobile from Levine, the conditional sale vendee, for a valuable consideration, plaintiff's conditional sale contract had not been filed for registration in the State of New York.

Section 65 of the New York Personal Property Law provides: "Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale. This section shall not apply to conditional sales of goods for resale." Plaintiff contends that, since it was filed for registration within the ten-day period, the conditional sale contract must

be treated as filed for registration *as of* the date of the execution thereof.

It is noted that the quoted New York statute contains the provisions of Section 5 of the Uniform Conditional Sales Act. (The last sentence appears only in the New York statute.) 2 Uniform Laws Annotated 6.

While, in respect of transactions within the State of New York, the quoted New York statute may provide absolute protection to a conditional sale vendor for a period of ten days after the making of the contract as against a person who purchases for a valuable consideration from the conditional sale vendee within the ten-day period, this provision of the New York statute is not controlling in North Carolina if in conflict with G.S. 44-38.1.

". . . comity is not permitted to operate within a State in opposition to its settled policy as expressed in its statutes, or so as to override the express provisions of its legislative enactments." *Credit Corp. v. Walters, supra; Discount Corporation v. McKinney, supra;* 13 A. L.R. 2d 1312, 1341 *et seq.*

Under Section (b) (1) of G.S. 44-38.1, a conditional sale contract is valid against a purchaser for a valuable consideration from the conditional vendee only if "properly registered in the state where such property was located *prior to its being brought into this State.*" (Our italics) Under Section (c) of G.S. 44-38.1, a conditional sale contract is valid as against a purchaser for a valuable consideration from the conditional sale vendee "only from the date of due registration of such encumbrance in the proper office in the state from which the property was brought." Under G.S. 47-20, a conditional sale contract is not valid as against a purchaser for a valuable consideration from the conditional sale vendee "but from" the registration thereof as provided therein. Our registration statutes contemplate that a purchaser for a valuable consideration from a conditional sale vendee acquires title free and clear of an unrecorded conditional sale contract.

The provisions of G.S. 44-38.1, in this respect, modify and supersede the general rule of comity; and Rocky Mount Motors, Inc., having purchased for a valuable consideration from the conditional sale vendee before the conditional sale contract was *actually* filed for registration in New York, acquired title from the conditional sale vendee free and clear of the then unrecorded conditional sale contract.

Since the other defendants derive their title from Rocky Mount Motors, Inc., it follows that plaintiff may not enforce its conditional sale contract as against them. "After property has passed into the hands of a *bona fide* purchaser, every subsequent purchaser stands in

the shoes of such *bona fide* purchaser and is entitled to the same protection as the *bona fide* purchaser, irrespective of notice, unless such purchaser was a former purchaser, with notice, of the same property prior to its sale to the *bona fide* purchaser." 77 C.J.S. Sales § 296 (d), quoted with approval by *Ervin, J.*, in *Motor Co. v. Wood*, 238 N.C. 468, 475, 78 S.E. 2d 391.

Frequently, in cases of this kind, loss falls upon an innocent victim, either the owner of the conditional sale contract or the purchaser for a valuable consideration from the conditional sale vendee. Their respective legal rights must be determined in accordance with the provisions of G.S. 44-38.1.

For the reasons stated, the judgment of Judge Bone is affirmed.

Affirmed.

JOE CUPITA v. CARMEL COUNTRY CLUB, INC.

(Filed 13 April, 1960.)

1. Negligence § 37a—

A member of a dance band which is engaged to play for a dance at a country club is a licensee of the club while on its premises for the purpose of his employment.

2. Negligence § 37b—

The proprietor owes a positive duty to an invitee to exercise ordinary care to have its premises in a reasonably safe condition for use by the invitee in a manner consistent with the purpose of the invitation, and to give him, when using the premises for such purpose, timely notice and warning of latent or concealed perils insofar as can be ascertained by reasonable inspection and supervision or are known by it and not by him.

3. Same—

A proprietor is not an insurer of the safety of an invitee.

4. Same—

A proprietor is not under duty to an invitee to keep his premises in a reasonably safe condition for uses which are outside the scope and purpose of the invitation, for which the property was not designed, and which could not reasonably have been anticipated, except where he is present and actively cooperates with the invitee in the particular use of the premises.

5. Negligence §§ 37a, 38—

Where an invitee goes to a place on the premises not covered by the invitation and not embraced within the ordinary aberrations or casualties of travel, such person becomes a licensee, and the proprietor's duty

is only to refrain from acts of wilful or wanton negligence and to refrain from doing any act which increases the hazard to such person while on the premises.

6. Negligence §§ 37f, 37g— Evidence held insufficient predicate for liability of proprietor to invitee going on a part of the premises outside the scope of the invitation.

Evidence tending to show that an invitee in going from a bus parked on defendant's premises to defendant's club house, started along a path but, upon discovering that the path led to the rear of the club house, cut across the lawn for the purpose of going to the front entrance, and fell to his injury in a hole in the lawn a few steps from the path, *is held* insufficient to be submitted to the jury on the issue of defendant's actionable negligence, the plaintiff having gone on a part of the premises outside the scope and purpose of his invitation, and further, plaintiff, in proceeding through darkness across the lawn without being able to see what dangers the darkness might be concealing, was guilty of contributory negligence as a matter of law.

APPEAL by plaintiff from *Craven, S. J.*, 11 January 1960 Special Term, of MECKLENBURG.

Action for damages for personal injury resulting from plaintiff falling in a hole.

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

Grier, Parker, Poe & Thompson for plaintiff, appellant.

Robinson, Jones & Hewson and Fairley & Hamrick for defendant, appellee.

PARKER, J. Plaintiff on 7 June 1958 was a 31-year-old musician and a member of Buddy Bair's dance orchestra. On this day this orchestra was travelling in a bus, which about 7:00 o'clock p. m. stopped in front of the main entrance of defendant's club building. The members of the orchestra carried their instruments and music from the bus into the club building to play for a dance there that evening. They returned to the bus, got in, and the bus was driven a short distance to a parking area on the club's premises and parked. The orchestra members remained in the bus about one hour, shaving, putting on their band uniforms, etc. The dance was to begin at 9:00 o'clock p. m. About 8:00 o'clock p. m. it was dark, and at that time plaintiff with two members of the orchestra stepped off the bus to go to the club building to set up their instruments and music and get ready for the dance. Plaintiff had never been on the club's grounds before. Travelling on the club's premises in the bus he was not able to get a

view of the grounds, because the bus had only four windows and by these windows were bunks and curtains.

When plaintiff stepped off the bus, he saw a gravel road leading to the club building and lights there. He and his two companions began walking down this road to the building and the lights. After they had walked 75 to 100 feet on this road, plaintiff realized they were going to the rear entrance of the building. He then saw the lights at the main entrance, where they had unloaded their instruments. Between him and the main entrance was a lawn of the club. The weather was clear. The lawn was flat and level with no big gullies. The lights at the main and rear entrances gave a dim view of the lawn.

Plaintiff and his two companions started walking to the lights and the main entrance of the club building. Plaintiff was looking on the ground as he walked, and had walked "perhaps twelve feet," when he fell in a hole on the lawn. The hole was about a yard in diameter and three or four feet deep. Grass was growing around the edge of the hole, and at the bottom of the hole were some tree roots. Near the hole were some trees and shrubbery, and the shrubbery cast shadows. Plaintiff testified, "the hole was invisible." He played at the dance.

After the dance plaintiff went with a flashlight to see the hole in which he fell. He was back again in November 1958. In the area of the hole was the mouth of a drain pipe going under the road. The lawn slopes down from the club building to the road. There was no ditch along the road, no gully. Plaintiff testified on cross-examination: "We knew there was a driveway of some kind that went from the front entrance to where the bus was parked. . . . Instead of going back and just finding the way the front entrance was from there, we cut across the lawn to the front entrance. We knew we were going across the lawn. We intentionally left the driveway to cross over the lawn. We left the driveway before I fell in the hole. We had traveled about 12 feet from the time we realized the road was leading to the back of the club before I fell into the hole. . . . The hole into which I fell was a step or two from the driveway. I had taken a few steps off the driveway before I fell in the hole."

Plaintiff's presence on the premises of the defendant at the time of his injury as a member of a dance orchestra to provide music for a dance in the club building gave him the status of an invitee. *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408; *Bemont v. Isenhour*, 249 N.C. 106, 105 S.E. 2d 431; 38 Am. Jur., Negligence, § 100; 65 C.J.S., Negligence, § 434(4) b.

Defendant owed plaintiff a positive duty to exercise ordinary care

to have its premises in a reasonably safe condition for his safety in using the premises in a manner consistent with the purpose of the invitation, and to give him, when using the premises for such purpose, timely notice and warning of latent or concealed perils in so far as can be ascertained by reasonable inspection and supervision or are known by it and not by him. Defendant is not an insurer of plaintiff's safety on its premises, and in the absence of negligence there is no liability. *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496; *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917; *Ross v. Drug Store*, 225 N.C. 226, 34 S.E. 2d 64; *Hood v. Coach Co.*, 249 N. C. 534, 541, 107 S.E. 2d 154, 159; *Waters v. Harris*, 250 N.C. 701, 110 S.E. 2d 283; 65 C.J.S., Negligence, § 45a; 38 Am. Jur., Negligence, § 96; Restatement of the Law, Torts, Vol. II, § 340.

This is said in *Ellington v. Ricks*, 179 N.C. 686, 102 S.E. 510: " 'The owner or occupant of premises is liable for injuries sustained by persons who have entered lawfully thereon only when the injury results from the use and occupation of that part of the premises which has been designed, adapted, and prepared for the accommodation of such persons.' 20 R.C.L., 67. If an invitee goes 'to out-of-way places on the premises, wholly disconnected from and in no way pertaining to the business in hand' and is injured, there is no liability. *Glaser v. Rothschild*, 221 Mo., 180, but a slight departure by him 'in the ordinary aberrations or casualties of travel' do not change the rule or ground of liability, and the protection of the law is extended to him 'while lawfully upon that portion of the premises reasonably embraced within the object of his visit.' *Monroe v. R. R.*, 151 N.C., 374; *Pauckner v. Waken*, 14 L.R.A. (N.S.), 1122."

The owner or person in charge of premises has a duty to keep the premises which are within the scope of the invitation in a reasonably safe condition for an invitee's safety for all uses by an invitee in a manner consistent with the purpose of the invitation, but the owner or person in charge is not bound to keep them in a reasonably safe condition for uses which are outside of the scope and purpose of the invitation, for which the property was not designed, and which could not reasonably have been anticipated, except where he is present and actively cooperates with the invitee in the particular use of the premises. *Dickau v. Rafala*, 141 Conn. 121, 104 A. 2d 214; *Leenders v. California Hawaiian Sugar Refining Corp.*, 59 Cal. App. 2d 752, 139 P. 2d 987; *Tomsky v. Kaczka*, 17 N.J. Super. 211, 85 A. 2d 809; *Augusta Amusements, Inc. v. Powell*, 93 Ga. App. 752, 92 S.E. 2d 720; 65 C.J.S., Negligence, § 49; Restatement of the Law, Torts, Vol. II, § 343(b). Accordingly, where a person has entered on the premises of

another under invitation, express or implied, he is bound by that invitation, and if he goes to another place on the premises not covered by the invitation, the owner's duty of care owed to such person as an invitee ceases forthwith, and he becomes a licensee. *Palmer v. Boston Penny Sav. Bank,* 301 Mass. 540, 17 N.E. 2d 899, 120 A.L.R. 633; *Loney v. Laramie Auto Co.,* 36 Wyo. 339, 255 P. 350, 53 A.L.R. 73; *Nichols v. Consolidated Dairies,* 125 Mont. 460, 239 P. 2d 740, 28 A.L.R. 2d 1216; *Fahey v. Sayer,* 48 Del. 457, 106 A. 2d 513, 49 A.L.R. 2d 353; 65 C.J.S., Negligence, § 33; 38 Am. Jur., Negligence, § 100.

This Court in *Quantz v. R. R.,* 137 N.C. 136, 49 S.E. 79, held that where the public is licensed to pass through a railroad station the railroad company is not liable for injuries sustained by a licensee who falls through a door located twelve feet from the passageway.

In *Money v. Hotel Co.,* 174 N.C. 508, 93 S.E. 964, we held there was no evidence of actionable negligence on the part of the hotel company, where plaintiff's intestate, a licensee in the hotel, went to a guest's room in the hotel at his invitation, and in leaving passed the passenger elevator and stairway provided for the purpose, and wandered around the hall and attempted to go down a baggage elevator at the back on the part of the floor used by servants, where he could not reasonably have been antcipated to go, and fell to his death.

In this case all the evidence shows that plaintiff fell into the hole and was injured, while intentionally and materially deviating from the premises which were within the scope of his invitation, and walking on a part of the premises not covered by his invitation — a part of the premises not designed as a road or path and the use of which for such purpose at night could not reasonably be anticipated by defendant. When plaintiff fell in the hole, he was a licensee, and the only duty defendant owed him is to refrain from acts of wilful or wanton negligence and from doing any act which increases the hazard to him while he is on the premises. *Coston v. Hotel,* 231 N.C. 546, 57 S.E. 2d 793; *Dunn v. Bomberger,* 213 N.C. 172, 195 S.E. 364; *Hood v. Coach Co., supra.* Plaintiff has neither allegation nor proof of wilful or wanton negligence, nor of any increase of hazard to him, while he was on the premises. This is not a case where the hole was so close to the road as to render travel thereon unsafe. 38 Am. Jur., Negligence, § 130.

Hood v. Coach Co., supra, relied on by plaintiff, is distinguishable, in that the evidence shows only a slight departure from the driveway, which was within the scope of the invitation, by plaintiff "in the ordinary aberrations or casualties of travel" in order to get out of the way of a bus. *Leavister v. Piano Co.,* 185 N.C. 152, 116 S.E. 405, re-

lied on by plaintiff, is also distinguishable. In that case plaintiff went into the store to buy music rolls, and a salesman there, who was busy, directed him to a cabinet in the rear of the store a few feet away. While going there plaintiff fell through a trap door, and was injured.

In our opinion, there is no evidence of actionable negligence on defendant's part shown by plaintiff's evidence.

But if we concede, which we do not, that the evidence makes out a case of actionable negligence against defendant, nevertheless, it is manifest that plaintiff's evidence establishes facts necessary to show contributory negligence as a matter of law so clearly that no other conclusion can be reasonably drawn therefrom, in that plaintiff being unfamiliar with the premises left the provided road, and proceeded through darkness beyond the scope of his invitation to walk across a lawn on such premises without being able to see what dangers such darkness may conceal, and there being no circumstances to show he was misled through a false sense of safety, and there being no emergency or stress of circumstances rendering it necessary that he should cross the lawn and not use the provided road. *Curet v. Hiern*, (Louisiana App.), 95 So. 2d 699; *Fahey v. Sayer, supra; Night Racing Ass'n. v. Green* (Fla.), 71 So. 2d 500; *Murphy v. Cohen*, 223 Mass. 54, 111 N.E. 771; *Johnson v. Mau*, 60 N.D. 757, 236 N.W. 472; *Keller v. Elks Holding Co.*, 209 F. 2d 901; Annotation 163 A.L.R. 590, where many cases are cited.

In *Johnson v. Mau, supra*, plaintiff, while an employee of defendant was putting gas and oil in a car he was to use, went into a back part of the garage, which was pitch dark, and fell down an elevator shaft in the garage. The Court assuming he was an invitee said: "He went beyond the scope of his invitation when he started out to look for the water himself, and without making any inquiry or taking any precaution by the exercise of any of his faculties he stepped out into the darkness. Surely reasonable minds cannot differ on the question of his contributory negligence, and it follows that the defendant's motion for judgment notwithstanding the verdict should have been granted."

In *Powers v. Raymond*, 197 Cal. 126, 239 P. 1069, it is held that one who had never used and did not know of dark pathway through grounds of hotel in which she was residing pending commencement of employment therein was guilty of contributory negligence as a matter of law in using such pathway instead of well lighted pathway parellel thereto.

O'Neil v. See Bee Club, (Ohio Court of Appeals), 118 N.E. 2d 175, relied on by plaintiff, is distinguishable, for the reason that plaintiff,

a member of the club, was injured when he stepped into an unseen window well on a dark parking lot provided by the club, a place within the scope of his invitation, while attempting to get in his car parked there.

"When it appears from all the evidence that the plaintiff ought not to recover, it is the duty of the court to say so." *Houston v. Monroe*, 213 N.C. 788, 187 S.E. 571. What *Stacy, C. J.*, said in that case is applicable here: "In the circumstances thus disclosed by the record, we are constrained to hold that the demurrer to the evidence should have been sustained, if not upon the principal question of liability, then upon the ground of contributory negligence."

The judgment of nonsuit below is

Affirmed.

F. W. WATTS, ADMINISTRATOR OF THE ESTATE OF MALCOLM WATTS, DECEASED, v. FREDERICK A. WATTS.

(Filed 13 April, 1960.)

1. Negligence § 21—

Negligence is never presumed from the mere fact of an accident or injury, but plaintiff has the burden of proving negligence and proximate cause and also that his injuries resulted from the alleged negligence.

2. Negligence § 14: Automobiles § 19—

A party is not entitled to the benefit of the doctrine of sudden emergency if he himself brings about the emergency or contributes to its creation.

3. Automobiles § 9—

The parking of a vehicle on a grade without properly setting the brake and turning the wheels toward the curb of the street, in violation of G.S. 20-163 and G.S. 20-124 (b), is negligence *per se*, and is actionable if the proximate cause of injury.

4. Same—

The fact that an automobile runs down the street for a considerable distance immediately after it was parked permits the inference that the driver did not turn its front wheels to the curb as required by statute.

5. Automobiles § 41r— Evidence held insufficient to show that emergency brake was defective at the time owner permitted intestate to use the car.

Evidence to the effect that the cable of the emergency brake of defendant's vehicle broke, that defendant thereafter repaired the brake by installing a new cable, but failed to test its operation after the re-

pair, and failed to advise plaintiff's intestate in regard to the brake or the installation of the new brake cable before permitting intestate to use the car, that intestate parked the car on a grade, setting the hand brake, and that shortly thereafter intestate saw the car rolling down the hill, and, in attempting to stop the car, was fatally injured when the car ran on a bank and turned over, striking intestate, with further evidence that when the car was removed from the scene after the wreck the operator of the wrecker had to let the emergency brake down and knock the car out of gear, but without evidence tending to show that intestate had properly set the hand brake or that it was defective and therefore ineffective when properly set, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence.

APPEAL by plaintiff from *Johnston, J.*, 26 October Term, 1959, of FORSYTH.

This is a civil action to recover for the alleged wrongful death of plaintiff's intestate who died on 10 November 1958. Plaintiff F. W. Watts, administrator, is the father of the deceased Malcolm Watts and of the defendant Frederick A. Watts. F. W. Watts and his three sons, Malcolm, James, and Frederick A. Watts, lived at the F. W. Watts' home located at 941 Vargrave Street in Winston-Salem, North Carolina.

The defendant Frederick A. Watts owned a 1951 4-door Mercury. The Mercury car was used by both Malcolm and Frederick A. Watts. Each of them owned another car and when either one of their cars was not in good running condition the Mercury car was used.

About 2:30 p.m. on Sunday, 9 November 1958, the plaintiff's intestate parked the Mercury automobile headed downhill at 1111 Vargrave Street. Vargrave Street runs generally north and south and the car was headed north. The car was parked on "a fairly good hill." Vargrave Street is paved and there are raised curbstones on each side of the street made of granite which are perpendicular to the street; the raised curb is six inches above the surface of the street.

It is alleged in the complaint that, after Malcolm Watts parked the car on Vargrave Street the plaintiff is informed and believes and so alleges that the plaintiff's intestate pulled up the emergency brake, as required by law; that he got out of the car and went around back of the car to the residence at 1111 Vargrave Street; that he noticed the automobile "begin to roll downhill * * *." According to the evidence, when he saw the car rolling down the hill he started running and tried to re-enter the car. Being unable to re-enter the car, and after the car had traveled some distance, it ran up on a bank and turned over, striking the plaintiff's intestate.

When the car was removed from the scene of the wreck, in order

for the wrecker to pull the car back off the sidewalk, the operator of the wrecker, according to one of the witnesses, "had to get the car out of gear and do something to the emergency brake." Another witness testified that the driver of the wrecker "let the emergency brake down and knocked it (the car) out of gear."

It is further alleged in the complaint that the emergency brake on the Mercury automobile was not in a safe working and mechanical condition and that the defendant had purchased parts with which to repair such emergency brake but had failed to do so. The evidence tends to show otherwise.

The defendant was called as a witness for the plaintiff and testified that the week before the accident the hand brake cable on the Mercury broke; that he secured a hand brake cable and installed it but had not driven the car thereafter to test it. "As far as I knew, the hand brake on my car would hold the car perfectly all right. * * * I had not tested the car to see whether or not it would hold. * * * I installed the hand brake cable, and I installed it correctly to the best of my knowledge."

There is neither allegation nor proof tending to show that Malcolm Watts knew anything about the defective emergency brake on the Mercury or about the installation of the new brake cable.

The defendant pleaded contributory negligence based on the conduct of plaintiff's intestate after the automobile began to roll down Vargrave Street and also pleaded the failure of plaintiff's intestate to turn the front wheels of the Mercury automobile towards the curb when he parked the car, as required by G.S. 20-163 and G.S. 20-124(b).

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

Harold R. Wilson for plaintiff appellant.
Smith, Moore, Smith, Schell & Hunter for defendant, appellee.

DENNY, J. The plaintiff assigns as error the ruling of the court below in sustaining the defendant's motion for judgment as of nonsuit.

The plaintiff alleged in his complaint that prior to 9 November 1958 "the defendant had actual knowledge that the emergency brake on said Mercury automobile was not in a safe working and mechanical condition and that the said defendant had purchased parts with which to repair said emergency brake but had failed to do so." The evidence offered in this connection was to the effect that the week before the

accident the hand brake cable on the Mercury broke; that the defendant secured a hand brake cable and installed it but did not drive the car thereafter to test it and find out whether or not the emergency brake would hold. It is alleged that plaintiff's deceased pulled up the emergency brake, as required by law, when he parked the car. Even so, no evidence was offered tending to show that the hand brake was properly set, or that it was defective and, therefore, ineffective when so set. There is evidence that before the car could be pulled back off the sidewalk where it came to rest after the accident, it had to be taken out of gear and the emergency brake "pushed down." Unfortunately, the mechanic who repaired the car after the accident and could have testified, no doubt, as to the mechanical condition of the emergency brake immediately after the accident, died a short time before the case was tried. Consequently, the plaintiff was deprived of the benefit of evidence in this respect.

In the case of *Harward v. General Motors Corp.*, 235 N.C. 88, 68 S.E. 2d 855, this Court said: "Negligence is never presumed from the mere fact of an accident or injury. The plaintiff has the burden of establishing by appropriate proof not only negligence but that such negligence was the proximate cause of the injury complained of. The plaintiff must also establish by his evidence a causal relation between the alleged negligence and the injury upon which a recovery is sought. Evidence that merely takes the matter into the realm of conjecture is insufficient. *Rountree v. Fountain*, 203 N.C. 381, 166 S.E. 329; *Lynch v. Telephone Co.*, 204 N.C. 252, 167 S.E. 847. * * *" *Williamson v. Randall*, 248 N.C. 20, 102 S.E. 2d 381; *Parker v. Wilson*, 247 N.C. 47, 100 S.E. 2d 258.

The plaintiff contends that the defendant by not informing plaintiff's intestate of the defective condition of the hand brake on the Mercury car, created the emergency that was brought about when the car started to roll downhill and that the plaintiff's intestate under those circumstances was not required to pursue the wisest course of conduct in connection with his efforts to re-enter the car. *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251.

If, however, plaintiff's intestate brought about the emergency or contributed to its creation by failing to park the car in the manner required by law, the plaintiff may not avail himself of the benefits of the doctrine of sudden emergency. *Brunson v. Gainey*, 245 N.C. 152, 95 S.E. 2d 514; *Cockman v. Powers*, 248 N.C. 403, 103 S.E. 2d 710.

There is no allegation or proof to the effect that when plaintiff's intestate parked the car headed downhill on Vargrave Street that he

turned the front wheels of the Mercury automobile towards the curb of the street, as required by G.S. 20-163 and G.S. 20-124 (b). A violation of these statutes constitutes negligence *per se*, but such violation must be a proximate cause of the injury to be actionable. *Arnett v. Yeago*, 247 N.C. 356, 100 S.E. 2d 855; *Tysinger v. Dairy Products*, 225 N.C. 717, 36 S.E. 2d 246. In other words, the fact that the Mercury automobile ran down the street for a considerable distance immediately after it was parked, permits the inference that plaintiff's intestate did not turn its front wheels to the curb of Vargrave Street, as required by the above statutes. *Arnett v. Yeago, supra.*

However, in our opinion, we do not reach the question of contributory negligence. There is substantial variance between some of the essential allegations of the complaint with respect to negligence and the evidence offered in support of such allegations. Moreover, irrespective of any variance in the allegations and proof, we do not think the plaintiff's evidence is sufficient to carry the case to the jury and support a verdict based on actionable negligence. *Webster v. Webster*, 247 N.C. 588, 101 S.E. 2d 325; *Harward v. General Motors Corp., supra.*

The judgment as of nonsuit will be upheld.

Affirmed.

STATE v. HARRY HUGH POPE.

(Filed 13 April, 1960.)

1. Criminal Law § 99—

On motion to nonsuit, the evidence must be considered in the aspect most favorable to the State.

2. Criminal Law § 101—

Circumstantial evidence is sufficient to overrule nonsuit if its tends to prove the fact of guilt, or reasonably conduces to such conclusion as a fairly logical and legitimate deduction. It is insufficient if it merely raises a suspicion or conjecture in regard thereto.

3. Homicide § 20— Evidence held insufficient to show that death of the deceased was the result of any act on the part of defendant.

Evidence tending to show that defendant, in a drunken condition, was driving his automobile on the public highways with his girl as a passenger, that about a week prior thereto she had informed him "she was going to break up with him", that some three weeks prior to the occasion in question he had stated he was going to take her to the military reservation where he was stationed and she had tried to stop the car

by putting her foot on the brake pedal, that on the night in question he was seen dragging a body along a highway toward where his car was parked at the entrance of a parking lot, and that the girl had died from a head injury of a type caused when a moving head suddenly strikes an object, with further evidence that there was no damage to the car or *indicia* that it had been in an accident or a collision, *is held* insufficient to be submitted to the jury and sustain a conviction of manslaughter, since the evidence leaves in mere conjecture whether the deceased fell or attempted to jump from the car or whether defendant struck her or shoved her from the vehicle.

APPEAL by defendant from *Burgwyn, E. J.*, October "A" Criminal Term, 1959, of WAKE.

Defendant was tried upon a bill of indictment which charged that on 9 August 1959 he did feloniously, wilfully and of his malice aforethought, kill and murder Mary Lee Duncan.

Plea: not guilty.

Verdict: guilty of involuntary manslaughter.

Judgment: imprisonment for not less than three nor more than five years.

Defendant appealed and assigned errors.

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

Arendell, Albright and Green and Jordan, Dawkins and Toms for the defendant.

MOORE, J. Defendant assigns as error the denial of his motion for nonsuit at the close of all the evidence. In determining whether or not the evidence was sufficient to make out a *prima facie* case of unlawful homicide it is necessary to review the facts and consider them in the aspect most favorable to the State. *State v. Ritter*, 239 N.C. 89, 79 S.E. 2d 164.

The evidence is summarized as follows:

The incidents herein related took place in or near the City of Raleigh. Defendant is thirty years of age and at the time of the indictment was in military service. He became acquainted with Mary Lee Duncan, age nineteen, in May 1959. He visited her in Raleigh every weekend thereafter until the time of her death. They had discussed marriage.

About three weeks prior to 9 August 1959 they had an argument. They and another couple were riding in defendant's car. Mary asked defendant to take her home. He refused and stated he was going to take her to Fort Bragg. He began to drive in that direction and she

tried to stop the car by putting her foot on the brake pedal. He slapped her. He was drunk at the time.

About a week before her death Mary informed defendant "she was going to break up with him."

About 10:00 P. M. on 8 August 1959, Saturday night, they met by prearrangement at the Carolina Pines dance club. Her sister and a number of their mutual friends were present. Most of the evening Mary and defendant sat at a table and did not dance. Defendant and a friend had a quantity of vodka. Mary took at least one drink. Defendant was drinking; he was "probably 'high.'" He tried to "pick an argument" with a male dancer. When the dance was over at midnight defendant sat at the table for awhile, then went to the ladies powder room and was asked to leave the club. He and Mary left together and rode in defendant's car to a drive-in where their friends had gone. Defendant's automobile was a 1959 Cadillac, color blue with a light colored top. They remained at the drive-in a short while. Mary spoke to her sister. Mary was in the front seat with defendant, the window of the car was down, she was "right at the window" and had her hands on the door. She and defendant left about 12:30 after agreeing to meet their friends at the home of one of them.

About 1:00 A. M. the witness, Robert Hamilton, was driving along old Highway 70 toward Garner, at a point about 3½ to 4 miles distant from the drive-in above referred to. His wife and children were with him. They saw a man dragging a body "along in the ditch alongside the highway" at a point about 60 to 70 feet from the entrance to a junk yard. ". . . (h)e had hold of two of the limbs, like arms or legs," and they were bare. Nearby on the right side of the highway was a Cadillac of the style and color of defendant's car. The man was near the rear fender of the Cadillac; he was not identified at this time. Hamilton drove by, turned around and returned to the scene about two minutes later. At this time the Cadillac was in the entrance to the parking lot of the junk yard, facing the highway. A body was lying on the ground parallel to the Cadillac and on the opposite side from the witness. Hamilton could not determine whether it was a man or woman; he could only see an arm and leg. The man was now in plain view in the headlights of Hamilton's car; he was the defendant: Defendant walked to the back of the car, stood there a minute, then got into the Cadillac and it began to move in the direction of the witness. The body was still on the ground and was not moving. Hamilton came to Raleigh and reported the matter to a police officer. On his way home he was followed for some distance by a blue Cadillac. When he passed the junk yard the defendant, automobile and body

were gone. The next morning, accompanied by police, Hamilton returned to the scene on the Garner Road. They found defendant's billfold. Near the point where defendant had first been seen there was a pool of blood about 15 inches in diameter. There was another, smaller bloody spot at the driveway to the parking lot.

About 4:50 Sunday morning defendant stopped his automobile in an alley in the City of Raleigh near a police car. He stated to the officer, "Sir, my girl friend is dead." Mary's body was found in the front seat of defendant's car with her head toward the steering wheel. There was blood on both doors of the car, the back seat, the floor and the back of the driver's seat. Defendant's bloody shirt and a partially empty bottle of vodka were found in the car. There was no indication of an accident involving the car; it was undamaged. Defendant was sober, with only a faint odor of alcohol on his breath. He was highly nervous and suffered from nausea during the morning.

Defendant gave the following version of the occurrence: He thought she had jumped or fallen from the automobile. He did not remember anything from the time they left the dance until he discovered suddenly she was not in the car. He picked her up at a gravelly place and put her on the front seat of the automobile. At the time "he didn't know she was hurt that bad." He passed out and didn't remember anything else. When he woke up he was on the south side of town and discovered she was dead.

Dr. Lineberger, a medical expert, specializing in pathology, did a post-mortem examination of deceased's head and brain. There was a wound on the back of the head. There were two lacerations. The larger laceration was on the left posterior of the scalp; the other was just to the right of the midline. There was a 5 or 6 inch fracture at the rear of the skull. In the Doctor's opinion the cause of death was brain injury. "Most extensive or obvious brain damage was to the front part of the brain . . . the site of the fracture being opposite the brain damage." This was "a countre-coupe type of injury." In this type of injury "the brain damage is opposite the point of impact. This type of injury may occur when the head is in motion and strikes an object suddenly, then the brain reverses and goes in the opposite direction from where the head has come." Tests showed deceased had been under the influence of alcoholic beverages. Examination disclosed no sexual attack.

The State's evidence of the corpus delicti is circumstantial. The true test of its sufficiency is "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." *State v. Simmons,* 240 N.C. 780, 785, 83 S.E. 2d 904, quoting from *State v. Johnson,* 199 N.C. 429, 154 S.E. 730.

The question here is what conduct, if any, on the part of defendant caused the injury to and death of the deceased? There is ample evidence that defendant was operating a motor vehicle on the public highways while under the influence of intoxicating liquor. But there is a total lack of evidence that this circumstance was the proximate cause of the death of deceased. *State v. Mundy,* 243 N.C. 149, 153, 90 S.E. 2d 312. There was no accident or collision. Did the defendant assault or strike deceased? Did he shove her from the car? To answer these questions in the affirmative would be to engage in pure speculation. The only evidence of cause of injury comes from defendant. He suddenly discovered that deceased was out of the car. He does not know whether she jumped out or fell out. The facts related by the witness Hamilton, the physical facts at the scene on the Garner road and the medical evidence is consistent with the theory that for some reason she fell from the car. The type of injury she sustained, according to the medical expert, ordinarily results when the head is in motion and meets resistance. To be sure there are some very suspicious circumstances consistent with guilt, but when all are considered, and when defendant's explanation is discarded, the cause of injury is left to surmise.

Defendant's demurrer to the evidence should have been sustained. As regrettable and tragic as is the death of this young lady in the early bloom of womanhood, we cannot in justice sustain defendant's conviction upon the evidence adduced.

Reversed.

WILLIAM MASON JUSTICE, PETITIONER v.
EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES, RESPONDENT.

(Filed 13 April, 1960.)

1. Automobiles § 1—

The General Assembly, in the exercise of the State's police power to enact such rules as are reasonable and necessary to promote safety upon the highways, has authority to require a showing of financial responsibility as a prerequisite to the issuance of license or operating permit to those using the public highways.

2. Same—

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute.

3. Same—

Construing Section 11(a) of Chapter 1006, S.L. 1947, with Section 15(c) of Chapter 1067, enacted the same day, the authority of the Department of Motor Vehicles or the Commissioner to suspend license or permit of an operator for failure to pay a judgment is limited to one year.

4. Statutes § 5d—

Statutes *in pari materia* are to be construed together and harmonized, if possible, so as to give effect to all of the provisions of each.

5. Automobiles § 1—

Section 14, Chapter 1300, S.L. 1953, by its express terms does not apply to any accident, or judgment arising therefrom, occurring prior to the effective date of the statute. G.S. 20-279.14.

6. Same—

A petition showing that the Commissioner of Motor Vehicles had refused petitioner's request for a driver's license solely because of an unsatisfied judgment against the petitioner, that more than a year had elapsed since the revocation of petitioner's license for failure to pay the judgment, that petitioner is now able to show financial responsibility and is qualified for the renewal of his license, states a cause of action for the issuance or renewal of the license and demurrer thereto was improperly sustained.

APPEAL by petitioner from *Johnston, J.*, December 7, 1959 Mixed Term, FORSYTH Superior Court.

Petition under G.S. 20-233 to review respondent's act in refusing to issue to petitioner an operator's or driver's permit to operate a motor vehicle upon the public highways. The petitioner alleges in substance the following: That he is a resident of North Carolina and for many years was a licensed truck driver with years of experience and a perfect accident record. In 1948 his son, while driving petition-

er's automobile, was involved in an accident as a result of which a judgment for $3,000 was rendered against the petitioner at the October Term, 1952, Forsyth Superior Court. On October 24, 1952, the judgment creditor caused a copy of the judgment to be certified to the Commissioner of Motor Vehicles, and a second copy was certified on April 22, 1953. On July 6, 1953, the Department of Motor Vehicles ordered petitioner's operator's license suspended and a member of the State Highway Patrol picked up the operator's license and the registration plates.

The petitioner, being unable to satisfy the judgment and his other obligations, on December 16, 1954, was adjudged a bankrupt. On February 28, 1955, the United States Court for the Middle District of North Carolina entered an order in the bankruptcy proceeding discharging him from all claims and debts provable against him under the acts of Congress; that the order discharged his liability on the judgment; that G.S. 20-244 to the contrary is unconstitutional.

The petitioner further alleges the Commissioner of Motor Vehicles is without power to revoke or suspend his operator's license for more than one year from the date of the accident in which his son was involved; that the petitioner is thoroughly qualified for operator's license; that he has made application to the proper authorities and has furnished liability insurance showing financial responsibility; that the Department of Motor Vehicles and the respondent have refused to permit him to take examination for operator's license and have ordered his liability insurance cancelled; that the Department claims authority to refuse to issue license so long as the judgment against him remains unpaid; that the Acts of the North Carolina General Assembly do not, when properly construed, authorize the denial of a permit; but if they be so interpreted, they are unconstitutional and invalid in that they contravene the Fourteenth Amendment to the Constitution of the United States.

The respondent filed a demurrer on the grounds the complaint showed upon its face that the petitioner is not qualified for operator's license by reason of the unpaid judgment. The court sustained the demurrer and the petitioner excepted and appealed.

Thomas Wade Bruton, Attorney General, Lucius W. Pullen, Assistant Attorney General for respondent, appellee.

W. Scott Buck for petitioner, appellant.

HIGGINS, J. Petitioner, in his excellent brief, contends (1) under applicable law in effect at the time of the accident the Department

of Motor Vehicles had authority to suspend his operator's license for one year only, for failure to satisfy the judgment; (2) if the Court should hold, as respondent contends, the revocation continued without limitation of time until the judgment is satisfied, then in that event the legislative provision violates the petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

Under its police power, the State, through its legislative branch, may make such rules as are reasonable and necessary to promote safety upon the highways and to protect the public by requiring a showing of financial responsibility as a prerequisite to the issuance of license or operating permit for those using the public highways. However, "A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute." *In re Revocation of License of Wright,* 228 N.C. 584, 46 S.E. 2d 696.

At the legislative session of 1947 two acts were passed regulating travel upon the highways: Chapter 1006, known as "The Motor Vehicles Safety and Responsibility Act," and Chapter 1067, known as "The Highway Safety Act." Section 11(a) of Chapter 1006 provides: "The Commissioner shall suspend the operator's or chauffeur's license . . . issued to any person who has failed for a period of sixty days to satisfy any judgment in amounts and upon a cause of action as hereinafter stated, immediately upon receiving authenticated report as hereinafter provided to that effect." No time limit for the suspension is provided in Chapter 1006. However, § 15(c) of Chapter 1067, after fixing other time limitations (not including failure to pay judgments) provides: "When a license is suspended under any other provision of law, the period of suspension shall be not more than one year."

Both chapters relate to the same subject — safety on the public highways. Both were passed and ratified on the same day, April 5, 1947, and both became effective on the same day, July 1, 1947. "Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible." *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898; *In re Wright,* 228 N.C. 584, 46 S.E. 2d 696; *Fletcher v. Collins,* 218 N.C. 1, 9 S.E. 2d 606; *State v. Dixon,* 215 N. C. 161, 1 S.E. 2d 521; *Wilson v. Jordan,* 124 N.C. 683, 33 S.E. 139. Section 11(a) of Chapter 1006, Session Laws of 1947, gives the Department of Motor Vehicles, or the Commissioner, authority to sus-

pend license or permit of an operator for failure to pay a judgment. Section 15(c) of Ch. 1067 limits the time of the suspension to one year.

It is argued that the Commissioner, under the authority of § 14 of Chapter 1300, Session Laws of 1953, now G.S. 20-279.14, may refuse to renew an operator's license under the provision, "Suspension To Continue Until Judgments Paid and Proof Given." The terms of the Act itself render it unnecessary to discuss other reasons why the contention is not well founded. Section 37 of the Act provides: "This Act shall not apply with respect to any accident or judgment arising therefrom, or violation of the motor vehicles laws of this State, occurring prior to the effective date of this Act."

We conclude the plaintiff's petition states a cause of action in that it alleges the petitioner is qualified for renewal of his license; that he is able to show financial responsibility; that the respondent has refused to permit him to show his qualifications solely upon the ground the judgment against him growing out of his son's accident in 1948 has not been satisfied. Having arrived at that conclusion, it is unnecessary for us to discuss other questions presented and argued on the appeal. The judgment of the Superior Court of Forsyth County in sustaining the demurrer is

Reversed.

FRANK C. ARNOLD, JOHN C. ARNOLD, JR., DORIS M. KINCADE, W. T. MORTON, JR., ETHEL W. ROY AND F. L. ROY v. W. R. BATTLEY, GUARDIAN AD LITEM FOR THE UNBORN GRANDCHILDREN OF A. F. MORTON, DECEASED.

(Filed 13 April, 1960.)

Wills § 33c—

Where there is a devise of land for life with limitation over to the grandchildren of the life tenant, and the same grandchildren are living at the death of the testator and at the death of the life tenant, such grandchildren take regardless of which date the roll is called, and the estate is no longer subject to be opened up to let in grandchildren who may thereafter be born.

APPEAL by defendant guardian *ad litem* from *Johnston, J.*, February 1960 Term, IREDELL Superior Court.

The plaintiffs brought this action to have the court determine and declare the rights under the will of Walter P. Morton. The testator was never married. He executed his will on October 14, 1932. It was

admitted to probate after his death on October 14, 1940. After disposing of certain specifically described real and personal property, the will provided: "I will to A. F. Morton all my other land and personal property — at his death the property goes to his grandchildren and when the youngest child becomes 21 years old the property is to be sold and the money equally divided, all my lawful debts and my burial expenses are to be paid out of this property." The estate has been completely administered and all debts and expenses connected therewith have been paid.

A. F. Morton, as life tenant, had the use and benefit of the property until his death in 1945. The grandchildren of A. F. Morton, living at the death of the testator and at the death of A. F. Morton, the life tenant, were: Frank C. Arnold, John C. Arnold, Jr., Doris M. Kincaid, W. F. Morton, Jr., J. F. Roy, and C. M. Roy. However, C. M. Roy died in 1953, leaving the plaintiff, Ethel W. Roy, as his widow and F. L. Roy, brother, as his only heir at law. The youngest grandchild of A. F. Morton is now 29 years of age. The plaintiffs now desire to sell the property and divide the proceeds.

Judge Johnston entered judgment that A. F. Morton took a life estate under the terms of the will and at his death the fee vested in his then living grandchildren; and that the plaintiffs could convey a good title. The guardian *ad litem* for unborn grandchildren excepted and appealed.

Scott, Collier, Nash & Harris, By: Robert A. Collier for plaintiffs, appellees.

W. R. Battley for defendant, appellant.

HIGGINS, J. We approve the judgment of the superior court. In doing so it is not necessary to determine whether the roll of grandchildren should have been called and the takers of the estate in remainder determined at the death of the testator or at the death of the life tenant. *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578. In either event the same grandchildren would have answered. However, since the estate vested, one of the takers has died, leaving a widow and a brother to take his share. Their interests will be taken into account in the division of the proceeds if the property is sold, or in the partition if all agree to take the property in its unconverted form. *Trust Co. v. Allen,* 232 N.C. 274, 60 S.E. 2d 117; *Seagle v. Harris,* 214 N.C. 339, 199 S.E. 271.

The judgment of the Superior Court of Iredell County is

Affirmed.

STATE v. QUEENIE PERRY BROWN.

(Filed 13 April, 1960.)

APPEAL by defendant from *Bickett, J.*, September 1959 Criminal Term, of WAKE.

Criminal prosecution upon a bill of indictment charging murder of one George Brown.

Plea—Not guilty.

The Solicitor for the State did not ask for verdict of murder in first degree, but did ask for verdict of murder in second degree or manslaughter as the jury should find the facts to be.

Upon trial in Superior Court the State offered evidence tending to show that defendant and her husband, the deceased, on the morning of 15 August 1959, were heard to be fussing in their house; that he was seen to come out of the door, followed by defendant who hit him back of the head with a rifle butt and, upon his turning to face her she shot him in the stomach—inflicting injury from which he died.

Defendant on other hand testified and contended contrariwise.

Verdict: Guilty of manslaughter.

Judgment: That the defendant be confined in the quarters provided for women by the State prison Department under the provisions of G.S. 148-27 for the term of not less than seven years nor more than ten years.

Defendant excepted to and appeals therefrom to Supreme Court, and assigns error.

Attorney General Bruton, Assistant Attorney General Harry McGalliard for the State.

Herman L. Taylor, Samuel S. Mitchell for defendant, appellant.

PER CURIAM. The case was properly presented to the jury. And the assignments of error duly considered fail to reveal prejudicial error for which a new trial should be granted. Hence in the judgment from which appeal is taken, there is

No error.

BLANCHE P. TRULL, ADMINISTRATRIX OF WALTER ALFRED TRULL, DECEASED, v. RAEFORD LEE AUSTIN.

(Filed 13 April, 1960.)

APPEAL by plaintiff from *Sharp, S. J.*, January 1960 Special Civil Term, of UNION.

This is an action to recover damages for the alleged wrongful death of plaintiff's intestate, Walter Alfred Trull.

About 11:15 P. M. on 22 May 1959 the deceased, while lying upon a paved rural road in Union County, was struck by a motor vehicle. He was injured and death immediately ensued. He had been drinking whiskey. Defendant drove a Ford pickup over his body.

Defendant was the only eyewitness. He testified that Trull was in his lane of travel, he first saw the body when about 200 feet away, it "appeared to be a bag or a piece of paper or maybe a dark spot in the road," it did not move, and he recognized it as a person when only 20 to 25 feet away and too close for him to stop or avoid striking it.

Verdict for defendant.

From judgment in accordance with the verdict plaintiff appealed and assigned errors.

Coble Funderbunk for plaintiff, appellant.
Smith & Griffin for defendant, appellee.

PER CURIAM. Appropriate issues, applying the "last clear chance" doctrine, were submitted to the jury. *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150. The jury answered only the first issue, finding that deceased was not injured or killed by the negligence of defendant. The trial judge properly denied plaintiff's motion for peremptory instructions on the "negligence" and "contributory negligence" issues. The issues were for jury decision. The exceptions to the charge are not well taken. The court's instructions adequately presented the applicable legal principles and are free of prejudicial error. There was no request for special instructions. The exception to exclusion of testimony is without merit.

No error.

KATE LEE JONES v. HARRY SCHAFFER, DOROTHY SCHAFFER, W. H. HARRIS, AND JOHN W. HARRIS, THROUGH HIS GUARDIAN AD LITEM, W. H. HARRIS.

(Filed 27 April, 1960.)

1. Appeal and Error § 51—

The correctness of a judgment of nonsuit entered in favor of one defendant at the close of plaintiff's evidence must be determined without reference to the evidence offered thereafter by the other defendant.

2. Automobiles § 17—

G.S. 20-155(a) has no application to an intersection governed by automatic traffic control signals.

3. Same—

The failure of a motorist to stop in obedience to the red light of a traffic control signal in violation of a municipal ordinance is negligence *per se*.

4. Same—

If at the time of starting forward into an intersection in response to a green traffic signal no other vehicle is then within the intersection or approaching the intersection within the range of the motorist's vision, the motorist's primary obligation thereafter is to keep a proper lookout in his direction of travel, and in such event he has the right to assume that a motorist approaching the intersection from his left will stop in obedience to the traffic signal unless and until something occurs that is reasonably calculated to put him on notice that such other motorist will unlawfully enter the intersection.

5. Automobiles § 7—

It is the duty of a motorist not merely to look but to keep a lookout in the direction of travel, and he is charged with the duty of seeing what he ought to see.

6. Automobiles §§ 39, 41a: Negligence § 24a: Trial § 22c—

While discrepancies, even in plaintiff's evidence, are ordinarily for the jury to resolve in the exercise of its function in determining the weight to be given the testimony, this rule does not apply when the only testimony favorable to plaintiff on a material question is in direct conflict with the physical facts established by plaintiff's uncontradicted evidence, and when such aspect of the evidence favorable to plaintiff is inherently impossible upon the undisputed physical facts, nonsuit is proper.

7. Automobiles § 41g— Evidence held insufficient to show negligence on part of driver entering intersection with green light.

The accident occurred at the intersection of two four-lane streets, the intersection being controlled by automatic traffic control signals. The evidence tended to show that the driver of one car involved in the collision was traveling south in the right-hand lane, that another car was to his left in the left southbound lane, that both cars started into the intersection shortly after the traffic light facing them turned green, that

the driver of the car in the left southbound lane, upon seeing a car approaching from the left along the intersecting street at a rate of speed not less than 30 m.p.h. stopped some two feet short of the northern curb line of the intersecting street, but that the driver in the right southbound lane continued on and, when his car had gotten some two to four feet within the intersection, was struck by the westbound car. The testimony of one witness, together with plaintiff's uncontradicted testimony as to the physical facts at the scene of the accident in regard to the respective speeds of the vehicles and the distances traveled by them, disclosed that the southbound cars had started forward before the westbound car came into view and entered the intersection, although there was some testimony in conflict with the physical facts that the westbound car first entered the intersection. *Held:* The evidence is insufficient to show that the driver of the car in the right southbound lane could or should have seen the westbound car in time to have avoided the collision in the exercise of due care, and nonsuit as to such driver was properly entered.

8. Damages § 12: Evidence § 44—

A medical expert witness who has examined the injured party and given his opinion as to the permanent partial disability to her neck may testify as to the injured person's physical ability to perform a particular kind of work.

APPEAL by plaintiff from *Campbell, J.*, August 31 Term, 1959, of MECKLENBURG.

Personal injury action growing out of a collision that occurred October 26, 1957, about 2:15 p.m., between the Schaffer and Harris cars, at the intersection of North Brevard and East Eleventh Streets in the City of Charlotte.

The Schaffer car, a 1955 Oldsmobile, headed west on Eleventh Street, was being operated by defendant Dorothy Schaffer, the sole occupant. Her father-in-law, defendant Harry Schaffer, was the owner.

The Harris car, a 1951 Nash Rambler, headed south on Brevard Street, was being operated by defendant John W. Harris, then sixteen years of age. His father and guardian *ad litem*, defendant W. H. Harris, was the owner.

There were three passengers in the Harris car: (1) Mrs. Jones, the plaintiff, on the front seat, to the right of the driver; (2) John Douglas Jones, plaintiff's son and then thirteen years of age, on the back seat, right side, directly behind his mother; and (3) R. J. Reaves, then (about) fourteen years of age, on the back seat, left side, directly behind the driver.

The case came on for trial upon the issues raised by plaintiff's second amended complaint and (separate) answers thereto filed by defendants Schaffer and by defendants Harris. Plaintiff, in her second amended complaint, alleged the collision and her injuries were proximately caused by the joint and concurrent negligence of the operators

of the Schaffer and Harris cars for which she was entitled to recover damages of $100,000.00 from the operators and owners of said cars.

In accordance with city ordinances, automatic traffic control signals had been erected for the regulation of traffic at this intersection and were functioning properly at the time of the collision, "changing from green to yellow to red and from red to green, and . . . when one light on one street would be green or yellow, the light on the other street would be red, and vice versa, and . . . they were synchronized."

Brevard Street, north of the intersection, was thirty-six feet wide from curb to curb, with four marked traffic lanes, each nine feet wide, two (the westerly lanes) for southbound traffic and two (the easterly lanes) for northbound traffic. The Harris car approached the intersection in the right southbound lane, the lane adjacent to the curb along the west side of Brevard Street. A 1953 Ford car, operated by Mrs. Ruth M. Shuler, approached the intersection in the left southbound lane, the lane adjacent to the center of Brevard and to Harris' left.

Street markings in the area included the following: (1) A heavy white line, some eleven feet north of the intersection, crossed the two lanes for southbound traffic on Brevard Street. (2) A pedestrian cross-walk, a seven-foot walkway between white parallel lines, extended (thirty-six feet) between the northeast and northwest corners of the intersection. The *southerly* cross-walk line was in line with the curb along the north side of Eleventh Street.

Eleventh Street, east of the intersection, was forty feet wide from curb to curb, with four marked traffic lanes, each ten feet wide, two (the northerly lanes) for westbound traffic, and two (the southerly lanes) for eastbound traffic. The Schaffer car approached the intersection in the right westbound lane, the lane adjacent to the curb along the north side of Eleventh Street. Street markings, similar to those described above, were on Eleventh Street, east of the intersection and between the northeast and southeast corners of the intersection.

A brick building, fronting on Brevard and extending sixty feet along Eleventh, occupied the northeast corner. On each street, the sidewalk extended some nine feet from the curb to the adjacent wall of this building. As they approached the intersection, this building was to the left of Mrs. Shuler and of Harris and was to the right of Mrs. Schaffer.

The evidence, set forth in the opinion, is for consideration against the background of the foregoing uncontroverted facts.

At the close of plaintiff's evidence, judgment of involuntary non-

suit was entered, dismissing the action, as to defendants Harris. Plaintiff excepted to this judgment and appealed therefrom.

Evidence was then offered by defendants Schaffer, to wit, the testimony of Mrs. Schaffer and of Eugene Schaffer, her husband.

At the close of all the evidence, the court submitted, and the jury answered, the following issues: "1. Was the plaintiff injured by reason of the negligence of the defendant Dorothy Schaffer, as alleged in the Complaint? ANSWER: Yes. 2. Was the defendant Dorothy Schaffer acting as agent for the defendant Harry Schaffer, as alleged in the Complaint? ANSWER: Yes. 3. What amount, if any, is the plaintiff entitled to recover? ANSWER: $7,500.00."

Judgment, that plaintiff have and recover from defendants Schaffer the sum of $7,500.00 and costs, was entered. Plaintiff excepted to this judgment and appealed.

Bailey & Booe for plaintiff, appellant.

Carpenter & Webb for defendants Schaffer, appellees.

Helms, Mulliss, McMillan & Johnston, W. H. Bobbitt, Jr., and Larry J. Dagenhart for defendants Harris, appellees.

BOBBITT, J. As to defendants Harris, plaintiff seeks a reversal of the judgment of involuntary nonsuit. As to defendants Schaffer, plaintiff, contending her damages greatly exceeded $7,500.00, seeks a new trial. Actually, there are two appeals; and, while properly presented in one record, each appeal requires separate consideration.

I

The Harris Nonsuit

The sole question is whether the evidence offered by plaintiff, considered in the light most favorable to her, was sufficient to warrant submission thereof to the jury as to the alleged actionable negligence of John W. Harris.

In limine, it is noted: (1) There was ample evidence to support a finding that defendant W. H. Harris, the owner of the 1951 Nash Rambler, is liable, under the family purpose doctrine, for the actionable negligence, if any, of John W. Harris, his minor son, on the occasion of the collision. (2) Since the judgment of involuntary nonsuit was entered at the close of plaintiff's evidence, the testimony offered later in behalf of defendants Schaffer is not for consideration on plaintiff's appeal from the Harris nonsuit.

According to plaintiff's allegations: Harris stopped at the intersection in obedience to a red signal light. After the signal light facing him changed to green, Harris proceeded into the intersection.

Mrs. Schaffer, notwithstanding the signal then facing her was red, entered the intersection at an excessive rate of speed. Mrs. Schaffer drove into the intersection first and undertook to proceed straight through it ahead of the car driven by Harris. Harris could and should have observed the prior entry and occupancy of the intersection by the car driven by Mrs. Schaffer.

Plaintiff alleged, in substance, that Harris was negligent in that: (1) he failed to yield the right of way and permit the Schaffer car to clear the intersection; (2) he failed to keep a proper lookout and thereby observe the Schaffer car; (3) he failed to keep his car under control; and (4) he failed to avoid a collision with the Schaffer car although he had the means to do so.

Uncontradicted evidence is to the effect that the traffic signal was red when Mrs. Schaffer approached and entered the intersection. Williamson, who was standing on the Used Car Lot at the northwest corner of the intersection, testified that he was looking (east) down Eleventh Street and first observed the approach of the Schaffer car when it was approximately sixty feet from the intersection and that it was 30-35 feet back from the intersection when the lights for traffic on Eleventh Street changed to red. Testimony as to when others witnesses first observed the Schaffer car will be discussed below.

Mrs. Schaffer approached and entered the intersection from Harris' left. However, whether Mrs. Schaffer or Harris had the right of way at this intersection was governed by the ordinance under which the automatic traffic control signals were erected and maintained, not by G.S. 20-155(a). Compare *Kennedy v. James, post,* 434, 113 S.E. 2d 889.

The failure of Mrs. Schaffer to stop in obedience to the red light, a violation of the city ordinance, was negligence *per se. Currin v. Williams,* 248 N.C. 32, 34, 102 S.E. 2d 455, and cases cited. Harris' liability, if any, depends upon whether, as he approached and entered the intersection, what he could and should have seen was sufficient to put him on notice, at a time when he could by the exercise of due care have avoided the collision, that Mrs. Schaffer would not stop in obedience to the red light. *Currin v. Williams, supra,* and cases cited.

When the collision occurred, according to uncontradicted evidence, the Schaffer car was proceeding at 30-35 or 35-40 miles per hour. The highest estimate of the speed of the Harris car was five miles per hour. The front of the Harris car was 2-4 feet in the intersection. The front of the Schaffer car had proceeded some thirty feet into the in-

tersection. The right front fender of the Schaffer car struck the left front fender of the Harris car.

Uncontradicted evidence tends to show that Mrs. Shuler and Harris stopped in their respective lanes in obedience to the red light and that neither proceeded until after the light facing them had changed from red to green. As to the exact position of their cars while they waited for the light to change, there are these discrepancies: Plaintiff, her son and Reaves testified that the front of the Harris car was (approximately) at the northerly pedestrian cross-walk line. Mrs. Shuler testified that she stopped "about the broad white line, about 11 feet from the intersection," and that the front of her car and the front of the Harris car were "even approximately as nearly as" she could tell. Harris, whose testimony on adverse examination was offered by plaintiff, testified that he stopped "about two or three feet behind the northerly white line" of the pedestrian cross-walk. He testified that the Shuler car was "a little ahead" of him.

The substance of Mrs. Shuler's testimony: When her car was stopped at the broad white line she could see approximately sixty feet to her left up Eleventh Street. After the light facing her changed to green, she waited "an additional two or three seconds" before starting. Her car and the Harris car "began moving about the same time." When she started, no car moving west on Eleventh Street was in sight. As she proceeded, she saw the Schaffer car "coming around the corner of the building." It was then "approximately 10 feet back from the broad white line in her lane of traffic." She "caught a glance of it out of the corner of (her) eye," applied the brakes "almost simultaneously" and stopped "approximately two feet back" from the southerly line of the pedestrian cross-walk. She traveled a distance of "about 10 feet." She testified: "Yes, I did just miss getting hit by a couple of feet. Yes, an instant or so after I stopped, John Harris got hit." Again: "No, the Harris car did not get ahead of me until I stopped."

The substance of plaintiff's testimony: When the Harris car stopped, she was "looking east" and could see approximately 125 feet up Eleventh Street. She glanced at the signal light and saw it had changed to green. Simultaneously, she glanced to the left and saw the Schaffer car. When she first observed it, the Schaffer car was five to ten feet east of the intersection, was coming at a rapid rate of speed, 30-35 miles per hour, and continued at this speed until the collision. She "knew it (the Schaffer car) would not stop." After she first observed the Schaffer car, Harris started to move forward. The Schaffer car entered the intersection first. On

cross-examination: When Harris started forward, some cars, headed west on Eleventh Street in the traffic lane adjacent to the center of the street, had stopped in obedience to the red light. As to whether she had time, from the time she first observed the Schaffer car until the collision, to move, cry out, or do anything except just realize there was a car there, her testimony was that it all happened so suddenly she did not believe she had time to do so.

The testimony of John Douglas Jones, as to the position and speed of the Schaffer car when he observed it, is substantially in accord with the testimony of his mother. In addition, he testified: ". . . I watched it (the Schaffer car), I thought we were going to sit still and as it (the Schaffer car) made the main intersection line I felt us moving and I hollered out and headed for the floorboard of the car. . . . At the time I felt our car begin to move for the first time, Mrs. Schaffer's car was approximately at the intersection of the main intersection."

The testimony of Reaves, who was facing (west) toward his right is to the effect that he did not see the Schaffer car until he heard Jones holler, "Look out"; that "(a)fter Douglas Jones hollered, our vehicle started up to move out south on Brevard" and "continued to move out into the street"; and that, after Jones hollered, he looked up and saw the Schaffer car "about five feet to the left front of Mr. Harris' car."

The substance of the testimony of John W. Harris: He was talking to plaintiff, facing generally to his right. When the light facing him changed to green he "paused a second or two" before starting forward. He started shortly after the car to his left, the Shuler car, had started. While doing so, he was looking straight ahead. He was relying upon what the Shuler car was doing and on the green light. The Shuler car obstructed his vision to the left. The Nash Rambler "was a little smaller and a little lower" than the Shuler car. The traffic lane for the Shuler car was slightly higher than the curb traffic lane. When the Shuler car came to a stop, he had his first view to his left. Then, for the first time, he saw the Schaffer car. He was then approximately at the southerly line of the pedestrian cross-walk. The Schaffer car "lacked approximately eight feet of having gone all the way through the intersection at that time." He testified: "The front of my vehicle had gone about two, maybe three feet into the intersection at the time the two cars came together."

While, as stated above, a bystander, who had a clear view (east) down Eleventh Street, saw the Schaffer car when it was approximately sixty feet east of the intersection, Mrs. Shuler did not see

it until it was approximately ten feet east of the "broad white line," presumably the "stop line," and plaintiff and her son (who were facing east) did not see it until it was 5-10 feet east of the intersection.

Unquestionably, Harris, from the time he actually saw the Schaffer car, could not have avoided the collision. The crucial question is whether he could and should have observed the Schaffer car sooner, either before the Harris car began to move or before it reached and entered the intersection, and at a time when he by the exercise of due care could and should have avoided the collision.

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." *Stathopoulos v. Shook,* 251 N.C. 33, 110 S.E. 2d 452, and cases cited. Also, see *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544.

"It is the duty of the driver of a motor vehicle not merely to *look,* but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330; *Kellogg v. Thomas,* 244 N.C. 722, 94 S.E. 2d 903.

"While ordinarily a driver may proceed on a green or 'go' light or signal, he may not rely blindly thereon but should exercise due care as to others who may be in the intersection." 60 C.J.S., Motor Vehicles § 360(b). Even so, a green light is a signal for a motorist to proceed; and if, when he starts forward in response to the green light, no other vehicle is then within the intersection or approaching the intersection within the range of his vision under circumstances sufficient to put him on notice that it is not going to stop in obedience to the red light, his primary obligation thereafter is to keep a proper lookout in the direction of his travel. In such case, he has a right to assume that any motorist approaching from his left on the intersecting street will stop in obedience to the red light facing him unless and until something occurs that is reasonably calculated to put him on notice that such motorist will unlawfully enter the intersection. Here nothing occurred to direct Harris' attention to the un-

lawful conduct of the operator of the Schaffer car until an instant prior to the collision.

While there are discrepancies as to whether the front of the Shuler car or the front of the Harris car was closer to the intersection when these cars were stopped, waiting for the light to change, the only evidence as to which of these cars started first is the following: Mrs. Shuler testified that these cars began moving about the same time and that the Harris car did not get ahead of her until after she had stopped. Harris testified that the Shuler car started first and was ahead of him until after the Shuler car had stopped.

Independent of evidence tending to show that Harris' view to the left, particularly with reference to the lane of travel on Eleventh Street adjacent to the curb, was obstructed by the building at the northeast corner and also by the Shuler car, it is noted that Harris is chargeable with notice only of what he could and should have seen had he looked to his left. *Stathopoulos v. Shook, supra,* and cases cited. In this connection, it is noted that, according to uncontradicted evidence, two or more cars, headed west on Eleventh Street in the traffic lane adjacent to the center of the street had actually stopped in obedience to the red light. This was the traffic lane of which Harris would have the better view. It is noted further that plaintiff testified the collision happened so suddenly after she (facing east) first observed the Schaffer car she had no opportunity to make an outcry or otherwise react to the emergency created by the failure of the Schaffer car to stop in obedience to the stop sign.

If, as the testimony of Mrs. Shuler tends to show, the Schaffer car came into view and entered the intersection after the Shuler and Harris cars had started forward, the evidence, when considered in the light most favorable to plaintiff, is insufficient to support a finding that Harris, by the exercise of due care, should have observed the unlawful operation of the Schaffer car at a time when he, by the exercise of due care, could have stopped and avoided the collision. It is noteworthy that Mrs. Shuler was nearer to and had the better view of the inside traffic lane in which the Schaffer car was traveling. True, she stopped when she caught a glimpse of the Schaffer car, then ten feet back from the broad white line. She missed getting hit by "a couple of feet." "An instant or so" after she stopped, Harris got hit. The Harris car had gone beyond the Shuler car a maximum of six feet, a maximum of four feet into the intersection. Thus, a "split second" elapsed between the time Mrs. Shuler stopped and the collision. Whether Harris could have observed the Schaffer car had he looked to his left at the precise moment when it came into view

is not the test. As stated by *Higgins, J.*, in *Wright v. Pegram, supra*: "Naturally he could take a last look in only one direction." The test is whether under all the circumstances his failure to observe it in time to have avoided the collision may be attributed to his failure to exercise due care to keep a proper lookout. The standard of care is that of an ordinarily prudent man, not of an infallible or omniscient man.

Plaintiff contends, and rightly so, that "(d)iscrepancies 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." *Stathopoulos v. Shook, supra,* and cases cited. She asserts, and rightly so, that there is testimony to the effect that the Schaffer car had actually entered and was within the intersection *before the Harris car started to move.* Indeed, the gist of the testimony of the Jones boy and of Reaves is that the Schaffer car had reached the center of Brevard Street before the Harris car started to move. This testimony is in direct conflict with the testimony of Mrs. Shuler.

Ordinarily, the weight to be given the testimony of a witness is exclusively a matter for jury determination. Even so, this rule does not apply when, as here, the only testimony that would justify submission of the case for jury consideration is in irreconcilable conflict with physical facts established by plaintiff's uncontradicted evidence.

At the time of the collision, the speed of the Schaffer car was not less than thirty miles per hour and the Harris car *had attained* a maximum speed of five miles per hour. The Schaffer car had crossed not less than 27 nor more than 30 feet of Brevard Street. The Harris car had moved not less than 9 feet. At a speed of thirty miles per hour (44.0 feet per second), the Schaffer car would travel 27 feet in 0.614 seconds and 30 feet in 0.682 seconds. At a speed of five miles per hour, the Harris car would travel 7.33 feet per second.

We assume, for present purposes, the speed of the Harris car *throughout the distance traveled* was five miles per hour. On this phase of the case, the evidence most favorable to plaintiff is that the Harris car was stopped at the northerly line of the pedestrian cross-walk and had traveled only two feet into the intersection when the collision occurred. At a speed of five miles per hour, the time required to travel nine feet (7.33 feet per second) would be 1.22 seconds. In 1.22 seconds, at thirty miles per hour, the Schaffer car would travel 53.68 feet. Thus, after considering all relevant factors in the light most favorable to plaintiff, if the Schaffer car had en-

tered the intersection precisely at the time the Harris car started it would have completely crossed Brevard Street (36 feet) and gone 17.68 feet beyond before the Harris car would have reached the point where the collision occurred. The conclusion is inescapable that both the Shuler and Harris cars had started and were in motion before the Schaffer car entered the intersection and that the testimony to the contrary is without probative value. It is noted that the uncontradicted physical facts are in complete accord with the testimony of Mrs. Shuler, a disinterested witness.

"As a general rule, evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury, and in case of such inherently impossible evidence, the trial court has the duty of taking the case from the jury." 88 C.J.S., Trial § 208(b)(5); *Powers v. Sternberg*, 213 N.C. 41, 43, 195 S.E. 88; *Atkins v. Transportation Co.*, 224 N. C. 688, 32 S.E. 2d 209; *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337; *Tysinger v. Dairy Products*, 225 N.C. 717, 723, 36 S.E. 2d 246; *Carr v. Lee, supra*. It is noted: "The rule that a nonsuit should be directed, if the physical facts disprove the plaintiff's case, is inapplicable if there is a substantial conflict in the evidence tending to prove the physical facts." 88 C.J.S., Trial § 245(c). Here, the relevant physical facts are established by plaintiff's uncontradicted evidence.

Plaintiff, in addition to cases cited above, cites *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25; *Hyder v. Battery Co., Inc.*, 242 N.C. 553, 89 S.E. 2d 124; *Marshburn v. Patterson*, 241 N.C. 441, 85 S.E. 2d 683; *Matheny v. Motor Lines*, 233 N.C. 673, 65 S.E. 2d 361; and *Morrisette v. Boone Co.*, 235 N.C. 162, 69 S.E. 2d 239. Each of these cases has been carefully considered in relation to the factual situation there presented. Suffice to say, we find nothing therein sufficient to justify reversal of the Harris nonsuit under the factual situation presented by the evidence herein.

The foregoing leads to the conclusion, and we so hold, that the judgment of involuntary nonsuit as to defendants Harris was properly entered and, therefore, is affirmed.

II

The Schaffer Trial

Plaintiff's assignments of error 4 through 27 are directed to the charge. Each has been carefully considered but none discloses prejudicial error or merits particular discussion. In this connection, it is noted that the jury answered the issues relating to the liability of

defendants Schaffer in plaintiff's favor and awarded damages.

Dr. Powers examined plaintiff on June 22, 1959. He testified as to what plaintiff stated to him, as to what his examination disclosed, and expressed the opinion, *inter alia,* that she had a permanent partial (30%) disability to her neck.

Plaintiff had alleged and offered evidence tending to show her loss of earnings and her inability to perform the work in which she was formerly engaged. On cross-examination by counsel for defendants Harris, this question was asked: "Doctor, I believe Mrs. Jones has testified that her job was that of inspecting in a hosiery mill which, as she said, was a job at which she sat at a table or bench and handled ladies' hosiery which would be on a form and examined it to see whether they were in shape to sell or not. What is your opinion as to whether or not Mrs. Jones could go ahead and do that kind of work?" The witness answered: "I think that she could, is physically able to do the work, yes." Assignments of error 1 and 2 are directed to the failure to sustain plaintiff's objection to said question and to the denial of plaintiff's motion to strike the answer.

Plaintiff, citing *Marshall v. Telephone Co.,* 181 N.C. 292, 106 S.E. 818, and *Parks v. Sanford & Brooks, Inc.,* 196 N.C. 36, 144 S.E. 364, contends that this opinion evidence was incompetent as an invasion of the province of the jury. The cited cases are readily distinguishable. In each, the opinion evidence considered related to the very issue upon which liability depended. Here, the opinion evidence relates solely to one of several alleged elements of damage. The admissibility of the challenged testimony, under the indicated circumstances, is supported by these decisions: *Green v. Casualty Co.,* 203 N.C. 767, 167 S.E. 38; *Leonard v. Insurance Co.,* 212 N.C. 151, 193 S.E. 166; *Mintz v. R. R.,* 236 N.C. 109, 114, 72 S.E. 2d 38.

Plaintiff's remaining assignments of error are either formal or directed to matters addressed to the discretion of the trial judge. Suffice to say, we find no error in law sufficiently prejudicial to justify a new trial.

As to defendants Harris—affirmed.

As to defendants Schaffer—no error.

THAD RAY v. FRENCH BROAD ELECTRIC MEMBERSHIP CORPORATION AND W. B. WOODY, DEFENDANTS, AND TOM RAY, ADDITIONAL PARTY.

(Filed 27 April, 1960.)

1. Automobiles § 38—

An officer standing at an intersection and observing a car approaching for a distance of 50 feet is competent to give his opinion of the speed of such car notwithstanding his prior statement that he couldn't determine the speed but had an opinion in regard thereto, the weight to be given his testimony being for the determination of the jury.

2. Appeal and Error § 41—

The admission of testimony over defendants' objection as to a particular fact cannot be prejudicial when defendant's own testimony thereafter establishes the identical matter.

3. Same—

The admission of testimony over defendants' objection as to a particular fact cannot be prejudicial when defendants' allege the identical matter in their separate answers.

4. Automobiles §§ 41g, 42g—

Where there is testimony by each driver that he entered the intersection when the traffic control signal facing him was green, the conflicting evidence is for the determination of the jury both on the question of negligence and the question of contributory negligence, and the submission of the issues to the jury under correct instructions, including the duty of motorists to keep a proper lookout, and the duty of the motorist turning left at the intersection to give a proper signal thereof, *held* without error.

5. Negligence § 26—

Nonsuit on the ground of contributory negligence is properly denied unless plaintiff's own evidence establishes the facts necessary to show contributory negligence as a matter of law so clearly that no other conclusion can be reasonably drawn therefrom.

6. Pleadings § 25—

When the rights of innocent third persons are not affected, an amendment relates back to the commencement of the action.

7. Pleadings § 8—

A counterclaim is in effect a statement of a cause of action on the part of the defendant against the plaintiff.

8. Master and Servant § 86—

Under G.S. 97-10 the insurance carrier which has paid the claim for an injury to an employee has the exclusive right for the period of six months from the date of the injury to maintain an action against the third person tort-feasor for negligence causing the injury, and when a counterclaim is set up by such injured employee the court properly al-

lows an amendment to allege that the counterclaim was being prosecuted by the insurer in the name of the employee and correctly charges the jury in regard thereto. The repeal of G.S. 97-10 by the Act of 1959, by its express terms, does not apply to an injury occurring prior to its ratification. (G.S. 97-10.1, G.S. 97-10.2, G.S. 97-10.3)

9. Appeal and Error § 20—

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

10. Appeal and Error § 40—

The burden is on appellant not only to show error but to show that the alleged error was prejudicial to him.

APPEAL by defendants from *Huskins, J.*, August 1959 Term, of YANCEY.

Civil action to recover damages for personal injuries resulting from an intersection automobile collision, in which both defendants plead in separate answers contributory negligence of plaintiff, and the corporate defendant pleads a counterclaim for compensation for damage to its automobile against plaintiff and Tom Ray, the owner of the automobile plaintiff was driving as his servant, agent and employee in the course of his employment, and the male defendant pleads a counterclaim for damages for personal injuries against plaintiff and Tom Ray, and in which they pray Tom Ray be joined as a party defendant. Tom Ray was made a party defendant, and filed separate replies to the counterclaim of the defendants, in which he pleads contributory negligence of both defendants, and a counterclaim against both defendants for compensation for damage to his automobile. Plaintiff filed replies to defendants' counterclaims pleading contributory negligence of Woody, agent, servant and employee of corporate defendant.

The jury found by its verdict that plaintiff's injuries were caused by the negligence of defendant Woody, as alleged in his complaint, that Woody at the time was the agent or employee of the corporate defendant, and was engaged in the discharge of his duties (this was by consent), that plaintiff was not guilty of contributory negligence, and awarded damages in the amount of $10,000.00. The jury did not answer the issues arising on the counterclaims of the original defendants. No issue was presented to the jury as to the counterclaim of Tom Ray.

From judgment entered on the verdict, both defendants appeal.

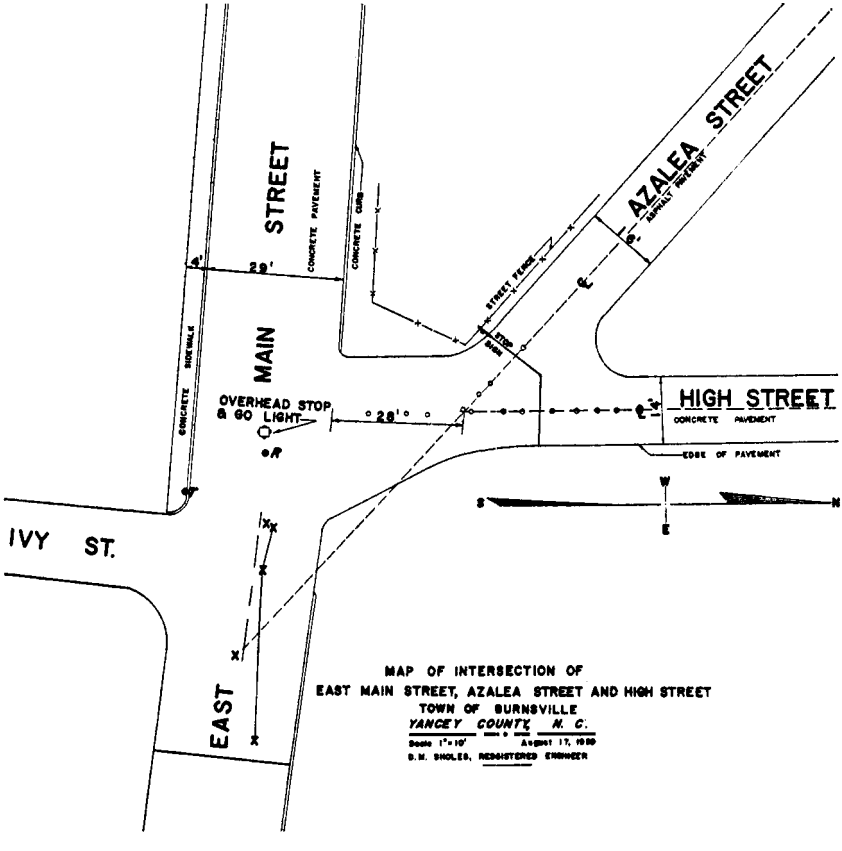
Uzzell and Dumont and C. P. Randolph for plaintiff, appellee, and additional party, appellee.

William J. Cocke and R. W. Wilson for defendants, appellants.

PARKER, J. The defendants, who filed a joint brief, assign as error the denial of their motions for judgment of nonsuit renewed at the close of all the evidence. Defendants argue in their brief that plaintiff's evidence establishes facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom.

Plaintiff's evidence shows the following facts: The collision between a 1951 International truck driven by plaintiff and owned by Tom Ray and a 1957 GMC truck driven by defendant Woody and owned by the corporate defendant occurred about noon on 13 June 1958 in about the middle of the intersection of East Main and Summit Streets in a residential district within the corporate limits of the town of Burnsville. The streets were dry and the weather was clear.

The scene of the collision is clearly shown by the map set forth below, which was introduced in evidence by the corporate defendant



to illustrate the testimony of its witness D. M. Sholes, when he was being examined in chief. The record shows the map was attached to the blackboard. The evidence of plaintiff and defendants show that High Street shown on this map is the same as Summit Street. Hereafter, it will be called Summit Street, as it is called in the evidence of both sides.

This is a summary of plaintiff's testimony when he was examined in chief: He drove down Azalea Street until he came to the Stop sign on Azalea Street, where he stopped, at which time the overhead traffic control light at the intersection of Summit and East Main Streets was red. Where he stopped, he could see all of Summit Street and about half or down middleways of East Main Street. He could see the white line on the south side of East Main Street: on the north side he could not. He saw no traffic at the intersection, and none on Summit Street, and none on Ivy Street meeting him. He saw no traffic on East Main Street west of the traffic control light at the intersection, and there was none on East Main Street east of the traffic control light. When the traffic control light facing him turned green, he drove on his right hand side, after he had looked up Summit Street for approaching traffic. He was travelling facing and watching Ivy Street and down East Main Street as far as he could see. The farther he drove the farther he could see. As he started off into the main part, he could see about 150 feet down the east side. He did not see any traffic. He looked down Ivy Street, and looked up to see if anything was coming down travelling east on East Main Street, and when he got out about the middle of the road, he cut to go down Ivy Street and saw a red flash coming up hitting him from the left side. The next thing he remembers is about six hours later in the hospital.

On cross-examination he testified in part: "When I came to the Stop sign on Azalea Lane, I came to a full and complete stop. And when I started off from there and before I had the collision, I had my truck in low gear coming around there 5 miles an hour. My brakes were good. . . . When I came to Main Street I had the red light in my favor. I did not stop at the edge of concrete. . . . When I came to the edge of Main Street I was looking down at East Main Street and Ivy Street. I looked at the red light before I came out there. . . . The wreck didn't occur before I had moved 10 feet. I was starting to make my turn. I was coming towards Ivy Street. I was not going down Ivy. I was going down East Main Street. I had travelled 10 feet or better after I left the north edge of East Main Street on the concrete before the collision occurred. The collision occurred, I would say, after I drove into the intersection about 30 feet or a little better. I had come

out about 30 feet. I was out in the middle of the street or a little over. I did travel from the Stop sign to the northern edge of East Main Street. At that point I could see about 150 feet or 200 feet down the street. I saw about 200 feet down there, and looked back to see if anything coming in Ivy and back up there, and as I turned back down, I was hit. I saw a red flash; and that's all I remember." He did not go west of the light.

John Ollis, a policeman of the town of Burnsville and a witness for plaintiff, was standing at the intersection watching the overhead traffic control light which was not working regularly, and saw the collision between plaintiff's truck and defendant Woody's truck in about the center of the intersection of Summit and East Main Streets. This is a summary of his testimony: He heard tires squealing on the Woody truck. He saw plaintiff's truck coming out of the Summit Street intersection at a speed of from five to eight miles an hour to East Main Street. At that time he saw defendant Woody's truck in plain view about 50 feet east of the intersection on East Main Street going west. East Main Street is straight there. From the traffic signal where he was standing looking east on East Main Street you can see around 300 yards. There was nothing between him and Woody's truck on East Main Street to obstruct his view. The Woody truck was in the vicinity of the white line across East Main Street when he first saw it. He assisted State Highway Patrolman A. W. Rector to make measurements. (Patrolman Rector had testified as a witness for plaintiff prior to John Ollis. Patrolman Rector testified that east of the overhead traffic control light at the intersection of Summit and East Main Streets there is a white line painted across East Main Street (c to d on the sketch he made on the blackboard to illustrate his testimony, a picture of which sketch is part of the record and signed by counsel of record), and that from this white line to the traffic control light is a distance of 70 feet and 5 inches). Ollis testified: "When I first saw the GMC truck, the International truck had already entered the right-hand lane of East Main Street traveling towards Burnsville. It was on the north side of East Main Street. As this International pick-up came out and turned down East on East Main Street, this red French Broad truck traveling west on East Main Street collided in about the center of the intersection. After the impact, the GMC truck came on across East Main Street to the south side and collided with the side of the automobile I was standing on. I don't know what happened to me. I must have climbed that light pole. When I found myself, I was on the ground. The automobile I was standing on was hit in the left side near the door and it knocked it into the side there about four

feet." Ollis was asked on direct examination, how fast Woody was driving? He replied, "I can't determine his speed. I have an opinion." He was then asked, "what is that opinion?" Over defendants' objection the court permitted him to answer, "I would say from 40 to 45 miles per hour." Defendants assign as error the admission in evidence of the testimony as to speed, and also assign as error the refusal of the court to strike the answer as to speed.

In *Tyndall v. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828, the Court said: "So now, any person of ordinary intelligence who has had an opportunity for observation is competent to testify as to the rate of speed of an automobile or other moving object."

In *Burton v. Oldfield*, 1952, 194 Va. 43, 72 S.E. 2d 357, the Court stated: "Defendant assigns error to the admission in evidence of Reeb's estimate of the speed of defendant's car, referred to above. Reeb estimated that when he first saw the Burton car it was about 90 feet away and defendant argues that he had no opportunity to make a valid estimate. We agree with the trial court that the evidence was admissible for such weight as the jury thought it should have."

Fleming v. Twiggs, 244 N.C. 666, 94 S.E. 2d 821; and *S. v. Becker*, 241 N.C. 321, 85 S.E. 2d 327, relied on by defendants, are distinguishable. In the *Fleming* case, the witness as to the speed of defendant's automobile saw it seven or nine feet or half the length of the courtroom behind the Fleming car, and looked away before the impact. In the *Becker* case, the witness as to the speed of defendant's automobile — 55 miles an hour — testified that she first saw this automobile at a point 15 feet from her, she then looked toward her husband and saw him shove her son aside before it struck her and the girls. The undisputed evidence in the case, if the witness was correct in her estimate of the distance between her and the automobile when she first saw it, is that the automobile stopped within 25 feet of that point.

In our opinion, it cannot be held as a matter of law that John Ollis, a police officer of the town of Burnsville standing at the intersection with nothing to obstruct his view of defendant Woody's approaching truck, and under the circumstances as shown by his testimony, did not have a reasonable opportunity to form an intelligent opinion as to the speed of Woody's truck, which was sufficiently reliable to be admissible in evidence for the consideration of the jury. That the question as to the opportunity of Ollis to estimate, under the particular circumstances shown by his testimony, the speed of Woody's truck goes to the weight of his testimony rather than to its admissibility. *Tyndall v. Hines Co., supra; Jones v. Bagwell*, 207 N.C. 378, 385, 177 S.

E. 170, 174; *Hicks v. Love*, 201 N.C. 773, 161 S.E. 394. The assignments of error as to Ollis' testimony as to the speed of Woody's truck are overruled.

A. W. Rector, a State Highway Patrolman and a witness for plaintiff, arrived at the scene of collision about ten or fifteen minutes after it occurred, and investigated it. His testimony tends to show that a great deal of glass and dirt and debris was lying near the center of the highway, and back east of this debris were white marks on the concrete about the width of a truck tire 36 feet in length, that the rear of plaintiff's truck was 32 feet from the debris. He testified, "the center of the debris was in the north lane of East Main Street." A four-sided traffic control light hangs overhead at the intersection. It hangs just east of the center of Summit Street in the middle of East Main Street.

Defendants assign as error that the trial court permitted Rector, over their objection, to testify that this traffic control light controls traffic travelling east and west on East Main Street and traffic entering East Main Street from Summit Street and traffic entering East Main Street from Ivy Street. Defendants in their brief contend, "what traffic it would control or what legal effect the light had was a question for the court in its charge, and it was not competent for the State Highway Patrolman to testify as to what streets it controlled or how it controlled traffic." If such evidence were incompetent, it was rendered harmless by defendants' evidence. Defendant Woody testified on his examination in chief: "As I approached the intersection at Summit and 19E (19E is East Main Street) the traffic light was red and I saw it about 500 feet down the road and I started coasting into a stop and when I got up within about 100 feet to the white line where I was supposed to stop, the light changed from red to green and I started on up the road." On recross-examination, Woody testified: "There is a traffic signal light there for traffic coming out of Summit St. and for traffic on E. Main St. and on Ivy St."

Defendants assign as error the admission in evidence, over their objection, of the testimony of Ralph Peterson, a witness for plaintiff who had worked for the town of Burnsville as street supervisor and chief of police, that he put the Stop sign on Azalea Street to stop traffic on Azalea Street entering Summit Street. The defendants alleged in their separate answers that the State Highway Commission and the town of Burnsville had erected this Stop sign to notify drivers of automobiles on Summit Street to come to a full stop before entering or crossing East Main Street, and that plaintiff negligently

ran through this Stop sign erected by the State Highway Commission and the town of Burnsville. This assignment of error is overruled.

The other assignments of error to the admission of evidence do not merit discussion, and all are overruled.

In our opinion, there is sufficient evidence of defendants' negligence to carry the case to the jury, and that plaintiff's evidence does not establish facts necessary to show contributory negligence as a matter of law so clearly that no other conclusion can be reasonably drawn therefrom. *Bondurant v. Mastin*, 252 N.C. 190, ... S.E. 2d ..... The trial court properly left to the jury the questions as to whether or not plaintiff was keeping a proper lookout for other vehicles, exercised due care for his safety, contributed to his injuries in failing to give a signal for a left turn at an intersection, etc. The court correctly denied defendants' motion for judgment of nonsuit renewed at the close of all the evidence.

The date of the collision here was 13 June 1958. Summons for defendants were issued on 8 October 1958, and served on them on 13 October 1958. The complaint was filed on 8 October 1958. The answers and counterclaims of defendants were filed on 25 November 1958. On 2 January 1959 plaintiff filed a reply to defendant Woody's counterclaim alleging that Woody was an employee of the corporate defendant, that he and the corporate defendant were subject to and bound by the provisions of the N. C. Workmen's Compensation Act, that the Employers Mutual Liability Insurance Company of Wisconsin was the workmen's compensation insurance carrier, that the injuries received by Woody arose out of and in the course of his employment, and that the insurance carrier has acknowledged in writing with the N. C. Industrial Commission its liability for Woody's injuries, benefits and medical expenses, and that the Industrial Commission has made an award or awards to him. That the corporate defendant and the insurance carrier are subrogated to Woody's rights in the amounts paid by them, and have the exclusive right under the statute to institute any action for Woody's injuries within six months from the date thereof. That Woody's counterclaim instituted within six months from the date of his injury should be dismissed, as nothing on its face indicates that it was instituted by the carrier or employer in the name of Woody. On 12 January 1959 defendant Woody filed a motion in writing asking that all of plaintiff's allegations in his reply in respect to the dismissal of his counterclaim be stricken. At the March term 1959 Farthing, J., entered an order denying Woody's motion to strike all the allegations in plaintiff's reply in respect to the dismissal of his counterclaim, and decreed as

follows: "It is further ordered, in the discretion of the Court, that an amendment is allowed to the Counterclaim of W. B. Woody to allege that the counterclaim is prosecuted by Employers Mutual Liability Insurance Company in the name of the employee, pursuant to G.S., Sec. 97-10, the said defendant W. B. Woody being within the provisions of the Workmen's Compensation Act as an employee of French Broad Electric Membership Corporation; said amendment to be filed within twenty days." Defendant Woody excepted to the order "overruling his prayer that his counterclaim be considered by the court as having been filed more than six months from June 13, 1958," and to the denial of the court to strike, as set forth above. On 20 March 1959 Woody's answer in respect to the counterclaim was amended as follows:

> "7. That at the time and on the occasion hereinbefore referred to, this defendant was an employee of his codefendant French Broad Electric Membership Corporation, and that the injuries hereinbefore described were sustained by him by accident arising out of and in the course of said employment and that the said French Broad Electric Membership Corporation and this defendant were and are bound by the provisions of the North Carolina Workmen's Compensation Act; that Employers Mutual Liability Insurance Company of Wisconsin was the workmen's compensation carrier of the said codefendant; that this defendant has accepted compensation under said Act from the carrier; that this counterclaim was interposed in the name of this defendant by said carrier, this action having been instituted prior to the expiration of six months from date of said injuries, and that the amount recoverable on this counterclaim is to be applied pursuant to G.S., Section 97-10, first to the expenses as set forth in said Act; second, to the reimbursement of the carrier for any sums paid or to be paid pursuant to its liability under said Act, and, third, if there be any excess the balance to this defendant."

Defendants offered in evidence this amendment. Defendants assign as error this part of the charge: "So, gentlemen, under that law, this action having been commenced within less than six months from the date the accident occurred, the right to prosecute an action on behalf of W. B. Woody against Thad Ray and Tom Ray was, by law, vested in French Broad and its insurance carrier; and so they brought this action under that law in W. B. Woody's name. They brought their counterclaim or cross action against Thad Ray and Tom Ray."

Defendants' argument in their brief is: "The date of the accident, June 13, 1958, the date of the original summons, October 8, 1958. The Answer and Counterclaim of Woody was filed November 25, 1958. The Reply of the plaintiff and the plea in bar therein attempted alleging that the defendant Woody was barred from setting up his counterclaim by reason of G.S. 97-10 was filed January 2, 1959. This plea was first made, therefore, January 2, 1959. The six-month period from the accident expired December 13, 1958, and at the time of filing the plea there was no bar against Woody's counterclaim."

Woody having accepted compensation under the Workmen's Compensation Act from the corporate defendant's insurance carrier, G.S. 97-10 provides that it has the exclusive right to commence an action in its own name and/or in the name of Woody for damages on account of his injuries against the third person. This same statute requires the recovery, if one is had, in the action against the third person to be disbursed in a specific manner. *Lovette v. Lloyd,* 236 N.C. 663, 73 S.E. 2d 886. This same statute provides that "where an injured employee has accepted compensation under our Workmen's Compensation Act, no action instituted within six months from the date of the injury may be maintained in the name of the injured employee, unless the complaint discloses that the action was instituted in the name of such injured employee by either the employer or his carrier." *Taylor v. Hunt,* 245 N.C. 212, 95 S.E. 2d 589.

Woody's counterclaim filed on 25 November 1958, within six months from the date of his injury, does not show it was instituted in his name by his employer or the insurance carrier, and Woody has pleaded no waiver of such right by the insurance carrier or by his employer.

Woody did not institute the action, but filed a counterclaim. This is said in McIntosh's North Carolina Practice and Procedure, 2nd Ed., Vol. I, § 1243: "Since a counterclaim is a cause of action upon which the defendant might sustain a separate action against the plaintiff, he has his election to plead it as counterclaim or to bring another action. . . . In the case of collision between two automobiles where the owner of each car contended that the other car was in fault and claimed damages, it was held that there was only one cause of action — the collision—and if one party was sued by the other, the latter did not have his election to plead a counterclaim for damages or to bring another action." In such a case the collision is one transaction, and the whole matter should be determined in one action. *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545; *Boney v. Parker,* 227 N.C. 350, 42 S.E. 2d 222; *Dwiggins v. Parkway Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892.

"The counterclaim is substantially the allegation of a cause of

action on the part of the defendant against the plaintiff. . . ." *Bank v. Northcutt,* 169 N.C. 219, 85 S.E. 210.

In the absence of a showing that the rights of innocent third persons would be affected, the amendment filed to Woody's counterclaim in his answer by order of Judge Farthing relates back to the commencement of the action. *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602; *Lee v. Hoff,* 221 N.C. 233, 19 S.E. 2d 858; *Lefler v. Lane,* 170 N.C. 181, 86 S.E. 1022.

Counsel have cited no case having similar facts, and after a search we have found none. Considering the provisions and purpose of G.S. 97-10, and its language, it seems that the necessary implication of G.S. 97-10 is the insurance carrier had the exclusive right within six months from the date of Woody's injury in the collision here to file the counterclaim of Woody in its name or in Woody's name, and Judge Farthing's order in that respect was correct. Defendants' assignments of error numbers 35 to 41 inclusive in respect to Judge Farthing's order as to the above counterclaim, and the charge of the court in respect thereto are overruled. G.S. 97-10 was repealed by Session Laws 1959, Chapter 1324, and §97-10.1, §97-10.2 and §97-10.3 substituted in lieu thereof. §2 of this Act provides that it "shall be in full force and effect from and after its ratification but shall not apply to any injury occurring before the ratification hereof." It was ratified on 20 June 1959.

We have carefully examined the other assignments of error to the charge. Reading the charge as a compositive whole (*Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19), defendants have not shown prejudicial error as to them sufficient to justify a new trial. Error appears in the charge harmful to plaintiff and favorable to defendants. For instance, in charging on the issue as to plaintiff's contributory negligence the court charged the jury as to G.S. 20-153, and gave defendants' contentions in respect thereto, though defendants did not allege in their answers that plaintiff was guilty of contributory negligence by violating such statute.

This Court said in *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657: "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 result of the trial might have been materially more favorable to him."

All of defendants' assignments of error have been considered, and all are overruled.

No error.

PAUL D. HAYNES, BY HIS NEXT FRIEND, PAULINE HAYNES v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 27 April, 1960.)

1. Master and Servant § 14—

Where an employee does not seek reinstatement and damages upon contention that his discharge was invalid, but accepts his discharge and seeks to recover damages on the ground that his discharge was wrongful, the state court has jurisdiction, and his complaint in such action is not demurrable for its failure to allege the exhaustion of administrative procedure.

2. Master and Servant § 15—

A member of a union, as a third party beneficiary, may maintain an action against the employer for his discharge in breach of the contract between his union and the employer, but his rights under the agreement can be no greater than they would have been had he entered into the contract directly with the employer.

3. Same—

Where the labor contract between the employer and the union authorizes the employer to discharge an employee for insubordination, the right of the employer to discharge an employee for such reason obtains regardless of whether the employee at the time of his act of insubordination was sane or insane.

4. Same—

Where the employee does not elect to pursue his remedies under the Railroad Labor Act but institutes an action for wrongful discharge against the employer, the employer may assert any cause or reason it may have in justification of the discharge of the employee, and it is not required that the employer show compliance with the provisions of the labor contract in regard to notice and hearing of a charge against the employee prior to dismissal.

5. Master and Servant § 10—

Ordinarily an employer is entitled to discharge an employee when the employee becomes mentally incapacitated to perform the duties of his employment.

6. Master and Servant § 15—

The complaint in this action for wrongful discharge of plaintiff railroad employee is held to affirmatively disclose that plaintiff committed an act of insubordination constituting a ground for discharge under the subsisting labor contract, and to disclose that the employee was discharged only after he became mentally incompetent, warranting the railroad employer to discharge him in the interest of safety regardless of the terms of the contract of employment with respect to hearing, and demurrer to the complaint should have been sustained.

Petition by defendant for writ of *certiorari* allowed, based on an

order overruling defendant's demurrer to the complaint by *Olive, J.*, at Chambers, in Lexington, North Carolina, 28 November 1959. From DAVIDSON.

This is a civil action to recover damages for alleged wrongful discharge. The action was instituted on 3 April 1959 by Paul D. Haynes, by his next friend, Pauline Haynes, Paul D. Haynes having been adjudged *non compos mentis* and committed to the State Hospital at Butner on 14 April 1958 as a mental patient, where he remained until 18 August 1958 when he was released on probation.

In substance the plaintiff's complaint alleges:

1. That for a period of approximately thirty years prior to 9 April 1958 the plaintiff was employed by the defendant, and for sometime prior to the foregoing date he was employed as a section foreman.

2. That by reason of an agreement between the employees' recognized bargaining agent, the Brotherhood of Maintenance of Way Employees, and the defendant, the plaintiff's employment was permanent. That on 9 April 1958 an incident occurred at the Duke Power Company's Beckerdite Spur Track, for which incident plaintiff was suspended by defendant through its agent.

3. That on 14 April 1958, following observation and treatment by physicians, the plaintiff was committed to the State Hospital at Butner by the Clerk of the Superior Court of Davidson County for observation and treatment for his mental disorder; that he remained in said hospital until 18 August 1958, at which time he was released from said commitment but he remained on probation and is at this time on probation from the State Hospital at Butner and has not been restored to competency.

4. That on 21 May 1959 the defendant demurred to the plaintiff's complaint in that the plaintiff failed to set forth a good cause of action for which he is entitled to relief for the following reasons: "(1) The plaintiff has failed to allege facts in his complaint indicating that he has exhausted his administrative remedies, under his contract of employment, he being an employee of a carrier subject to the Railway Labor Act. (2) The plaintiff has failed to allege facts in his complaint to show that he was wrongfully discharged or to show that he is entitled to compensation from the defendant as an employee."

5. That on 16 July 1959 the plaintiff was permitted to amend his complaint and, among other things, alleged that he was duly and legally restored to sanity on 13 August 1959.

6. It is alleged in the complaint as amended, "That after the discharge from the State Hospital at Butner of the plaintiff on August 18, 1958, the plaintiff was able to perform any and all of the duties

and functions which he had been doing prior to his temporary incompetence. That shortly after his discharge, a hearing was held pursuant to an incident which occurred on April 9, 1958 at Beckerdite Spur Track near Mile Post No. 7. This incident occurred five days previous to the entrance of the plaintiff in the State Hospital at Butner. That at the hearing which was held shortly after the plaintiff's discharge from the hospital, the ground on which the hearing was being held was for 'insubordination to an immediate superior.' That at the time of the occurrence of insubordination which was on April 9, 1958, the plaintiff was temporarily insane and was in no way responsible for any of his acts. That at the hearing the defendant knew or should have known the condition of the plaintiff at the time the incident of 'insubordination' took place. That nevertheless, the plaintiff was discharged and relieved of his position on the grounds of 'insubordination' and that even though at the time of the hearing the defendant knew or should have known the condition of the plaintiff at the time * * * the incident of 'insubordination' took place, the decree of final discharge was rendered on September 25th 1958. That this discharge was wrongful and in violation of the rights of the plaintiff under said contract."

7. After the complaint was amended showing that the plaintiff had been restored to sanity, and by striking out certain paragraphs of the complaint and substituting others in lieu thereof, the plaintiff renewed its demurrer to the complaint and the amendment thereto as follows:

"1. The defendant, through its counsel, demurs to the amendment to complaint and to the complaint, as amended, for the reasons set forth in the original demurrer filed in this cause and hereby amends the second ground of demurrer, by setting forth more specifically that:

"(2) The plaintiff has failed to set forth a good cause of action, in that:

"(a) He has failed to allege any contractual provisions as a basis for the alleged wrongful discharge or loss of damages;

"(b) He has failed to allege any facts relating to the incident at Beckerdite spur track or to allege that the plaintiff's actions during that incident did not support the stated grounds of discharge, so as to make the discharge wrongful.

"(c) He has clearly shown by his own allegations that he was both incompetent and guilty of insubordination at the time of the incident which served as the basis for the discharge, thereby showing that the defendant had proper grounds for discharging the plaintiff.

"2. The defendant, through its counsel, further demurs to the com-

plaint and amendment to complaint for the reason that the plaintiff has failed to institute a good cause of action within the time required by Rule 11, Section 4, of the agreement between the defendant and the Maintenance of Way Employees, which contract is binding on the plaintiff and is a part of the court records in this cause.

"3. * * * (not pertinent to this appeal)."

The following stipulations were entered into at the hearing below:

"It is stipulated and agreed that an agreement between the Atlantic Coast Line Railroad Company and its Maintenance of Way Employees, represented by Brotherhood of Maintenance of Way Employees, effective October 1, 1956, is applicable to this case, is binding upon both plaintiff and defendant and is hereby incorporated by reference into the complaint.

"It is further stipulated and agreed that the Rules of the Operating Department of the Winston-Salem Southbound Railway Company, dated November 1, 1950, were binding on the plaintiff during his employment with defendant and are hereby incorporated by reference into the complaint."

The court overruled the demurrer to the complaint as amended.

The defendant applied to this Court for writ of *certiorari*, pursuant to Rule 4 (a), Rules of Practice in the Supreme Court, 242 N.C. 766. Petition allowed.

Elledge & Mast, Walser & Brinkley, Clyde C. Randolph, Jr., for plaintiff.

Craige, Brawley, Lucas & Hendrix; Phillips, Bower & Klass for defendant.

DENNY, J. The Rules of the Operating Department of the defendant railroad provide for discharge on the following grounds: "Disloyalty, dishonesty, desertion, intemperance, immorality, vicious or uncivil conduct, insubordination, incompetency, wilful neglect, inexcusable violation of rules resulting in endangering, damaging or destroying life or property, making false statements, or concealing facts concerning matters under investigation will subject the offender to summary dismissal."

Likewise, the Agreement between the defendant and the Brotherhood of Maintenance of Way Employees contains these pertinent provisions with respect to dismissal: "Rule 10 — Discipline and Grievances. Section 1. An employee who has been in the service thirty (30) calendar days or more will not be disciplined or dismissed

without a proper hearing as provided for in Section 2 of this rule. He may, however, be held out of service pending such hearing.

"Section 2. An employee against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial hearing by a designated official of the Company. Such hearing shall take place within ten (10) days after notice by either party. Such notice shall be in writing and shall clearly specify the charge or nature of the complaint. He shall be given reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented by the duly accredited representatives of the employees. All witnesses except the one testifying will be excluded from the hearing both before and after testifying. No testimony or statements will be admitted at the hearing except such as may bear directly upon the precise charge against the employee, except that the official service record of the employee involved will always be admissable. No evidence or statements will be admitted to the record of the hearing, or used in assessing discipline, except such as have been introduced at the hearing, and which have been subject to cross examination. A decision in writing will be rendered within ten (10) calendar days from the close of the hearing. A copy of the transcript of evidence taken at the hearing will, upon request, be furnished the employee affected and his representative."

Under these applicable rules and agreement the defendant has reserved the authority to discharge an employee for cause, and causes which will justify summary dismissal are set out therein. Therefore, in an action by an employee against a railroad, based on allegations that his discharge was wrongful and in violation of the terms of the collective bargaining agreement between the employees' union and the railroad, is failure to allege that the employee has exhausted his administrative remedies under the union contract and under the Railway Labor Act, 45 U.S.C.A., section 151, *et seq.*, fatal to plaintiff's cause of action when challenged by demurrer?

The authorities seem to support the view that where a railroad employee refuses to accept the discharge as valid and seeks reinstatement or damages for suspension, in such a situation his contention will be construed as a grievance arising out of the contract and statute, and such grievance must be presented to the agency provided by the Railway Labor Act. *Piscitelli v. Pennsylvania-Reading Seashore Lines*, 8 N.J. Super. 557, 73 A 2d 751; *Moore v. Illinois C. R. Co.*, 312 U.S. 630, 85 L.Ed. 1089; *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239, 94 L. Ed. 795; *Transcontinental & West. Air v. Koppal*, 345 U.S. 653, 97 L. Ed. 1325.

In the case of *Lee v. Virginian Railway Co.*, 197 Va. 291, 89 S.E. 2d 28, It is pointed out that, " * * * where an employee accepts his discharge as final and seeks damages for breach of contract * * * then either the federal or the state courts have jurisdiction. In the case where an employee refuses to recognize the discharge as valid and seeks reinstatement and damages, neither the state nor the federal court has jurisdiction, but his sole remedy is the right of referral of his grievance to the Railway Adjustment Board. *Spires v. Southern Ry. Co,*. 4 Cir., 204 F 2d 453; *Switchmen's Union of North America v. Ogden Union Railway & Depot Co.*, 10 Cir., 209 F. 2d 419."

In light of the foregoing decisions, we hold that the plaintiff on the facts alleged had the right to institute his action in a court of law instead of pursuing his administrative remedies. Therefore, his failure to allege that he had exhausted his administrative remedies is not fatal to the plaintiff's cause of action in the face of the defendant's demurrer in that respect. However, the serious question for determination is whether or not the complaint, as amended, states a cause of action.

The original complaint alleged that at the time of the incident which resulted in the suspension of the plaintiff on 9 April 1958, the plaintiff was *non compos mentis.* It was likewise alleged that at the time of the hearing, shortly after the plaintiff was discharged from the State Hospital at Butner, he was still *non compos mentis* and "incapable from want of understanding of participating in a hearing or being a party to any proceedings conducted by the defendant for the purpose of determining whether just cause existed for his suspension and dismissal from the service of the defendant."

The amendment to the complaint, however, alleged that after the discharge of the plaintiff from the State Hospital at Butner on 18 August 1958, the plaintiff "was able to perform any and all of the duties and functions which he had been doing prior to his temporary incompetence." We do not interpret the plaintiff's allegations with respect to the hearing pursuant to the rules governing such hearings to allege any irregularity with respect to the hearing or the denial of any of the plaintiff's rights in connection therewith pertaining to procedure. Nor do the allegations of the complaint attempt to negative or deny the act of insubordination for which the plaintiff was discharged; instead, the plaintiff relies squarely on his allegations to the effect that the discharge was wrongful because, not at the time of the hearing but at the time the plaintiff committed the act of insubordination (the character of which is not revealed by the record), the plaintiff was *non compos mentis.*

The plaintiff, being a third party beneficiary under the agreement between the defendant and the Brotherhood of Maintenance of Way Employees, is entitled to the rights and benefits thereunder. *Lammonds v. Mfg. Co.*, 243 N.C. 749, 92 S.E. 2d 143. Even so, his rights thereunder are certainly no greater than they would have been had he entered into the contract directly with the defendant. Therefore, in our opinion, when he committed an act of insubordination he became subject to dismissal whether he was sane or insane at the time.

While the agreement between the defendant and the Brotherhood of Maintenance of Way Employees provides that an employee, who has been in the service of a railroad which is subject to the Railway Labor Act, for thirty calendar days or more, will not be disciplined or dismissed without a proper hearing, and that the notice of hearing shall be in writing and shall clearly specify the charge or nature of the complaint, we think this requirement is essential only where the parties are seeking to assert their remedies and establish their rights under the Railway Labor Act. But where a plaintiff employee elects to seek relief in a court of law instead of seeking relief through his administrative remedies under the Railway Labor Act, the defendant railroad may assert any cause or reason it may have in justification of its discharge of the employee. On the one hand, we think the complaint affirmatively establishes the fact that the plaintiff committed an act of insubordination on 9 April 1958 — that seems to be conceded; while on the other hand, we think that when the plaintiff became mentally incompetent and was so adjudged and remained so for several months, the defendant had the right to terminate the plaintiff's employment without regard to the terms of the agreement with respect to a hearing.

In 35 Am. Jur., Master and Servant, section 29, page 465, it is said: "Generally, a contract for the performance of personal services must be held to have been terminated where it appears that either the employer or the employee has died or become incapacitated by insanity. * * *"

It is likewise stated in 56 C.J.S., Master and Servant, section 38, page 423: "A contract of employment for personal services is terminated by the death of the servant, or where by reason of insanity, sickness, or other disability, or conviction of a felony, he is unable to perform his contract, unless the parties have contracted to the contrary. The fact that the servant is incapacitated by causes beyond his control, or, as it is termed, by the act of God, does not deprive the master of his right to terminate the contract."

In *Ivey v. Cotton Mills*, 143 N.C. 189, 55 S.E. 613, this Court said:

"There is said to be always on the part of the servant an implied obligation to enter the master's service and serve him diligently and faithfully, and to conduct himself properly, and generally to perform all the duties incident to his employment honestly and with ordinary care, having due regard to the master's interest and business. So, too, the law implies a representation by the servant that he is competent to discharge the duties of his position and is possessed of the requisite skill which will enable him to do so. These and perhaps other obligations arise out of and are implied from the relation created by the contract, and the breach of any material stipulation, whether express or implied, which disables the servant to perform his part of the contract or which results in his inability to do so, furnishes a good ground for the master to terminate the contract and is a valid and legal excuse for the discharge of the servant." See Anno: — Discharge of Employee—Incompetency, 49 A.L.R. 472; 35 Am. Jur., Master and Servant, section 41, page 475, *et seq.; Robertson v. Wolfe,* 214 Ky. 244, 283 S.W. 428, 49 A.L.R. 469; *New York, C. & St. L. R. Co. v. Schaffer,* 65 Ohio St. 414, 62 N.E. 1036, 62 L.R.A. 931, 87 Am. Rep. 628; *Moore v. Chicago B. & Q. R. Co.,* 65 Iowa 505, 22 N.W. 650, 54 Am. St. Rep. 26; *Brighton v. Lake Shore & M. S. R. Co.,* 103 Mich. 420, 61 N.W. 550.

In the case of *Smith v. St. Paul & D. R. Co.,* 60 Minn. 330, 62 N.W. 392, in an action for alleged wrongful discharge of an engineer for drunkenness, the Court said: "We feel justified in stating, as a proposition of law, that any conduct on the part of an engineer, in respect to the use of intoxicating liquors, which, to retain him, would render it negligence on the part of a railway company towards its passengers, constitutes good and sufficient grounds for the engineer's discharge."

It would be difficult to imagine a situation more hazardous to its employees and to the safety of its passengers than for a railroad to retain an employee as its section foreman who had been adjudicated *non compos mentis* and whose legal status so remained at the time of the hearing some months later and who was not restored to sanity for approximately a year thereafter.

We hold, as a matter of law, that on the facts alleged, the defendant had the legal right to discharge the plaintiff. Hence, the ruling of the court below is

Reversed.

PARKER *v.* PARKER.

ELIZABETH E. PARKER, J. D. PARKER, C. J. PARKER AND BEATRICE P. MEARES, V. C. J. PARKER, JR. AND WIFE, HAZEL W. PARKER; HAROLD K. PARKER AND WIFE, PATRICIA H. PARKER; ALTON M. PARKER AND WIFE, CATHY PARKER; MARIAN P. HARRELL AND HUSBAND, WALTER HARRELL; DONALD G. PARKER; MARY LOUISE P. EASON AND HUSBAND, DALLAS EASON; BRANCH BANKING & TRUST COMPANY, INC., SUBSTITUTE TRUSTEE; AND THE UNBORN CHILDREN OF CHESHIRE J. PARKER.

(Filed 27 April, 1960.)

1. Wills § 33h—

The rule against perpetuities requires that an estate vest not later than twenty-one years, plus the period of gestation, after the life or lives of persons in being at the time of the creation of the estate, and if there is a possibility that a future interest may not vest within the time prescribed the gift is void.

2. Same—

The rule against perpetuities refers solely to the vesting of estates and is not concerned with their possession or enjoyment.

3. Wills § 33c—

As a general rule remainders vest at the death of the testator unless some later time for vesting is clearly expressed in the will or is necessarily implied therefrom, and a devise will be held to take effect at the earliest moment the language of the will permits

4. Same—

An estate is vested when there is either an immediate right of present enjoyment or a present vested right of future enjoyment.

5. Same: Wills § 33h—

Where land is devised to testator's son for life with remainder to such son's children, with further provision that in the event any of the son's children should predecease him the issue of such child should take his parent's share, vests the remainder in testator's grandchildren *in esse* as of the date of testator's death, subject to be opened up to let in any children thereafter born to testator's son, and since the estate in remainder would vest during the son's life or within the period of gestation after his death, such devise does not violate the rule against perpetuities.

6. Wills § 33b—

The rule in *Shelly's* case does not apply to a devise to a named son for the term of his natural life, with remainder to the son's children.

7. Evidence § 4: Wills § 34c—

The law presumes that a man is capable of procreation so long as he lives.

8. Wills § 33h—

The rule against perpetuities is one of law and not of construction.

9. Wills § 33c—

Where there is a devise of an estate in trust with provision that the *corpus* should be distributed to members of a class upon the termination of the trust, and there is no gift of the income or other interest to the beneficiaries except the provision for final distribution, termination of the trust marks both the time of the vesting and the time of the enjoyment of the estate.

10. Wills § 33h— Under terms of this will, corpus of trust might not vest until after period prescribed by rule against perpetuities.

The transfer and conveyance of property to a trustee with provision that the trustee should manage the property and use the net rents for the education of testator's grandchildren in accordance with the needs of each grandchild and without a division of the net rents according to the number of the grandchildren, with further provision for the termination of the trust and the division of the *corpus* among the grandchildren and the issue of deceased grandchildren when the youngest grandchild should arrive at the age of twenty-eight, *is held* to violate the rule against perpetuities even in regard to grandchildren *in esse* at the time of testator's death, since the roll must be called at the termination of the trust and at that time a grandchild *in esse* at the time of testator's death may have been dead for longer than the prescribed period, and the interest could not vest in the issue of such deceased grandchild until the termination of the trust.

11. Trial § 5½—

Where the parties in open court waive any right or claim they may have in a particular fund, the judicial disclaimer is binding upon them.

APPEAL by plaintiffs and defendants C. J. Parker, Jr. and wife, Hazel W. Parker, Harold K. Parker and wife, Patricia H. Parker, Alton M. Parker and wife, Cathy Parker, and Marian P. Harrell and husband, Walter Harrell, from *Parker, J.*, January 1960 Civil Term, of WILSON.

This is a proceeding under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, for interpretation of certain provisions of the will of Josephus Parker, who died 26 October 1938 domiciled in Wilson County. His will is dated 6 September 1938 and was admitted to probate 28 October 1938.

The controversies herein relate to the following portions of the will:

"Item 6: I give and devise unto my son, Cheshire J. Parker, for and during the term of his natural life and at his death to his children, and in the event any child shall predecease him, the issue of such child shall stand for, represent and take that portion which his, her or their parents would have taken, the following described lands. . ." (four tracts containing 32¼, 124½, 10 and 58.52 acres, respectively, described by reference to recorded deeds.)

"Item 7: I give and devise unto my son, Cheshire J. Parker, Trustee, upon the uses and trusts hereinafter set out . . . tract of land . . . (containing 135 acres, described by reference to recorded deed) . . . The Trustee shall take charge of the said real estate, the team, farming implements, corn, Fodder and forage; shall use the corn Fodder and forage and other feed to feed the team; the Trustee will rent the land in accordance with the customs of the neighborhood and may supply the tenants as is usually done by landlords in the neighborhood; the Trustee will cause the land to be cultivated in a good husbandmanlike manner and from the rents and profits so received, will pay the taxes lawfully assessed; will keep the buildings and equipment upon the farm in good repair and condition; will replace the team, farming tools and implements from time to time as may be needed, using such amount for such purposes as in the good judgment and discretion of the Trustee may seem necessary; the net rents the Trustee shall use for the following purposes: As the child or children finish the Public Schools, if such child or children shall enter a College or University, the Trustee will pay as nearly as possible the expenses of such child or children at said College or University so long as such child or children shall attend the same, using such amount as in the judgment and discretion of the Trustee may be necessary. The Trustee shall not be compelled to divide the net rents according to the number of children, but may expend as much upon any child or children as the Trustee may think necessary. The Trustee shall make annual reports to the Superior Court of Wilson County and the rents and disbursements. Any rents accumulating prior to the time that such child or children shall enter a College or University, shall be held by the Trustee as herein set out. When the child or the youngest one shall arrive at the age of twenty-eight (28), the Trustee will convey the land, team, farming implements and tools to such child or children, and if any child or children shall in the meantime have died leaving issue surviving, such issue shall stand for, and represent his, her or their parents, and receive the share that his, her or their parents would have received."

Josephus Parker was survived by his widow and three children, J. D. Parker, Cheshire J. Parker and Beatrice P. Meares, all of whom are now living. The three children and widow are plaintiffs in this action.

Cheshire J. Parker is the father of six children, all of whom are living. Four of them, C. J. Parker, Jr., Harold K. Parker, Alton M. Parker and Marian P. Harrell, were born before the death of the

testator. The other two, Mary Louise P. Eason and Donald G. Parker, were born subsequent to testator's death.

Cheshire J. Parker was removed as trustee and the Branch Bank and Trust Company was appointed in his stead.

Plaintiffs, the three children of testator, contend that items 6 and 7 of the will are violative of the rule against perpetuities and void. Defendants maintain that these items do not infringe the rule, but those *in esse* at the death of testator assert that those born or to be born after death of testator are not entitled to share in the gifts.

Upon the stipulated facts, the trial court adjudged:

1. ". . . that the devise in said Item 6 is not subject to any trust and is not in violation of the rule against perpetuities but is upheld as simply creating in Cheshire J. Parker an estate for the term of his own life with the remainder in fee simple to all of his children whether now in being or yet to be born."

2. ". . . that the devise in said Item 7 is subject to an active trust calculated to enable all of the children of Cheshire J. Parker, whether now in being or yet to be born, to obtain as much higher education as any of such children might desire, that the legal title to the property devised in trust by Item 7 vested in the named Trustee immediately upon the death of Josephus Parker and that immediately upon the death of Josephus Parker the equitable remainder and whole beneficial interest vested in all of the children of Cheshire J. Parker who were then in being subject to open up to admit all children of Cheshire J. Parker who might thereafter be born; that as all interests in said property vested or must vest within the time permitted by the rule against perpetuities, said rule does not apply and said trust is upheld."

Plaintiffs and the defendants indicated above appealed and assigned errors.

John Webb and Gardner, Connor & Lee for plaintiffs, appellants.

Charles H. Dorsett and Smith, Leach, Anderson & Dorsett for appealing defendants, who are also appellees on plaintiffs' appeal.

Lucas, Rand & Rose and Naomi E. Morris for Branch Banking and Trust Company, Inc., Substitute Trustee, appellee.

Carroll W. Weathers, Jr., Guardian Ad Litem for Donald G. Parker and Mary Louise P. Eason, appellees.

Allen W. Harrell, Guardian Ad Litem for the Unborn children of Cheshire J. Parker, appellees.

MOORE, J. No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-

one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void. *McPherson v. Bank,* 240 N.C. 1, 15, 81 S.E. 2d 386, quoting from *McQueen v. Trust Co.,* 234 N.C. 737, 741, 68 S.E. 2d 831. The rule refers solely to the vesting of estates and does not concern itself with their possession or enjoyment. *Springs v. Hopkins,* 171 N.C. 486, 494, 88 S.E. 774; *McQueen v. Trust Co., supra.*

As a general rule, remainders vest at the death of the testator unless some later time for vesting is clearly expressed in the will or is necessarily implied therefrom. *Pridgen v. Tyson,* 234 N.C. 199, 201, 66 S.E. 2d 682. A devise should take effect at the earliest moment the language will permit. *McDonald v. Howe,* 178 N.C. 257, 259, 100 S.E. 427.

"The present capacity of taking effect in possession, if possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." *Power Co. v. Haywood,* 186 N.C. 313, 318, 119 S.E. 500. "An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment." *Patrick v. Beatty,* 202 N.C. 454, 461, 163 S.E. 572. See also *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689; *Pridgen v. Tyson, supra.*

"A legacy given to a class subject to a life estate vests in the persons composing that class at the death of the testator; but not absolutely; for it is subject to open, so as to make room for all persons composing the class, not only at the death of the testator, but also at the falling in of the intervening estate. This is put on the ground that the testator's bounty should be made to include as many persons who fall under the general description or class as is consistent with public policy; and the existence of the intervening estate makes it unnecessary to settle absolutely the ownership of the property until that estate falls in." *Mason v. White,* 53 N.C. 421, 422. The rule thus clearly enunciated has been consistently adhered to in this jurisdiction. *Privett v. Jones,* 251 N.C. 386, 393, 111 S.E. 2d 533; *Sawyer v. Toxey,* 194 N. C. 341, 343, 139 S.E. 692; *Walker v. Johnston,* 70 N.C. 576, 579.

We now apply these rules to the devise in item 6 of the will of Josephus Parker.

Item 6 may be paraphrased in this wise: Lands to Cheshire J. Parker for and during the term of his natural life and at his death to his

children, and in the event any child shall predecease him, the issue of such child shall stand for, represent and take that portion.

The rule in *Shelly's* case does not apply. *Griffin v. Springer,* 244 N.C. 95, 101, 92 S.E. 2d 682. Cheshire J. Parker took an estate for life. At the death of testator there vested in C. J. Parker, Jr., Harold K. Parker, Alton M. Parker and Marian P. Hall an estate in remainder in fee. At the respective births of Mary Louise P. Eason and Donald G. Parker the estate in remainder opened to make room for them and they were vested of an estate in remainder in fee. The estate in remainder is likewise subject to open for admission of any children who may hereafter be born to Cheshire J. Parker. *Privett v. Jones, supra; Griffin v. Springer, supra.* The law indulges the presumption that so long as a man lives he is capable of procreation. *McPherson v. Bank, supra* at page 19.

The facts in the instant case are closely analagous to those in *Trust Co. v. McEwen,* 241 N.C. 166, 84 S.E. 2d 642. The remainders in fee are defeasible and, if a remainderman dies before the falling in of the life estate, his or her issue will take as purchasers. *Bowen v. Hackney,* 136 N.C. 187, 48 S.E. 633. In any event, the estate or estates of the executory devisees would vest during the life of Cheshire J. Parker, at his death, or within the period of gestation thereafter. Therefore the provisions of item 6 do not violate the rule against perpetuities. This item contains no trust provisions and the trust created in item 7 has no application thereto. All individual defendants in this action, whether *in esse* or *in posse,* have a vested or possible future estate in the lands described in item 6 as hereinbefore indicated.

We now consider item 7 of the will. Its provisions in brief are: "I give and devise unto my son, Cheshire J. Parker," land and personal property in trust; the net rents to be used in defraying the college expenses of the children of Cheshire J. Parker, without regard to any equal application of the rent income among them for this purpose; and "when" the youngest child reaches "the age of twenty-eight (28), the trustee will convey the land" and personal property to the children, "and if any child or children shall in the meantime have died leaving issue surviving, such issue shall stand for and represent his, her or their parents, and receive the share that his, her or their parents would have received."

Defendants- appellees contend that the same principles apply here as in item 6, that upon the death of testator the equitable title immediately vested in the children of Cheshire J. Parker then living subject to open up to admit all children who might thereafter be born, and that the rule against perpetuities has no application to an estate

thus vested. They invoke the principle that "the intervention of the estate of the trustee will not have the effect of postponing the gift itself, but only its enjoyment." *Finch v. Honeycutt,* 246 N.C. 91, 100, 97 S.E. 2d 478, quoting from *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420. See also *McQueen v. Trust Co., supra; Williams v. Sasser,* 191 N.C. 453, 458, 132 S.E. 278. They assert that the trust only fixes the time for enjoyment of the gift.

Defendants-appellants agree that the equitable estate vested in the children of Cheshire J. Parker who were *in esse* at the death of the testator and that the trust only postponed the enjoyment of the gift. But they call attention to the principle of law that where there is no intervening estate, "a legacy given to a class immediately, vests absolutely in persons composing that class at the death of the testator; for instance, a legacy to the children of A: the children *in esse* at the death of the testator take estates vested absolutely, and there is no ground upon which children who may be born afterwards can be let in." *Mason v. White, supra.* See also *Cole v. Cole,* 229 N.C. 757, 760, 51 S.E. 2d 491; *Sawyer v. Toxey, supra; Wise v. Leonhardt,* 128 N.C. 289, 38 S.E. 892; *Walker v. Johnson, supra.*

Defendants-appellants further contend that the beneficiaries were ascertained at the death of the testator, that title in fee simple then vested and the rule against perpetuities does not apply. *Fuller v. Hedgpeth,* 239 N.C. 370, 80 S.E. 2d 18; *Robinson v. Robinson,* 227 N.C. 155, 41 S.E. 2d 282; *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420. If fee simple titles did so vest, then, by the express terms of item 7, they are defeasible and subject to be divested should any of the beneficiaries die before the termination of the trust. In the event of such death or deaths, the issue of those so dying would take as purchasers under the will. *Smyth v. McKissick,* 222 N.C. 644, 453, 24 S.E. 2d 621; *Mercer v. Downs,* 191 N.C. 203, 131 S.E. 575; *Bowen v. Hackney, supra.* There is authority for the proposition that a vested gift, though subject to a condition subsequent, does not come within the rule against perpetuities. 41 Am. Jur., Perpetuities, sec. 29, p. 74; Re Friday (1933), 170 A. 123, 89 A.L.R. 766; *Shoemaker v. Newman* (1933), 65 F. 208, 89 A.L.R. 1034. On the contrary, it is said that "an executory interest (that is, an interest which cuts off a previous estate rather than follows after it when it has terminated) is not 'vested' until the time comes for taking possession." American Law of Property: Casner, Vol. VI, sec. 24.3, p. 13. In view of our interpretation of item 7 we think it unnecessary to decide which rule applies here.

It is our opinion, and we so hold, that the rule against perpetuities is violated by the terms of Item 7.

"The rule is one of law and not of construction, and it is to be applied even if it renders the express intent of the testator impossible of accomplishment. . . . In the case of wills, the time at which the validity of limitation is to be ascertained is the time of testator's death." The Law of Real Property (3d Ed.): Tiffany, Vol. 2, secs. 393 and 400, pp. 153 and 163. "If by any conceivable combination of circumstances it is possible that the event upon which the estate or interest is limited may not occur within the period of the rule, or if there is left any room for uncertainty or doubt on the point, the limitation is void. . . . The fact that the event does actually happen within the period does not render the limitation valid." 41 Am. Jur., Perpetuities, sec. 24, pp. 69 and 70. *Moore v. Moore,* 59 N.C. 132.

At the time of testator's death, the youngest child of Cheshire J. Parker then living was two years old. Two have been born since his death. At the time of the institution of this action the younger of these was eighteen. There is still the possibility that other children will be born to Cheshire J. Parker.

The primary intent of Josephus Parker was to encourage and provide for the collegiate education of his grandchildren, the children of Cheshire J. Parker. It would seem unreasonable, considering the will as a whole, that he intended to exclude such grandchildren as might be born after his demise. In some items of his will, other than 6 and 7, he made provision for grandchildren and specifically named them. But in items 6 and 7 he made provision for grandchildren as a class. It was his intention that the trust should continue for a time sufficient to permit even the youngest child to pursue collegiate training of an extended nature or to complete a college course which might for some reason be interrupted; he, therefore, provided that the trust should not terminate until the youngest child was 28 years old. It was his further intention that when the purposes of the trust had been fully accomplished, the *corpus* should then be conveyed to the children of Cheshire J. Parker, and if any child had died in the meantime leaving issue surviving, such issue should receive the share of such child. In other words, the roll would be called at the termination of the trust.

The inquiry is whether the estates created by the will are vested or contingent. The rule against perpetuities inveighs against contingent interests which may not vest within the prescribed period. In other words, "the rule against perpetuities applies only to future contingent estates and is inapplicable to estates already vested." 41 Am. Jur., Perpetuities, sec. 30, p. 74.

". . . (W)hen there is uncertainty as to the person or persons who

are to take, the uncertainty to be resolved in a particular way or according to conditions existing at a particular time in the future, the devise is contingent." *Trust Co. v. Schneider,* 235 N.C. 446, 452, 70 S.E. 2d 578; *Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410. Where there is no gift of an estate, or the income therefrom, or other interest therein, distinct from the division which is to be made equally between all the children and, for the first time, upon the termination of the trust, the "when" of the division is of the essence of the donation and is a condition precedent. It marks both the time of vesting and time of enjoyment of the estate. *Carter v. Kempton,* 233 N.C. 1, 6, 62 S.E. 2d 713. See also *Anderson v. Felton,* 36 N.C. 55.

In item 7 there is no bequest of income to the class as a whole or to any particular individual in the class, nor is there any gift of the *corpus* apart from the provision for conveyance *per stirpes when* the trust has terminated. The persons in whom the estate will ultimately vest are not ascertained at the death of the testator and cannot be ascertained until the termination of the trust. The estate and interests created are therefore contingent.

At the death of testator the possibility existed that the four children of Cheshire J. Parker then *in esse* might die more than twenty-one years and ten lunar months prior to the attainment of the age of twenty-eight by the youngest child of Cheshire J. Parker born after the death of testator. Indeed the possibility still exists. Therefore, the provisions of item 7 violate the rule against perpetuities and are void. The property involved must pass by intestate succession to the heirs at law and next of kin of Josephus Parker.

It is observed that plaintiffs waived in open court any and all rights or claims they may have to any income of the trust property heretofore expended. This judicial disclaimer is binding upon them.

The cause is remanded that judgment may be modified in accordance with this opinion.

Modified and remanded.

ALICE B. SGUROS v. PETER L. SGUROS.

(Filed 27 April, 1960.)

1. Divorce and Alimony § 16—

The plaintiff in an action for alimony without divorce on the ground of abandonment is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person of plaintiff as to render her condition intolerable and life burdensome. G.S. 50-16.

2. Divorce and Alimony § 18—

In this action for alimony without divorce on the ground of abandonment, G.S. 50-16, the court's findings are *held* sufficient to entitle plaintiff to an award of alimony *pendente lite* and to counsel fees.

3. Same—

In fixing the amount to be allotted as subsistence pending trial on the merits, the court should take into account the estate and earnings of the husband as well as the estate and earnings of the wife.

4. Same—

Where the husband quits one employment and accepts another employment at a lower salary solely for the reason that the second employment offers greater opportunities for advancement in his specialized field, and there is no finding or evidence that the husband acted otherwise than in good faith, the allowance of alimony *pendente lite* should be based upon the lower salary, and he may make a motion in the cause to have the amount of alimony reconsidered for such change of condition.

5. Same—

The law recognizes the responsibility of the father to support his children and the responsibility of the husband to provide subsistance for his wife, and therefore in an action for divorce, alimony and subsistence may be awarded her under G.S. 50-15, G.S. 50-16 if she is the plaintiff and under the common law if she is the defendant.

6. Same—

In fixing the amount of subsistence to the wife *pendente lite* the court may properly award the wife in addition to monthly allowance, exclusive possession of the home, the furnishings and the family automobile, and require defendant to make payments on the mortgage on the home in order that the wife and children may have a place to live, but the award of alimony *pendente lite* is solely for the purpose of providing subsistence and counsel fees pending the litigation, and it is error for the court to go further and direct that she should have a lien on the home for the amounts paid by her on the mortgage out of the monthly allowance to her.

APPEAL by defendant from *Johnston, J.*, August 25, 1959 Term, FORSYTH Superior Court.

This is a civil action for alimony without divorce. The plaintiff alleged abandonment and failure to support the plaintiff and the two children born of the marriage. Pending trial on the merits, the plaintiff asked for alimony *pendente lite,* counsel fees, and custody of the children. In support of the motion for alimony *pendente lite* the plaintiff filed an affidavit alleging in substance the defendant had an annual income of $12,000; that the necessary living expenses for herself and the children are $578.95 per month. Included in that total is an item of $113.12 per month due on the purchase price of the home, title to which is in the defendant's name but now occupied by the plaintiff and the children. Plaintiff admits she is working at a gross salary of $271 per month.

The defendant filed a verified answer in which he admitted the parties are living separate and apart, but he alleged that he had just and adequate cause for the separation, giving details; that he has delivered to the plaintiff the possession of the home, worth more than $20,000, the furnishings, worth $5,000, and the family automobile; and in addition he has paid her more than $2,800 cash during the preceding five months, leaving him insufficient income for his own needs; that he is now employed as a professor in Miami University at an annual salary of $8,000.

After a hearing on the motion for alimony *pendente lite,* Judge Johnston made findings of fact of which the following are pertinent to this appeal:

"5. The defendant is a strong, able-bodied man, and was employed by Reynolds Tobacco Company Research Department in Winston-Salem, North Carolina, at an annual wage of $10,800. In addition to his annual wage, the defendant also participated in drills with the United States Naval Reserve Unit in Winston-Salem, North Carolina, where he received an annual income of $1,000 per year. The defendant on or about August 25, 1959, terminated his employment with Reynolds Tobacco Company, and also terminated his relationship with the United States Naval Reserve Training Center in order to take employment at the Marine Laboratory at the University of Miami, at an annual wage of $8,000."

"7. At the time of the separation by the defendant from the plaintiff, and also at the time of this hearing, the plaintiff had in her possession the house and lot at 450 Lynn Avenue, in the City of Winston-Salem, North Carolina, and a 1956 Oldsmobile automobile; and it appearing to the Court that the plaintiff should be allowed temporary subsistence in the amount of $200.00 per month, together with the right of exclusive occupancy of the family residence at

450 Lynn Avenue in Winston-Salem, North Carolina, and the exclusive possession of said 1956 Oldsmobile automobile; and it further appearing that the amount of $150.00 should be paid to the plaintiff for the maintenance and support of the two minor children born of the marriage; and it further appearing that the plaintiff is a fit and proper person to have the custody of said children, and that the sole and exclusive custody of the children should be awarded to the plaintiff."

"8. It further appearing to the Court that the defendant is the owner of the house and lot located at 450 Lynn Avenue in the City of Winston-Salem (described in deed recorded in Deed Book 718, page 429, office of the Register of Deeds of Forsyth County) and that it will be necessary and is contemplated by the Court that the plaintiff shall pay the monthly amounts of $113.12 to Wachovia Bank and Trust Company on the the note secured by deed of trust on said house and lot, which amount includes taxes and fire insurance";

Upon the facts found the court entered an order (1) awarding custody of the children to the plaintiff; (2) giving the plaintiff exclusive possession of the home, the furnishings, and the family automobile; (3) requiring the defendant to pay to the plaintiff for the benefit of the children the sum of $150 per month; and (4) to pay to the plaintiff the sum of $200 per month from which she shall pay the monthly installments of $113.12 due on the purchase money mortgage, taxes and insurance on the home. The order further provided: "Now, therefore, it is ordered by the Court that the plaintiff shall have a lien on the house and lot above described for any amounts she may pay on the mortgage indebtedness to Wachovia Bank and Trust Company, and for taxes or insurance."

From the foregoing order, defendant appealed.

Clyde C. Randolph, Jr., Keith Y. Sharpe for defendant, appellant.

Deal, Hutchins and Minor, By: Edwin T. Pullen for plaintiff, appellee.

HIGGINS, J. The complaint states a cause of action based on abandonment under G.S. 50-16. Hence it is not necessary to allege with particularity acts and conduct as required when the cause is based on such indignities to the person as to render the condition intolerable and life burdensome. See *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923; *Allen v. Allen,* 244 N.C. 446, 94 S.E. 2d 325; *Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420. The evidence before the court is

sufficient to sustain the court's finding of abandonment and the suitability of the plaintiff to have custody of the children. Likewise the evidence is sufficient to entitle the plaintiff to an award of alimony *pendente lite* and counsel fees. *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867.

In fixing the amount to be allotted as subsistence pending trial on the merits, the court should take into account the estate and earnings of the husband as well as the estate and earnings of the wife. *Herndon v. Herndon,* 248 N.C. 248, 102 S.E. 2d 862; *Rayfield v. Rayfield,* 242 N.C. 691, 89 S.E. 2d 399; *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226. However, in fixing the alimony payments in this case the court apparently did so on the basis of the defendant's annual income of $11,800 at the time the action was instituted rather than upon the annual income of $8,000 at the time the order was signed.

At the time the action was instituted the defendant, who "has a Ph.D. degree in Bacteriology," was employed in the research department of Reynolds Tobacco Company at a salary of $10,740 per year and a further salary of $1,000 per year from the Naval Reserve Unit to which he belonged. Subsequently he resigned from Reynolds, retired from the Naval unit, and accepted an associate professorship at Miami University in Florida at a salary of $8,000 per year.

According to his affidavit his opportunities for advancement in his special field are greater as a university teacher than as a tobacco laboratory technician. There is neither allegation nor evidence, nor finding his change of positions was otherwise than for the reason he assigns. Under the circumstances here disclosed, we hold he had the right, so long as he acted in good faith, to accept the professorship at Miami even though at a reduction in salary. The court should have fixed the monthly payments on the basis of a salary of $8,000. If, as the defendant contends, the allowance was made on the basis of conditions no longer existing, he may, by motion in the cause, show how he is prejudiced by the order now in effect and have it reconsidered.

The parties have resorted to the court for settlement of their differences. It is the policy of the law to be impartial with respect to the merits of the controversy. However, the law recognizes the responsibility of the father to support his children. It likewise recognizes the responsibility of the husband, according to his means, to provide subsistence and counsel fees for his wife who has a cause of action against him and who is financially unable to provide them for herself. If the wife is the plaintiff, her remedy pending final decision is provided by G.S. 50-15, 50-16. If she is the defendant, her remedy

is under the common law. *Branon v. Branon,* 247 N.C. 77, 100 S.E. 2d 209.

After the trial judge has determined an allowance is justified, the amount is left to his sound judicial discretion, not subject to review except for abuse or error of law. We hold it was proper in this case to award exclusive possession of the home, the furnishings, and the family automobile to the wife, and to require the defendant to make payments on the mortgage in order that the plaintiff and the children may have a place to live. *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555.

The court ordered the defendant to pay the plaintiff $200 per month—$113.12 of which she was directed to pay on the mortgage. Taking into account her salary and the $86.88 available to her after the payment on the mortgage, she has for her own use more than $350.00 per month. However, the order attempts to give to the wife a lien on the home for the additional $113.12 per month paid by the defendant. A *pendente lite* order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. Such is not the purpose and cannot be made the effect of an order. The order is modified by striking that part which attempts to create a lien. Otherwise it was within the discretionary power of the judge.

Modified and affirmed.

BEATRICE E. CONRAD v. WOODROW W. CONRAD.

(Filed 27 April, 1960.)

1. Appeal and Error § 22—

Where, upon the rendition of an order upon findings of fact made by the Court, appellant takes exceptions, each one directed to a specific factual conclusion, and thereafter lists the exceptions on which he relies and asserts the single legal error that the evidence was insufficient to support the findings excepted to, there is a sufficient compliance with the requirements of Rule of Practice in the Supreme Court No. 19(3).

2. Appeal and Error § 19—

Error can be asserted only by exception taken at an appropriate time and in an appropriate manner.

3. Same—

Exceptions to rulings made during the trial must ordinarily be based on an objection taken when the ruling is made. G.S. 1-206.

4. Appeal and Error § 24—

Exceptions to the charge can be taken within the time allowed for the preparation of the case on appeal. G.S. 1-282.

5. Appeal and Error § 34—

The case on appeal need not contain all the exceptions taken at the trial but only those upon which appellant then intends to rely.

6. Appeal and Error § 31—

Upon settlement of case on appeal by the trial judge upon disagreement of counsel, the judge has the power and duty to exercise supervision to see that the record accurately presents the questions on which the Supreme Court is expected to rule.

7. Appeal and Error § 19—

In grouping the exceptions assigned as error, appellant should bring together all of the exceptions which present a single question of law, and the exceptions so grouped must set out in detail and must refer to the page of the record where each exception is to be found, and appellant may reduce the number of the exceptions by failing to thus assign them as error. Rules of Practice in the Supreme Court, 19(3).

8. Appeal and Error § 38—

Appellant may reduce the number of assignments of error by failing to discuss them in his brief. Rules of Practice in the Supreme Court. No. 28.

9. Appeal and Error § 12—

Where appellant has filed specific and definite exceptions to the court's findings of fact and the court signs the entry of appeal and the case on appeal is settled, the jurisdiction of the Superior Court is at an end, and the Superior Court has no power thereafter to compel appellant to furnish additional assignments of error nor authority to compel him to group the assignments of error to comply with the rules of the Supreme Court.

10. Divorce and Alimony § 18—

While the provisions of G.S. 50-14 limiting the amount of alimony upon divorce from bed and board does not apply to G.S. 50-16, the limitations of G.S. 50-14 should not be completely ignored but should be used as a guide in fixing the amount of alimony without divorce or alimony and subsistance *pendente lite* in an action under G.S. 50-16.

11. Same—

The allowance of alimony *pendente lite* in an action under G.S. 50-16 should be based on the amount of the current earnings of the husband and not upon the earnings of the husband in a single preceding year unless there is a finding, based on evidence, that the husband was failing to exercise his capacity to earn because of a disregard of his marital obligations to provide his wife reasonable support.

12. Same—

An allowance of alimony and subsistence *pendente lite* based on the findings of the court that the husband was capable of earning a stipulated amount, which the evidence discloses was made by him in only one preceding year, with further evidence that his current earnings were in a substantially smaller amount, and without a finding based on evidence that the husband was failing to exercise his capacity to earn because of his disregard of his marital obligations, *held* erroneous.

APPEAL by defendant from *Johnston, J.*, September 28, 1959 Term, of FORSYTH.

Plaintiff instituted this action to obtain alimony without divorce as authorized by G.S. 50-16. The facts alleged in the complaint are sufficient to support such an award. Having given the required notice, plaintiff moved for alimony *pendente lite* and for counsel fees. The court heard the evidence, made findings of fact, and, based thereon, made an award. Defendant, having excepted to the findings and the award based thereon, appealed.

R. Lewis Alexander and Hudson, Ferrell, Carter, Petree & Stockton for plaintiff, appellee.

Eugene H. Phillips and James M. Hayes, Jr., for defendant, appellant.

RODMAN, J. Before passing on questions presented by the appeal, we must dispose of procedural questions raised by the parties.

To fix the amount which the court should award as alimony *pendente lite* and for counsel fees, the parties relied on documentary evidence consisting of the complaint, affidavits, and the transcript of the adverse examination of defendant. Based on this evidence the court found that defendant was capable of earning $16,000 per year, and on this finding required defendant to pay plaintiff $600 per month and $1000 for attorneys' fees.

Upon the rendition of the judgment defendant gave notice of appeal. In his notice he took exceptions to the findings of fact and the judgment based thereon. Each exception was directed to a specific factual conclusion. These exceptions to the findings and to the award are detailed in the appeal entry. Following the exceptions is a list of the papers which should constitute the record on appeal. The appeal so entered was signed by the presiding judge. Following the list of the papers to be sent here, the entry reads: "a statement of the case on appeal is deemed unnecessary and inappropriate, it being deemed sufficient that defendant deliver to plaintiff's counsel his assignments of error within 20 days hereafter, service thereof being waived."

The transcript filed here, certified by the clerk of the Superior Court of Forsyth County, contains the papers named in the appeal entered with the exceptions there shown. The transcript does not contain a grouping of the assignments of error as required by Rule 19(3) of this Court.

On 27 October 1959 and within 20 days from the rendition of the judgment and the signing of the appeal entries by the judge, defendant filed with the clerk of the Superior Court of Forsyth County a paper which he designated as "assignment of error." It lists as the exceptions on which he relies those shown in the appeal entry signed by the judge and points to the single legal error which he asserts, i.e., insufficiency of the evidence to support the findings and award. It is sufficient to comply with the requirements of our Rule 19(3). This document was not included in the transcript certified by the clerk of the Superior Court which was filed here 16 December 1959. Defendant, suggesting a diminution of the record, caused a certified copy of this paper to be filed here on 15 February.

Plaintiff filed here a motion to dismiss for failure to file with plaintiff within the 20-day period assignments of error as directed by Judge Johnston. He also filed with Judge Johnston a motion to dismiss defendant's appeal, asserting that the assignments of error referred to in the appeal entry had not been delivered. Judge Johnston, on conflicting affidavits, found as a fact that the assignment of error had not been delivered, and, acting pursuant to his interpretation of G.S. 1-287.1, entered an order dismissing the appeal.

The motions and orders indicate the desirability of a statement of the proper procedure to present to this Court errors of law which appellant claims are prejudicial to him.

Error can only be asserted by an exception taken at an appropriate time and in an appropriate manner. Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. G.S. 1-206. Exceptions to the charge can be taken within the time allowed for the preparation of the case on appeal. G.S. 1-282.

The case on appeal to be presented to this Court need not contain all of the exceptions taken at the trial, but only such as appear in the case on appeal can be made the basis for appellate relief. *Bulman v. Baptist Convention,* 248 N.C. 392, 103 S.E. 2d 487; *In re McWhirter,* 248 N.C. 324, 103 S.E. 2d 293; *Moore v. Crosswell,* 240 N.C. 473, 82 S.E. 2d 208.

The reason which requires appellant in the case on appeal to assign or designate the exceptions on which he will rely is apparent.

Appellee is entitled to know which of the exceptions taken appellant intends to rely on so that there may be included in the record such parts as may be necessary to show that there was in fact no error. *Jenkins v. Castelloe,* 208 N.C. 406, 181 S.E. 266.

Upon disagreement of counsel the court settles the case on appeal. G.S. 1-283. The trial judge then has both the power and the duty to exercise supervision to see that the record accurately presents the questions on which this Court is expected to rule. *Hoke v. Greyhound Corp.,* 227 N.C. 374, 42 S.E. 2d 407; *Chozen Confections, Inc. v. Johnson,* 220 N.C. 432, 17 S.E. 2d 505; *Commissioners v. Steamship Co.,* 98 N.C. 163.

Where appellant has in his case on appeal enumerated the errors on which he expects to rely, he may reduce the number of asserted errors when he groups for our convenience as required by Rule 19(3) the exceptions he expects this Court to consider. *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700; *Jones v. R. R.,* 153 N.C. 419, 69 S.E. 427. This grouping of the exceptions assigned as error (sometimes for brevity also called "assignments of error") should bring together all of the exceptions which present a single question of law. *Ellis v. R. R.,* 241 N.C. 747, 86 S.E. 2d 406. The exceptions so grouped must be set out in detail and must refer to the page of the record where each exception is to be found. *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405; *Keith v. Wilder,* 241 N.C. 672, 86 S.E. 2d 444. It is not sufficient to merely refer to the page for the asserted error. If appellant reduces the number of errors previously assigned when he complies with Rule 19(3) by eliminating some of those noted in the case on appeal, he may further reduce the number when he prepares and files his brief. Rule 28 of this Court declares that exceptions in the record not set out in appellant's brief or in support of which no argument is stated will be deemed abandoned. The rules of this Court were promulgated for our convenience in the dispatch of our appellate jurisdiction.

The exceptions shown in the appeal entry challenge the findings because not supported by any evidence, and because the findings were erroneous, the judgment based thereon is likewise erroneous. The exceptions are specific and definite. The Superior Court had no power to compel appellant to furnish additional assignments of error nor to group the errors assigned to comply with our rule. When the case on appeal was settled, the jurisdiction of the Superior Court was at an end.

The court, as a basis for its award, found "that the defendant is capable of earning in excess of Sixteen Thousand ($16,000.00) Dollars per year." Defendant maintains there is no evidence in the record

supporting such a finding as the basis for an award of alimony. He makes this finding one of his exceptions and also excepts to the refusal of the court to find what his income is or has been.

The complaint contains no specific allegation as to plaintiff's estate or income. It merely alleges: "The defendant has earned and is capable of earning thousands of dollars per year." The complaint was filed after defendant and his financial records had been examined by counsel for plaintiff.

Defendant's income is derived from an insurance business which he owns and has operated in Winston-Salem for sixteen years. Plaintiff developed from defendant's adverse examination that his net income from his insurance business amounted to $10,756.16 for 1956, $15,357.94 for 1957, $8,477 for 1958. His income for the first eight months of 1959 amounted to $3,916.43. The figures for 1956, 1957, and 1958 were shown by audited accounts of defendant's business. There was no evidence to controvert these figures.

Defendant testified that beginning in January 1958 one of the companies for which he sold insurance reduced the commissions paid from 30% of the insurance premium to 20%, resulting in a loss of income from that particular account of $12,000 for the year 1958. Defendant's testimony in that respect was supported by the affidavit of the agency superintendent of that company. Defendant testified that regulations of the Insurance Board of Winston-Salem prohibiting the employment of part-time workers on commission basis had likewise materially affected his income.

It is not contended that defendant has any estate or income other than from his insurance business. Plaintiff developed on adverse examination of defendant that the liabilities of the insurance agency exceeded its assets by something in excess of $2500, indicating a scale of living not justified by earnings. No evidence was offered tending to show that defendant had in any year earned a sum approximating $16,000 except in 1957 when his earnings before taxes amounted to $15,357.94. Based upon the evidence adduced, defendant's income for the 44 months to which the testimony relates averaged just under $850 per month, and for 20 months immediately preceding the hearing, $620 per month.

The statute (G.S. 50-16) on which plaintiff relies for an award authorizes the court "to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances." G.S. 50-14 limits the amount of alimony which may be awarded upon a divorce to one-third of the "net annual income from the estate, occupation or labor

of the party against whom the judgment shall be rendered." The limitation there imposed is not applicable when plaintiff seeks alimony *pendente lite* or without divorce, but the limitation there expressed ought not to be completely ignored when the court is called upon to make an award as provided by G.S. 50-16. *Kiser v. Kiser*, 203 N.C. 428, 166 S.E. 304; *Davidson v. Davidson*, 189 N.C. 625, 127 S.E. 682. We think it certain the Legislature never contemplated the court would select the earnings for a single year in the past and use that as the basis for an award when that year does not fairly represent defendant's current nor the average of his earnings for several years.

The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Sguros v. Sguros, ante*, 408.

To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband was failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife. *Davidson v. Davidson, supra.* There is no finding to that effect in this case.

If the court was of the opinion that it could use as the basis for the award earnings made in some preceding year rather than current earnings, it applied the wrong yardstick. If the award is based on current earnings, there is no evidence to support it. In either event the amount awarded was improper. Plaintiff is entitled to a fair and reasonable allowance for her support and for counsel fees based on defendant's current earnings. If they are to exceed that sum, there should be specific findings that defendant is not fairly and diligently conducting the business which he has selected as appropriate to earn a livelihood for himself and his wife.

Reversed.

THE BANK OF WADESBORO, ADMINISTRATOR OF THE ESTATE OF WILLIAM DANIEL TEAL, JR. v. OLIVETTE TEAL JORDAN; WAYNE TEAL; CORA BARNES AND HUSBAND, LEXIE BARNES; AND ALL UNKNOWN HEIRS OR NEXT OF KIN OF WILLIAM DANIEL TEAL, JR., AND B. T. HILL, GUARDIAN AD LITEM OF CORA BARNES AND ALL UNKNOWN HEIRS AND NEXT OF KIN OF WILLIAM DANIEL TEAL, JR.

(Filed 27 April, 1960.)

1. Process § 9—

Notice by publication must set forth the names of those defendants who are known, and notice to all "unknown heirs or next of kin" of the deceased is insufficient when there are heirs or next of kin whose names are known, since notice by publication is not only to alert the individuals named, but also their friends and acquaintances who may see the publication and give them actual notice.

2. Parties § 5—

Heirs who are *sui juris* are not represented by a guardian *ad litem* for all unknown heirs of the deceased, the guardian having expressly denied his authority to represent the competent heirs *sui juris*.

3. Process § 9—

Service by publication is in derogation of the common law and strict compliance with the statute is required.

4. Courts § 2—

A judgment against a defendant who is not brought into court in some way sanctioned by law and who does not make a voluntary appearance is void for want of jurisdiction.

5. Courts § 2: Descent and Distribution § 10—

Where the court has not acquired jurisdiction over the persons of the next of kin of a decedent it may not adjudicate that such next of kin are not entitled to inherit because the decedent had been adopted (Chapter 813, S.L. 1955) and that therefore notice and service as to them was not required, since the next of kin have a right to be heard before the court decrees that they are precluded from sharing in the estate of their kinsman who died intestate.

APPEAL by the petitioner and by B. T. Hill, Guardian *Ad Litem*, from *Phillips, J.*, November, 1959, Term, ANSON Superior Court.

This is a special proceeding under G.S. 28-160.1 to determine who are the heirs and next of kin of William Daniel Teal, Jr., and entitled to share in the distribution of his estate. The petitioner alleges it has for distribution personal property belonging to the estate and "expects to receive substantial other properties from the Trustees under the Will of W. D. Teal." The petition alleges in substance that Joseph Laster Barnes, born December 10, 1922, was the illegitimate son of Cora Barnes who later married Lexie Barnes. In 1928, by order of adoption entered in the Superior Court of Durham Coun-

ty, W. D. Teal adopted Joseph Laster Barnes, *without right of inheritance,* and had his name changed to William Daniel Teal, Jr. On December 8, 1943, William Daniel Teal, Jr., was adjudged an incompetent and so continued until his death intestate on July 28, 1957. He was never married. The whereabouts of Cora Barnes and husband, Lexie Barnes is unknown, "and in so far as the plaintiff knows, William Daniel Teal, Jr., left no other heirs at law or next of kin."

Summons was issued for Cora Barnes and husband, Lexie Barnes, and all unknown heirs or next of kin of William Daniel Teal, Jr. The process was directed to the Sheriff of Anson County who returned, "Cora Barnes and husband, Lexie Barnes are not to be found in Anson County or the State of North Carolina." Upon affidavit the Clerk entered an order that service be made by publication. Notice was published for four successive weeks in the Anson Record: "To Cora Barnes and husband, Lexie Barnes, and all unknown heirs or next of kin of William Daniel Teal, Jr. (formerly Joseph Laster Barnes)." The notice stated the purpose of the proceeding.

B. T. Hill, (guardian *ad litem*) for Cora Barnes, Lexie Barnes and all unknown heirs or next of kin of William Daniel Teal, Jr., answered *per se* the petition, alleging that William Daniel Teal, Jr., was survived by other heirs and next of kin, and that his next of kin by blood are entitled to his properties. "That if either Cora Barnes, Lexie Barnes, or other heirs or next of kin of said William Daniel Teal, Jr., are alive and more than 21 years of age he would have no authority to act as Guardian *ad Litem* for such persons."

Based on the amended answer of Wayne Teal, whose interests are adverse to the blood kin of William Daniel Teal, Jr., the clerk superior court made, among others, the following findings:

> "3. That while the evidence is not conclusive, it appears that Cora Faulks (Fawks) Barnes gave birth to children other than William Daniel Teal, Jr., that the best information which has been obtainable she was the mother of these children, viz: Beulah Land Barnes, Mary Ann Barnes, Lexie London Barnes, Jr., and Cora Barnes; that it appears that Cora Faulks (Fawks) Barnes is also the mother of a Mrs. M. R. Gill, who might be the same person as one of those whose names are listed above; that it also appears that Cora Faulks (Fawks) Barnes has a living sister named Lula Mae Faulks (Fawks); that all of said children and Lula Mae Faulks (Fawks) are more than twenty-one (21) years of age, and that there is no evidence or sugges-

tion before the Court that there are any other natural next of kin or heirs at law of William Daniel Teal, Jr."

The clerk adjudged that the next of kin by blood, Cora Barnes and the others named in paragraph 3 above quoted, are precluded from sharing in the estate of William Daniel Teal, Jr., by reason of Ch. 813, Session Laws of 1955. From the judgment of the clerk superior court, the petitioner and the guardian *ad litem* appealed to the Judge Superior Court in Term. After hearing, Judge Phillips entered judgment affirming the order of the clerk. Thus the controversy involves the effect of the adoption proceeding and Ch. 813, Session Laws of 1955. From the order entered by Judge Phillips, both the petitioner and the guardian *ad litem* appealed.

Taylor, Kitchin & Taylor for petitioner, appellant.

B. T. Hill, Guardian Ad Litem of Cora Barnes and all unknown heirs and next of kin of William Daniel Teal, Jr., appellant.

T. L. Caudle, T. L. Caudle, Jr., for respondent Olivette Teal Jordan, appellee.

Arthur Vann, Claude V. Jones for respondent, Wayne Teal, appellee.

HIGGINS, J. Many thousands of dollars are involved in this proceeding. While this fact does not change applicable principles of law, nevertheless it does increase the likelihood that the surviving blood kin of William Daniel Teal, Jr., may eventually present themselves and claim as successors to his interest. This proceeding should not be concluded until they are legally before the court. Presented, therefore, is the question whether publication of the notice to Cora Barnes and husband, Lexie Barnes, and all unknown heirs and next of kin of William Daniel Teal, Jr., (formerly Joseph Laster Barnes) was legally sufficient to bring them before the court. In holding the notice sufficient, the clerk had before him the evidence upon which his finding of fact No. 3 is based. With information and notice that Beulah Land Barnes, Mary Ann Barnes, Lexie London Barnes, Jr., Cora Barnes, and Mrs. M. R. Gill are next of kin by blood (and assuming service by publication is proper) yet the notice should be directed to them as named individuals. Notice merely to known and unknown heirs is insufficient if more definite identification is available. The guardian *ad litem* does not purport to answer for these named individuals. Service by publication is in derogation of the common law and strict compliance is required. *Board of Commissioners v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144. "It is the universal holding

that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance, . . . a judgment rendered against him is void for want of jurisdiction." *Jones v. Jones,* 243 N.C. 557, 91 S.E. 2d 562.

The purpose of giving notice by publication is not only to alert the individuals named, but also their friends and acquaintances who may see the publication and give them actual notice. The court proceeded by holding that Ch. 813, Session Laws of 1955, deprived the blood kin of all right to share in an adopted person's estate; therefore, having no interest, notice was not required. However, before the court decides this question, the known persons who may claim an interest must be given such notice and opportunity to be heard as the facts permit and the law requires.

The guardian *ad litem* asserts in his answer the blood kin are the lawful heirs and distributees. The order of adoption entered in 1928 contains a qualification that the adoption is without right of inheritance. The effect of this provision is not now before us. Its effect should not be decided until all interested parties are before the court. *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510. "No matter how laudable the purpose of the parties to the action, no judicial declaration should be made which could have no binding effect but which might seriously cloud and interfere with such rights as the Odums may have." *Britt v. Children's Homes,* 249 N.C. 409, 106 S.E. 2d 474. "Whenever, as here, a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court." *Morganton v. Hutton,* 247 N. C. 666, 101 S.E. 2d 679. "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." *Oxendine v. Lewis,* 251 N.C. 702, 111 S.E. 2d 870. "All persons having an interest in the controversy must be parties, to the end that they may be concluded by the judgment, and the controversy be finally adjudicated as in the case of an action instituted in the usual way." *Peel v. Moore,* 244 N.C. 512, 94 S.E. 2d 491.

Next of kin have a right to be heard before the court decrees they are precluded from sharing in the estate of their next of kin who dies intestate. We go no further than to say that they have the right to be heard and are entitled to such notice of the hearing as the law provides. This may be by proper publication in the event personal service cannot be had. *Ferguson v. Price,* 206 N.C. 37, 173 S.E. 1.

For the reasons assigned, the case is remanded to the Superior Court of Anson County for the service of notice of this proceeding on those whose names are known.

Remanded for additional parties.

THE BANK OF WADESBORO, ADMINISTRATOR OF THE ESTATE OF WILLIAM DANIEL TEAL, JR.; H. P. TAYLOR, SURVIVING EXECUTOR OF THE ESTATE OF W. D. TEAL; THE BANK OF WADESBORO AND H. P. TAYLOR, SURVIVING TRUSTEES UNDER THE WILL OF W. D. TEAL; AND THE BANK OF WADESBORO AND H. P. TAYLOR, TRUSTEES AND/OR GUARDIANS FOR WILLIAM DANIEL TEAL, JR. v. THE ANSON SANATORIUM, A CORPORATION; BAPTIST ORPHANAGE OF NORTH CAROLINA, FORMERLY THE TRUSTEES OF THE MILLS HOME, FORMERLY THOMASVILLE BAPTIST ORPHANAGE, A CORPORATION; FOREIGN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION; HOME MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, A CORPORATION; NORTH CAROLINA BAPTIST STATE CONVENTION, A CORPORATION; ALEXANDER SCHOOLS, A CORPORATION; WAYNE TEAL, OLIVETTE TEAL JORDAN, CORA BARNES AND HUSBAND, LEXIE BARNES; AND THE KNOWN AND UNKNOWN HEIRS OF WILLIAM DANIEL TEAL, JR.

(Filed 27 April, 1960.)

APPEAL by all parties from *Phillips, J.*, November, 1959 Term, ANSON Superior Court.

This civil action was instituted under G.S. 1-253, *et seq.*, to have the court construe the will of W. D. Teal, declare the respective rights of legatees and devisees, and to advise the executors and trustees with respect to their duties. One of the principal beneficiaries under the will was William Daniel Teal, Jr., (formerly Joseph Laster Barnes) adopted son of the testator. Further pertinent facts are stated in the companion case, *The Bank of Wadesboro v. Olivette Teal Jordan, et al.*, decided this day. The two cases were argued, considered, and decided together by this Court.

Identically the same procedure was followed in both cases with respect to the service of process by publication on Willian Daniel Teal Jr.'s next of kin by blood, except in this case the notice was directed to the *Known* and Unknown Heirs of William Daniel Teal, Jr. The court's judgment in this case excluded the blood kin of William Daniel Teal, Jr., from succeeding through him (now deceased) to any share in the bequests and devises made to him in the Will of W. D. Teal. The appeal by all parties brings the judgment here for review.

Taylor, Kitchen & Taylor for plaintiffs, appellants; B. T. Hill, Guardian Ad Litem for Cora Barnes, Lexie Barnes, and the known and unknown heirs of William Daniel Teal, Jr., appellants.

T. L. Caudle, T. L. Caudle, Jr. for defendant Olivette Teal Jordan appellant, defendant.

Arthur Vann, Claude V. Jones, for Wayne Teal defendant, appellant.

Brock & McLendon for The Anson County Hospital defendant, appellant.

Williams & Gwathmey for the Foreign Mission Board of the Southern Baptist Convention defendant, appellant.

Douglass & McMillan, for the Baptist State Convention of North Carolina defendant, appellant.

Jones, Reed & Griffin for The Baptist Children's Homes of North Carolina defendant, appellant.

Thos. J. Edwards for The Alexander Schools defendant, appellant.

Brock & McLendon, Carlton W. Binns for The Home Mission Board of The Southern Baptist Convention defendant, appellant.

Brock & McLendon, Carlton W. Binns for The Home Mission Board of The Southern Baptist Convention defendant, appellee.

Brock & McLendon for The Anson County Hospital defendant, appellee.

Williams & Gwathmey for The Foreign Mission Board of the Southern Baptist Convention defendant, appellee.

Douglass & McMillan for the Baptist State Convention of North Carolina defendant, appellee.

Jones, Reed & Griffin for the Baptist Children's Homes of North Carolina defendant, appellee.

Thos. J. Edwards for The Alexander Schools defendant, appellee.

PER CURIAM. For reasons discussed in *Bank of Wadesboro v. Jordan, et al.*, decided this day, and of which we take notice (*Kelly v. Piper*, 243 N.C. 54, 89 S.E. 2d 764) this cause is remanded to the Superior Court of Anson County for legal service of process on the known next of blood kin of William Daniel Teal, Jr.

Remanded for additional parties.

A. F. PATTON AND VANN DORIS PATTON v. HENRY DAIL.

(Filed 27 April, 1960.)

1. Evidence § 18—

The origin of a fire causing the damages in suit may be established by circumstantial evidence.

2. Negligence § 24c— Circumstantial evidence that fire was result of negligence of defendant held sufficient to be submitted to the jury.

Evidence tending to show that defendant, pursuant to contract, made a plumbing connection under the floor of the bathroom in plaintiff's house, that the use of an open flame was necessary in soldering operations incident to the type of connection made, that some two hours prior to defendant's work the house was inspected and that no evidence of fire or smoke was found, that some one-half to two hours after the work was performed fire was seen underneath the house, together with evidence that the fire originated under the house directly beneath the bathroom floor where the work was done, *is held* sufficient to be submitted to the jury on the issue of whether defendant set the wood under the bathroom floor or its sills afire and whether he failed to take reasonable precautions to see that no flames or smouldering wood were present when he left the work.

3. Same—

Direct evidence of negligence is not required, but negligence may be inferred from the facts and attendant circumstances, and if the facts proven establish negligence and proximate cause as the more reasonable probability nonsuit cannot be entered notwithstanding that the possibility of accident may also arise on the evidence.

APPEAL by plaintiffs from *Sharp, S. J.,* November 1959 Assigned Civil Term, of WAKE.

Action for damages for the burning of a house allegedly caused by defendant's negligence.

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

Simms & Simms and Smith, Leach, Anderson & Dorsett for plaintiffs, appellants.

Teague, Johnson & Patterson for defendant, appellee.

PARKER, J. A. F. Patton is an electrical contractor. On 20 December 1958 he and his wife were the owners of a four and one-half room house with bathroom, located about five miles from the city of Raleigh, which they rented. Plaintiffs lived in the city. About 8:15 a. m. o'clock on this day defendant, who is a plumber, by contract with A. F. Patton met him at this house and replaced a spigot

in the kitchen. After defendant left, A. F. Patton turned on the water and discovered a leak under the house. A. F. Patton went under the house to find the leak, and found a bursted joint in the pipe under the bathroom. The bathroom was about 14 to 16 inches above the ground. The house had no basement. He turned the water off, and disconnected the electric hot water heater. He returned to the city about 9:15 a. m. o'clock and instructed defendant to go back and repair the leak.

About 10:00 a. m. o'clock on this day Bennett Rowland, who had rented this house from plaintiffs, began moving his furniture in. He finished moving about 2:30 p. m. o'clock, locked up the house, and left, because he had no oil to heat it, and would not have any until two days later. Before leaving he went into all the rooms to see if there was any evidence of fire or smoke, and found none. He heard of the fire the next day. Some of his furniture was burnt up, other parts of it were damaged by fire and smoke.

Between 4:30 and 5:30 p. m. o'clock defendant telephoned plaintiffs' daughter, Harriet Patton, and asked for her father. When she said he was out, defendant said he had completed the work at the house, but had not turned on the water.

About 6:00 or 6:30 p. m. o'clock on this day Emmett Bagwell and his wife driving to Raleigh were travelling along the road, which is approximately 50 yards from this house. He drove into some smoke, looked toward the house, and saw it was on fire underneath. He backed up, and went to Lewis Wilkins' to call the Garner Fire Department. He returned to the house. He testified on cross-examination: "When I got there it was fire underneath and burnt through the floor. The first thing I seen when I walked in there was fire underneath the house. I didn't see no hole in the floor. The fire burnt through the floor. I saw that hole, saw it when I first got there. I saw it from underneath the house."

Lewis Wilkins went to the house. He testified on direct examination: "The first flame I saw was under the house. It was burning both the timber under the house and also a little dry grass was burning. Yes I stayed there after that. We was trying to put water on it at that time and while we was trying to put water on it, the flames seemed to have broken loose inside the house then." On cross-examination he said: "I saw some burning timber under the house; that was directly under the bathroom. No other burning except under that area of the house, that's right. . . . I said it was approximately 6:30 when Mr. Bagwell stopped by my house. . . . I lived about 150 yards from the house."

W. R. (Jack) Johnson is chief of the Garner Fire Department. He and twelve firemen and fire fighting equipment went to this burning house. When he arrived, fire was coming out of the front gable and two windows on the Raleigh side of the house. A bedroom and the bathroom were on the Raleigh side of the house. The fire was concentrated in the area of the bedroom and bathroom, the worst damage was done in that area. He looked under the house. "The wood underneath the bathroom area of the house, the underpinning around the hole was charred somewhat." He had to put some fire out up under the house.

A. F. Patton heard of the fire, and arrived at the house about 7:00 or 7:15 p. m. o'clock. The Garner Fire Department was there fighting the fire. He went in the house. The whole front of the ceiling was burnt, and the firemen had knocked holes in the kitchen wall. One bedroom was badly burned, and another destroyed. There was evidence of fire in the attic all over the house. The bathroom was burned up, and there was a big hole, about 3½ feet in diameter, through the bathroom floor. "There were no other holes burnt through the floor anywhere in the house." He could see beneath the hole in the bathroom floor the piece of copper pipe defendant had replaced.

About 9:00 or 9:30 p. m. o'clock that night defendant told him "he had replaced a piece of copper pipe under the bathroom. . . . Mr. Dail did not say anything in his conversation with me with respect to how he formed that pipe. He just told me that he had sweated pipe at one end at the truck before he went under the house and made the last connection under the house. He told me he had replaced the bursted fitting with a piece of copper pipe. I know what is meant by saying that he sweated one end at the truck. It means sweating one end of the pipe into the adapter so when he went under the house he screwed it in the pipe because you cannot sweat and screw in after it is sweated. There were not more than two joints to this pipe. There is an electrical device that can be used to sweat a connection and make the solder joint. I don't think Mr. Dail said anything to me about what device he used."

A. F. Patton returned to this burned house during daylight, and examined the copper pipe defendant had replaced. He testified: "It had been connected up by the use of two copper adapters, copper to iron pipe adapters, sweat joint. The adapter is used to screw into a fitting of iron pipe. It is a galvanized pipe and to the end you slip the copper into it and sweat that joint. Sweat that joint means, that is used by a flame torch that you heat this pipe and adapter to a temperature and place your solder on it and it runs in and runs around the joint. Both ends of this pipe were attached that way. . . .

I have been in the electrical business since about 1932 or 1933. In that connection I have been connected with the construction trade and have had occasion to observe plumbing work being done. I am familiar with the usual accepted methods for doing the work of placing copper pipes to iron pipes, either a sweat joint or a flare fitting. On the pipe replaced by Mr. Dail, a sweat joint was used. I know the usual accepted method for making a sweat joint. Sweat joint is used most commonly and the flare joint is used most whenever they are connecting water heaters, some movable appliance. There was not any flare joint used in connection with this piece of pipe. . . . I am familiar with Mr. Dail's equipment. He and I have worked on jobs. The equipment he uses is the torch, open flame. The type of torch he uses is butane gas torches. That has an open flame when in operation."

The house was so badly burned plaintiffs did not repair it. Afterwards the Garner Fire Department burnt what was left of the house for practice.

A. F. Patton before leaving the house the morning of the fire turned off the electric hot water heater in the house by disconnecting at the fuse box the two wires leading to this heater. The hot water heater, which was in the bathroom, had rested on a deck. After the fire, the hot water heater had fallen down into the hole burned in the bathroom floor, and the deck on which it was built was burned so that it had fallen down. "The fiber glass in the jacket of the hot water heater was melted but not all of the fiber glass was burned. You could see some of the fiber glass insulation around the bottom of the heater and the bare metal at the top of the water heater."

It is well settled law in this jurisdiction that the fact in controversy here, as to the origin of the fire, may be established by circumstantial evidence. *Drum v. Bisaner*, 252 N.C. 305, 113 S.E. 2d 560; *Lawrence v. Power Co.*, 190 N.C. 664, 130 S.E. 735; *Moore v. R. R.*, 173 N.C. 311, 92 S.E. 1; *Ashford v. Pittman*, 160 N.C. 45, 75 S.E. 943.

Plaintiffs' evidence, if believed by the jury, is sufficient to establish the following facts:

One. The fire, which burned plaintiffs' house, originated under the house directly beneath the bathroom floor, and burned a hole about 3½ feet in diameter through the bathroom floor. No other hole was burned through the floor anywhere else in the house.

Two. When the fire burned through the bathroom floor, it broke loose inside the house.

Three. Beneath the burned hole in the bathroom floor was a leaking piece of copper pipe the defendant had replaced on the afternoon of the fire.

Four. Bennett Rowland, who as a tenant moved his furniture inside the house the day of the fire, locked up the house and left about 2:30 p. m. o'clock on that day. Before he left, he went into all the rooms of the house to see if there was any evidence of fire or smoke, and found none.

Five. Defendant, a plumber, by contract with plaintiffs the afternoon of the fire repaired a leak in the water pipes of the house directly beneath the burned hole in the bathroom floor by using a sweat joint. He told A. F. Patton "he had sweated pipe at one end at the truck before he went under the house and made the last connection under the house."

Six. "Sweat that joint means, that is used by a flame torch that you heat this pipe and adapter to a temperature and place your solder on it and it runs in and runs around the joint." Both ends of the pipe fixed by defendant were attached that way.

Seven. Defendant uses in his work butane gas torches, which have open flames when in operation.

Eight. Between 4:30 and 5:30 p. m. o'clock on the afternoon of the fire defendant told Harriet Patton by telephone that he had completed this work. About 6:00 or 6:30 p. m. o'clock this same afternoon Emmett Bagwell driving in a car along a road approximately 50 yards from the house saw a fire underneath the house.

Only one other fact is necessary to be established in order to sustain plaintiffs' allegations as to the origin of the fire, to wit, that defendant repaired the leaking water pipe by a sweat joint using for such purpose an open flame gas torch in a negligent and careless manner, so that the wood under the bathroom floor or its sills were set afire, which he did not extinguish before he left, or that he failed to take reasonable precautions and care to see that no flames or smouldering wood were present before he removed himself from beneath the house. In our opinion, the facts and circumstances shown by plaintiffs' evidence would permit, but not compel, a jury fairly and reasonably to infer this fact. In finding said fact the jury would not be left to mere speculation and conjecture.

In *Frazier v. Gas Co.*, 247 N.C. 256, 100 S.E. 2d 501, this Court said: "' . . . Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and . . . if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence.' *Fitzgerald v. R. R.*, 141 N.C. 530, 54 S.E. 391; *Peterson v. Tidewater Power Co.*, 183 N.C. 243, 111 S.

E. 8. 'The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself.' *Henderson v. R. R.*, 159 N.C. 581, 75 S.E. 1092."

Plaintiffs' evidence, in our opinion, is strong enough in probative force to require the submission of the issues to the jury. The judgment of compulsory nonsuit entered below is

Reversed.

PETER A. MITCHELL, MRS. EVA ELMORE, AND MRS. IVYREE G. BRATSOS v. KENNETH R. DOWNS, ADMINISTRATOR C.T.A., D.B.N. OF THE ESTATE OF HARRY E. POULOS.

(Filed 27 April, 1960.)

1. Executors and Administrators § 4—

The clerk of the Superior Court has authority to grant letters of administration with the will annexed, and the person so appointed has the same rights, powers and duties as though he had been named executor in the will. G.S. 28-1; G.S. 28-24.

2. Executors and Administrators § 33—

The authority of an executor or administrator to represent the estate continues so long as the estate is not fully settled, unless terminated by his death, resignation, or removal in some manner sanctioned by law.

3. Executors and Administrators § 36—

An action against an executor or administrator on a claim against the estate may be brought originally in the Superior Court at term time, and the Superior Court has authority in such action to order an account to be taken by such persons as the court may designate, and to adjudge the application and distribution of assets of the estate, or to grant such other relief as the nature of the case may require. G.S. 28-147.

4. Executors and Administrators § 33—

Where it is made to appear that the administrator c.t.a. has funds in his hands belonging to the estate, a prior order of the clerk discharging the personal representative may be set aside by motion in the cause, and an action asserting a claim, which if established would constitute a debt of the estate, may be treated as such motion.

APPEAL by defendant from *Sharp, S. J.*, at December 7, 1959 Special Civil Term, of MECKLENBURG.

Civil action to recover of defendant's decedent certain damages as a result of fraud and misrepresentation on the part of Harry E. Poulos as alleged in the complaint.

The record of complaint shows that Harry E. Poulos, of Mecklenburg County, North Carolina, died on 20 July 1957, leaving a last will and testament in which he named Peter A. Mitchell, who is one of the plaintiffs herein, as Executor.

The will was duly probated, and Peter A. Mitchell qualified as executor. Letters testamentary were issued to him on 5 November 1957, and he immediately thereafter entered upon the duties of executor. And thereafter, in carrying out his duties as executor, Peter A. Mitchell discovered among the papers of the deceased certain bank books, records and other documents which led him to believe that the deceased, Harry E. Poulos, had wilfully, maliciously and knowingly concealed and misappropriated to his own use and benefit certain moneys of a partnership that rightly belonged to the plaintiffs here. As soon as Mitchell discovered this alleged fraud and misappropriation, he filed petition with the Clerk of Superior Court of Mecklenburg County for his resignation as Executor and was discharged as such on 15 September 1958.

Thereafter, the defendant Kenneth R. Downs was appointed administrator c.t.a., d.b.n. of the Estate of Harry E. Poulos, and entered upon the duties as such, and on 7 November 1958, he filed in office of Clerk of Superior Court what is denominated "Final Account".

And on 21 November 1958, the final account and record of disbursements of Kenneth R. Downs as administrator c.t.a., d.b.n. was audited and approved and an order discharging him as such administrator c.t.a., d.b.n. was signed by the Clerk of Superior Court of Mecklenburg County, and filed in his office.

On 5 June 1959, the present suit was filed by the plaintiffs naming as defendant Kenneth R. Downs, Administrator c.t.a., d.b.n. of the Estate of Harry E. Poulos. Summons was issued and served. And the record shows that on 2 July 1959, the defendant herein entered a special appearance solely for the purpose of making motion, and moved the court "to dismiss this action due to the fact that he is not a proper party to this action." And as grounds therefor defendant shows to the court:

"1. That as Administrator c.t.a., d.b.n. of the Estate of Harry E. Poulos, the said Kenneth R. Downs filed a final account and record of disbursements in the office of the Clerk of Superior Court on the 7th day of November, 1958.

"2. That on the 21st day of November 1958, the final account of Kenneth R. Downs, Administrator c.t.a., d.b.n. was audited and approved and an order discharging Kenneth R. Downs Administrator

c.t.a., d.b.n. was signed by J. Lester Wolfe, the Clerk of Superior Court an ex officio Judge of Probate."

And thereafter on 16 December 1959, the cause coming on for hearing and being heard before Judge Susie Sharp, upon defendant's motion before-stated, and the court being of opinion that the motions should be denied, "ordered, adjudged and decreed that the motion to dismiss the action be, and the same was thereby overruled and denied."

And by order of the court defendant was allowed thirty (30) days from date thereof in which to file answer or otherwise plead.

Defendant excepted to the court denying his motion to dismiss the action and to the signing of the order, and appeals to Supreme Court and assigns error.

George J. Miller for defendant, appellant.
Herbert & James for plaintiffs, appellees.

WINBORNE, C. J. In this State it is provided by statute, G.S. 28-1, that the Clerk of Superior Court of each county has jurisdiction within his county, among other things, to grant letters of administration with the will annexed.

In this State it is also provided by statute, G.S. 28-24, that an "administrator *cum testamento annexo* must observe the will"; that "whenever letters of administration with the will annexed are issued, the will must be observed and performed by such administrator, both with respect to real and personal property"; that "such administrator has all the rights and powers, discretionary or otherwise, unless a contrary intent clearly appears from the will, and is subject to the same duties as if he had been named executor in the will." These provisions are incorporated in an amendment, 1945 Session Laws, Chapter 162, rewriting the old statute G.S. 28-24, and repealing all laws and clauses of laws in conflict therewith effective on ratification 10 February, 1945.

And the general rule is that after an executor or administrator is appointed and qualified as such, his authority to represent the estate continues until the estate is fully settled, unless terminated by his death, or resignation, or by his removal in some mode prescribed by statute, or unless the letters be revoked in a manner provided by law. See *Edwards v. McLawhorn*, 218 N.C. 543, 11 S.E. 2d 562.

In the *Edwards v. McLawhorn* case the Court cites and quotes with approval from *Johnston v. Schwenck*, Ohio St. 124 N.E. 61, 8 A.L.R. 170, the following: "It is the universal holding that the authority of an executor or administrator to represent the estate continues

until the estate is fully settled, unless he is removed, dies, or resigns, and that the filing of what purports to be a final account does not extinguish the trust." Indeed, in the case *Weyer v. Watt,* 48 Ohio St. 545, 28 N.E. 670, it was held that an order by the court directing that the administrator be discharged, made at the time of the filing of a final account, does not terminate his authority if assets of the estate remain unadministered. Indeed, until the debts have been paid, the duties and obligations of the administrator continue. *Creech v. Wilder,* 212 N.C. 162, 193 S.E. 281.

Moreover it is provided by statute G.S. 28-147 that "In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the Superior Court at term time." *Davis v. Davis,* 246 N.C. 307, 98 S.E. 2d 318. "And in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief as the nature of the case may require." *Casualty Co. v. Lawing,* 223 N.C. 8, 25 S.E. 2d 183.

It now appears from the record and case on appeal that plaintiffs here assert claim against the estate of Harry E. Poulos which if established will constitute a debt of said estate, and funds are in the hands of the Clerk, as shown in return to writ of *certiorari,* which would indicate that factually the estate has not been settled, and that the duty devolves upon the defendant as administrator c.t.a. d.b.n.. to perform his duty as such.

However it appears that the Clerk of Superior Court made an order of discharge of defendant. This order is subject to being set aside on motion in the cause, and this proceeding may be treated as such motion. *Craddock v. Brinkley,* 177 N.C. 124, 98 S.E. 280. Then the way would be open to plaintiffs to assert claim against the administrator of the estate.

It may be that the court below may find it expedient to allow amendment to allege facts to fit the factual situation in hand. And pending decision the court should retain the fund *in custodia legis.*

The cause will be remanded to the end that further proceedings may be had in accordance with law.

Error and remanded.

G. FRANK KENNEDY v. VIOLA CARTER JAMES.

(Filed 27 April, 1960.)

1. Automobiles §§ 41g, 42g—

Plaintiff's evidence tending to show that he was traveling at a lawful speed and entered a street intersection before defendant's car approaching the intersection from plaintiff's right, reached the intersection, and was struck by defendant's car after plaintiff's car had been driven more than half way across the intersection, *is held* sufficient to take the case to the jury on the issue of defendant's negligence and not to show contributory negligence as a matter of law on the part of plaintiff. G.S. 20-155(b).

2. Automobiles § 46: Trial § 31b—

Where the trial court charges the law in regard to the statutory duties of a motorist to keep a proper lookout and the statutory provisions in regard to the right of way at an intersection, and applies the law to the evidence in the case, G.S. 20-141(c); G.S. 20-155(a), objection on the ground that the court failed to charge on the statutes is without merit, it not being required that the court read the applicable statutes to the jury.

3. Same—

Where the court correctly charges the law of the right of way when two vehicles approach an intersection at the same time, the following charge of the court on the law as to the right of way when one vehicle enters the intersection first "all other things being equal", *held* not misleading when the charge is construed contexually.

4. Appeal and Error § 42—

The charge to a jury must be read and considered in its entirety, and not in detached fragments.

5. Appeal and Error § 39—

The burden is on appellant to show prejudicial error amounting to the denial of some substantial right.

APPEAL by defendant from *Pless, J.*, December 1959 Term, of CABARRUS.

Civil action to recover compensation for damage to an automobile resulting from an intersection automobile collision, in which defendant pleads contributory negligence of the driver of plaintiff's automobile, and a counterclaim for damage to her automobile.

The jury found by its verdict that plaintiff's automobile was damaged by the negligence of defendant, that the driver of plaintiff's automobile was not guilty of contributory negligence, and awarded damages in the sum of $776.00. The jury did not answer the issues arising on defendant's counterclaim.

From judgment entered on the verdict, defendant appeals.

John R. Boger, Jr., Clyde L. Propst, Jr., and Hartsell & Hartsell for plaintiff, appellee.

John Hugh Williams for defendant, appellant.

PARKER, J. Defendant assigns as error the denial of her motion for judgment of compulsory nonsuit renewed at the close of all the evidence. Her argument in her brief is that her motion should have been allowed on the ground of the contributory negligence of the driver of plaintiff's automobile as a matter of law.

Plaintiff's evidence tends to show these facts: About 6:45 or 7:00 p. m. o'clock on Sunday, 27 July 1958, Kenneth R. Kennedy, son and agent of plaintiff, was driving his father's Chevrolet automobile south on Kerr Street in the city of Concord, and approaching its intersection with Moore Street. At the same time defendant was driving her Ford station wagon east on Moore Street in the city, and approaching the same intersection. Both streets are paved. Kerr Street is about 26 feet wide, and Moore Street about 25 feet wide. Kerr street runs north and south, and Moore Street east and west. At the time there were no stop signs, stationary or signal, and no yield right of way signs at the intersection. It was a residential district of the city, and the maximum speed of automobiles there was thirty-five miles per hour.

About 500 feet from the intersection Kenneth R. Kennedy checked his speed, looked at his speedometer, and saw he was going thirty miles an hour. He testified on direct examination: "As I came on into Moore Street I saw nothing in the intersection until my wife screamed and I was in the intersection most of the way across when she screamed and I looked to my right just in time to see Mrs. James' car hit my right side. . . . At the time of the collision the front end of Mrs. James' car was about three feet east of the west side of the prolongation out into Kerr Street. The front end of my car was approximately equal with the south edge of Moore Street. I was on the righthand side of Kerr Street." He testified on cross-examination: "I was going 30 miles per hour. I was going about the same speed at the time of the collision. I did not slow down as I approached the intersection. . . . I was familiar with the intersection. . . . I thought I had the right of way. I looked but did not slow down. I was approximately halfway across the intersection when I saw Mrs. James' car. I saw her approximately three to five feet before she struck me."

On the northwest corner of Kerr and Moore Streets there is a house which faces on Kerr Street. It has a hedge around the yard. A witness for plaintiff testified: "You would have to get out to the edge of Kerr Street before you could see your way safely to go ahead. You

could see from Kerr Street to an automobile on Moore the same distance you could see from Moore on Kerr. The distance of visibility is the same in both directions."

Plaintiff alleged in his complaint, "that plaintiff's car entered the intersection that Moore Street makes with Kerr Street before the defendant's car, which was proceeding in an easterly direction on Moore Street, entered said intersection; that, after said Kenneth R. Kennedy had driven said plaintiff's automobile more than halfway across said intersection, a 1955 Ford, owned and operated at said time by the defendant, entered said intersection and violently struck the plaintiff's automobile in the vicinity of the right front door," and Kenneth R. Kennedy testified that he was approximately half way across the intersection when he saw defendant's car three to five feet before she hit his car. This distinguishes the instant case from *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686, which is relied on by defendant.

Plaintiff has *allegata* and *probata* tending to support his theory of the case that he had the right of way by virtue of N.C. G.S. 20-155(b). This Court said in the recent case of *Carr v. Stewart,* 252 N.C. 118, 113 S.E. 2d 18: "The plaintiff's evidence in the instant case tends to show that he entered the intersection first. Hence, in our opinion, he is entitled to have his case heard by a jury on appropriate issues, and we so hold." See also *Downs v. Odom,* 250 N.C. 81, 108 S.E. 2d 65.

The question as to whether or not plaintiff was guilty of contributory negligence in entering the intersection at the time and under the conditions then existing was for the jury, and the trial judge correctly so held, and properly overruled defendant's motion for judgment of nonsuit entered at the close of all the evidence.

Defendant assigns as error this part of the charge in respect to the first issue: "Now, Ladies and Gentlemen, as I say, you've got to take into consideration all of the surrounding circumstances for the purpose of determining who had the right of way. If a person enters an intersection at a lawful rate of speed, all other things being equal, and gets into the intersection first, then it is the duty of others to let him proceed before entering. If he enters it at an unlawful rate of speed or in violation of the reasonably prudent person, then, of course, that law would not apply."

Defendant contends that the vice of this part of the charge lies in its failure to consider N.C.G.S. 20-141(c) and N.C.G.S. 20-155(a), as well as the common law duty of maintaining a proper lookout. However, a study of the charge before this challenged part of it shows that the trial judge did instruct the jury as to the duty of maintaining a proper lookout, and did state in substance the provisions of

N.C.G.S. 20-141(c) and N.C.G.S. 20-155(a), though he did not read these two statutes to the jury, and did charge that there is no such thing, as an absolute right of way. In *Batchelor v. Black,* 232 N.C. 314, 59 S.E. 2d 817, the Court said: "This Court has repeatedly held that the court need not read a statute to the jury, and in fact the opinions tend to discourage the practice. While the court must apply the law to the evidence (G.S. 1-180) this is often better accomplished by a simple explanation without the involvement of the technical language of the statute."

Defendant further contends that the challenged part of the charge "detracted from the previous statement that the defendant had the right of way if the two vehicles 'did approach' the intersection at about the same time. In fact, the expression 'all other things being equal' could have been considered by the jury as referring to the proposition of the vehicles reaching the intersection at approximately the same time. This would negate G.S. 20-155(a)."

This is said in *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147: "If, on the other hand, the automobile of the plaintiff approaching from the left reached the intersection first and had already entered the intersection, the driver of defendant's automobile was under duty, to permit the plaintiff's automobile to pass in safety. G.S. 20-155(b); *Davis v. Long,* 189 N.C. 129 (136), 126 S.E. 321; *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316."

Defendant's evidence tends to show that she approached the intersection at not over ten miles an hour, that when she got to the intersection, she stopped and looked both ways, didn't see any approaching traffic, and started into the intersection, that when she had gone three feet in the intersection, the collision occurred. When she first saw plaintiff's car, it was about two feet in the intersection, and, in her opinion, was going 40 miles an hour.

A charge to a jury must be read and considered in its entirety, and not in detached fragments. *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19; *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356. When the charge here is read as a composite whole, prejudicial error as to the defendant sufficient to warrant a new trial is not shown. This assignment of error is not tenable. The case of *Primm v. King,* 249 N. C. 228, 106 S.E. 2d 223, relied on by defendant, is easily distinguishable.

The other assignments of error to the charge have been carefully considered, and are overruled.

The burden is on appellant to show prejudicial error amounting

to the denial of some substantial right. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657; *Keener v. Beal, supra.* This, she has not done.

No error.

STATE v. RAYMOND RHODES.

(Filed 27 April, 1960.)

1. Homicide § 20—

The direct and circumstantial evidence in this case *is held* sufficient to overrule motions for judgment as of nonsuit and to support the verdict of guilty of manslaughter.

2. Criminal Law § 98—

The probative weight of the evidence is for the jury; the legal sufficiency of the evidence is for the court.

3. Criminal Law § 101—

Upon motions to nonsuit in a prosecution in which the State relies upon circumstantial evidence, the evidence must be considered in the light most favorable to the State and the motions overruled if the evidence is sufficient to prove the fact of guilt or if it conduces to that conclusion as a fairly logical and legitimate deduction, and thus raises more than a mere conjecture of suspicion of guilt.

4. Criminal Law § 51—

Where the court finds upon supporting evidence that the witness is a medical expert, he having performed many autopsies in the course of his work, the testimony of such witness as to the cause of death based upon his autopsy on the body of the deceased is competent notwithstanding the failure of the State to show that the witness was authorized to make the autopsy. In the absence of evidence to the contrary it will be assumed that the autopsy was lawfully performed.

5. Criminal Law § 79—

Ordinarily the courts look to the competency of the evidence and not to the manner in which it was acquired.

6. Criminal Law § 154—

An assignment of error should present only a single question of law for consideration.

7. Criminal Law § 71—

Where the court hears evidence and determines that the incriminating statements of defendant were voluntarily made, the admission of testimony thereof will not be disturbed when the record fails to show that the statements were not voluntary.

8. Criminal Law § 42—

The admission into evidence of certain articles of clothing and other articles of personal property found at the scene *held* not error.

9. Criminal Law § 162—

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have said if permitted to testify.

10. Criminal Law § 156—

An assignment of error based on eight exceptions to the charge *held* to constitute a broadside assignment of error.

11. Criminal Law § 112—

The order of stating the respective contentions of the State and the defendant rests largely in the discretion of the trial court, and an objection to the statement of the contention must ordinarily be brought to the trial court's attention in apt time.

APPEAL by defendant from *Phillips, J.*, at October 1959 Term, of RICHMOND.

Criminal prosecution upon a bill of indictment charging defendant with the murder of Ruth Breeden English Rhodes.

Plea— Not guilty.

The Solicitor for the State announced in open court 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 manslaughter, as the jury should find.

Upon the trial in Superior Court the State offered evidence tending to show by direct and circumstantial evidence that Ruth Rhodes, defendant's wife, came to her death as result of injuries inflicted upon her by defendant. And the case was submitted to the jury under the charge of the court.

Verdict: Guilty of manslaughter.

Judgment: That defendant be confined in the State's Prison and assigned to work under the direction of the State Prison Department for the State of North Carolina in such place or places as designated by said department for the work of prisoners for a period of not less than ten nor more than fifteen years.

Defendant excepts thereto and appeals to Supreme Court, and assigns error.

Attorney General Bruton, Assistant Attorney General H. Horton Rountree for the State.

Z. V. Morgan for defendant, appellant.

WINBORNE, C. J. Before taking up the assignments of error in the order set forth in the record on this appeal, we find that exceptions ten, eleven and twelve, in part the basis for assignment of error number "1", as well as exceptions sixteen and seventeen, basis for assignment of error number "4", and exceptions twenty-six and twenty-seven in part basis for assignment of error "8", are expressly abandoned by defendant as set forth in brief filed here.

And when challenged by assignments of error 6 and 7, based upon exceptions 19 and 20 to denial of defendant's motions for judgment as of nonsuit, the Court is of opinion that the evidence offered in the instant case, taken in the light most favorable to the State, and giving to it the benefit of reasonable inferences of fact arising thereon, as is done in such cases, is substantially sufficient to take the case to the jury and to support the verdict of guilty of manslaughter returned by the jury.

In passing upon the legal sufficiency of the evidence so taken, when the State relies upon circumstantial evidence for a conviction of a criminal offense, as in the present case, the rule is that the facts established or advanced on the hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and to exclude any other reasonable hypothesis. *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d 617; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268; *S. v. Jarrell,* 233 N.C. 741, 65 S.E. 2d 304; *S. v. Roman,* 235 N.C. 627, 70 S.E. 2d 857.

While the probative weight of legally sufficient proof is for the jury, the sufficiency of proof in law is for the court. *S. v. Prince,* 182 N.C. 788, 108 S.E. 330. So in considering a motion for judgment of nonsuit under G.S. 15-173, the general rule, as stated in *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730, and in numerous other cases before this Court, is that "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," approved in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

As to assignment of error 1, the record points out that "his Honor permitted the State to call Dr. B. B. Andrews for examination as a witness for the State before showing that Dr. Andrews had been called or ordered to make the autopsy, concerning which he testified, by order of the solicitor, coroner, coroner's jury, or any other lawful

agency of the State, or that the same was done by permission of the persons entitled by law to give permission for the performance of autopsies, and that his Honor allowed said witness, Dr. B. B. Andrews, to testify relative to his findings brought about by the performance of said autopsy." And it is said that this constitutes the basis of defendant's exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12. R. pp 4, 6, 7, 8, 9, 10 and 11.

In respect to this assignment, first and foremost, the record discloses that the doctor is a duly practicing licensed physician and surgeon,— specializing in the field of medicine known as pathology, directing a laboratory in the hospital in which he now is, among other things, performing autopsies for the purpose of determining cause of death, and held by the court to be an expert witness. And it is seen that on 18 February 1959, the doctor performed an autopsy on the body of Ruth English Rhodes at Mark's Funeral Home in Rockingham, and that from his findings, as he described them "on and about the body of the deceased", he gave it as his opinion, satisfactory to himself, that "her death was caused by pulmonary congestion and edema due to subdural hemorrhage of the brain due to trauma," that is, "the laceration and bruises on the face and head." See *S. v. Bright,* 237 N.C. 475, 75 S.E. 2d 407; *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; Strong's N. C. Index Vol. 1, p. 724.

And it is not contended that there was mistake of identity, that is, that the autopsy was performed on body of other than that of defendant's wife. The doctor was testifying from facts found upon his examination. Such testimony is competent for an expert. Indeed, in the absence of evidence to the contrary it will be assumed that the autopsy was lawfully performed.

These exceptions, as contended by the Attorney General, are without foundation and involve a collateral issue as to the source from which the evidence was obtained. See *S. v. McGee,* 214 N.C. 184, 198 S.E. 616, where the Court had this to say: "Under the common law, with few exceptions, such as involuntary confessions, evidence otherwise competent is admissible irrespective of the manner in which it was obtained by the witness. The courts look to the competency of the evidence, not to the manner in which it was acquired. This rule has long been followed in the courts of North Carolina," citing cases.

Finally let it be noted that this assignment of error presents more than a single question of law for consideration by this Court, and is violative of elementary procedure. See *S. v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507, citing cases.

As to assignment of error 2, based upon exceptions 13 and 14: These

exceptions challenge the voluntariness of the statement made by defendant to officers. However the record fails to show that the statements were not voluntary. And the Court, in the absence of the jury, considered evidence offered and determined the voluntariness of the incriminating statements. See *S. v. Mays, supra, S. v. Rogers,* 233 N. C. 390, 64 S.E. 2d 572.

As to assignment of error 3, based upon exception 15: This is to trial court allowing "the introduction of certain bed clothing, personal clothing, and other items as State's Exhibit No. 1." In this there is no error. See *S. v. Vann,* 162 N.C. 534, 77 S.E. 295.

As to assignment of error 4, based upon Exceptions 16 and 17: The record fails to show what the witness would have said in answer to the questions asked. Hence there is no error. See *S. v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342, and many others.

Assignment of error 8: The record expressly indicates that "this constitutes the basis" of defendant's exceptions 21 through 28. And these constitute a broadside attack on the charge, and are of no avail. *S. v. Atkins, supra.*

Assignments of error 9 and 10, based upon defendant's exceptions 29 to 39, both inclusive: These relate to the order in which the court stated the contentions of the State and defendant. This is a matter in the discretion of the court, and is not ordinarily subject to attack. If, however, there be objection to statement of a contention it is the duty of the party objecting to call the matter to attention of the court at the time, so that the court may have opportunity to correct the statement if need be. Hence no error is made to appear.

Assignments of error 11, 12 and 13 are directed to formal matters which need no express consideration. These are matters of discretion, and on the record and case on appeal fail to show error.

After careful consideration of the record and case on appeal, as a whole, prejudicial error is not made to appear. Hence in the judgment below there is

No error.

SCOTT *v.* BOARD OF MISSIONS.

P. M. SCOTT, W. H. PERKINS AND OCEAN FOREST, INC., A CORPORATION OF SOUTH CAROLINA, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS OF LOTS, EXCEPT THE EASTERN CAROLINA YACHT CLUB, IN THE SUBDIVISION KNOWN AS MILES AWAY LOCATED NEAR NEW BERN, NORTH CAROLINA, WHO MAY AGREE TO JOIN IN AND BECOME PARTIES TO THIS ACTION, v. BOARD OF MISSIONS NORTH CAROLINA ANNUAL CONFERENCE, SOUTHEASTERN JURISDICTION OF THE METHODIST CHURCH, INCORPORATED, A NORTH CAROLINA CORPORATION, AND ROBERT McLEAN BOYD, CHARLES T. BARKER AND RALPH T. MORRIS, TRUSTEES OF THE GARBER METHODIST CHURCH.

(Filed 27 April, 1960.)

1. Deeds § 19—

A restriction that not more than one dwelling should be constructed on any lot in a subdivision is not a restriction limiting the use of the property to residential purposes or prohibiting the building of a structure on more than one lot, and therefore the building of a church on three lots is not a violation of the restriction.

2. Same—

Covenants restricting the use of property impose servitudes in derogation of the usual right to the free and unfettered use of land by the owner, and such covenants are to be strictly construed and may not be enlarged by inference, implication or strained construction.

3. Same—

A covenant restricting the placing of a structure nearer than fifteen feet from the sidelines of a lot relates, in an instance where several lots are owned by one person, to the outside lines, and does not prohibit such owner from placing a single structure on several lots when the structure is not nearer than fifteen feet from the outside lines.

APPEAL by plaintiffs from *Paul, J.*, February Term, 1960, of CRAVEN.

The plaintiffs herein are owners of lots in a subdivision known as Miles Away, a plat of which is recorded in the office of the Register of Deeds in Craven County, North Carolina.

Plaintiff Ocean Forest, Inc. developed and subdivided the real estate involved into lots. The plaintiff corporation still owns one lot. Defendants obtained lots Nos. 11, 12 and 13 in the subdivision by *mesne* conveyances. The deeds to all the lots in the subdivision, with the exception of two conveyed to the Eastern Carolina Yacht Club, contain the following restrictive language: "SUBJECT TO THE FOLLOWING RESTRICTIONS AND COVENANTS and a violation of the same shall entitle any other owner or owners of lots in said Subdivision to maintain an action for the enforcement of said restrictions, namely:

"1. There shall not be constructed on said lot more than one (1)

dwelling house, but this restriction shall not be interpreted to prevent the construction of quarters for domestic servants actually employed by the owner or occupant of said lot in any building such as a garage or other outbuilding.

"2. No building shall be constructed nearer than fifteen (15') feet from the side lines of said lot, nor nearer than twenty-five (25) feet from the line of the river shore."

Plaintiffs, Ocean Forest, Inc. and other lots owners similarly situated, bring this action to enjoin the defendants from constructing a church on their lots, which plans contemplate a building essentially in a "U" shape, covering portions of all three lots owned by the defendant Board of Missions.

The court below held the construction of a church as contemplated would not be in violation of said restrictions and entered judgment accordingly. The plaintiffs appeal, assigning error.

R. E. Whitehurst, David S. Henderson for plaintiffs.
A. D. Ward for defendants.

DENNY, J. It is clear that the owners of lots in the subdivision under consideration may not build more than one residence on each lot owned, but there is no restriction limiting the use of the property for residential purposes only, or prohibiting the building of a residence or other building on more than one lot.

In the case of *Construction Co. v. Cobb*, 195 N.C. 690, 143 S.E. 522, the question for decision was whether a building restriction providing that the lot of land thereby conveyed "shall be used for residential purposes only * * * and there shall not at any time be more than one residence or dwelling house on said lot (servants' house excepted)," is violated by the erection on said premises of an apartment house containing four apartments, each designed for a family or family group. This Court upheld the ruling of the court below, to the effect the restriction did not prohibit the erection of the proposed apartment house. *Stacy, C. J.*, speaking for the Court, said: "If the parties wanted to prohibit the building of an apartment house on the defendant's lot, they could easily have said so in language importing such intent.

"It is the position of a number of courts that, in the absence of clear and unequivocal expressions, restrictive covenants ought not to be expanded, but rather buckled in against those claiming their benefit and in favor of free and unrestricted use of property. 27 R.C.L., 756, *et seq.* 'It is a well settled rule that, in construing deeds and in-

struments containing restrictions and prohibitions as to the use of property conveyed, all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee.' *Hunt v. Held,* 90 Ohio St., 280, 107 N.E. 765, L.R.A. 1915 D, 543."

It was likewise said in *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892, "Restrictive covenants are not favored. As was said by this Court in *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619, 624, 'Further, it is to be noted that we adhere to the rule that since these restrictive servitudes are in derogation of the free and unfettered use of land, covenants and agreements imposing them are to be strictly construed against limitation on use. *Craven County v. First-Citizens Bank & Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620.' The courts are not inclined to put restrictions in deeds where the parties left them out."

In *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197, this Court said: "Restrictive covenants cannot be established by parol evidence or otherwise save by a recordable instrument containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction. Thompson, Real Property, Vol. 7, p. 64; *Holliday v. Spahr,* 282 Ky. 45, 89 S.W. 2d 327."

It is also said in 26 C.J.S., Deeds, section 164 (3), page 1115, "A provision as to the character and location of dwellings which may be erected on the premises has been held not in itself to constitute a restriction of the premises to residential use, * * *" citing *Sporn v. Overholt,* 175 Kan. 197, 262 P. 2d 828; *Holliday v. Spahr,* 262 Ky. 45, 89 S.W. 2d 327; *Reed v. Docterman,* 95 N.J. Eq. 240, 122 A. 745, s.c. 97 N.J. Eq. 544, 128 A. 921.

In the case of *Holliday v. Spahr, supra,* the development consisted of more than 500 acres of land, and the deeds contained the following: "No dwelling house shall be built in any part of said addition, when laid off into streets, lots and alleys, closer than 25 feet to the pavement line, and no residence shall be built on Boone Avenue or Belmont Street, which is now known as the Colbyville Pike, costing less than * * * $3,500.00 * * *." The development was advertised in the papers as an exclusive residential area. The Court said: "The essence of the restrictions is, if the owner erects a residence thereon, the same shall cost not less than the sum designated in the deed, and no nearer the street fronting the same than the distance fixed in it. At most, such are no more than limited 'building restrictions,' and not a limitation on the free use of the land."

Furthermore, we hold that the restriction, "No building shall be

constructed nearer than fifteen (15') feet from the side lines of said lot * * *" is applicable only to the outside lines of the lots involved. 36 A.L.R. 2d, Anno. — Covenants — Building Side Lines, 871; *Goldstick v. Thomas,* 237 Mich. 236, 211 N.W. 666; *Shaffer v. Temple Beth Emeth,* 198 App. Div. 607, 190 N.Y.S. 841; *Busch v. Johnstone,* 107 Fla. 631, 145 So. 872; *Struck v. Kohler,* 187 Ky. 517, 219 S.W. 435.

In *Struck v. Kohler, supra,* the Court said: "The limitation in the restriction is that the improvement on each lot shall consist of only one building and it is clear that two residence buildings could not be erected on each lot without violating the restriction; but we do not think the restriction prohibited the erection of one building for residence purposes that might cover two or more lots. If one residence building, large enough to cover two lots, or even three, was erected, it could not be said that there was more than one building on each lot. We think it is clear that a purchaser of two or more lots might, if he wishes, put his residence on the center lot and leave the lots on either side vacant, or that he might build his residence on two of the lots and leave one of them vacant. In other words, the restriction does not impose any limitation on the right of the lot owner as to the size of the residence to be erected, or confine it to a building that could be placed on one lot."

The judgment of the court below is

Affirmed.

JAMES IVEY WILLIAMSON v. JAMES HAL VARNER AND LULA LUTHER SAUNDERS.

(Filed 27 April, 1960.)

1. Pleadings § 8: Trial § 26—

The allowance of nonsuit in favor of a defendant sought to be held liable under the doctrine of *respondeat superior* does not affect such defendant's counterclaim against plaintiff for damages to property.

2. Automobiles § 11—

The operation of an automobile on the public highway at night without lights is negligence *per se.* G.S. 20-129.

3. Automobiles § 41h—

Evidence tending to show that the operator of defendant's car, traveling north, gave the signal for a left turn at an intersection, waited until a car with headlights burning traveling south, passed, and then proceeded to turn left, and was struck by plaintiff's car which was

traveling south at an excessive rate of speed without headlights, raises, on defendant's counterclaim, the issue of plaintiff's negligence for the determination of the jury, and plaintiff's evidence in conflict therewith cannot entitle plaintiff to nonsuit on the counterclaim.

4. Automobiles § 35; Pleadings § 10—

Where plaintiff alleges negligence on the part of the defendant driver and that the driver was the agent of defendant owner, there is no necessity, upon the filing of a counterclaim by defendant owner to recover for damages to his vehicle, for plaintiff to repeat the allegation of negligence and the imputation of such negligence to defendant owner, and the filing of a reply to the counterclaim is not required.

5. Automobiles § 54f—

Where plaintiff alleges that defendant driver was the agent of defendant owner and was acting in the course of the employment at the time of the collision, and that defendant owner admitted the ownership of the vehicle, plaintiff is entitled to the benefit of G.S. 20-71.1, and upon defendant owner's denial of the agency and the introduction of evidence that the driver was a bailee, an issue of fact is raised for the determination of a jury.

APPEAL by defendant Varner from *Armstrong, J.*, November 1959 Civil Term, of RANDOLPH.

This action was instituted in May 1959 by plaintiff against defendants, hereafter respectively designated as Varner and Saunders, to recover damage to plaintiff's automobile sustained in a collision occurring about midnight 14 May 1959 at the intersection of Highway 220, sometimes referred to as Fayetteville Street, and Walker Avenue in Asheboro. Plaintiff alleged that Varner was the owner of an automobile operated with Varner's consent by Saunders, the collision was the result of the negligent operation by Saunders, in that she operated in a reckless manner, at an excessive rate of speed, and turned to her left immediately in front of plaintiff without warning.

Saunders, answering, admitted that she was operating Varner's automobile. She denied that she was acting as his agent, asserting the motor vehicle had been loaned to her for her benefit. She denied negligence, asserted contributory negligence to defeat plaintiff's claim, asserting specifically that he operated his motor vehicle without headlights at an unlawful rate of speed and collided with her after she had given proper signals of her intention to make a left turn and had traversed the greater part of the intersection. She did not assert a counterclaim.

Varner answered and admitted ownership of the vehicle driven by Saunders. He averred that Saunders was operating the vehicle for her personal use but with his consent. He denied any negligence on

his part or on the part of Saunders. He pleaded contributory negligence on the part of plaintiff to defeat plaintiff's claim, asserting the same acts of negligence alleged by Saunders. He then asserted a counterclaim for damage done to his motor vehicle in the collision. The negligence charged against plaintiff by Varner was unlawful speed, failure to maintain a proper lookout, and operation without lights. The cause was tried at the September Term of Randolph at which time Judge Sharp, then presiding, allowed the motion of Varner for judgment of nonsuit.

Issues were submitted to the jury to determine Saunders' negligence, plaintiff's contributory negligence, damage to plaintiff's motor vehicle and negligence of plaintiff causing injury to Varner's motor vehicle. The jury answered the issue of Saunders' negligence in the affirmative, contributory negligence in the negative, assessed damages and found no negligence on the part of plaintiff causing damage to Varner. On motion of defendants the court in its discretion set the verdict aside and ordered a new trial. It allowed plaintiff to amend his complaint. Pursuant to this authorization, plaintiff amended his complaint to specifically allege that Saunders was at the time of the collision operating the automobile as Varner's agent and in the scope of her employment. It was also amended to allege Saunders' failure to yield the right of way.

The cause was heard on the amended pleadings at the November Term 1959. At the conclusion of all the evidence the motion of defendants to nonsuit plaintiff's action was allowed. The motion of plaintiff to nonsuit Varner's counterclaim was likewise allowed. Varner excepted and appealed. Plaintiff did not appeal from the judgment dismissing his action.

H. Wade Yates for appellant James Hal Varner.
No counsel contra.

RODMAN, J. The sole question now for consideration is the correctness of the ruling nonsuiting the counterclaim of Varner. The judgment entered at the September Term on Varner's motion dismissing plaintiff's action against Varner did not affect Varner's claim against plaintiff. Varner's cause of action stated as a counterclaim remained on the docket and required a determination. G.S. 1-183.1.

Varner cannot recover from plaintiff unless plaintiff negligently caused damage to Varner's motor vehicle. To establish negligence proximately causing damage, Varner alleged that plaintiff was operating his motor vehicle on a public highway at night and without lights.

If so, this was a violation of a statutory provision, G.S. 20-129, enacted for the protection of those using the highways. Such violation is a misdemeanor, G.S. 20-176, and is negligence *per se*. *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276.

There is positive and unequivocal evidence from Varner's witnesses that plaintiff's automobile had no lights. He was traveling south on Highway 220. Varner's automobile, operated by Saunders, was traveling north on that highway. Varner's evidence is sufficient to support a finding that Saunders, traveling north, gave signal of her intention to turn left into Walker Avenue. She was confronted with a green light. A car with headlights was approaching. She stopped and waited for that car to pass. Seeing no other car approaching and with a signal indicating her intention, she executed her turn and was in the intersection and past the center of the intersection when she was struck by the motor vehicle operated by plaintiff traveling at an unreasonable rate of speed under existing conditions. Plaintiff maintained that his vehicle was equipped with headlights, that he saw Saunders approaching, saw the turn signal that she gave, but did not anticipate that she would execute a left turn immediately in front of him. This dispute with respect to the factual situation can only be resolved by a jury, unless a jury trial is waived and the judge is permitted to find the facts.

Plaintiff filed no reply to Varner's counterclaim. He does not, *eo nomine,* allege contributory negligence as a defense to the counterclaim. His complaint does, however, allege negligence on the part of Saunders, and he alleges that Saunders was Varner's agent. The allegations so made are, in our opinion, sufficient to serve as a plea imputing Saunders' negligence to Varner and sufficient to defeat Varner's claim, if established. There was no necessity for merely repeating the same allegations with respect to the negligence of Saunders and the imputation of this negligence to Varner.

If the jury should find that plaintiff was negligent and that his negligence was one of the proximate causes of the damage to Varner's automobile, whether the liability so created could be defeated by negligence of Saunders would depend upon the relation existing between Saunders and Varner. Plaintiff alleges that Saunders was Varner's agent and at the time of the collision was acting in the course and scope of her employment. He alleges and Varner admits ownership of the vehicle driven by Saunders. Plaintiff has, there-

fore, the benefit of the statutory presumption of agency. G.S. 20-71.1. If Saunders was an agent of Varner, and she was negligent, and such negligence was a proximate cause of the collision, Varner could not recover.

Varner and Saunders, however, deny the allegations of agency and alleged facts establishing the relationship of bailor and bailee between Varner and Saunders. In an action by bailor against a third party, bailee's negligence is not imputed to bailor. *Sink v. Sechrest,* 225 N.C. 232, 34 S.E. 2d 2; *Martin v. Bus Line,* 197 N.C. 720, 150 S.E. 501.

Hence an issue of fact arises on the pleadings and evidence, namely: Was Saunders the agent of Varner? If Saunders was agent and acting in the scope of her agency, her negligence would be imputed to her principal, Varner, and would bar recovery by him. If she was not his agent, but a mere bailee, her negligence would not defeat Varner's claim.

Whether Saunders was guilty of negligence which was the proximate cause of the collision is, also, we think, a question of fact that must be decided by a jury. Since the rights of the parties cannot be determined as a matter of law, it follows that the judgment is

Reversed.

LULA H. HERRING, WIDOW; FORREST HERRING AND WIFE, DOROTHY B. HERRING; JASTEEL H. FIELDS AND HUSBAND, JESSE FIELDS; EUNICE W. HODGES, WIDOW; PERSIS H. CRAWFORD AND HUSBAND; P. H. CRAWFORD, JR.; AND MARY H. WARREN AND HUSBAND, A. D. WARREN, JR. v. VOLUME MERCHANDISE, INC., A CORPORATION, AND EFIRD'S DEPARTMENT STORE OF KINSTON, N. C., INC., A CORPORATION; JOHN M. BELK, R. L. MANSFIELD AND GIBSON L. SMITH.

(Filed 27 April, 1960.)

1. Frauds, Statute Of, § 6c: Landlord and Tenant § 10½—

Evidence that the agent of lessors advised the agent of lessee that lessors, effective the end of that month, would accept the lessee's prior offer to surrender the premises more than three years before the end of the term, and that the lessee assigned the lease during the same month and the assignee took possession of the property, *is held* insufficient to support a cause of action by lessors against the lessee's assignee, since the agreement to accept a surrender of the lease at a future date was executory and precluded by the statute of frauds.

2. Estoppel § 4—

Estoppel may not be invoked in order that the person asserting the estoppel may gain a profit, but estoppel may be asserted only as a shield to save him harmless.

APPEAL by plaintiffs from *Fountain, S. J.*, September 8, 1959 Term, of LENOIR.

Plaintiffs seek to recover damages for the asserted wrongful detention of their property described in a lease from them to Efird's Department Store of Kinston, N. C., for a term to expire 31 January 1960. They allege Volume Merchandise was in actual possession, claiming the right to occupy by virtue of an assignment of the lease which had at the time of the assignment terminated by surrender or estoppel. Defendants asserted rightful possession and pleaded the statute of frauds to repel the alleged termination of the lease. The case was here at the Fall Term 1958 on appeal by plaintiffs from a judgment based on the pleadings. See 249 N.C. 221, 106 S.E. 2d 197. At the conclusion of plaintiffs' evidence the court granted the motions of defendants for nonsuit and plaintiffs appealed.

Jones, Reed & Griffin, White & Aycock for plaintiff appellants.

John G. Dawson and Albert W. Cowper for Volume Merchandise, Inc. and David M. McConnell and John L. Green, Jr., for Efird's Department Store of Kinston, N. C., Inc., John M. Belk, R. L. Mansfield, and Gibson L. Smith.

RODMAN, J. When the case was here before we held the statute of frauds was applicable to a parol offer to surrender a lease having more than three years to run, but had no application to an agreement to terminate consummated by an actual surrender. We also held the doctrine of estoppel in *pais* could be invoked when the facts were sufficient to call for its application.

The questions now for determination are: (1) Is there any evidence of an agreement to terminate consummated by an actual surrender? (2) Is there evidence sufficient to support plaintiffs' claim of estoppel?

The evidence viewed most favorably for plaintiffs suffices to permit a jury to find these facts: Belk's and Efird's, corporate structures, owned competing subsidiary corporations located in Kinston. Belk's acquired the stock of Efird's and thereby gained control of its subsidiary, defendant Efird's Department Store of Kinston. J. M. Belk became its president. Defendants Mansfield and Smith, real estate agents of Belk's, were also agents for defendant Efird's. J. M. Tyler was the merchandise manager of Belk-Tyler Company, Belk's

subsidiary in Kinston. Early in October 1956 Mansfield and Smith went to Kinston, hoping to arrange a cancellation of the lease held by defendant Efird's. They were introduced by Tyler to P. H. Crawford, Jr., agent for the owners, as persons in charge of the real estate operations of defendant Efird's. Mansfield and Smith offered to cancel and surrender the lease, but Crawford refused to accept cancellation and surrender without compensation. Efird's declined to make any payment for the privilege of surrendering. Crawford was given Mansfield's and Smith's address in Charlotte where he could communicate with them if the owners wished to accept the offer to surrender. He was told that any offer he had to communicate could be given to Tyler. Following this conference, Crawford and the Belk interests each began looking for a tenant for the property. On 8 November 1956 Crawford notified Tyler he had arranged to lease the property as of 1 December 1956 to Miles Shoes of Kinston, Inc., and would therefore accept the offered cancellation effective 1 December 1956. Tyler indicated his approval.

Defendant J. M. Belk, as president of Efird's, assigned the lease to Volume Merchandise in November. This assignment was part of a contract between the Belk interest and Volume Merchandise covering the assignment of several leaseholds. Belk notified Tyler that the assignment had been made and was then informed by Tyler that Crawford had contracted to lease the property beginning 1 December 1956 to Miles Shoes of Kinston, Inc. Belk thereupon telephoned Crawford and informed him of the assignment by Efird's to Volume Merchandise. The lease from plaintiffs to Efird's provided for a monthly payment of $400 for the period here in controversy. The lease which Crawford as agent for the owners arranged with Miles Shoes provided for a guaranteed minimum monthly rent of $660 plus additional rent if the shoe company's sales should exceed estimated amounts. The contract with the shoe company provided for a ten-year term with the right to renew for additional periods.

Defendant Volume Merchandise, pursuant to the assignment, took possession of the property. The $400 monthly rent as provided in the lease under which it took possession has been paid.

Assuming but not deciding there is evidence to show that Tyler had authority to act for defendant Efird's on 8 November 1956, the evidence does no more than show an agreement to terminate at a future date, to wit, 30 November 1956. Such an agreement is within the statute of frauds and not having been consummated by an actual surrender, the lease remained in force, binding on lessors and lessee.

Plaintiffs make no claim that they have suffered any loss by the

refusal of Efird's to comply with the asserted agreement to terminate. Crawford testified: "So if the landowners lose this case they will still be in the position they were in before negotiations were started about surrendering the Efird lease." Equity does not estop one from asserting his legal rights to enable another to make a profit which he could not otherwise obtain. As said in *Lindsay v. Cooper,* 94 Ala. 170, 33 Am. St. Rep. 105: "(E)stoppels are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation, in all cases, should be limited to saving harmless, or making whole, the person in whose favor they arise, and they should not in any case be made the instruments of gain or profit." *Miller v. Casualty Co.,* 245 N.C. 526, 96 S.E. 2d 860; *Textile Corp. v. Hood, Comr. of Banks,* 206 N.C. 782, 175 S.E. 151; *Trust Co. v. Wyatt,* 191 N.C. 133, 131 S.E. 311; *Leroy v. Steamboat Co.,* 165 N.C. 109, 80 S.E. 984; *Rainey v. Hines,* 120 N.C. 376; *East v. Dolihite,* 72 N.C. 562; Estoppel, 19 Am. Jur. sec. 85, 31 C.J.S. sec. 74.

Affirmed.

MRS. MYRTLE J. BROWN AND MELVIN JOHNSON, EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF THE LATE HASSIE M. JOHNSON; AND MRS. MYRTLE J. BROWN, INDIVIDUALLY, AND MELVIN JOHNSON, INDIVIDUALLY, v. MRS. MARY J. BYRD, VANCE JOHNSON, MRS. LURA J. WOOD, AVERY JOHNSON, CLAUDE B. JOHNSON, MRS. ISABELLE J. GREGORY, MRS. EMMA J. DANIELS, MRS. GWENDOLYN J. AVERY, TIM JOHNSON, MACK BYRD, MRS. LOIS B. FISHER, DR. DWIGHT J. BROWN, JR., MRS. FRANCES B. LUGO, MRS. HORTENSE W. PARKER, MRS. WEECE W. DUFFY, MACK L. WOOD, GENE WOOD, MRS. JANICE W. McLEOD, MRS. BILLIE W. SAWYER, MRS. STELLA J. CALDWELL, THOMAS R. JOHNSON, WILLIAM ERWIN JOHNSON, GERALD J. JOHNSON, MRS. MARGARET J. TEMPLE, MRS. HELEN J. BYRD, MRS. GLADYS J. BYRD, MRS. PAULINE J. SMITH, JERRY JOHNSON, BILLY JOHNSON, WILLIAM PRESTON JOHNSON, CLIFTON JOHNSON, MRS. BEULAH J. McDONALD, MRS. EVELYN J. STEPHENSON, DALLAS B. JOHNSON, CLAYTON JOHNSON, EDWARD JOHNSON, MRS. ROTHA J. McLAMB, MRS. JUANITA J. STRICKLAND, RALPH TURLINGTON, MRS. THELMA T. SNIPES, COLMAN TURLINGTON, MRS. ELOISE T. GREGORY, MRS. KATHLEEN T. BOWDEN, BOBBY TURLINGTON, MRS. MARGARET T. GREGORY, WALLACE DANIELS, LT. T. W. DANIELS, JR., S/SGT. CHARLES V. DANIELS, MRS. PATSY DANIELS BACUZZI, AND MRS. VOLA JOHNSON.

(Filed 27 April, 1960.)

Wills §§ 7, 34a—

Where there are only two subscribing witnesses to an attested will, such witnesses may not take under the will, G.S. 31-10, and judgment that such witnesses were entitled to take their respective shares bequeathed to them by the will as members of a class must be held for error.

APPEAL by certain (sixteen) defendants, Mrs. Gwendolyn J. Avery, *et al.*, from *Williams, J.*, October Term, 1959, of HARNETT.

Civil action under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, for construction of the last will and testament of Hassie M. Johnson. The testator died June 18, 1957. His will, dated November 6, 1952, was duly probated and letters testamentary were issued on July 5, 1957.

Plaintiffs instituted this action as executors and also as individuals. Mrs. Myrtle J. Brown is a sister of Hassie M. Johnson. Melvin Johnson is a son of Avery Johnson, a surviving brother of Hassie M. Johnson.

Hassie M. Johnson had nine brothers and sisters. Eight survived him and are now living. Each of these eight had a child or children who survived the testator and are now living. These nieces and nephews of the testator number thirty-nine. Will Johnson, a brother,

predeceased the testator. He had four children, all of whom survived him and the testator and are now living. All of the forty-three nieces and nephews of Hassie M. Johnson are of full age and *sui juris* except Mrs. Patsy Daniels Bacuzzi, whose mother is a surviving sister of Hassie M. Johnson.

The defendants are: (1) The surviving brothers and sisters, except plaintiff Mrs. Myrtle J. Brown; (2) the surviving nieces and nephews, except plaintiff Melvin Johnson; and (3) Mrs. Vola Johnson, not related to the testator by blood.

Separate answers were filed by (1) Mrs. Gwendolyn J. Avery, *et al.*, children of brothers and sisters who survived Hassie M. Johnson, (2) Mrs. Vola Johnson, and (3) the guardian *ad litem* of Patsy Daniels Bacuzzi.

The questions presented relate solely to the following dispositive provision:

> "2nd—That all of the Johnson Furniture Co. Store and 1 Chevrolet Car and all the Benefits of the Jr O U A M, State & National, The P O S of A and the Sons & Daughter of Liberty Be divided equal among all my Brothers and Sisters and the children except Melvin Johnson Two Extra Shares and Mrs. Vola Johnson 1 share that are living at the time of my Death."

Plaintiffs allege the amount for distribution under said dispositive provision is $21,755.17 less costs. Mrs. Vola Johnson denies this allegation and asserts she has a $3,200.00 claim against the estate for services rendered Hassie M. Johnson.

The court concluded that each of the eight surviving brothers and sisters was entitled to receive one full share (1/16 part); that each of the four children of Will Johnson was entitled to receive a full share (1/16 part); that Mrs. Vola Johnson was entitled to receive a full share (1/16 part); and that Melvin Johnson was entitled to receive three full shares (3/16 part).

Judgment, in accordance with this construction of the will, was entered. Fifteen of the nieces and nephews of Hassie M. Johnson, children of a surviving brother or sister, and also Mrs. Vola Johnson, excepted and appealed.

Howard G. Godwin for plaintiffs, appellees.

Robert Morgan and McLeod and McLeod for defendants, appellants.

BOBBITT, J. Plaintiffs allege that the four children of Will Johnson "were called 'the children' by the said Hassie M. Johnson during his lifetime." The answers deny this allegation. The answer of

Mrs. Gwendolyn J. Avery, *et al.*, alleges that Hassie M. Johnson referred to all of his nieces and nephews as "the children." The court made no finding of fact as to this controverted matter.

The judgment contains recitals to the effect (1) that the facts are not in dispute, and (2) that the court "heard the evidence, stipulations and written contentions of the parties," and made the findings of fact set forth in the judgment. The record before us contains neither evidence nor stipulations. If the "circumstances attendant" when the will was executed are to be considered in ascertaining the intent of the testator, there must be stipulations or evidence and findings of fact with reference thereto. See *Entwistle v. Covington*, 250 N.C. 315, 108 S.E. 2d 603; *Trust Co. v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246; S. c., 245 N.C. 535, 96 S.E. 2d 690. We would be reluctant to construe the will in the absence of stipulations or evidence and findings of fact relating to the question of fact raised by the pleadings as to the identity of the persons referred to by the testator as "the children." Be that as it may, the judgment must be vacated for the reason stated below.

Under the judgment, Melvin Johnson, a plaintiff, and Mrs. Vola Johnson, a defendant, are adjudged beneficiaries. Yet it appears on the face of the record that these two persons were the attesting witnesses, and the only attesting witnesses, to the will. The record indicates, and it was stated on oral argument, that the will was probated as an attested will.

G.S. 31-10, as amended by Ch. 1098, Session Laws of 1953, and by Ch. 73, Session Laws of 1955, provides:

"(a) A witness to an attested written or a nuncupative will, to whom or to whose spouse a beneficial interest in property, or a power of appointment with respect thereto, is given by the will, is nevertheless a competent witness to the will and is competent to prove the execution or validity thereof. However, if there are not at least two other witnesses to the will who are disinterested, the interested witness and his spouse and any one claiming under him shall take nothing under the will, and so far only as their interests are concerned the will is void.

"(b) A beneficiary under a holographic will may testify to such competent, relevant and material facts as tend to establish such holographic will as a valid will without rendering void the benefits to be received by him thereunder."

Upon the present record, Melvin Johnson and Mrs. Vola Johnson take nothing under the will and so far as their interests are con-

cerned the will is void. Hence, the judgment is vacated and the cause remanded for hearing *de novo*.

Judgment vacated, cause remanded.

STATE v. ISSAC V. DEWITT.

(Filed 27 April, 1960.)

1. Homicide § 26—

In a prosecution for involuntary manslaughter, a charge which fails to define culpable negligence and proximate cause must be held for error.

2. Criminal Law § 107—

The court has the affirmative duty of instructing the jury as to the law applicable to the facts in the case, and this duty is not discharged by a mere statement of the State's contentions.

APPEAL by defendant from *Williams, J.*, December, 1959 Term, JOHNSTON Superior Court.

Criminal prosecution upon indictment charging involuntary manslaughter. At the trial the defendant was not represented by counsel. The evidence tended to show that about one o'clock, P. M., August 16, 1959, the defendant was driving a Ford station wagon north on U. S. Highway 301 in Johnston County Eye-witnesses stated he was driving 70 miles per hour, darting in and out of traffic, passing other vehicles also going north. As he attempted to pass a vehicle near a bridge over Holt Lake, the gap between two cars in front closed and, in attempting to cut back too quickly into his line of traffic, he lost control of the vehicle, skidded across the center line into the line for south-bound traffic, and collided head-on with a Chevrolet driven south by Mrs. Thelma Laura Richmond, who was killed in the accident. The collision occurred about the center of the bridge. The defendant's vehicle left skid marks 100 feet and Mrs. Richmond's left skid marks about 75 feet. The defendant had an unobstructed view of the highway to the north of the bridge for at least one-fourth mile.

The jury returned a verdict of guilty as charged. The court imposed a sentence of not less than 10 nor more than 15 years. The defendant excepted and appealed.

T. W. Bruton, Attorney General, Harry W. McGalliard, Assistant Attorney General for the State.

Canaday & Canaday, By: Harry E. Canaday for defendant, appellant.

HIGGINS, J. The defendant relies for a new trial on two assignments of error. Both relate to the court's charge to the jury. The defendant, now represented by counsel, urgently contends the court gave such undue stress and emphasis to the contentions and evidence for the State as to constitute the charge a powerful summing up for the prosecution.

The somewhat more tangible assignment is addressed to the court's failure properly to define the crime charged in the bill of indictment. Aside from one or two casual references in giving the State's contentions, the following is the sum total of the court's instructions on involuntary manslaughter: "Manslaughter is a degree of murder which is divided into three degrees: murder in the first degree; murder in the second degree, and, manslaughter. You are not concerned with murder in the first degree, or murder in the second degree, which has a different definition. Manslaughter arises when there is an unlawful killing. It does not have to be with malice, but it is caused by an unlawful act which constitutes manslaughter."

In cases of involuntary manslaughter, in order to convict, the State must show culpable negligence. *State v. Stansell,* 203 N.C. 69, 164 S.E. 580; *State v. Cope,* 204 N.C. 28, 167 S.E. 456; *State v. Mundy,* 243 N.C. 149, 90 S.E. 2d 312. "An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of life or limb, which proximately results in injury or death, is culpable negligence. . . . Proof of culpable negligence does not establish proximate cause. To culpable negligence must be added that the act was a proximate cause of death to hold a person criminally responsible for manslaughter." *State v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *State v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638; *State v. Satterfield,* 198 N.C. 682, 153 S.E. 155.

The court made no attempt to define proximate cause, and mentioned the term only in the statement of the State's contentions. The court should have instructed the jury as to the law applicable to the facts in the case. This requirement is an affirmative duty placed on the presiding judge. The duty is not fulfilled by merely endorsing the State's contentions. The defendant's assignment of error is sustained, for which the defendant is entitled to a

New trial.

COVA ELLEN HOOVER v. MARY BETTY THOMAS ODOM.

(Filed 27 April, 1960.)

Automobiles §§ 21, 47—

Nonsuit is properly entered in an action by the guest in a car to recover of the driver thereof for injuries sustained when the door of the car, because of a worn latch, flew open while the driver was making a left turn, throwing or causing the guest to fall therefrom, when there is no evidence tending to show that the driver had any knowledge that the latch was defective or that the door had theretofore come open in a like manner.

APPEAL by plaintiff from *Sharp, Special Judge,* September-October Term, 1959, of RANDOLPH.

This is a civil action to recover for personal injuries allegedly sustained by the plaintiff on 1 September 1957 when she was thrown or fell from the 1950 Plymouth automobile of the defendant while riding as a passenger in the right-hand front seat of said car. The door latch on plaintiff's side of the car gave way and the door flew open when the defendant, while driving about 15 miles per hour, made a 90 degree turn to the left at the intersection of Sunset Avenue and North Ridge Street, in the Town of Asheboro, North Carolina.

It is alleged that the defendant was negligent in that she operated her 1950 Plymouth automobile with defective door latches and that she failed to have them repaired and properly adjusted.

Plaintiff testified that the defendant had remarked to her on one occasion prior to the accident that there was something wrong with the car door, and on another occasion that the door was difficult to open. The plaintiff further testified, "I rode with Mrs. Odom to church and Sunday school just about every Sunday * * * for around two years * * * before I fell out of the car. * * * I did not have any difficulty with the door as to opening and closing it * * *. No, the door had never come open when I had been riding with them * * *. As to having difficulty with opening and closing it, it was hard sometimes to open. I was always able to open it but sometimes it was harder than others to open. * * * It had never opened before without someone opening it."

After the accident, the latch on the door involved was examined and it was discovered that one of the four notches of the roller latch was worn sufficiently so that the door could be pulled or pushed open when some pressure was applied if the worn latch happened to be turned so that it was in the position it was intended to hold the door.

At the close of plaintiff's evidence the defendant moved for judg-

ment as of nonsuit. The motion was allowed. Plaintiff appeals, assigning error.

Ottway Burton for plaintiff.
Smith, Moore, Smith, Schell & Hunter for defendant.

PER CURIAM. There was no evidence in the trial below tending to show that the automobile of the defendant was being operated in a careless or negligent manner at the time of the accident. Neither was there any evidence tending to show that the defendant had any knowledge that the latch on the door of her car was defective. Likewise, there was no evidence to the effect that this door had ever come open before in the manner in which it did at the time the plaintiff sustained her injuries.

The general rule with respect to injuries suffered by a guest as the result of a defect in the condition of an automobile is concisely stated in the case of *Helton v. Prater's Admr.*, 272 Ky. 574, 114 S.W. 2d 1120, and quoted with approval in *Perry v. Krumpelman*, 309 Ky. 745, 218 S.W. 2d 963, 9 A.L.R. 2d 1335, in which the Court said: "One who invites another to ride in his automobile is not bound to furnish a vehicle free from defects, and, unless he knows it is defective and therefore unsafe, he will not be liable for injuries received by the guest in an accident caused by the defect in the automobile and not by its negligent operation." 9 A.L.R. 2d Anno:—Automobile Guest—Falling Through Door, 1338, *et seq.* See also *Watts, Admr. v. Watts*, 252 N.C. 352, 113 S.E. 2d 720, and cited cases.

The plaintiff has failed to establish actionable negligence on the part of the defendant and, therefore, the judgment of the court below is

Affirmed.

R. G. OWENS AND A. G. MANESS v. LONNIE VONCANNON AND WIFE, DORIS VONCANNON, LEONARD VONCANNON AND ALMA S. BROWN.

(Filed 27 April, 1960.)

Pleadings § 6: Judgments § 13—

Where a defendant has a consent judgment against her set aside on the ground that she did not employ the attorney who filed answer and did not authorize him to consent to the judgment in her behalf, she may not rely upon the answer filed by the attorney, and the court, upon its finding that she has no meritorious defense, properly refuses to exercise its discretionary power to permit her to file answer after the expiration of the time allowed, and properly enters judgment by default.

APPEAL by defendant Alma S. Brown from *Crissman, J.*, February Term, 1960, of RANDOLPH.

After decision on former appeal, 251 N.C. 351, 111 S.E. 2d 700, (*q. v.* for particulars as to prior proceedings) there was a hearing *de novo* on appellant's motion of May 19, 1959.

In her motion of May 19, 1959, appellant alleged, *inter alia*, that she "never at any time retained Sam W. Miller, Attorney at Law, of Asheboro, North Carolina, in the above entitled case." She prayed, *inter alia*, that the consent judgment of November 25, 1957, signed by Sam W. Miller, Esq., purportedly as attorney for all defendants, be set aside, and that the court order the clerk to accept and file the answer tendered in her behalf on March 10, 1959.

Judge Crissman found as facts that appellant did not directly or indirectly employ Sam W. Miller, Esq., to file the answer of June 24, 1957, and did not authorize him to consent to the judgment of November 25, 1957; that the time for filing answer expired June 24, 1957, but no answer was tendered by appellant until March 10, 1959; and that appellant has no meritorious defense to plaintiffs' action.

Thereupon, the court (1) denied, in its discretion, appellant's motion that she be permitted to file the answer tendered March 10, 1959; (2) adjudged void and vacated, as to appellant, the judgment of November 25, 1957; and (3) adjudged that plaintiffs recover of appellant, by reason of her default, the sum of $2,000.00, with interest and costs.

Appellant, excepting to said findings of fact and judgment, appealed.

Miller & Beck for plaintiffs, appellees.

Ottway Burton for defendant Alma S. Brown, appellant.

PER CURIAM. The court's finding to the effect that appellant did not directly or indirectly authorize Sam W. Miller, Esq., to file in her behalf the answer of June 24, 1957, is amply supported by the statement in appellant's verified motion of May 19, 1959, quoted above, and by appellant's testimony at the hearing before Judge Crissman. Nothing in the record indicates that appellant has a meritorious defense. The failure of appellant to show that she has a meritorious defense was properly considered by the court in determining whether, in the exercise of its discretion, appellant should be permitted to file belatedly the answer tendered in her behalf on March 10, 1959.

Appellant, having consistently denied the authority of Sam W. Miller, Esq., to act as her attorney for any purpose, cannot now rely on an answer filed by him, purportedly in behalf of all defendants, on June 24, 1957.

Affirmed.

NATHAN K. BLACKWELDER v. MARCUS LAFAYETTE HARRIS.

(Filed 27 April, 1960.)

APPEAL by plaintiff from *Sharp, S. J.*, November 1959 Term, of CABARRUS.

Civil action to recover damages for personal injuries and damage to an automobile resulting from a collision of automobiles in the intersection of two roads.

Defendant in his answer denied that he was negligent, alleged that plaintiff was guilty of contributory negligence, and asserted a counterclaim for damages to his automobile.

At the close of all the evidence, the court allowed plaintiff's motion for judgment of nonsuit as to defendant's counterclaim.

Issues were submitted to the jury, which found by its verdict that plaintiff was injured and damaged by the negligence of the defendant, and that plaintiff by his own negligence contributed to his injury and damage.

From judgment entered in accord with the verdict, plaintiff appeals.

C. M. Llewellyn and Ann L. McKenzie for plaintiff, appellant.
John Hugh Williams for defendant, appellee.

PER CURIAM. The record shows that at the January Term 1959

of the Superior Court of Cabarrus County, this action was tried by a judge and jury, and that the jury answered the issues as the jury did at the November Term 1959. The presiding judge at the January Term 1959, in his discretion, set the verdict aside.

Plaintiff's assignments of error have been carefully considered, and all of them are overruled. There is nothing in the record before us to justify a new trial.

No error.

DAVID J. ARTESANI, BY HIS NEXT FRIEND, J. H. ARTESANI v. HAROLD RICHARD GRITTON AND DURHAM LIFE INSURANCE COMPANY

AND

J. H. ARTESANI v. HAROLD RICHARD GRITTON AND DURHAM LIFE INSURANCE COMPANY.

(Filed 4 May, 1960.)

1. Witnesses § 4—

The test of the competency of a child to testify is not age but capacity to understand and relate under the obligation of an oath a fact or facts which will assist the jury in determining the truth with respect to the ultimate facts, and a ruling excluding the testimony of a child on the arbitrary basis of age of the child, is error.

2. Appeal and Error § 46: Trial § 19—

The discretion to determine the competency of a witness on the basis of age or mentality, in the same manner as the power to determine the qualification of experts or the voluntariness of confessions, is the power to determine a factual question in accordance with established rules of law and is not an arbitrary power, and therefore when the court hears evidence to determine the question of competency its factual conclusions are binding if supported by any evidence, but if the court applies to the facts found by it an incorrect legal principle, the conclusion is reviewable and will be corrected on appeal.

3. Witnesses § 4—

Whether a child possesses sufficient mental capacity to testify is to be determined on the basis of the mental capacity of the child at the time he is called upon to testify and not his capacity at the time the subject matter of the testimony transpired.

4. Automobiles § 41m—

The evidence adduced in this case, together with evidence erroneously excluded, *is held* sufficient to be submitted to the jury on the question of whether defendant motorist by the exercise of reasonable care could or should have seen the child on the highway in time to have avoided striking him.

5. Appeal and Error § 51—

On appeal from judgment of involuntary nonsuit, plaintiff's evidence erroneously excluded will be considered together with the evidence admitted.

APPEAL by plaintiffs from *Johnston, J.*, November 23, 1959 Term, of FORSYTH.

These actions were instituted to recover damages, hospital bills, and loss of services resulting from injuries sustained by David Artesani, the minor son of J. H. Artesani, when struck by an automobile operated by defendant Gritton as agent for the corporate defendant. Plaintiffs allege the automobile was negligently operated. The causes were consolidated for trial. At the conclusion of plaintiffs' evidence, motions for nonsuit were allowed. Plaintiffs appealed.

Deal, Hutchins and Minor for plaintiff appellants.
Hudson, Ferrell, Carter, Petree & Stockton for defendant appellees.

RODMAN, J. Plaintiffs, residents of a suburb of Winston-Salem, live on the north side of Bethabara Road, which runs in an easterly and westerly direction. The road is paved, with dirt shoulders on the side. The paved area is 18 feet in width and the south shoulder at the scene of the accident has a width of 7 feet. A mail box is located at the southern edge of the shoulder opposite the Artesani home. Traveling from east to west, one encounters a sharp curve to the right which terminates just before reaching the Artesani property, permitting an unobstructed view of the highway to the mail box for 250 feet. Because of the curve the view to the entrance of the Artesani yard would be less than this, but how much less does not appear from the evidence.

About 2:30 p.m. on 9 April 1957 defendant Gritton was driving his automobile westwardly on the Bethabara Road. He was accompanied by his superior, Mr. Poindexter. Gritton was in the northerly lane, the proper lane for travel moving west as he was. His automobile struck David and inflicted serious injuries to his right shoulder, leg, and head. The car left skid marks for a total distance of 70 feet. These marks began 21 feet east of the mail box. The child was carried with the car until it stopped at the end of the skid marks. Gritton, examined adversely by plaintiff, testified: "The first time I saw the child was when he was directly in front of my car, some 4 or 5 or 10 feet, whatever it was, right directly in front, approximately midways of the righthand section of the road. Mr. Poindexter saw the child just an instant before I saw him, and he said 'Look out!' . . .

The first time I remember seeing the child he was right in front of me and he was running, and he was over on my side of the road." Gritton, immediately following the accident, told a police official that when Poindexter called attention to the child "he (Gritton) looked up at that time and the child was about 6 foot in front of him."

Liability of defendants is based on the asserted failure of the driver to maintain a proper lookout, which would have disclosed the presence of the child crossing the highway from the mail box to his home. Plaintiffs contend when traveling in that direction and from the mail box the child would have traversed some 20 feet of highway in plain view of defendant. To support their contention they point to the injuries which were on the right side of the body, indicating the child was facing north when struck; and as additional proof that the child was returning from the mail box to his home, he was called as a witness for the purpose of showing why he was on the road and where he came from. Defendants objected to the proposed testimony, asserting that the child was, because of his youth, not competent to testify. Thereupon the jury was excused, the child was sworn. He identified the Bible, said that he knew what it was, that it contained stories about God, and said that people who told lies were punished. He stated that he lived on the Bethabara Road. At the time of the trial he was in the second grade of the public school. He was then asked and answered these questions:

"Q Can you tell the Judge what you were doing?

"A I was going across the street to mail a letter.

"Q What were you doing when the car hit you? Were you going across the street, or the other way?

"A I was going back, you know, across the street back home.

"Q Back home?

"A (The witness nodded his head affirmatively.)

"Q You don't remember anything else about it, do you, David?

"A I do.

"Q What else do you remember?

"A I remember how I was inside. I remember how it happened inside and everything, when I started to go across the street, what kind of feeling I had.

"Q What kind of feeling you had?

"A Feeling. I had a bad feeling.

"Q Do you remember anything else, David?

"A No."

Thereupon the court directed this entry to be made: "The Court finds as a fact that David Artesani is, as of this date, seven years

and three months old, and on the date of the alleged collision between the motor vehicle of the defendants and the plaintiff, was four years and eight months old, and the Court is of opinion that by reason of age that the witness is incompetent to testify as to matters concerning the alleged collision, and in its discretion sustains the objection of the defendants to the proposed testimony of the witness."

Plaintiff J. H. Artesani came to the scene of the accident about fifteen minutes after the child was struck. He was then lying in the road and was conscious. He asked: "David, how do you feel?" The child replied: "I hurt." The witness then testified that David said: "Daddy, I was at the mail box, mailing a letter to Nana, and I got hit on my way back." This statement made by the child to his father was excluded.

Plaintiff assigns the exclusion of the proffered testimony of the child and father as prejudicial error.

Whether there was error in excluding the testimony must be determined by interpreting the ruling made by the trial judge with respect to the competency of the child to testify.

The test of competency is not age but capacity to understand and relate under the obligation of an oath a fact or facts which will assist the jury in determining the truth with respect to the ultimate facts which it will be called upon to decide. *S. v. Edwards,* 79 N.C. 648; *Lanier v. Bryan,* 184 N.C. 235, 114 S.E. 6; *S. v. Satterfield,* 207 N.C. 118, 176 S.E. 466; *S. v. Jackson,* 211 N.C. 202, 189 S.E. 510; *Carpenter v. Boyles,* 213 N.C. 432, 196 S.E. 850; *S. v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754; *Cross v. Commonwealth,* 77 S.E. 2d 447; *Hill v. Skinner,* 79 N.E. 2d 787; *Senecal v. Drollette,* 108 N.E. 2d 602; Stansbury, N.C. Evidence, sec. 55; 58 Am. Jur 99-100; 97 C.J.S. 449.

Wigmore states the law thus: "But this much may be taken as settled, that no rule defines *any particular age* as conclusive of incapacity; in each instance the capacity of the particular child is to be investigated." Wigmore on Evidence, 3rd ed., sec. 505.

Courts, in declaring and applying the rule which determines the competency of children to testify, have said the question of competency rests in the sound discretion of the trial judge. Typical is the statement of *Reade, J.,* "(I)t being a question of capacity, and of moral and religious sensibility in any given case whether the witness is competent, it must of necessity be left mainly if not entirely to the discretion of the presiding Judge." *S. v. Edwards, supra.*

This discretion to determine the competency of evidence is the power to determine a factual question in accord with established rules of law. It is not an arbitrary power. *Jarrett v. Trunk Co.,* 142 N.C.

466. When the court hears evidence to determine competency, its factual conclusion will not be set aside on appeal if there be any evidence to support the finding. The weight which the trial judge accords the evidence rests in his discretion. The reason is manifest. *S. v. Pitt,* 166 N.C. 268, 80 S.E. 1060. If to the facts so ascertained the court applies an incorrect legal principle, the error so committed will be corrected on appeal. *S. v. Grundler,* 249 N.C. 399, 106 S.E. 2d 488; *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324; *Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d 84; *S. v. Fuller,* 114 N.C. 885.

The basic rule to determine the competency of the proffered testimony is the same whether applied to those of tender years or to adults of subnormal mentality, or to the qualification of experts, *Hardy v. Dahl,* 210 N.C. 530, 187 S.E. 788; *Pridgen v. Gibson,* 194 N.C. 289, 139 S.E. 443; *Smith v. Kron,* 96 N.C. 392, or confessions challenged as involuntary, *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *S. v. Hammond,* 229 N.C. 108, 47 S.E. 2d 704; *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603.

Competency is to be determined at the time the witness is called to testify. *Cross v. Commonwealth, supra.*

When the child was called as a witness he was seven years of age. He had entered public school as soon as the law permitted. G.S. 115-162. He had successfully completed his first grade work. In this connection it is interesting to note that in a booklet, "Language Arts in the Public Schools Of North Carolina," issued by the Superintendent of Public Instruction, it is said with regard to first grade children:

"Immediately following the morning devotions each day, children are encouraged to express themselves along some of the following lines:

"Tell of some personal experience.
Tell a story heard before.
Create a story.
Say a poem, taught in classroom.
Read a story from a library book or from a book brought from home.
Report on a library book.
Imitate an animal.
Ask riddles.
Describe a picture.
Dramatize a character in a story."

He was at the time of the trial in the second grade. Based on the questions asked and answers given, we see nothing which would disqualify him when the correct rule of law is applied, that is, mental capacity as distinguished from mere age.

The court, as we interpret its ruling, disqualified the witness not because he was in fact lacking in mental capacity, but it held him incompetent solely "by reason of age." This was not a finding of fact but a legal conclusion which was erroneous. The superadded statement that the ruling was in the court's discretion added no force. It could not correct the legal error. *GMC Trucks v. Smith,* 249 N.C. 764, 107 S.E. 2d 746.

If the child was possessed of sufficient mental capacity to testify, it was competent to corroborate him by showing the statement made to his father shortly after the accident happened or in any other proper manner.

Considering all of the evidence offered, we are of the opinion that it was sufficient to support a finding that the injuries were proximately caused by the failure of the driver to exercise due care in the operation of his motor vehicle.

Upon another trial the court will hear such evidence as may be necessary to determine as a matter of fact the mental capacity of the child, and, based on its finding, rule as a matter of law on the competency of the evidence offered.

Reversed.

JEWEL Y. KERSEY v. JACOB M. SMITH.

(Filed 4 May, 1960.)

1. Pleadings § 8—

The defendant in a civil action for assault and battery may not set up a counterclaim for malicious prosecution based upon a prior prosecution of the defendant instigated by plaintiff for the same assault.

2. Same—

In order for a cause of action in tort to be available as a counterclaim it must have arisen at the time of and out of the facts and circumstances constituting the basis of plaintiff's cause of action.

APPEAL by defendant from *Crissman, J.,* February Term, 1960, of RANDOLPH.

This is a civil action instituted by the plaintiff to recover damages from the defendant which allegedly resulted to the plaintiff from an assault and battery committed upon her person by the defendant on the night of 10 October 1959.

On 20 October 1959, the plaintiff caused a warrant to be issued charging the defendant with the crime of assault and trespass. There-

after, the plaintiff instituted this civil action for damages arising out of the assault upon which the warrant was based. The criminal action was tried in the Recorder's Court for Randolph County on 26 November 1959. Defendant was acquitted of the criminal charge. Thereafter, the defendant filed his answer to the complaint and set up a counterclaim to the plaintiff's action for malicious prosecution based upon the issuance of the warrant and subsequent acquittal of the defendant in the Recorder's Court.

The plaintiff demurred to the counterclaim in which the defendant seeks to recover for malicious prosecution, on the ground that the alleged cause of action for malicious prosecution did not arise out of the subject of the action upon which the plaintiff seeks to recover, as required by G.S. 1-137.

The court sustained the demurrer and dismissed the counterclaim. Defendant appeals, assigning error.

Moser & Moser for plaintiff.
Miller & Beck for defendant.

DENNY, J. We think the determinative question on this appeal is whether or not a counterclaim for malicious prosecution, based on the criminal prosecution instituted on 20 October 1959 and which ended favorable to the defendant, may be maintained in an action for alleged damages growing out of an assault allegedly committed on 10 October 1959.

Whatever right of action the plaintiff has growing out of the alleged assault, arose at the time of its commission on 10 October 1959. The defendant's cause of action, if any, did not arise until the criminal prosecution was instituted on 20 October 1959 and terminated in defendant's favor on 26 November 1959.

In the case of *Hancammon, et al v. Carr,* 229 N.C. 52, 47 S.E. 2d 614, the defendant Carr executed and delivered to one Malcolm E. Thomas a check for $377.13, drawn on the Peoples Savings Bank & Trust Company. Thomas secured certain merchandise from the plaintiffs and tendered the check in payment. Plaintiffs accepted the check duly endorsed and paid Thomas the difference in cash. The check was returned by the bank endorsed "Payment Stopped." Thereupon, plaintiffs procured a warrant against Carr, the maker of the check, charging him with the violation of our worthless check statute. On the trial in the county recorder's court he was convicted and appealed. When the cause came on for hearing in the Superior Court, a *nol pros* was entered. The plaintiffs then instituted an action against Carr

to recover the amount paid on said check. The defendant Carr, in his answer, set up a cross-action for damages for abuse of process in prosecuting the criminal action against him in uttering a worthless check in violation of the provisions of G.S. 14-106. Plaintiffs demurred to the cross-action on the ground that such cross-action was not pleadable in the action and in any event did not state a cause of action. The demurrer was overruled and the plaintiff appealed. This Court reversed the ruling on the demurrer. *Barnhill, J.,* later *C. J.,* speaking for the Court, said: "While there is a casual relation between the two incidents or 'transactions,' there is no causal or interdependent connection. They are not so connected that the circumstances surrounding both must be detailed in order to tell a complete story as to either. Recital of the facts on which plaintiffs' cause of action rests does not require or permit the inclusion of those forming the basis of defendant's cross-action. Instead, his claim begins where theirs ends. *Pressley v. Tea Co., supra* (226 N.C. 518, 39 S.E. 2d 382)."

A general discussion of this type of misjoinder is found in 10 A.L.R. 2d Anno:—Tort Counterclaim in Tort Action, page 1167, section 10, at page 1181, where the following is stated: "The decisions are uniform that in an action for malicious prosecution or false arrest the defendant cannot interpose a counterclaim for a distinct tort committed by the plaintiff against him even though that tort is the offense for which he had unsuccessfully prosecuted the plaintiff or caused his arrest." *Ferris v. Armstrong Mfg. Co.,* 32 N.Y.S.R. 908, 10 N.Y.S. 750, affirmed without opinion 125 N.Y. 722, 26 N.E. 756; *Rothschild v. Whitman,* 132 N.Y. 472, 30 N.E. 858.

Therefore, if a counterclaim cannot be maintained in an action for malicious prosecution, based on the tort which was the basis for the unsuccessful prosecution, it would seem equally clear that a counterclaim for malicious prosecution is not pleadable in an action based on assault and battery, where the facts constituting the alleged cause of action for malicious prosecution had not arisen at the time plaintiff's cause of action arose.

The weight of authority supports the view that a counterclaim based on tort, in order to be pleadable, must have arisen at the time and out of the facts and circumstances which constitute the plaintiff's cause of action. In the present case, it is clear that the alleged basis of the defendant's counterclaim did not arise out of the matters and things pleaded in plaintiff's cause of action but out of matters and things that occurred subsequently thereto.

In the case of *Finance Corp. v. Lane,* 221 N.C. 189, 19 S.E. 2d

849, *Seawell, J.*, speaking for the Court, said: "When the defendant's counterclaim lies in tort, the statute finds the test of eligibility in plaintiff's pleading. C.S. 521 (1). In the instant case the transaction set out in the complaint as the basis of plaintiff's action is not the same as that out of which the counterclaim arose—both time and circumstance negative that — and it is more than questionable whether defendant's alleged cause of action, as alleged, is sufficiently connected with the subject of plaintiff's action to come within the statute, however available it may be in an independent action."

Hence, we hold that the court below properly sustained the plaintiff's demurrer to the defendant's counterclaim. The defendant may have a cause of action for malicious prosecution; if so, he must assert it in an independent action.

The judgment of the court below is

Affirmed.

FLORA TURNAGE ADAMS v. SAMUEL M. GODWIN, D/B/A/ GODWIN SALES COMPANY.

(Filed 4 May, 1960.)

Automobiles § 18—

G.S. 20-150(c) prohibits a motorist from overtaking and passing another motorist traveling in the same direction not only at an intersection of highways designated and marked by the State Highway Commission but also at any street intersection in a city or town, without regard to whether such street intersection is marked or unmarked, and an instruction permitting a motorist to ignore an unmarked intersection of streets in a municipality must be held for prejudicial error.

APPEAL by defendant from *Williams, J.*, November, 1959 Civil Term, JOHNSTON Superior Court.

This civil action was instituted by the plaintiff to recover for personal injuries and property damage allegedly caused by the actionable negligence of Sam M. Godwin, D/B/A/ Godwin Sales Company. The claim grew out of a motor vehicle collision between a 1958 Edsel automobile owned and operated by the plaintiff and a 1950 model Chevrolet truck owned by the defendant and operated by his agent, Raymond Howard Jackson.

Prior to, and at the time of the collision, both vehicles were proceeding in an easterly direction on Main Street in the corporate limits of the Town of Benson. As they approached the intersection

of Main Street and Fayetteville Street (north and south) the plaintiff was driving at an estimated 20-30 miles per hour. The defendant's truck was in front at an estimated speed of 8-15 miles per hour. According to the plaintiff's evidence, when the truck reduced its speed she sounded her horn and attempted to pass, whereupon the truck, without giving any warning signal, attempted to make a left turn into a filling station about 30 feet west of the intersection. The plaintiff sounded her horn and attempted to pass the defendant's truck on its left. The defendant's truck crossed over the center line and the bumper struck the plaintiff's car about the center of the body, turned it over, and in the accident plaintiff sustained personal injury and property damage.

According to the defendant's evidence, the driver looked to the rear, saw no approaching traffic, gave a signal of his intention to turn left on Fayetteville Street, and, as he was executing the intended movement, the plaintiff's Edsel crashed into the truck; that he did not hear any horn or other signal device giving notice of the plaintiff's intention to pass in the intersection. The defendant denied negligence and interposed the plea of contributory negligence on the part of the plaintiff in bar of her right to recover.

The defendant's evidence indicated the collision occurred in the intersection. The evidence was not definite as to whether Fayetteville Street made a direct right-angle crossing or whether there was a slight offset to the west. The evidence disclosed that there were no highway signs at the crossing.

After the pleadings were cast, the defendant died. His personal representative was substituted as a party defendant and adopted the pleadings already filed. Issues of negligence, contributory negligence, and damages were submitted to and answered by the jury in favor of the plaintiff. From the judgment on the verdict, defendant appealed.

Canaday & Canaday, By: C. C. Canaday, Jr., for defendant, appellant.

R. E. Batten, Levinson & Levinson, By: L. L. Levinson for plaintiff, appellee.

HIGGINS, J. There is some discrepancy in the evidence whether the collision occurred near or in the intersection. The plaintiff's evidence placed the point of contact between the vehicles at about 30 feet west of the intersection. The defendant's evidence placed it in the intersection. The plaintiff's vehicle skidded and turned over after crossing Fayetteville Street. The defendant's truck stopped in the in-

tersection. It is agreed that no signs had been erected indicating an intersection. All the evidence was to the effect that the streets crossed within the corporate limits of the Town of Benson.

G.S. 20-150(c) provides: "The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer. For the purposes of this section the word 'intersection of highway' shall be defined and limited to intersections designated and marked by the State Highway Commission by appropriate signs, *and street intersections in cities and towns.*" (emphasis added) The meaning of the section is that one motorist may not pass another going in the same direction under either of two conditions: (1) At any place designated and marked by the State Highway Commission as an intersection; (2) at any street intersection in any city or town. *Donivant v. Swaim,* 229 N.C. 114, 47 S.E. 2d 707; *Cole v. Lumber Co.,* 230 N.C. 616, 55 S.E. 2d 86; *Levy v. Aluminum Co.,* 232 N.C. 158, 59 S.E. 2d 632.

On the issue of contributory negligence the defendant was entitled to a charge that if the jury should find by the greater weight of the evidence, the burden being on the defendant, that the plaintiff attempted to pass the defendant's truck going in the same direction at a public street intersection, and should further find that the intersection was located within the corporate limits of the Town of Benson, her attempt so to pass would be negligence on her part; and if the jury should further find that such negligence was one of the proximate causes of her injury and damage, then the issue of contributory negligence should be answered, yes; otherwise, no. *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543.

The court actually charged: "I instruct you, ladies and gentlemen, that if you are satisfied by the greater weight of the evidence that there were no signs put there, no appropriate signs put there by the State Highway Commission, then it would not constitute an intersection within the meaning of that statute and would place no duty upon the driver of the Edsel automobile."

The statute required the plaintiff to observe the street intersection in the Town of Benson whether marked or unmarked. The charge permitted her to ignore the intersection if unmarked. Assignment of Error #2 based on Exception #2 challenges the instruction given. For the error assigned, the defendant is entitled to a

New trial.

EVELYN H. KRIDER v. WILLIAM ARTHUR MARTELLO AND CURRY W. KRIDER.

(Filed 4 May, 1960.)

1. Automobiles § 25—

The operation of an automobile at a speed in excess of that lawfully prescribed is a negligent act.

2. Automobiles § 41a—

Evidence that a driver entered an intersection controlled by traffic signals at a speed of 35 m.p.h. in a 20 m.p.h. speed zone, resulting in a collision with a car entering the intersection from his right, takes the issue of such driver's negligence to the jury notwithstanding that other allegations in respect to such driver's entering the intersection while facing the red light are not supported by evidence.

3. Same: Negligence § 24a—

Nonsuit may not be allowed if plaintiff's evidence is sufficient to establish as a proximate cause of his injuries any one of the negligent acts enumerated in the complaint.

APPEAL by defendant Curry W. Krider from *Armstrong, J.*, October 1959 Term, of ROWAN.

Plaintiff seeks compensation for injuries sustained in a collision of automobiles at the intersection of West Fifth Street and North Broad Streets in Winston-Salem.

Curry W. Krider, hereafter called appellant, was operating his vehicle in a westwardly direction on Fifth Street. Plaintiff, his guest, occupied the right front seat. Defendant Martello was operating his vehicle northwardly on Broad Street.

Movement of traffic across the intersection was regulated by a traffic light exhibiting in sequence green, yellow, red, and green. Obedience to the color signals given by the traffic light is required by city ordinance.

The complaint alleges joint and concurrent negligence by defendants. The allegations are that each defendant operated his motor vehicle (a) in a reckless manner, (b) without keeping a proper lookout, and (c) at a speed which was greater than was reasonable and prudent under the existing conditions. In addition to these allegations of negligence specifically charged against each defendant, the complaint contains an additional specification of negligence directed against appellant, charging him with entering the intersection in violation of the city ordinance because of a red traffic light confronting him.

Appellant offered no evidence. At the conclusion of plaintiff's evidence he moved for nonsuit. This motion was overruled. The jury,

on appropriate issues, found plaintiff sustained injuries resulting from appellant's negligence and assessed damages. Judgment was entered on the verdict and appellant appealed.

Thomas W. Seay, Jr. and John C. Kesler for plaintiff, appellee.
Linn & Linn for defendant, appellant.

RODMAN, J. The record and brief present only this question: Did the court err in refusing to allow the motion to nonsuit?

Appellant contends that the motion should have been allowed because plaintiff failed to establish her allegation that defendant entered the intersection when forbidden to do so by a red light.

Each defendant made statements to traffic officers investigating the collision. Each told the officer the light was green on his side. Plaintiff testified that the light was green as appellant approached the intersection but that she last saw it when two or three car lengths away.

There is merit in the contention that plaintiff failed to establish her allegation that defendant violated the ordinance relating to the traffic light, but that was not the only charge of negligence leveled at appellant. He was charged with a violation of G.S. 20-141, which requires operation at a reasonable speed. This statute fixes maximum reasonable speeds under varying conditions.

Plaintiff's evidence places this intersection in a 20 m.p.h. speed zone. Appellant informed the investigating officer he was traveling about 35 m.p.h. in the 20 m.p.h. zone. In addition to the statement made by appellant with respect to his speed, plaintiff testified that he was traveling 30-35 m.p.h.

Operation at a speed in excess of that lawfully prescribed was a negligent act. *Arnett v. Yeago,* 247 N.C. 356, 100 S.E. 2d 855 *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115. The admissions made by appellant as related by the investigating officer, supported by plaintiff's testimony with respect to speed, were sufficient to require a jury determination of the charge of unreasonable speed and such speed as the proximate cause of the injury.

It is true, as appellant contends, that there must be *allegata* and *probata* to support a verdict and judgment, but this does not mean that a plaintiff cannot recover unless there is proof of each alleged negligent act. It is sufficient to impose liability to establish any one of the negligent acts enumerated in the complaint which proximately results in the damage claimed. *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560; *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688.

Affirmed.

JOHNNIE ANDER RICHARDSON, BY AND THROUGH HIS NEXT FRIEND, LARCIE RICHARDSON v. CECIL RANDOLPH GRAYSON.

(Filed 4 May, 1960.)

Negligence §§ 7, 28—

An instruction on the issue of negligence which places the burden upon plaintiff to prove that defendant's negligence was the proximate cause of plaintiff's injuries held prejudicial, since the issue of negligence must be answered in the affirmative if defendant's negligence is a proximate cause of the injuries.

APPEAL by plaintiff from *Olive, J.*, at January Term, 1960, of WILKES.

Civil action to recover for personal injuries sustained by plaintiff in an automobile collision which occurred on the Traphill Road in Wilkes County, North Carolina, on 3 August, 1958. Automobiles operated by plaintiff and defendant respectively were proceeding in the same direction. At the time of the collision plaintiff was in the act of passing defendant, and defendant was in the act of turning to his left from the road into a private driveway.

The pleadings and evidence raised five issues which were submitted to the jury in the usual order as to: (1) Negligence of defendant, (2) Contributory negligence of plaintiff, (3) Damages to plaintiff, (4) Negligence of plaintiff, and (5) Damage to defendant. The jury answered the first issue (as to defendant's negligence) in the negative, and the fourth issue as to plaintiff's negligence in the affirmative.

To judgment in accordance therewith in favor of defendant, plaintiff excepts and appeals therefrom to Supreme Court and assigns error.

McElwee, Ferree & Hall for plaintiff, appellant.

Hudson, Ferrell, Carter, Petree & Stockton, Whicker & Whicker, for defendant, appellee.

WINBORNE, C. J. Of the many assignments of error, based upon exceptions to matters occurring in the course of the trial, and in the charge of the court to the jury, plaintiff groups, in his brief, and assigns as error several portions of the charge as to proximate cause on the first issue. Throughout the charge on this issue the court placed upon the plaintiff the burden of showing that defendant's negligence was *the* proximate cause of plaintiff's injury. This constitutes prejudicial error within the rulings in *Price v. Gray*, 246 N.C. 162, 97 S.E. 2d 844, and *Pugh v. Smith*, 247 N.C. 264, 100 S.E. 2d

503. Hence on authority of the the holding of the opinions of this Court in these two cases, there must be a new trial.

Therefore it is deemed unnecessary to expressly consider other assignments of error. They may not recur upon another trial.

For error pointed out, let there be a

New trial.

LOLA ASHFORD, ADMINISTRATRIX OF THE ESTATE OF LOLA BELLE REESE v. WILLIAM FOX AND SANDALL CLAWSON.

(Filed 4 May, 1960.)

Automobiles §§ 41r, 47—

Evidence to the effect that defendant backed the car into a ditch in attempting to turn around, that he left his passenger in the car with the motor running to keep her warm and went off to obtain aid in getting the car out of the ditch, and that upon his return the passenger was dead as a result of carbon-monoxide poisoning from the fumes of the motor entering the car because the exhaust pipe was buried in the bank of the ditch, without any evidence that the driver could or should have known of the condition of the exhaust pipe, *is held* insufficient to be submitted to the jury on the issue of negligence of the driver in an action for the wrongful death of the passenger.

APPEAL by plaintiff from *Farthing, J.*, January Regular Civil "A" Term, 1960, of MECKLENBURG.

This is an action to recover for the alleged wrongful death of plaintiff's intestate.

It is alleged in the complaint that, on or about the 11th day of April 1958, at about 11:30 p.m., plaintiff's intestate, Lola Belle Reese, was in a highly intoxicated condition at a club in Belmont, North Carolina, and the defendant William Fox, the owner of the club, requested the defendant Sandall Clawson to take the said Lola Belle Reese home in his, William Fox's, 1951 Ford convertible automobile; that Lola Belle Reese was placed in the front seat of the automobile and the defendant Sandall Clawson drove the car some distance along Catawba Colony Road; that in attempting to turn the automobile around, the defendant negligently and carelessly backed it into a ditch, thereby imbedding the exhaust pipe of the car in the side of the ditch.

Plaintiff's evidence tends to show that, the defendant Clawson met the plaintiff's intestate at a club near Belmont and offered to take her home and she agreed; that Clawson asked the defendant Fox if he

could borrow his car; that Fox said he had to go home first; that Fox drove Clawson and plaintiff's intestate to his home and then Clawson drove the car to Beatty's Service Station and from there down the Old Dowd Road where he thought the plaintiff's intestate lived. When she informed him that she did not live on that road, he undertook to turn the car around and backed it into a ditch. The defendant Clawson and plaintiff's intestate tried to get the car out of the ditch but failed. Plaintiff's intestate told Clawson about a man who lived nearby who could possibly help them. Clawson went to this man's house and the man informed him he could not get his tractor started. Clawson tried two or three other places but could not get anyone to answer. The motor had been left running to keep the plaintiff's intestate warm, the weather was very cold. When he returned to the car plaintiff's intestate suggested he go to Beatty's Service Station and see if he could get someone to help him. He did so and returned in about an hour with a young white man, Jerry Groner, who had agreed to help him. Defendant Clawson, upon returning to the car, spoke to Lola Belle Reese, but she did not answer him. He opened the right front door of the car and she fell into his arms. She was then placed in Groner's car and carried to Beatty's Service Station and the Life Saving crew and the police were called.

The evidence tends to show that Lola Belle Reese had died from carbon-monoxide poisoning while in a drunken condition, but, from the alcoholic content contained in her body, not so drunk as to be unconscious therefrom. The evidence further tends to show that the only way it could be determined that the exhaust pipe was stopped up by being imbedded in the bank was to crawl under the car with a flashlight. The exhaust pipe could not be seen from the back of the car.

Both defendants moved for judgment as of nonsuit at the close of plaintiff's evidence. The motions were allowed and the plaintiff appeals, assigning error.

K. R. Downs, Charles V. Bell for plaintiff.
Robinson, Jones & Hewson for defendants.

PER CURIAM. There is no evidence tending to support the allegation in the complaint to the effect that the defendant Clawson was the agent of the defendant Fox at the time plaintiff's intestate met her death.

Moreover, there is no evidence tending to show that the defendant Clawson knew that the exhaust pipe of the car had become stopped

up or rendered defective in any manner at the time he left plaintiff's intestate to get help in order that the car might be removed from the ditch.

In our opinion, plaintiff's evidence is insufficient to establish actionable negligence against these defendants or either of them.

The judgment below is

Affirmed.

RALPH T. REAVIS v. WILLIAM A. BEAM AND RED BIRD CAB COMPANY AND BOBBY GENE REAVIS, BY HIS NEXT FRIEND, RALPH T. REAVIS v. WILLIAM A. BEAM AND RED BIRD CAB COMPANY.

(Filed 4 May, 1960.)

Negligence § 29—

The issues of contributory negligence and last clear chance do not arise when there is insufficient evidence to be submitted to the jury on the issue of negligence.

APPEALS from *McKinnon, J.*, August, 1959 Civil Term, GUILFORD Superior Court, Greensboro Division.

These civil actions grew out of an injury to Bobby Gene Reavis, minor son of Ralph T. Reavis, alleged to have resulted from the defendants' actionable negligence. In the first action the father seeks to recover expenses for treatment, and loss of wages during the minority of the son. In the second, the son, by his next friend, seeks to recover for his injuries.

The plaintiffs' evidence disclosed that Bobby Gene Reavis, on an exceedingly rainy night, attempted to cross Webb Avenue in Burlington within the block at a point not marked or intended for pedestrian use. The defendants' cab turned into Webb Avenue from Hoke Street and was going at ten to fifteen miles per hour when it struck Bobby Gene Reavis near the curb on the defendants' right-hand side of the street. Bobby Gene testified that after seeing the cab lights for the first time they were so near, "it happened so quick I couldn't move."

Issues of negligence, contributory negligence, and last clear chance arose on the pleadings. At the close of the plaintiffs' evidence, however, the court entered judgments of nonsuit, from which plaintiffs appealed.

Wade C. Euliss, Hines & Morrisette, By: Stedman Hines for plaintiffs, appellants.

Smith, Moore, Smith, Schell & Hunter, By: Bynum H. Hunter for defendants, appellees.

PER CURIAM. On the oral argument here, the plaintiffs confined the discussion to the sufficiency of the evidence to go to the jury on the defendants' last clear chance to avoid the injury. However, issues of negligence and contributory negligence were discussed in the brief. After careful analysis, we fail to find any evidence of actionable negligence on the part of the defendants. Hence issues of contributory negligence and last clear chance do not arise. The judgments of nonsuit in the court below are

Affirmed.

TOM GALLOS AND WIFE, RITA A. GALLOS v. PHILLIP LUCAS AND WIFE, ANNABELLE LUCAS.

(Filed 4 May, 1960.)

Mortgages § 30—

The fact that the trustee's sale upon foreclosure of a deed of trust was not reported within five days as directed by G.S. 45-21.26 does not deprive the clerk of jurisdiction to thereafter order a resale based on a raised bid, G.S. 45-21.29, and the purchaser at the resale acquires title upon the execution of deed to him, the foreclosure being regular in all other respects.

APPEAL by defendants from *Crissman, J.*, November 9, 1959 Civil Term, of GUILFORD (High Point Division).

Plaintiffs allege they are the owners of lands in High Point wrongfully occupied by defendants. The determinative facts were stipulated. Defendants, owners of the land, conveyed the same in trust to secure their note. They failed to pay their debt, and, upon demand of the creditor, the trustee advertised and sold the property on 13 April 1959, at which time plaintiffs were the high bidders at the sum of $15,500. The sale so made was reported to the clerk of the Superior Court 22 April 1959.

In addition to the foregoing summarized facts, the parties stipulated: "That within ten days allowed by law an advance bid was filed with the Clerk of the Superior Court of Guilford County, North Carolina, and an order issued by said court directing said substituted

trustee to resell said properties described hereinbefore; that after due advertisement a re-sale was had at public auction to the highest bidder for cash at the front door of the county building in the City of High Point, North Carolina, on May 15, 1959, when and where Tom Gallos became the last and highest bidder at the price of $16,-350.00 and made a cash deposit as required by law; that a report of such re-sale was duly filed in the office of the Clerk of the Superior Court of Guilford County, North Carolina, on May 19, 1959; that said matter remained open for more than ten days and no advance bid was made; that said sale was confirmed by the court and the trustee directed to execute and deliver a deed to said Tom Gallos or his nominee upon receipt of the purchase price; that said purchase price was paid and a deed in fee simple to the properties described heretofore was executed to the plaintiffs on June 5th, 1959; that a copy of said deed is attached hereto marked 'Exhibit A' and made a part of this Agreed Statement of Facts."

The court adjudged plaintiffs the owners and defendants appealed.

Louis J. Fisher for plaintiff appellees.
Morgan, Byerly & Post for defendant appellants.

PER CURIAM. Determinative of the appeal is this question: Did the failure to report the sale made 13 April 1959 within five days as directed by G.S. 45-21.26 render the subsequent sale void? The answer is no.

If a trustee fails to report within the five days directed by the statute, the clerk may compel a report. G.S. 45-21.14. When the clerk assumes jurisdiction and orders a resale based on a raised bid, his orders are not void. One who purchases and receives a deed for the property pursuant to such orders acquires a good title. G.S. 45-21.29.

Affirmed.

STATE v. FLOYD WILLIAM MORTON.

(Filed 4 May, 1960.)

1. Criminal Law § 136—

Where sentence for wilful failure to provide adequate support for defendant's wife and children is suspended on condition that defendant pay a stipulated sum per week for their support, and the sum is later increased for change of condition, the wilful failure of defendant thereafter to pay any amount warrants the revocation of suspension regardless of whether the wilful failure to pay the increased amount was made a condition of suspension, since upon the facts defendant has breached the original condition as well as the later one.

2. Same—

Upon a hearing of whether defendant wilfully breached a condition of suspension of sentence, the court is not bound by strict rules of evidence.

3. Same—

On an appeal from an order of an inferior court revoking a suspension of sentence, the Superior Court properly hears the matter *de novo* for the purpose of determining the sole question whether defendant had violated the condition of suspension without lawful excuse, and the Superior Court determines this question in its sound discretion and its order of revocation will not be disturbed when the evidence is sufficient to support it.

APPEAL by defendant from *Preyer, J.*, October 1959 Criminal Term, of GUILFORD (Greensboro Division).

Defendant was tried on 9 June 1958 in the Domestic Relations Court of Guilford County (Greensboro Division) on a warrant which charged wilful failure to provide adequate support for his wife and children. (G.S. 14-325). Verdict: Guilty. A prison sentence of 6 months was suspended for 5 years on condition defendant pay $25.00 per week for support of his family and pay other family expenses. The judgment contained a provision for modifying the *sentence* upon change of circumstances. On 17 April 1959, after hearing, the weekly payment for support was increased to $45.00. After 22 April 1959 defendant made no further payments. On 2 October 1959 he was brought into court on a capias and, after a hearing, his prison sentence was put into effect. He appealed to Superior Court.

The Superior Court heard evidence and found as a fact that defendant had "made no payment since April 22, 1959," was in arrears in the amount of $1080.00, and his failure to make payments was wilful. The court ordered that defendant serve the prison sentence. Defendant appealed to Supreme Court.

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

George A. Younce for the defendant, appellant.

PER CURIAM. Defendant challenges the authority of the court to activate the prison sentence for his failure to pay the increased weekly amount. He contends that the prison sentence was suspended on condition he pay $25.00 per week, that the amount was thereafter raised to $45.00, and that this modified amount was not such condition that breach thereof would justify activation of the sentence. However, the facts are such that we need not discuss this question. The court found as a fact that he had paid nothing after April 22, 1959. He was therefore in violation of the original condition as well as the one later imposed.

Defendant excepted to the admission and exclusion of evidence. The court was not bound by strict rules of evidence. Strong: N. C. Index, Criminal Law, sec. 136, Vol. 1, p. 819. The matter was heard *de novo* in Superior Court solely upon the question of whether there had been a violation of the condition without lawful excuse. *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376. This question is determined by the Court in its sound discretion. *State v. Marsh,* 225 N.C. 648, 36 S.E. 2d 244.

A careful review of the record indicates that the competent evidence heard by the judge was sufficient to support his findings of fact and that the findings of fact adequately support the judgment. *State v. McKinney,* 251 N.C. 346, 111 S.E. 2d 189.

The judgment below is

Affirmed.

MRS. ELGIE LEE BAREFOOT v. HARRY LOUIS RULNICK.

(Filed 4 May, 1960.)

Appeal and Error § 39—

The burden is on appellant to show prejudicial error amounting to the denial of some substantial right.

APPEAL by defendant from *Williams, J.,* January-February Civil Term, 1960, of CUMBERLAND.

Civil action to recover damages caused by an automobile collision.

Upon the call of the case for trial it was stipulated by counsel for

plaintiff and defendant that the first issue of negligence should be answered Yes, and the issue of damages only should be submitted to the jury.

The jury found by its verdict that plaintiff was injured by the negligence of the defendant as alleged in the complaint, and awarded damages in the amount of $14,000.00.

From judgment in accord with the verdict, defendant appeals.

N. H. McGeachy, Jr., for plaintiff, appellee.
Nance, Barrington & Collier for defendant, appellant.

PER CURIAM. The burden is on appellant to show prejudicial error amounting to the denial of some substantial right. *Kennedy v. James,* 252 N.C. 434, ... S.E. 2d ..... A careful examination of defendant's assignments of error discloses no prejudicial error that would justify a new trial. All these assignments of error are overruled. The verdict and judgment will be upheld.

No error.

A. W. WOOD v. OLA P. SEWARD AND M. C. SEWARD.

(Filed 4 May, 1960.)

Appeal and Error § 19—

Appeal dismissed on authority of *Hunt v. Davis,* 248 N.C. 69 for failure properly to group the exceptions.

APPEAL by plaintiff from an order of *Gwyn, J.,* February 22, 1960 Civil Term, of GUILFORD (High Point Division).

This action was begun to recover damages resulting from an alleged breach of contract. A judgment by default and inquiry was rendered by the clerk. Defendants gave notice of an intent to move to vacate the judgment because of excusable neglect. The motion was not made at the time fixed in the notice. Judge Thompson, without a hearing and before the motion was filed, rendered judgment refusing to set the default judgment aside. Thereafter defendants filed their motion to set aside the default judgment for excusable neglect and to set aside the judgment rendered by Judge Thompson for irregularity. These motions were heard by Judge Gwyn. He made extensive findings of fact and on his findings concluded the judgment rendered by Judge Thompson was irregular, defendants had a good and meri-

torious defense, and the failure to file an answer in due time was due to excusable neglect. Based on his findings he vacated both judgments. Plaintiff took exceptions to the findings of fact and conclusions of law and appealed.

Schoch and Schoch for plaintiff, appellant.
Robert S. Cahoon for defendant, appellees.

PER CURIAM. Plaintiff groups his exceptions in substantially the same manner condemned in *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405. For the reasons there given, the appeal is
Dismissed.

MRS. CALLIE C. YORK v. JOSEPH O. COLE AND WIFE, SARAH FRANCES COLE.

(Filed 4 May, 1950.)

APPEAL by defendants from *Sharp, Special J.,* at January 11 Regular Civil Term, 1960, of GUILFORD, High Point Division—heard upon motion of defendants for removal of the cause of action, as a matter of right, from Guilford County, North Carolina, to and for trial in Wake County, North Carolina,—possession of personal property being involved in the action.

The record shows that the cause came on for hearing before Sharp, S. J., assigned to hold the aforesaid Civil Term of the Superior Court, who, after reciting the procedural history of the action, finds "that on December 9, 1959, the defendants filed a motion in writing that the 'cause of action for the recovery of the automobile and all other personal property described in the complaint, except the property described in paragraph 32 of the plaintiff's amended complaint, be moved to Wake County for trial.'" It is there, that is, in paragraph 32, described as certain specific household and kitchen furniture owned by plaintiff of the approximate value of five thousand dollars, and located in her three houses in High Point.

And the record recites that after reading the pleadings and other papers filed in this case and hearing argument of counsel the court being of the opinion that the motion to remove as a matter of right should be denied, "ordered, adjudged and decreed that the motion to remove be and the same is hereby denied."

Defendants except thereto and appeal therefrom to Supreme Court and assign error.

J. W. Hinsdale, Thomas Turner for plaintiff, appellee.
Allen Langston for defendant appellants.

PER CURIAM. Consideration of the record on appeal reveals that the judgment from which appeal is taken is accordant with law. The recovery of the personal property in Wake County is but incidental to the main action. Hence the appeal is without merit, and patently is dilatory and frivolous. The judgment below is

Affirmed.

SANDRA PARNELL, BY HER NEXT FRIEND, EUGENE C. SEDBERRY, v. E. L. WILSON, MARSHALL WILSON AND HAROLD BULL.

(Filed 4 May, 1960.)

APPEAL by defendants from *Crissman, J.*, November 1959 Term, of GUILFORD (High Point Division).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff because of the joint and concurring negligence of defendants.

Plaintiff was a passenger in an automobile owned and being driven by defendant Bull northwardly along North Carolina Highway 68 in Guilford County. This automobile met and collided with a car being driven by defendant Marshall Wilson and owned by his father, E. L. Wilson. The collision occurred about 11:00 P. M. on 2 November 1957 near Carroll's Store. The cars met and collided about the center of the paved highway. Plaintiff was seriously and permanently injured.

The complaint alleges that plaintiff was injured because of the joint and concurrent negligence of the drivers for that both were driving at speeds greater than was reasonable and prudent under the circumstances, failed to pass to the right and yield one-half of the main traveled portion of the highway, drove to the left of the double yellow line on a curve, drove to the left of the center of the highway, failed to keep a reasonable lookout, and failed to keep their vehicles under proper control. It was further alleged that the defendant Bull attempted to make a left turn without giving a signal and without ascertaining he could make the turn in safety, and that defendant Wilson was driving in excess of the maximum speed allowed by law and was under the influence of intoxicants.

Each defendant, answering, denied the allegations of negligence

and alleged that the other suddenly turned to the left, created an emergency, and caused the collision.

The jury verdict declared that plaintiff was injured by the joint and concurrent negligence of the defendants and awarded damages in the amount of $10,000.00.

From judgment in accordance with the verdict defendants appealed.

Schoch & Schoch and Sedberry, Sanders & Walker for plaintiff.
Martin & Whitley for defendants E. L. Wilson and Marshall Wilson.
Deal, Hutchins and Minor for defendant Harold Bull.

PER CURIAM. There was evidence supporting the allegations of joint and concurrent negligence proximately causing plaintiff's injuries. The weight of the evidence was for the jury. The exceptions of defendant Bull to the exclusion of evidence and the rulings of the court with reference to arguments of counsel are not sustained. If erroneous in any respect, they were not sufficiently prejudicial to warrant a new trial. The charge of the court, when considered contextually, adequately presented the law applicable to the factual situations disclosed by the evidence. The burden is on the defendants to show prejudicial error. *Taylor Co. v. Highway Commission,* 250 N.C. 533, 539, 109 S.E. 2d 243.

In the trial below we find

No error.

ADA REAVES BRYANT, EXECUTRIX OF THE ESTATE OF ALFRED A. BRYANT, DECEASED v. EDWARD EARL WOODLIEF AND ROY PEARSON RAY

(Filed 18 May, 1960.)

1. Negligence § 8—

The test of whether the negligence of one tort-feasor is insulated as a matter of law by the independent act of another is whether such intervening act and the resultant injury could have been reasonably foreseen.

2. Negligence § 27—

The question of whether the independent act of one tort-feasor insulates the negligence of another is ordinarily for the determination of the jury, and it is only when the evidence is susceptible to the sole reasonable conclusion that the intervening and independent act could not have been reasonably foreseen that nonsuit is proper on this ground.

3. Automobiles § 41b—

Evidence that the operator of a motor vehicle was traveling in excess of 80 m.p.h. *is held* sufficient to be submitted to the jury on the question of whether such negligence was a proximate cause of a collision with another vehicle, since it cannot be said as a matter of law the driver could not have reasonably foreseen that some accident or injury was likely to occur as the result of such excessive speed.

4. Automobiles § 41h—

Testimony of the driver of a car that he saw a car approaching from the opposite direction at a speed which he estimated at 100 m.p.h., together with evidence that he turned left to enter a driveway in the path of such other car when it was between 200 to 600 feet away, *is held* sufficient to be submitted to the jury on the questions of such driver's negligence and proximate cause in a suit for the death of a passenger in his vehicle resulting from the collision of the cars.

5. Automobiles § 43—

Evidence tending to show that the driver of one vehicle was traveling in excess of 80 m.p.h. along a straight section of highway, and that the driver of the vehicle in which plaintiff's testate was riding as a passenger, traveling in the opposite direction and intending to enter a driveway on his left, turned left across the path of the first vehicle when it was some 200 to 600 feet away, *is held* sufficient to be submitted to the jury on the question of the concurring negligence of both drivers in proximately causing the collision.

6. Death § 6—

In an action for wrongful death the measure of damages is the present worth of the pecuniary loss resulting to the family of the deceased by reason of his untimely death, which loss is to be ascertained by deducting his personal expenditures from the amount which deceased would probably have earned, based upon his life expectancy.

7. Same—

The retirement income which a deceased was receiving at the time of his death is properly shown in evidence on the question of damages in an action for wrongful death, since such retirement income is earned by an employee as the result of his previous labors, and evidence that the deceased was earning such income is alone sufficient basis for the admeasurement of damages.

APPEAL by defendants from *Sink, Emergency Judge,* Second September Civil Term, 1959, of WAKE.

This is a civil action to recover damages for wrongful death.

About 4:30 p.m. on 22 November 1958 the automobiles operated by the two defendants were approaching each other on a rural paved road near Raleigh, known as Rhamkatte Road, which runs generally east and west. The defendant Woodlief was traveling east and the defendant Ray was traveling west. The plaintiff's testate was a passenger in the defendant Ray's car. From the point at which the collision occurred the road was straight and practically level for four-tenths of a mile west and five-tenths of a mile east. At the western end of this straight stretch of road there was a curve and a small hill, with a church being located in the curve on the south side of the road. As the defendant Woodlief came over the hill and around the curve, he could see in an easterly direction for nine-tents of a mile and was at that time four-tenths of a mile from the point of collision. When the defendant Ray came to the eastern end of this straight stretch of road, traveling in a westerly direction, he could see nine-tenths of a mile to the hill and curve in which the church was located and five-tenths of a mile to the point of collision. When the defendant Ray reached the point of collision he could see four-tenths of a mile westwardly up to the hill and curve referred to hereinabove.

At the point of collision there was a private driveway leading from the south side of the road to a house occupied by Janie McLean, who was also a passenger in the Ray car and who was killed as a result of the collision. Just west of this house and driveway there are two other houses and driveways, all on the south side of Rhamkatte Road. The house referred to as Janie McLean's house was the easternmost of the three houses. The house of Isaac Kearney was the third or westernmost of the three houses. From the west side of the first driveway, Janie McLean's driveway, to the west side of the westernmost driveway at the Kearney house, was 124 feet and six inches.

The evidence tends to show that the defendant Ray was driving on the right-hand side of the road at a slow rate of speed and was proceeding in a westerly direction for the purpose of taking his cook,

Janie McLean, to her home. Just before defendant Ray reached the intersection of Janie McLean's driveway, he testified that he gave a left-hand turn signal, that he gave this signal while traveling a distance of about twenty feet and came almost to a stop, waiting for an automobile to pass which was traveling in an easterly direction. Before starting to make his turn to the left into the McLean driveway, the defendant Ray first looked to his front and to his rear, and not observing any traffic he started to make his left turn across the road towards the driveway. He was traveling at a speed of only two or three miles per hour, according to his evidence, when he made his turn. But just before he started his turn, the defendant Ray testified that he observed the Ford automobile driven by the defendant Woodlief approaching him from the west on Rhamkatte Road, at a speed estimated by the defendant Ray of 100 miles per hour. Plaintiff's eyewitness, Isaac Kearney, III, testified that the Woodlief Ford was 600 feet away from the Ray car when the Ray car began its turn. Other testimony tended to show that the Woodlief car was within 200 or 250 feet of Ray's car when it turned left across the road.

The witness Kearney testified that the defendant Woodlief, as he came around the curve traveling towards the point of collision, was traveling at a speed of 85 to 90 miles per hour.

George Edward Jones, a witness for the plaintiff, who was standing in his yard, testified, "I observed the red and cream Ford over a distance of * * * approximately 275 to 300 feet prior to * * * impact. I formed an opinion * * * that the Ford was going in the neighborhood of 80 to 90 miles an hour before the collision. * * * I saw the Ford apply its brakes, the wheels appeared to be locked and smoke was boiling out from under the tires * * *. The car proceeded on after it * * * hit the Chevrolet (Ray's car) in the right-hand side, close to the front door. * * * I saw the * * * Chevrolet * * * knocked into the air and the Ford went under it and proceeded on down the road another 75 to 100 feet, something like that. * * * The Chevrolet * * * was knocked down the road approximately 60 to 70 feet from the point where it was struck."

The evidence tends to show that the Ford car came to rest 30 or 40 feet farther away from the point of collision than did the Chevrolet.

The evidence further tends to show that the defendant Woodlief's car skidded in a straight line in his lane of travel for a distance of 197 feet prior to the impact; that the front wheels of Ray's car were entering the McLean driveway at the time of the collision. The paved portion of the road where the collision occurred is twenty feet wide.

The defendant Woodlief testified that the "operator of the Ray car gave no signal at all."

The plaintiff's testate was 73 years of age with a life expectancy, according to G.S. 8-46, of 8.48 years. Plaintiff's testate was in good health, was able to get around in his yard, and had recovered from a broken hip. The hip was broken on 10 May 1957. Plaintiff's testate was drawing $140.28 per month from the Railroad Retirement Board at the time of his death. Living expenses of plaintiff's testate, according to the opinion of plaintiff, were $35.00 per month. Plaintiff was 52 years of age at the time of her testate's death and not eligible for railroad retirement benefits and will not be until she reaches sixty years of age. She is receiving no income from this source at the present time.

On the issue of negligence the jury found the plaintiff's testate was injured and killed by the joint and concurrent negligence of the defendants as alleged in the complaint and answered the issue of damages in the sum of $8,401.34.

From the judgment entered on the verdict, both defendants appeal, assigning error.

Manning & Fulton for plaintiff.
Armistead J. Maupin for defendant Ray.
Smith, Leach, Anderson & Dorsett for defendant Woodlief.

DENNY, J. Each defendant assigns as error the refusal of the court below to sustain his motion for judgment as of nonsuit.

The appellant Woodlief insists that if he was negligent his negligence was insulated by the negligence of the defendant Ray in turning his car in front of him, and he cites in support of his position *Hudson v. Transit Co.*, 250 N.C. 435, 108 S.E. 2d 900; *Aldridge v. Hasty*, 240, N.C. 353, 82 S.E. 2d 331; and *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808.

The test of whether the negligent conduct of one tort feasor is to be insulated as a matter of law by the independent act of another, is well settled by our decisions. In *Harton v. Telephone Co.*, 141 N.C. 455, 54 S.E. 299, the Court said: " * * * the test * * * is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected * * *. We think it the more correct rule that, except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of

the original wrong could reasonably have expected them to occur as a result of his own negligent act. * * *" *Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555; *Beach v. Patton*, 208 N.C. 134, 179 S.E. 446; *Gas Co. v. Montgomery Ward & Co.*, 231 N.C. 270, 56 S.E. 2d 689; *Moore V. Plymouth*, 249 N.C. 423, 106 S.E. 2d 695.

In our opinion, the cases relied on by the appellant Woodlief and cited above are not controlling on the factual situation revealed by this record.

The *Hudson* case involved a collision which occurred at an intersection governed by a traffic control signal, with the defendant Miller having a red light in his traffic lane until defendant Minton, who was driving the defendant Transit Company's truck, was 75 feet from the intersection approaching from the opposite direction at a speed of approximately 45 miles per hour, when traffic lights for both operators simultaneously turned green. Defendant Miller then made a left turn directly in front of Minton when the truck driven by Minton was so close that a collision was unavoidable. We upheld a nonsuit as to the Transit Company and its driver.

In *Aldridge v. Hasty, supra,* the defendant Burns turned to his left directly in front of the defendant Hasty when Hasty was 20-25 feet away. In the instant case, the defendant Woodlief testified that he was from 100 to 200 feet away from the McLean driveway when the defendant Ray cut across the highway in front of him. The physical facts seem to warrant the inference that he was more than 200 feet away when he saw the Ray car making a left turn, since he managed to apply his brakes and his car left tire and skid marks after the brakes were applied for 197 feet before reaching the point of impact.

In the *Butner* case, while traveling at night and at such time when he should have known his hand signal for a left turn could not be seen by the approaching car because his hand would be in the shadow of his own lights, defendant Spease turned to his left and directly in front of Butner's car at a time when the vehicles were only some forty feet apart.

In the consolidated cases of *Henderson v. Powell* and *Rattley v. Powell*, 221 N.C. 239, 19 S.E. 2d 876, at the time of the accident complained of, the plaintiffs Henderson and Sylvester Rattley, intestate of the plaintiff administratrix, were guest passengers in an automobile owned and operated by George McCrimmon. McCrimmon pulled into the path of a train approaching at a speed of approximately 60 miles per hour, with resultant injuries to plaintiff and injuries resulting in the death of Sylvester Rattley. In reversing a judgment as of nonsuit in the lower court, as to the defendant railroad, this Court

said: "The defendants insist that their negligence, if any there was, would not have produced the injury to the plaintiffs without the negligence of McCrimmon; and therefore it stands insulated, leaving McCrimmon's intervening negligence the sole proximate cause. The converse of this statement is universally accepted as true, and is thus expressed in a leading case: 'When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened.' *Ring v. City of Cohoes,* 77 N.Y. 83, 90. It took the combined activities of the railroad company and McCrimmon to bring their respective vehicles into the collision inflicting the injury. The formula proposed by defendants would exonerate both of them with equal impartiality."

There is ample evidence on this record to support the plaintiff's contention that the defendant Woodlief was operating his automobile at an excessive and unlawful rate of speed, to wit, 80 to 90 miles per hour as he approached the point of collision. In light of the evidence on the record before us, it cannot be said as a matter of law that the defendant Woodlief could not reasonably have foreseen that some accident or injury was likely to occur as the result of his excessive speed. *Moore v. Plymouth, supra.*

With respect to the evidence against the defendant Ray, in our opinion, when the evidence against him is considered in the light most favorable to the plaintiff, it was sufficient to carry the case to the jury. It was within the province of the jury to determine whether or not the defendant Ray exercised reasonable care under the circumstances in turning his car into the path of an approaching car which he testified was in his opinion approaching him at a speed of 100 miles per hour; and the greatest distance between the Woodlief car and the Ray car at the time defendant Ray began his left turn, was fixed by the plaintiff's witness Kearney at 600 feet, and the shortest distance between the two vehicles when the defendant Ray began his left turn was 100 to 200 feet, testified to by the defendant Woodlief.

In our opinion, the court below properly overruled the respective motions for judgment as of nonsuit, and we so hold.

The most serious question raised by both defendants and assigned by both as error was the admission of evidence in the trial below to the effect that plaintiff's testate was a retired railroad employee and was drawing the sum of $140.28 per month from the Railroad

Retirement Board at the time of his death. Both defendants insist that such evidence was inadmissible and that the court below committed error in allowing the jury to consider such evidence in determining the pecuniary loss sustained by the plaintiff as the result of her testate's wrongful death.

G.S. 28-174 provides: "Damages recoverable for death by wrongful act. — The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death."

The defendants insist and seriously contend that the pecuniary value of the life of plaintiff's testate is limited to the net income which the deceased might reasonably have been expected to earn from his own labors had his life not been cut short by his untimely death. *Caudle v. R. R.*, 242 N.C. 466, 88 S.E. 2d 138; *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49; *Journigan v. Ice Co.*, 233 N.C. 180, 63 S.E. 2d 183; *Queen City Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Carpenter v. Power Co.,* 191 N.C. 130, 131 S.E. 400; *Purnell v. R. R.*, 190 N.C. 573, 130 S.E. 313; *Poe v. R. R.*, 141 N.C. 525, 54 S.E. 406; *Russell v. Steamboat Co.*, 126 N.C. 961, 36 S.E. 191.

Ordinarily, in an action for wrongful death the plaintiff's evidence presents no facts that would warrant any formula or method for ascertaining the fair and reasonable compensation for the pecuniary injury resulting from wrongful death, other than that laid down in the above cases. Even so, we do not understand that the general rule in this respect would exclude the inclusion of income from an annuity, life estate, retirement pay or other income for life only, in arriving at the pecuniary loss sustained by reason of wrongful death.

In *Poe v. R. R., supra,* it is said: "This Court has not prescribed any 'hard and fast rule' by which to bind the jury in making the estimate of what sum should be given or to require them to give the assessment of the damages in any particular way."

In the case of *Mendenhall v. R. R.*, 123 N.C. 275, 31 S.E. 480, a proper charge in such case was given and its form was commended as a safe one for guidance in the opinion of *Poe v. R. R., supra,* and is as follows: "The measure of damages is the present value of the net pecuniary worth of the deceased to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show, and for them to consider the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed — the end of it all

being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the *pecuniary worth of the deceased to his family.* You do not undertake to give the equivalent of human life. You allow nothing for suffering. You do not attempt to punish the railroad, but you seek to give a fair, *reasonable pecuniary worth of the deceased to his family,* under the rule which I have laid down. You should rid yourself of all prejudice, if you have any, and of sympathy. It is not a question of sympathy; it is just a plain, practical question, and you should give a reasonable and fair verdict upon all the issues." (Emphasis added)

In *Collier v. Arrington,* 61 N.C. 356, it is said: " * * * our statute, which gives an action to the representative of a deceased party, who was injured or slain by a trespasser, confines the recovery to the amount of *pecuniary injury.* It does not contemplate *solatium* for the plaintiff, nor punishment for the defendant. It is therefore in the nature of pecuniary demand, the only question being, *how much has the plaintiff lost by the death of the person injured?*" (Emphasis added)

In *Kesler v. Smith,* 66 N.C. 154, the opinion states: "The defendant in open court admitted the unlawful killing, and the sole point at issue and tried was the question of damages." In discussing this point, *Reade, J.,* speaking for the Court, said: "The English statute (9-10 Vic., ch. 93) is substantially the same as ours. It is not precisely as definite as ours as to the rule of damages, inasmuch as our statute specifies *'pecuniary injury,'* whereas the English statute also makes it the duty of the jury to apportion the damages among the beneficiaries, which ours does not.

"Although the English statute omits *pecuniary,* yet the rule of damages which the courts have laid down is 'the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased.' We have carefully examined the English cases, and although the rule is not laid down in all of them in precisely these words, yet in substance it is; and *the rule* may now be said to be *settled* as above."

It will be noted that the pecuniary worth of a life in a wrongful death case was not limited in our earlier cases to the net income the deceased would probably have earned during his life expectancy had his life not been terminated by wrongful death.

In *Gurley v. Power Co.,* 172 N.C. 690, 90 S.E. 943, the plaintiff administratrix instituted the action to recover for the wrongful death of a boy of 13 or 14, who was drowned in a tank at a substation of the defendant power company. On appeal from a verdict for plaintiff,

there was an exception to the charge on the issue of damages. The Court said: "This charge was evidently quoted by the judge from the opinion in *Mendenhall v. R. R.*, 123 N.C. at p. 278, which has been approved often by this Court (see Anno. Ed.), down to *Ward v. R. R.*, 161 N.C. at p. 186, and *Massey v. R. R.*, 169 N.C. 245 * * *. The charge in regard to measure of damages is in exact accord with the precedents of this Court." This exception was overruled, but a new trial granted on other grounds.

It will be noted that the charge in the *Mendenhall* case said nothing about limiting the pecuniary loss by reason of the wrongful death to income the deceased probably would have earned by his own exertions had his life not been cut short by his wrongful death.

The general rule for the measure of damages as laid down in our later cases, as set forth in *Caudle v. R.R., supra,* and many other cases, in all probability grew out of the necessity for differentiating between income earned from personal exertions and income derived from investments or from an established business that would not be adversely affected by the wrongful death.

In the recent case of *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793, the question presented was whether or not the plaintiff was entitled to recover nominal damages where there is no evidence of actual damages. The Court by majority vote held that the nominal damages under such circumstances were not recoverable. *Rodman, J.,* speaking for the Court in a very scholarly opinion, traced the history of the statute now under consideration and said: "Our statute has from its passage been interpreted to accord with the interpretation given by the English courts to Lord Campbell's Act."

In the case of *Franklin v. South Eastern Rwy. Co.* (1858), 3 Hurlstone & Norman 211, 157 Eng. Repr. 448, the action was instituted for wrongful death and the Court's ruling is succinctly stated in the syllabus of the opinion as follows: "In an action by a father for injury resulting from the death of his son, it appeared that the father was old and infirm, that the son, who was young and earning good wages, assisted his father in some work for which the father was paid 3s. 6d. a week. The jury found that the father had a reasonable expectation of benefit from the continuance of his son's life: — Held, that the action was maintainable."

In Halsbury's Laws of England, Third Edition, Volume 28, Negligence, page 102, it is said: "Damages are not given merely in respect of the loss of a legal right, inasmuch as they are distributed among relations only and not among all individuals sustaining the loss, and

they should be calculated with reference to the amount of reasonable expectation of pecuniary benefit from the continuance of the life."

We have been able to find only one case directly in point from other jurisdictions in this country on the question now before us. On the other hand, we have not been able to find any opinion by any court in this country that has held that the admission of evidence in a wrongful death action with respect to retirement income is improper.

In the case of *Heskamp v. Bradshaw's Adm'r.*, 294 Ky. 618, 172 S.W. 2d 447, the action was instituted to recover for the wrongful death of C. W. Bradshaw. On appeal it was contended, as it is in the case now before us, that it was error to allow the plaintiff to prove that for some years prior to his death Mr. Bradshaw had been the recipient of a pension. It was argued that plaintiff's decedent had not earned any money for several years and that he was not able to earn money at the time of his death. Mr. Bradshaw was 78 years of age and had a life expectancy of 6.21 years at the time of his death. He was in good health and unusually active for a man of his age. He was an employee of the Louisville & Nashville Railroad Company for more than forty years, and was a division superintendent when he was retired on a pension in 1922. At the time of his death he was receiving retirement pay in the sum of $146.01 each month. The Court said: "But, say appellants, the proof as to the pension received by the decedent was incompetent and afforded the jury a false basis on which to rest their verdict. The precise question has never been decided by this court, and there is a dearth of authority on the subject. The decedent had earned the pension by his services in the past, and, under such circumstances, it is more reasonable to believe that a pension will continue until the pensioner's death than to believe that any salary or wages being earned by a man of advanced years will continue until his death. That a workman is earning wages at the time of his death is a circumstance to be considered by the jury in fixing the amount of damages, but it is only one element and must be considered in connection with other pertinent facts. *West Kentucky Coal Company v. Shoulder's Adm'r.*, 234 Ky. 427, 28 S.W. 2d 479. We think a pension, especially a type such as the one received by the decedent in this case which very probably will continue until the recipient's death, is a proper element to be considered by the jury in arriving at a verdict in an action brought for damages for the death of a person by tortious act pursuant to Kentucky Statutes, § 6, K.R.S. 411.130. Such a pension is a substitute for earning power. It follows that the court did not err in admitting evidence concerning the decedent's pension."

In the case of *Bridges v. Charlotte,* 221 N.C. 472, 20 S.E. 2d 825, it was held that payments from a retirement fund to teachers after they had ceased to serve, were not offensive to Article I, Section 7, of our State Constitution, in that they were regarded as in the nature of delayed compensation for public services rendered or delayed payments of salary.

Certainly, plaintiff's testate through long years of labor, earned everything paid to him by the Railroad Retirement Board and everything that would have been paid to him had his life expectancy not been cut short by his wrongful death.

In our opinion, the facts compel the conclusion that the plaintiff has suffered a pecuniary loss that is fixed and certain, less the reasonable personal living expenses which in all probability plaintiff's testate would have expended for his own support and maintenance had he lived out his expectancy.

We hold, therefore, that the admission of the evidence complained of was competent, and this assignment of error is overruled as to both defendants.

It is not intended that this opinion shall alter, modify or overrule any of our previous opinions dealing with the measure of damages for wrongful death. The fact is, in this case, we are confronted with a factual situation not heretofore presented to this Court. However, we are constrained to hold that our wrongful death statute includes pecuniary loss of the character involved in this case.

There are numerous other assignments of error, but in our opinion there were no prejudicial errors committed in the trial below that would justify or warrant the awarding of a new trial.

In the trial below we find no error in law.

No error.

STATE v. BEULA ROGERS
AND
STATE v. EVA FOSTER.

(Filed 18 May, 1960.)

1. Criminal Law § 98—

While the probative weight of legally sufficient proof is for the jury, the sufficiency of proof in law is for the court.

2. Criminal Law § 101—

Circumstantial evidence is sufficient to be submitted to the jury if it tends to prove the fact in issue or reasonably conduces to such conclusion as a fairly logical and legitimate deduction, and does not merely raise a suspicion or conjecture of guilt.

3. Same

In passing upon motion for judgment as of nonsuit in a criminal prosecution, the evidence must be considered in the light most favorable to the State, and it is entitled to every intendment upon the evidence and every reasonable inference to be drawn therefrom.

4. Same—

On motion to nonsuit, only the evidence favorable to the State will be considered, and contradictions and discrepancies, even in the State's evidence, do not warrant nonsuit.

5. Intoxicating Liquor § 5—

The possession by an individual of intoxicating liquor for the purpose of sale is unlawful in this State.

6. Intoxicating Liquor § 6—

The possession of more than one gallon of intoxicating liquor at any one time, whether in one or more places, and whether actual or constructive, is *prima facie* evidence of possession for the purpose of sale. G.S. 18-32.

7. Intoxicating Liquor § 13c—

Evidence tending to show that defendants jointly occupied an apartment and that more than two and one-half gallons of taxpaid liquor was found in the apartment and in the car in which they were riding, together with other circumstantial evidence, *is held* sufficient to be submitted to the jury as to each defendant on the charges of unlawful possession of intoxicating liquor and possession of liquor for the purpose of sale.

8. Criminal Law § 85—

The introduction by the State of exculpating declarations of a defendant does not preclude the State from showing that the facts are otherwise.

9. Criminal Law § 101—

The fact that substantive evidence offered by the State is conflicting, some of the evidence tending to inculpate and some tending to exculpate defendant, does not warrant nonsuit.

APPEAL by defendants Beula Rogers and Eva Foster, respectively, from *Preyer, J.*, at November 29, 1959 Criminal Term, of GUILFORD—Greensboro Division.

Criminal prosecutions upon separate warrants issued out of Municipal-County Court, Criminal Division of Guilford County, (I) charging each defendant separately with (1) unlawful possession, and (2) possession for purpose of sale five and one-half pints of taxpaid whiskey at 413 O. Henry Boulevard in Greensboro, N. C., and (II) charging each defendant separately with possession for the purpose of sale of two gallons of taxpaid whiskey, and transporting same from place to place against the statute in such case made and provided,—heard and tried upon original warrants in Superior Court upon appeal thereto from judgments of Municipal-County Court, Criminal Division.

And upon trial in Superior Court the State offered evidence substantially as follows:

Officer R. W. Steele as witness for the State testified in pertinent part: " * * * On June 6, 1959 * * * I had occasion to see Eva Alice Foster and Beula Thompson Rogers. I was in car with Officer Meadowbrook and Officer Hart was in car with Officer Ledford. We had secured two search warrants for a Buick automobile and for an apartment, and went to the Perkins Street area. Officer Meadowbrook and I were sitting on Gillespie Street, and the other car was at another location. We were waiting for a 1953 red and black Buick automobile with license AC 2580 to arrive at apartment 6 * * * and waited for them from 8 o'clock until 10:30, at which time the car came * * * and turned into the apartment. We proceeded behind the car * * * and * * * stopped behind it. I got out and read the search warrant to Eva Foster, who was driving the car. Whereupon she asked me 'When do I have to come to court?' * * * When I asked her for the keys to the trunk she stated that she didn't have the key to the trunk, only the switch key * * * Officer Meadowbrook asked her for the switch key * * * and she replied that she did not have that. Beula Rogers in the car with her, and there was no one else in the car. On the rear floorboard of the car I observed a sack containing eight pints of whiskey and a 50-pound bag of crushed ice * * * After the conversation I just related and the finding of the paper sack, Beula Rogers said that the contents of the sack were hers. I asked Eva about the key again, and she stated that the key was left with a

mechanic when she had some work done on the car * * * We told her we had a search warrant and would have to go into the car. Whereupon she stated that one of the neighbors in another apartment kept the key to the car. She went to this door and knocked, but no one came. Then she said 'I believe I have the key under this bucket,' and bent over and came up with the key in her hand. We went back to the car, from which Officer Meadowbrook had removed the rear seat and was taking a sack out of the trunk * * * This sack which contained eight pints of whiskey Officer Meadowbrook was taking * * * from the trunk * * *."

And the witness continued: "Beula stated to Eva 'I thought you took all of the liquor out of the trunk of the car.' We opened the trunk of the car with the key and found other packages, including groceries * * * I then stated that we had a search warrant for the apartment and wanted to go in. They said this was okay with them, whereupon we went to the apartment * * * Officer Meadowbrook found five and half pints of whiskey in the house * * * It was in one of the bedrooms * * * The whiskey was in pint bottles * * *."

And the witness continued: "Eva Foster was questioned and denied living at this address. In searching the house I found a set of keys, car keys, a house key, that type of key, with a key chain with identification on it which read 'Eva Alice Foster, 413 O. Henry Boulevard, Apartment 6.' Officer Meadowbrook showed me a light bill, electric bill, 'Eva Alice Foster, 413 O. Henry Boulevard, Apartment 6' on it. Eva Foster saw this and was asked about the keys and light bill. She stated that the keys were hers and the light bill was in her name. Beula Rogers first stated that Eva was helping her out, but later stated that they were sharing expenses at the apartment * * *."

And on cross-examination the witness testified: " * * * Mrs. Rogers said the sack of liquor and pint of gin on the floorboard was hers. I believe she also told me the liquor and gin found in the house was hers * * *."

On re-direct examination the witness testified: "* * * The whiskey from the floorboard of the car was in one sack. That in the trunk was in another sack. That in the house was not in a sack but was placed in a sack."

Also the testimony of Officer Steele tends to show that all of the whiskey was introduced in evidence, and that comparing same with numbering system utilized at the ABC stores in Greensboro part of the whiskey found in the apartment had numbers which were in sequence with numbers found on the whiskey in the trunk of the car,—that some of the corresponding numbers were bought on June 5 and others on June 6.

Officer J. J. Hart as witness for the State testified: "* * * the sack from the trunk * * * contained eight pints of taxpaid whiskey. The sacks were taken into the house * * * I was standing there with Beula Rogers. That was the sack that was on the floorboard. It was on the ground by me and Beula Rogers. Beula Rogers stated that that was her whiskey * * * We went into the house and there were five and a half pints found in the house. Beula Rogers and Eva Foster were in the apartment where the apartment search warrant was read. When we searched, Officer Meadowbrook found five and a half pints of whiskey there. On the table was one small drink glass that had the smell of whiskey in it or some alcoholic beverage. There was another glass sitting there and there were six glasses in the sink. They were small, approximately three or four-ounce glasses. The sink was stopped up, with water in it, and six glasses in it. The five and a half pints were found in the bedroom. Beula stated that was her whiskey in the house. Eva contended she did not live there. We asked why we had seen her there on numerous occasions then, and she stated that she was helping Beula out. She wasn't working then * * * I asked her about the light bill in Eva Foster's name and she said she didn't know, that she just put it in her name to help out. There were other statements there with Beula Rogers and also with Eva Foster there. The telephone was listed in Eva Foster's name, and also the key chain with the address 'Eva Foster, 413 O. Henry Boulevard.' Eva Foster stated that she lived with her father at 1502 E. Market Street * * *."

Then on cross-examination Officer Hart continued his testimony: "* * * Miss Foster told me that the liquor in the back (trunk) of the car was hers, and that's all she had * * * Mrs. Rogers * * * stated, when it was brought out of the trunk: 'I thought you got all of the whiskey out of there.' Mrs. Rogers said that, and she is the one claiming the liquor on the floorboard between the two seats. I had a conversation with Miss Foster and Mrs. Rogers about the light bill and phone bill being in Eva Foster's name. Eva stated that she didn't live there, that she lived with her daddy, a preacher * * * she stated that she was just helping her out * * * Neither of them mentioned * * * At the time the whiskey was seized there was no question there that the whiskey numbers in the trunk of the car corresponded with the numbers in the house also at the time of the arrest * * * the numbers in the trunk of the automobile did run with the numbers in the house at that time. Mrs. Rogers said she got the whiskey in the floorboard of the car and put it there, and that it was hers * * *."

The State rested, and counsel for defendants moved for judgment as of nonsuit. The motion was denied. Defendants excepted.

Defendant's Evidence: Rev. J. O. Foster, father of Eva, testified, summarily stated: "* * * In June of this year when she was arrested with Mrs. Rogers in this case, she lived nowhere in particular but at my house * * *."

And on cross-examination he stated: "Eva will be 35 years old her next birthday * * *. Yes, I knew that she was staying over at Beula Rogers sometimes * * * I did not know Beula Rogers before my daughter started going with her and staying over there at the apartment. Yes, the phone was listed in her name over there so I could get her when I wanted to. She did not have a phone listed at my house, as far as I know. I've got three phones in my house * * * Yes, she stayed over there (at the apartment) as long as she wanted to * * * Yes, she was over there enough so that I put a telephone over there so I could get in touch with her * * * she had two cars."

And defendant Eva Foster as witness for defendants testified in pertinent part, briefly stated: "* * * On June 6th, 1959, I was in an automobile accompanied by Mrs. Rogers when the police came down there * * * And I had eight pints of bourbon in the trunk of my car * * * I didn't have any other brands in that sack * * * I did not know she (Mrs. Rogers) had put any whiskey in my car that night, but I had a gallon of liquor in the trunk of the car. I knew it was in there. I told Mrs. Rogers, in front of the policemen that I wished she had told me * * * I did not have the liquor in the trunk of my car for the purpose of selling it. * * * I told the officers * * * due to the fact that she (Mrs. Rogers) had done me some favors, I thought it was my duty, since I was able to get the phone, that I get it— she is my friend. Some of my father's money might have put the phone in over there * * * but he didn't put the phone in. The light bill was the same * * * The officers * * * I told them I was just doing that just to help her out * * * I didn't buy any of the whiskey in the apartment."

Defendant Beula Rogers testified: "* * * The five full bottles and the half bottle in my apartment No. 6 on O. Henry Boulevard were mine— my individual liquor. The liquor I bought that evening and put in the car didn't belong to me at all * * * Yes, I had five and a half pints of some kind of beverage in my apartment. Yes, that was mine. Yes, I had eight pints in the sack in the car. I said I had five and a half pints for my own personal use, to do whatever I wanted to do. * * * The apartment was in my name. The phone was in Miss Foster's name, both of us. My name was also in the telephone directory, but it was in her name. The light bill was in Miss Foster's name The reason for this was, as she said, my credit wasn't good * * *."

And the record shows that in Superior Court the cases were submitted to the jury under the charge of the court, and the jury re-

turned verdicts of guilty as charged in each case. And upon the coming in of verdicts, the defendants, through their counsel of record, moved to set the same aside as being against the greater weight of the evidence, and for errors assigned and to be assigned. Motion denied and defendants except in apt time. Whereupon defendants moved in arrest of judgment. Motion denied and the defendants except.

In the two cases against each defendant as above set forth, consolidated for purpose of judgment, the court ordered judgment as to each that she "be confined in the Women's Division of State Prison for a period of 18 months. With the consent of defendant this judgment is suspended for a period of three years" on conditions stated.

Each defendant excepts and gives notice of appeal in open court and appeals to Supreme Court, and assigns error.

Attorney General Bruton, Assistant Attorney General H. Horton Rountree for the State.

T. Glenn Henderson, Robert S. Cahoon for defendants, appellants.

WINBORNE, C. J. First and foremost, defendants in their assignments of error contend that judgment as of nonsuit should have been allowed for that the evidence is insufficient to be submitted to the jury on the charges set forth in the several warrants on which defendants were tried.

The State, on the other hand, contends that the evidence, both direct and circumstantial, is full and complete and points unerringly to the guilt of the defendants.

In passing upon the legal sufficiency of the evidence so taken when the State relies upon circumstantial evidence for a conviction of a criminal offense, as in the present case, "the rule is that the facts established or advanced on the hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and to exclude any other reasonable hypothesis. *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868, and numerous other cases cited in *S. v. Rhodes, ante,* 438.

And while the probative weight of legally sufficient proof is for the jury, the sufficiency of proof in law is for the court. *S. v. Prince,* 182 N.C. 788, 108 S.E. 330.

So in considering a motion for judgment of nonsuit under G.S. 15-173, the general rule, as stated in *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730, and in numerous other cases before this Court, is that "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," approved in *S. v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431. See *S. v. Rhodes*, *supra*.

In this connection, it is settled law in this State that in passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State, and it is entitled to every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, and if there be any competent evidence to support the charge in the warrant, the case is one for the jury. Contradiction and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit. Ordinarily only evidence favorable to the State will be considered. See Index to North Carolina Reports, Criminal Law, Sec. 98—foot notes numbered 800 *et seq.*

Indeed in this State G.S. 18-32 declares it unlawful for any person to have or keep in possession for the purpose of sale, except as otherwise authorized by law, any spirituous liquor, and proof of the possession of more than one gallon of spirituous liquor, at any one time, whether in one or more places, shall constitute *prima facie* evidence of the violation of this section. And possession within the meaning of this statute, G.S. 18-32, may be either actual or constructive. See *S. v. Buchanan*, 233 N.C. 477, 64 S.E. 2d 549, and cases cited.

Applying these principles to the case in hand the Court is of opinion and holds that the evidence is sufficient to support verdict of guilty of the offenses with which defendants are charged.

Defendants contend that the evidence offered by the State exculpates defendants. In this respect, however, the State by offering evidence of declarations or admissions of a defendant is not precluded from showing that the facts are other than as related by them. And when the substantive evidence offered by the State is conflicting, some tending to inculpate and some tending to exculpate the defendant, it is sufficient to repel a demurrer thereto. See *S. v. Tolbert*, 240 N.C. 445, 82 S.E. 2d 201.

Indeed, there is evidence of facts and circumstances from which incriminating inferences may be drawn.

The matters to which other assignments relate have been considered, and in them prejudicial error is not made to appear.

Hence in the judgments from which defendants appeal there is found to be

No error.

GLADYS F. KING, ADMINISTRATOR OF THE ESTATE OF PAMELA FAYE KING, DECEASED v. HOOVER POWELL AND JAMES ADAM KING.

(Filed 18 May, 1960.)

1. Appeal and Error § 51—

In an action against two joint tort-feasors in which both defendants introduced evidence, the evidence offered by plaintiff and both defendants must be considered in the light most favorable to plaintiff in passing upon the exception of one of the defendants to the refusal of his motion to nonsuit, and only such defendant's motion made at the close of all of the evidence will be considered on his appeal.

2. Automoble § 17—

While a motorist approaching an intersection along a dominant highway may assume that a motorist traveling on the servient highway will stop as required by statute, and may rely on such assumption even to the last moment in the absence of anything which gives or should give him notice to the contrary, the motorist along the dominant highway is nevertheless required not to exceed a speed which is reasonable and prudent under the circumstances, to keep his vehicle under control, to keep a reasonably careful lookout, and to take such action as an ordinarily prudent person would take to avoid a collision when danger of collision is discovered or should have been discovered in the exercise of due care.

3. Same—

If a motorist along the dominant highway sees or should see, in the exercise of due care, that a motorist along the servient highway has entered the intersection without stopping as required by statute, and obtains such knowledge, actual or imputed, in time to have avoided a collision by the exercise of due care, his failure to do so is negligence regardless of whether such failure is due to his excessive speed or to his miscalculation that the other car would clear the intersection before contact.

4. Automobiles § 41g— Evidence held sufficient for jury on question of negligence of driver approaching intersection on dominant highway.

Evidence tending to show that a motorist along the dominant highway approached an intersection with a servient highway at excessive speed, that a car traveling along the servient highway entered the intersection when he was still 150 feet away, that he put on his brakes, that then, thinking the other car was going to get out of the way, he accelerated his speed, and that after he saw a collision was imminent he again applied his brakes, but was unable to stop before colliding with the other car, *is held* sufficient to take the question of his negligence to the jury, either on the basis that he was unable to avoid the collision because of excessive speed or on the basis that he failed to keep his car under proper control and maintain a proper lookout after he saw or should have seen that the car traveling the servient highway was not going to stop in obedience to the statute.

5. Automobiles § 39—

In this case, the physical facts at the scene of the collision at the intersection, including evidence as to the course, and position of, and damage to the respective cars after the collision, skid marks extending 50 feet from the point of impact along the dominant highway and evidence as to the violence of the impact, *is held* sufficient to support a finding that the driver traveling dominant highway was operating his car at an unlawful and excessive speed.

6. Automobiles § 35—

In this action against the drivers of the two cars involved in a collision at an intersection to recover for the death of a passenger in one of the cars, the complaint, liberally construed, *is held* not to allege negligence on the part of one of the drivers as the sole proximate cause of the collision, and the demurrer of the other driver is overruled, the complaint being sufficient to allege concurring negligence.

7. Appeal and Error § 24—

An exception to an excerpt from the charge, without exception to any omission or failure of the court to give further instructions, ordinarily does not challenge the omission of the court to charge further on the same or any other aspect of the case.

8. Trial § 31b—

Where the court adequately charges the jury on an aspect of the case arising upon the evidence, the failure of the court to give more explicit instructions in regard thereto will not be held for error in the absence of a special request, notwithstanding that appellant would have been entitled to have more explicit instructions given had request therefor been aptly made, especially when the more explicit instructions would have to be predicated upon the jury's rejection of appellant's own testimony.

9. Automobiles § 40: Evidence §§ 19, 58—

In an action against two joint tort-feasors it is competent for counsel of one of defendants to ask the other defendant on cross-examination for the purpose of impeachment whether such other defendant had not entered a plea of guilty to a charge of manslaughter arising out of the same accident, it appearing that the charge of manslaughter was based on every element necessary to establish such other defendant's actionable negligence.

APPEALS by defendants from *Fountain, Special J.*, December 7, 1959 Term, of FORSYTH.

The administratrix (mother) of Pamela Faye King instituted this action to recover damages for the death of her intestate, allegedly caused by the joint and concurrent negligence of the defendants.

The instant death of the intestate, a two-year old girl, was caused by a collision that occurred on Sunday, November 30, 1958, about 9:00 a.m., in Montgomery County, within the intersection of two

paved roads, between a 1957 Ford, operated by Hoover Powell, hereafter called Powell, and a 1957 Ford, operated by James Adam King, hereafter called King.

Answering, each defendant denied he was negligent and alleged the collision and the intestate's death were caused solely by the negligence of his codefendant.

The intersecting roads are N. C. Highway #731, nineteen feet wide and extending east-west, and the Troy-Pekin Road, eighteen feet wide and extending north-south. Powell, traveling east, approached the intersection on #731; and King traveling south, approached the intersection on the Troy-Pekin Road. The intestate was a passenger in the King car.

The intersection is referred to as the Troy-Pekin Crossroad and there are one or more buildings on each corner. A shed and Shell Service Station are located on the northwest corner. The Shell Service Station building is back from the north line of #731 a distance variously estimated as from 25 to 55 feet. In addition to said structures, there are trees and hedges on the northwest corner.

As King approached the intersection, these highway signs, on the right (west) side of Troy-Pekin Road, faced him: (1) A "Stop Ahead" sign approximately two-tenths of a mile north of the intersection, and (2) a "Stop" sign approximately seventy feet north of the intersection. As Powell approached the intersection, these highway signs, located on the right (south) side of #731, faced him: A diamond-shaped sign, with a cross on it, indicating a crossroad ahead; and beneath it, on the same post, a 12 x 12 yellow sign with black letters, with the words "35 MPH" on it. These signs, according to Powell's testimony, were some 400 feet west of the intersection where #731 makes a curve on a hill. East of this curve and hill, #731 extends straight and level to the intersection.

#731 is the dominant highway. Powell approached the intersection from King's right. As they approached the intersection, each operator's view of the other was obstructed to some extent by the structures, trees and hedges on or near the northwest corner of the intersection.

When he came to the intersection King did not come to a complete stop, but he slowed down and proceeded across #731. The right front end of the Powell car struck the right side of the King (two-door) car between the rear of the door and the bumper. The impact occurred some five feet south of the center line of #731 and near the center of the Troy-Pekin Road.

The court submitted, and the jury answered, the following issues: "1. Was the plaintiff's intestate killed by the negligence of Hoover

Powell, as alleged in the complaint? Answer: Yes. 2. Was the plaintiff's intestate killed by the negligence of James Adam King, as alleged in the complaint? Answer: Yes. 3. What damages, if any, is the plaintiff entitled to recover? Answer: $12,160.00."

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

Averitt & White for plaintiff, appellee.

Hudson, Ferrell, Carter, Petree & Stockton for defendant Powell, appellant.

Womble, Carlyle, Sandridge & Rice and H. Grady Barnhill, Jr., for defendant King, appellant.

BOBBIT, J.

1. Powell's appeal. The assignments of error brought forward by Powell in his brief are these: Assignments of error 1 and 2, directed to the denial of his motions for judgment of nonsuit; and assignments of error 3, 4, 5, 6, 7, 8, 11, 12 and 13, directed to designated portions of the court's instructions to the jury. Other assignments of error are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 562.

Evidence was offered by plaintiff, by Powell and by King. Hence, the only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. G.S. 1-183; *Murray v. Wyatt*, 245 N.C. 123, 128, 95 S.E. 2d 541. In determining its sufficiency for submission to the jury, the evidence, whether offered by plaintiff or by either of the defendants, must be considered in the light most favorable to plaintiff. *Murray v. Wyatt, supra.* Mindful of these well established rules, we consider the evidence tending to support plaintiff's allegations that negligence on the part of Powell was a concurring proximate cause of the collision and of her intestate's death.

With reference to G.S. 20-158(a), the legal principles stated below are well established.

". . . the operator of an automobile, traveling upon a designated main traveled or through highway and approaching an intersecting highway, is under no duty to anticipate that the operator of an automobile approaching on such intersecting highway will fail to stop as required by the statute, and, in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment, that the operator of the automobile on the intersecting highway will act in obedience to the statute, and stop before entering such designated highway." *Winborne, J. (now C. J.),* in *Hawes v. Refining Co.*, 236

N.C. 643, 650, 74 S.E. 2d 17; *Blalock v. Hart*, 239 N.C. 475, 80 S.E. 2d 373; *Caughron v. Walker*, 243 N.C. 153, 90 S.E. 2d 305; *Carr v. Lee*, 249 N.C. 712, 107 S.E. 2d 544.

In *Blalock v. Hart, supra, Johnson, J.*, after quoting the above excerpt from *Hawes v. Refining Co., supra*, continues: "However, the driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discoverd." *Caughron v. Walker, supra; Primm v. King*, 249 N.C. 228, 106 S.E. 2d 223; *Carr v. Lee, supra.*

It is noted that the trial judge fully and accurately instructed the jury as to these legal principles.

Plaintiff alleged, in substance, that Powell was negligent in that he failed to perform the legal obligations indicated in (1), (2), (3) and (4) of the above quotation from the opinion in *Blalock v. Hart, supra.*

Powell contends, on authority of *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808, and similar cases (see *Loving v. Whitton*, 241 N.C. 273, 84 S.E. 2d 919, and cases cited therein), that the evidence establishes the negligence of King as the sole proximate cause of the collision. If the only reasonable inference to be drawn from the evidence is that Powell, when he saw or should have seen King enter the intersection, could not have avoided the collision even if he were free from negligence in the respects alleged, the rationale of these decisions would apply. Suffice to say, this is not the only reasonable inference that may be drawn from the evidence.

The testimony most favorable to plaintiff tends to show that Powell approached the intersection in a 35 mile speed zone; that, shortly after the collision, he stated to the investigating State Highway Patrolman that "he was doing approximately 50 miles an hour . . . when he first saw Mr. King's car"; that two solid parallel lines of

skid marks, "roughly 6 feet apart," made by the Powell car, extended 50 feet west from the point of impact; and that the impact was of such violence as to cause three of the passengers in the King car, including the intestate, to be thrown therefrom. This testimony, together with evidence as to the course, position and damaged condition of each car after the collision, was sufficient to support a finding that Powell was operating his car at an unlawful and excessive speed.

Moreover, the evidence most favorable to plaintiff tends to show that the front part of the King car had crossed and was out of the intersection when the collision occurred, and that the Powell car was 100 feet or more away after the King car had actually entered the intersection. Too, a witness testified that Powell stated that he saw the King car when it was 150 feet away; that he put on his brakes; that, thinking the King car was going to get out of the way, he took his foot off the brakes and put it on the gas; and that, when he saw the King car was not going to get out of the way, he put his foot back on the brakes and tried to stop.

The evidence referred to above was sufficient in our opinion to support a finding by the jury that Powell, when he saw the King car enter the intersection, could and should have brought his car under control and stopped, if necessary, and avoided the collision, if he had operated his car at a lawful speed and had exercised reasonable care to have his car under proper control after he saw the King car in the intersection. If Powell was unable or failed to bring his car under control and stop, if necessary, and thereby avoid the collision, either because of his unlawful and excessive speed or because of his assumption that the King car would clear the intersection before he (Powell) reached it, or a combination of these factors, his negligence in respect thereof was a proximate cause of the collision.

For the reasons stated, Powell's assignment of error directed to the court's refusal to enter judgment of nonsuit is overruled.

In this Court, Powell demurred *ore tenus* to the complaint on the ground that the facts alleged show that King's negligence was the sole proximate cause of the collision. Emphasis is placed upon an allegation to the effect that Powell drove his car into the King car "immediately" after King had entered the intersection. However, when plaintiff's further allegations are considered, to wit, allegations to the effect that Powell, after he saw the King car in the intersection, had opportunity to avoid the collision, we think the word "immediately," when considered in the context of the entire complaint, must be construed as denoting a very short time rather than as denoting simultaneous events. The rule requiring that a pleading be liberally

construed in favor of the pleader would seem to require this interpretation. Moreover, the trial below was conducted on that theory. Hence, Powell's demurrer *ore tenus* is overruled.

In each of the assignments of error relating to the charge, Powell sets out the portion to which exception was taken. In each instance, the quoted excerpt is preceded by these words: "For that the trial court erred in charging the jury as follows, and in failing to declare and explain the law relative to proximate cause and insulated negligence as it related to the evidence in this case, . . ."

Examination of the instructions given in each of the quoted excerpts fails to disclose prejudicial error. Indeed, Powell's brief contains no contention that these instructions are erroneous. Rather, his contention is that they are inadequate in the respect indicated in his assignments of error.

"It is elemental that an exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case." *Peek v. Trust Co.*, 242 N.C. 1, 16, 86 S.E. 2d 745; *Rigsbee v. Perkins*, 242 N.C. 502, 503, 87 S.E. 2d 926; *S. v. Taylor*, 250 N.C. 363, 365, 108 S.E. 2d 629.

In the case on appeal, no exception was taken by Powell to any omission or failure of the court to give further instructions bearing on any aspect of the case. Thus, the portion of each assignment of error relating to the alleged inadequacy of the charge is not supported by exceptions.

Apart from the foregoing, a careful reading of the charge compels the conclusion that it is in substantial compliance with G.S. 1-180.

While Powell does not indicate with particularity what instructions he contends the court should have given, it would seem that Powell, had he so requested, would have been entitled to an explicit instruction to the effect that if, when he saw or should have seen the King car was not stopping but was entering the intersection, he (Powell) was then so close to the intersection that he could not have avoided the collision even if traveling at a lawful rate of speed, his unlawful or excessive speed, under such circumstances, would not be a proximate cause of the collision. Even so, the instructions given, although in less specific terms, seem sufficient to convey this idea to the jury. Indeed, this idea is very clearly embraced in the court's recital of this contention: "She (plaintiff) contends further that the defendant Powell, had he been driving at a reasonable and prudent rate of speed, could have stopped, and would have stopped, his automobile, if necessary, or at least would have driven it in such a manner,

had his speed been reasonable and prudent, to have avoided the collision."

It is noteworthy that Powell's testimony was that he slowed down from 50 to 35 miles per hour when he passed the "35 MPH" sign; that, as he approached the intersection, his speed was no greater than was reasonable and prudent under the conditions then existing; and that he was not put on notice that King would enter the intersection until he (Powell) had reached a point 50-75 feet from the intersection, at which time he was unable to avoid the collision. Under these circumstances, the failure of the court, in the absence of special request, to give more explicit instructions, such as that indicated in the preceding paragraph, predicated on the hypothesis that the jury would reject Powell's testimony and find that he was driving at an unlawful and excessive speed, is not deemed sufficient ground for a new trial.

2. King's appeal.

The only assignment of error brought forward in King's brief is directed to the competency of King's testimony, elicited on cross-examination by counsel for Powell, to the effect that King had entered a plea of guilty to a charge of manslaughter on account of the death of plaintiff's intestate. The court overruled the objection interposed by King to the question by which this testimony was elicited and the assignment of error is based on King's exception to this ruling.

In 18 A.L.R. 2d 1307, many decisions are cited in support of this statement: "In civil actions where one of the issues is the guilt of a person convicted of a criminal offense, or some fact necessarily involved in the determination of such guilt, the courts are agreed that it is proper to admit evidence of the person's plea of guilty to the criminal offense." For earlier decisions, see 31 A.L.R. 278.

It is noted that the criminal charge of manslaughter on account of the death of plaintiff's intestate included all elements necessary to establish King's actionable negligence. It is noted further that *the fact* of King's plea of guilty is established by his own testimony.

The court sustained King's objections to questions asked plaintiff's witnesses concerning the manslaughter charge and King's plea thereto. The question was allowed only on cross-examination of King. Unquestionably, it was competent, as bearing upon the credibility of King's testimony, for Powell's counsel to elicit the admission that King had pleaded guilty to the manslaughter charge. Whether competent (as an admission) as substantive evidence is not directly presented on this appeal.

After full consideration of each appeal, we find no error deemed

sufficiently prejudicial to justify a new trial. Hence, the verdict and judgment will not be disturbed.

Powell's appeal—no error.

King's appeal—no error.

RANSOM WILLIAMS AND WIFE, EDNA ORDERS WILLIAMS v. STATE HIGHWAY COMMISSION OF NORTH CAROLINA.

(Filed 18 May, 1960.)

1. Appeal and Error § 38—

Exceptions not set out in the brief are deemed abandoned.

2. Evidence § 28—

Testimony that a person had stated that petitioners had been damaged in a specified sum is hearsay and incompetent unless it comes within an exception to the hearsay rule.

3. Principal and Agent § 4—

The fact of agency cannot be proved by the extra-judicial declarations of the alleged agent.

4. Evidence § 31—

In order for a statement of an agent to be competent against the principal it must be shown that the statement was made within the scope of the agent's authority, and the burden of so showing is upon the party offering such testimony in evidence.

5. Eminent Domain § 6—

Where a witness has testified as to his opinion of the reasonable market value of the land immediately before and after the taking, it is competent for him to testify that in arriving at such opinion he took into consideration the highest and best use of which the land was susceptible, since such possible use is properly considered to the extent it affects the present market value of the property, and it being incumbent on the adverse party, if the witness had considered elements and followed methods that did not reflect the true market value of the property either before or after the taking, to so show upon cross-examination of the witness.

6. Same—

It is competent for a witness to testify as to his opinion of the highest and best use to which the land taken was susceptible.

7. Trial § 36—

The issues arise upon the pleadings only and no exact formula can be prescribed for the form of the issues, but the issues submitted will be held sufficient if they present to the jury proper inquiries as to all determinative facts in dispute and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly.

8. Eminent Domain § 11—

In a proceeding to recover compensation for the taking of land under the power of eminent domain, the court properly submits the issue as to what amount, if any, the petitioners are entitled to recover and properly instructs the jury thereon, and such charge will not be held for error as permitting the jury to answer the issue "nothing" in the face of petitioner's evidence of damages, since the questions of the sufficiency of the evidence and the determination of the amount of damages lie in the exclusive province of the jury.

9. Damages § 15—

The determination of the issue of damages lies in the exclusive province of the jury, and the court may not in its charge give an opinion of whether any damages must be awarded or the amount thereof.

10. Eminent Domain § 11—

An instruction that the measure of damages is the difference in the fair market value of the entire tract immediately before and the fair market value of the remaining land immediately after the taking, and that the items going to make up such difference embrace compensation for the land taken and compensation for injury to the remaining lands, to be offset by any special benefits resulting to the land, *is held* without error.

APPEAL by petitioners from *Farthing, J.*, at November 16, 1959 Special Civil Term, of BURKE.

Special Proceeding to recover compensation for the taking by respondent, under its right of eminent domain, of an easement of right of way over approximately 7 acres of a 45-acre tract of land owned by petitioners. The appropriation of the easement, which occurred on 1 March, 1957, was under Project No. 8.18121, Burke County, for the relocation and construction of a new highway designated U. S. No. 70, to be re-designated Interstate No. 40.

Petitioners' land is located 3 to 4 miles west of Morganton. The tract is south of a paved highway known as the Jamestown Road and fronts on this road for 689 feet. Several acres adjacent to the Jamestown Road and north of the appropriated section were planted in corn in 1958 or 1959. The remainder of the tract had been cultivated for hay or grain some 25 years or more previously, and had since grown up in young timber variously described as field pine, scrub pine, sycamore, ninebark, and scrub timber.

The new limited access highway runs in an east-west direction through the approximate center of petitioners' land, leaving around 19 acres in the northern portion and about the same amount in the southern portion. Petitioners have access to the southern portion by a service road built by respondent. In addition to damages brought about by the taking of the easement, petitioners alleged damages to the

remainder of the tract by the northern portion being cut off from the water supply available on the southern portion, by the construction of cuts and fills, by the diversion of surface waters, by the deposit of mud, silt and debris, and in other particulars. Respondent alleged that the construction of the new highway benefits the property, thereby enhancing its value and diminishing the damages.

Subsequent to the filing of the petition, a hearing was held before the Clerk of Superior Court, and commissioners were appointed to determine the amount of compensation. To the order entered by the Clerk approving the report of the commissioners, respondent excepted, and appealed therefrom to the Superior Court. Upon trial in Superior Court, the jury returned a verdict awarding petitioners $3,550.00 plus interest at 6% from 1 March, 1957.

From the judgment entered on the verdict, petitioners appeal to Supreme Court and assign error.

Simpson & Simpson for plaintiffs, appellants.

Attorney General Bruton, Assistant Attorney General Kenneth Wooten, Jr., G. Andrew Jones, Patton & Ervin for respondent, appellee.

WINBORNE, C. J. At the outset it is noted that Exceptions 1, 2, 9, 29 and 30 were expressly abandoned by petitioners, and Exceptions 5, 6, 7, 10 and 32 not having been set out in appellants' brief, are taken as abandoned by them. *Harmon v. Harmon,* 245 N.C. 83, 95 S.E. 2d 355; *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658.

Nevertheless appellants assign as error the exclusion of certain testimony offered by them relating to a Mr. Cabe, an alleged agent of respondent. Part of this testimony consisted of observations of and conversations with Mr. Cabe by petitioner Ransom Williams in the course of settlement negotiations. Neither the purpose for which the excluded testimony was offered, nor the asserted basis of its admissibility are stated in the record. It is apparent that petitioners wanted to place before the jury statements allegedly made by Mr. Cabe to petitioners during the course of negotiations, that "they have damaged you $15,000," and "if he was going to sue, he would sue for $15,000." The statements were hearsay and therefore inadmissible unless within an exception to the hearsay rule. The extra-judicial declarations were not competent to prove the agency of the declarant. *Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817; *Sledge v. Wagoner,* 250 N.C. 559, 109 S.E. 2d 180. Even if it be conceded that declarant was respondent's agent, there was no showing that the quoted statements

were within the scope of authority of declarant, and the burden of so showing was on petitioners. *Fanelty v. Jewelers*, 230 N.C. 694, 55 S.E. 2d 493; *Sledge v. Wagoner, supra.*

Assignments of error, based on exceptions taken, are made to the admission of testimony of two of respondent's witnesses relating to damages suffered by petitioners. Witness Mull, on direct examination, after testifying in detail as to his qualifications and his observations of the land in question, and after giving his opinion as to the reasonably fair market value of the land before and after the taking, was asked to describe how he arrived at his opinion of the difference. He replied: "By breaking the land down to its highest and best use, I computed what would be approximately 3½ acres of frontage along the Jamestown Road which I figured at $1,000 an acre * * *." Petitioners objected to "highest and best use". In *Light Co. v. Moss*, 220 N.C. 200, 17 S.E. 2d 10, this Court said: "In estimating its value all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner." This principle is cited in *Gallimore v. Highway Commission*, 241 N.C. 350, 85 S.E. 2d 392, and *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219. "The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered not as a measure of value but to the full extent that such prospect or demand for such use affected the market value at the time respondents were deprived of their (property)." *Barnes v. Highway Commission, supra*, quoting *Light Co. v. Moss, supra.* The witness had already testified as to his opinion as to the reasonably fair market value of the land. The phrase "highest and best use" was used by witness to show one of the factors considered in arriving at his opinion of the market value. As stated in *Highway Commission v. Privett*, 246 N.C. 501, 99 S.E. 2d 61: "Cross-examination was the available medium whereby the weight of the testimony might be impaired by showing that the witness 'considered elements and followed methods' that did not reflect fair market value either before or after the taking." The highest and best use was certainly one of the capabilities of the property. It was one of the uses to which the land might be applied, or for which it was adapted, and one which affected its value. Indeed, the highest and best use, the highest and most valuable use, the highest and most profitable use, or the most advantageous use are generally accepted factors in determining the market value of land taken in condemna-

tion proceedings. *U. S. v. Toronto, Hamilton & Buffalo Nav. Co.*, 70 S. Ct. 217, 338 U.S. 396; *Olson v. United States*, 292 U.S. 246; *People v. Ocean Shore R. R.*, 32 Cal. 2d 406, 196 P. 2d 570; *City of Chicago v. Harbecke*, 409 Ill., 425, 100 N.E. 2d 616; *Steifer v. City of Kansas City*, 175 Kan. 794, 267 P. 2d 474; *Louisiana Power & Light Co. v. Simmons*, 229 La. 165, 85 So. 2d 251; *Airports Commission v. Hedberg-Freidheim Co.*, 226 Minn. 282, 32 N.W. 2d 569; *Hazard Lewis Farms, Inc. v. State*, 149 N.Y.S. 2d 658, 1 A.D. 2d 923; *Moyle v. Salt Lake City*, 111 Utah 201, 176 P. 2d 882; *Appalachian Elec. Power Co. v. Gorman*, 191 Va. 344, 61 S.E. 2d 33. The evidence was properly admitted.

Also the witness Schiflet, after testifying on direct examination as to his opinion of the reasonable market value of the land before and after the taking, and after testifying on cross-examination that he considered the 3½ acres bordering the Jamestown Road for building purposes, was asked on re-direct examination his opinion as to what was the highest and best use of that particular part of the property. Over objection, he was allowed to answer "for building lots". Appellants contend that the highest and best use is not the criteria to be used in placing a value on condemned property unless such potential use is so reasonably probable or so reasonably immediate as to affect the reasonable market value of the land. That a portion of the land was adaptable to building lots, and that such use was so reasonably probable as to affect the market value is amply supported by petitioners' pleadings, and by the evidence. The objection was properly overruled.

Moreover, petitioners except to the issue submitted to the jury. In this connection "It is well settled that issues arise upon the pleadings only and not upon the evidential facts." *Darroch v. Johnson*, 250 N.C. 307, 108 S.E. 2d 589. "No exact formula is prescribed for the settlement of issues." *Pruett v. Pruett*, 247 N.C. 13, 100 S.E. 2d 296. "Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly." *Hill v. Young*, 217 N.C. 114, 6 S.E. 2d 830; *Cherry v. Andrews*, 231 N.C. 261, 56 S.E. 2d 703; *Pruett v. Pruett, supra; Whiteside v. McCarson*, 250 N.C. 673, 110 S.E. 2d 295. The issue submitted in the instant case complies with the established principles quoted above. The exception thereto is without merit.

Lastly, the remaining assignments of error are directed to the court's charge to the jury on the element of damages. Error is assigned on the basis that the court instructed the jury that it might bring in a

verdict answering the issue "Nothing", when all the evidence tended to show that petitioners were damaged in some amount.

"The general rules of evidence apply as to the weight and sufficiency of the evidence in condemnation proceedings in respect of the compensation to be awarded or allowed to owner, including the value of the property taken or condemned and including the injuries or damages to the property not taken. Although jurors or commissioners cannot disregard the evidence which the parties produce in respect of the compensation to be awarded, including the value of property taken and injuries to property not taken, they are not bound by the opinions or estimates of witnesses." 29 C.J.S. Eminent Domain, sec. 275. "The question of the measure of damages is for the court, but where an issue is made by the pleadings and is tried by a jury the estimation and determination of the amount of the injury sustained is usually a question of fact for their sound and reasonable discretion, and they usually assess the damages if any are to be awarded." 25 C.J.S. Damages, sec. 176, p. 857.

The determination of the amount of damages is the province of the jury. *Lowe v. Hall,* 227 N.C. 541, 42 S.E. 2d 670. "* * * It is the task of the jury alone to determine the facts of the case from the evidence adduced; and * * * 'no judge, in giving a charge to the petit jury * * * shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury.'" *S. v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173; G.S. 1-180. In the instant case, the questions of the sufficiency of the evidence, and of the amount of damages, if any, to which petitioners were entitled were properly submitted for the jury's determination.

The basic statement of law given by the court, and the one around which the remaining instructions were built was as follows:

"But, when a governmental agency takes or appropriates private property for public use, the law imposes upon it a correlated duty to make just compensation to the owner of the property appropriated. When private property is taken for public use, just compensation must be paid. Where by compulsory process and for the public good the State or any of its agencies invades and takes the property of its citizens in exercise of its highest prerogative in respect to property, it should pay them full compensation. The compensation must be full and complete and include everything which affects the value of the property taken and in relation to the entire property affected. The petitioners are entitled to be put in as good position pecuniarily as if the property had not been taken." * * * "And I instruct you where only a part of a tract of land is appropriated by the State Highway

Commission for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway." Petitioners except to the instructions contained in the last two sentences.

That this is a correct statement of the applicable law is too well established to require further elaboration. See *Highway Commission v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314; *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479; *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778; *Statesville v. Anderson,* 245 N.C. 208, 95 S.E. 2d 591; *Robinson v. Highway Commission,* 249 N.C. 120, 105 S.E. 2d 287; *Taylor Co. v. Highway Commission,* 250 N.C. 533, 109 S.E. 2d 243. The portion of the charge excepted to above was repeated in the concluding portion of the court's charge. The intervening portions of the charge in which the court instructed the jury as to how it should apply the rule stated above for the measure of damages are fair and correct, and no prejudicial error appears therein.

Hence in the judgment from which appeal is taken there is

No error.

SAMUEL R. PRUETT, JR. v. WILLIAM McK. INMAN.

(Filed 18 May, 1960.)

1. Negligence § 11—

Contributory negligence *ex vi termini* presupposes negligence on the part of the defendant.

2. Automobiles § 17—

Where one highway, running north and south, is intersected by another highway from the east, forming a "T" intersection. and ninety feet further north the intersecting highway leads off again to the west, forming another "T" intersection, each entrance of the intersecting highway is a separate intersection. G.S. 20-38(1).

3. Automobiles § 18—

G.S. 20-150(c) prohibits a motorist from passing another at an intersection only if the intersection is designated and marked by the State Highway Commission by appropriate signs, or is a street intersection in a city or town.

4. Negligence § 21—

Contributory negligence is an affirmative defense which defendant must plead and prove. G.S. 1-139.

5. Negligence § 26—

A defendant may avail himself of his plea of contributory negligence by motion for compulsory nonsuit when the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can reasonably be drawn therefrom.

6. Same—

Nonsuit on the defense of contributory negligence is proper only when plaintiff proves himself out of court, and nonsuit may not be entered on this ground if it is necessary to rely in any aspect upon defendant's evidence, notwithstanding that defendant's evidence on such aspect is not in conflict with plaintiff's evidence but tends to explain or clarify it.

7. Same—

Plaintiff's evidence must be considered in the light most favorable to him in passing upon defendant's motion to nonsuit on the ground of contributory negligence, and contradictions in plaintiff's evidence will be resolved in plaintiff's favor in passing upon such motion.

8. Automobiles § 42e— Plaintiff's evidence held not to show that he attempted to pass at intersection, and nonsuit for contributory negligence was erroneous.

Plaintiff's evidence tended to show that he was traveling north on a highway which was intersected by another highway from the east, and that ninety feet further north the intersecting highway again led off to the west, that defendant's car was preceding him on the highway at a very slow speed, apparently intending to stop, that plaintiff approached the eastern intersection at 40 m.p.h., blew his horn and started to pass defendant's car, and that defendant's car suddenly turned left when he had gotten to a point about six feet from the western intersection, resulting in a collision of the cars and the resultant damage. Plaintiff's evidence did not disclose that the intersection had been marked by the State Highway Commission by appropriate signs and did not disclose that the intersection was within the corporate limits of a municipality. *Held:* Nonsuit on the ground of contributory negligence was erroneously entered, notwithstanding the defendant's evidence that the intersection was within the limits of a municipality, since on such motion only plaintiff's evidence should be considered, and since plaintiff's evidence does not compel the inference that his negligence contributed as a proximate cause to his injury and damage.

9. Negligence § 23—

Proximate cause is ordinarily to be determined by the jury as a fact from the attendant circumstances, and conflicting inferences of causation arising from the evidence carry the issue to the jury.

APPEAL by plaintiff from *Johnston, J.*, November 1959 Term, of FORSYTH.

Civil action to recover compensation for personal injuries and damages to an automobile, in which defendant pleads contributory negligence of plaintiff and a counterclaim for damages to his automobile.

Plaintiff and defendant offered evidence. At the close of all the evidence the trial court allowed the defendant's motion for judgment of nonsuit, and with the consent of defendant nonsuited his counterclaim.

From the judgment of involuntary nonsuit, plaintiff appeals.

Deal, Hutchins and Minor for plaintiff, appellant.

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

PARKER, J. Plaintiff's evidence tends to show these facts: Highway 52 bypasses the business district of the town of Pilot Mountain: Highway 52-A goes through the business district of the town. At this point Highway 52 runs in a general north and south direction. Highway 268 enters Highway 52 from the east at about right angles forming a T intersection, Highway 52 being the top of the T. Ninety feet north of this intersection Highway 268 intersects Highway 52 from the west forming another T intersection. Highway 52 is twenty-four feet wide, and Highway 268 is eighteen feet wide.

On 4 September 1958 there were no speed signs or slow signs on Highway 52 from where it separates from Highway 52-A to the point of collision hereinafter referred to, and no crossroads signs at any point south of either of the intersections of Highway 268. On this bypass at that time there was no sign stating it was within the town limits of Pilot Mountain. About twenty or thirty feet from the northeast corner of the eastern intersection of Highway 268 with Highway 52 there was at that time a small sign erected looking like a Z, indicating Highway 52 going straight ahead and Highway 268 farther down Highway 52 going off to the left or west. This was the only intersection sign there at this time. "It was open highway, apparently, with the State 55 mile speed limit."

About 8:00 o'clock a.m. on 4 September 1958 plaintiff, going from his home in Forsyth County to his work at Mt. Airy, was driving his 1952 Cadillac automobile north on Highway 52. He was driving at a speed of about 40 miles an hour as he approached the intersection of Highway 268 from the east with Highway 52, and did not slow down. When he first saw defendant's automobile, it was three or four or maybe five car lengths in front of him, and travelling north on

Highway 52 on its right side of the road at a speed of five or ten miles an hour, and appeared to be slowing down and planning to stop. At that time he was two or three car lengths south of the eastern intersection he was approaching. Defendant gave no signal at all. When he was right at the eastern intersection, he blew his horn, and started around defendant's automobile. "I say I was going forty miles an hour coming up to the intersection, and when I got to 268 and saw his car three to four car lengths ahead of me, I didn't slow up but I blew my horn, because he was proceeding to stop, apparently. Mr. Inman did not stop; he never stopped; he made a left turn without warning; he made a left turn into the northern entrance of 268." When his automobile was about even with the left front door of defendant's automobile, defendant's automobile turned very sharply to the left, and the automobiles collided when defendant's automobile was about six feet from the southwest corner of the intersection of Highway 268 from the west with Highway 52. In order to avoid defendant's automobile and to get out of his way he put his automobile in passing gear and travelling very rapidly drove off of Highway 52, crossed Highway 268, entered on a lawn or yard of a house, knocked down a tree in the yard, proceeded on, and stopped when his automobile struck a large pine tree. The lawn was wet with dew, slick as glass, and "I tried to drive out, rather than to brake out, and couldn't get out; there was a tree in the way." The greater part of damage to his automobile was caused by hitting the tree. On cross-examination plaintiff put an X mark on a photograph marked defendant's Exhibit #5 as to where the collision occurred, which X mark is at the southwest wide entrance of Highway 268 into Highway 52.

Plaintiff was thoroughly familiar with the highway and road conditions by reason of his travelling on it going to his work in Mt. Airy, though he had not particularly noticed the two intersections of Highway 268. At the time of the collision there were no other automobiles on the bypass.

The Complaint alleges that *near* the town of Pilot Mountain Highway 268 intersects Highway 52, and the answer admits this averment. During the direct examination of the chief of police of the town of Pilot Mountain, first witness for defendant, he testified that the collision occurred "at the intersection of 268 and the bypass, 52 Highway, in the city limits of Pilot Mountain." Whereupon, the court allowed defendant to file an amendment to his answer to the effect that the collision occurred in the intersection of Highway 52 and Highway 268, an intersection of streets within the town limits of Pilot Mountain.

Defendant's evidence does not show whether the scene of the collision was taken in the corporate limits of Pilot Mountain, when the town limits were last extended in January 1958 or before. C. W. Thomas, a commissioner of Pilot Mountain and a witness for defendant, testified during the trial there is a sign marked "Pilot Mountain" on the bypass, not "City Limits of Pilot Mountain," but "I wouldn't say for a fact that that sign was not there in September 1958, or was there in September 1958, but I know it is there now."

Defendant states in his brief: "It is respectfully submitted that the demurrer to the evidence should be sustained upon the ground of contributory negligence of the plaintiff." The term "contributory negligence" *ex vi termini* implies or presupposes negligence on the part of the defendant. *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163. Defendant's contention is this: Plaintiff was contributorily negligent as a matter of law for that, one, he was attempting to pass defendant at an intersection in violation of G.S. 20-150(c), two, he failed to drive his automobile on his right half of the highway in violation of G.S. 20-147, and three, he failed to decrease his speed when approaching and crossing an intersection in violation of G.S. 20-141(c).

Highway 268 enters Highway 52 from the east, and ninety feet to the north it enters Highway 52 from the west. By virtue of G.S. 20-38(1) each entrance is regarded as a separate intersection. According to the plaintiff's evidence the only intersection sign on Highway 52 was a small sign looking like a Z situate about 20 or 30 feet from the northeast corner of the eastern intersection of Highway 268 with Highway 52 and some 60 feet from the northern intersection of the same roads. G.S. 20-150(c) prohibits the driver of an automobile from overtaking and passing another vehicle proceding in the same direction at an intersection of highways, unless permitted to do so by a traffic or police officer, but the statute specifically provides that "the words 'intersection of highway' shall be defined and limited to intersections designated and marked by the State Highway Commission by appropriate signs, and street intersections in cities and towns." *Adams v. Godwin*, 252 N.C. 471, 114 S.E. 2d 76. Defendant states in his brief: "The defendant contends, however, that the provision of the statute as to signs is inapplicable to the case at bar, since the collision occurred at a street intersection in the town of Pilot Mountain. G.S. 20-150(c). It is respectively submitted that the application of G.S. 20-150(c) is not conditioned upon the marking of town or city limits."

Plaintiff's evidence does not show that the scene of the collision is within the corporate limits of the town of Pilot Mountain: that is shown by defendant's evidence. Defendant contends that this evi-

dence of his as to the scene of the collision should be considered by the court on the question as to whether or not plaintiff was guilty of contributory negligence as a matter of law, on the ground that it is not in conflict with plaintiff's evidence, and may be used to explain and make clear plaintiff's evidence. This contention is not tenable.

Contributory negligence is an affirmative defense which the defendant must plead and prove. G.S. 1-139. Nevertheless, the rule is firmly embedded in our adjective law that a defendant may avail himself of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under G.S. 1-183, when the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. *Bondurant v. Mastin*, 252 N.C. 190, 113 S.E. 2d 292; *Daughtry v. Cline*, 224 N.C. 381, 30 S.E. 2d 322, 154 A.L.R. 789; *Hayes v. Telegraph Co.*, 211 N.C. 192, 189 S.E. 499; *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601; *Elder v. R. R.*, 194 N.C. 617, 140 S.E. 298.

This Court said in *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307: "In ruling upon a motion for an involuntary judgment of nonsuit under the statute after all the evidence on both sides is in, the court may consider so much of the defendant's testimony as is favorable to the plaintiff or tends to clarify or explain evidence offered by the plaintiff not inconsistent therewith; but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by the plaintiff. (Citing authorities). But the court cannot allow a motion for judgment of nonsuit on the ground of contributory negligence on the part of the plaintiff in actions for personal injury or of the decedent in actions for wrongful death if it is necessary to rely either in whole or in part on testimony offered by the defense to sustain the plea of contributory negligence. (Citing authorities)."

"Only when plaintiff proves himself out of court is he to be nonsuited on the evidence of contributory negligence." *Lincoln v. R. R., supra.*

Plaintiff's evidence is sufficient to establish actionable negligence on defendant's part. This seems to be conceded by defendant. Defendant's contention that plaintiff was contributorily negligent as a matter of law necessitates an appraisal of his evidence in the light most favorable to him.

Plaintiff's evidence does not show that the western intersection of Highway 268 and Highway 52 is within the corporate limits of the town of Pilot Mountain. This being true, plaintiff's evidence does not compel the inference that he attempted to pass defendant's automobile

at a street intersection in a town or city, as prohibited by G.S. 20-150(c).

From the plaintiff's point of view, considering the evidence in the light most favorable to him, the factors of comparative speed and distance and of the intersections ninety feet apart, and of no speed or slow signs being on the side of the highway, and that when the plaintiff travelling at forty miles an hour was right at the eastern intersection of Highway 268 he blew his horn and started to pass defendant's automobile, who was a short distance ahead of him travelling five to ten miles an hour on his right side of the road and appeared to be slowing down and planning to stop, were such as to afford reasonable ground for the assumption that he could pass in safety before defendant's automobile apparently slowing down and planning to stop reached the intersection, and the inference is permissible that but for the unexpected action of defendant in suddenly turning to the left without any signal indicating a left turn, the collision about six feet from the southwest corner of the northern intersection would not have occurred. Conceding for the purpose of deciding the question before us that plaintiff's evidence shows negligence on his part, certainly, taking it in the light most favorable to him, it does not compel the inference that his negligence contributed as a proximate cause to his injury and damage. Though plaintiff on cross-examination placed the point of collision in the entrance to the intersection, on the motion for nonsuit, we take the evidence favorable to him as true, and resolve all conflict of his testimony in his favor. *Bundy v. Powell, supra.*

To be sure, defendant offered evidence tending to show that plaintiff rendered the collision inevitable by attempting to pass defendant's automobile at an intersection within the corporate limits of the town of Pilot Mountain. While this evidence, if accepted by a jury, would justify them in answering an issue of contributory negligence Yes, the evidence that the intersection was within the corporate limits of the town of Pilot Mountain comes from defendant and is not shown by plaintiff's evidence, and for that reason cannot be considered by the court on the question of whether plaintiff was contributorily negligent as a matter of law. *Insurance Co. v. Cline,* 238 N.C. 133, 76 S.E. 2d 374; *Bundy v. Powell, supra.*

What is the proximate cause of an injury is ordinarily a question for a jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury. *Howard v. Bingham,* 231 N.C. 420, 57

S.E. 2d 401; *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S. E. 2d 740.

This is a close case. We have no case in our Reports with similar facts. In our opinion, the instant case falls under the line of cases of *Howard v. Bingham, supra; Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538; *Insurance Co. v. Cline, supra; Adams v. Godwin, supra*, rather than of *Cole v. Lumber Co.*, 230 N.C. 616, 55 S.E. 2d 86; *Sheldon v. Childers*, 240 N.C. 449, 82 S.E. 2d 396; *Crotts v. Transportation Co.*, 246 N.C. 420, 98 S.E. 2d 502, relied on by defendant. See *Bennett v. Livingston*, 250 N.C. 586, 108 S.E. 2d 843.

We conclude that plaintiff has not proved himself out of court, and that his evidence was sufficient to withstand a motion to nonsuit. The judgment of involuntary nonsuit was improvidently entered.

Reversed.

BESSIE WALL BOWLING, PLAINTIFF v. JOSEPH WESLEY BOWLING, DEFENDANT.

(Filed 18 May, 1960.)

1. Appeal and Error § 1—

Where defendant admits that the lands in question were conveyed to him and plaintiff as husband and wife, and does not make any affirmative allegation of sole ownership by him and does not include in his tender of issues any issue relating to his sole ownership, his exception to the failure of the court to submit such issue will not be considered on appeal, since an appeal will be considered on the theory of trial in the lower court.

2. Husband and Wife § 14—

A conveyance to husband and wife creates an estate by the entireties in the absence of fraud or mistake or an agreement that she should hold in trust for him, even though she furnishes no consideration for the conveyance, since in such instance the law presumes a gift to her.

3. Same—

Evidence that land was conveyed to husband and wife by the uncle of the husband, that the land was paid for by income and rents from the land, without any evidence of an agreement that the wife should hold her interest in trust for the husband, is insufficient to raise the issue of the husband's sole ownership, the transaction being presumed a gift to the wife, clear, strong and convincing proof being necessary to establish a resulting trust against her.

4. Trial § 36—

The court is not required to submit an issue which does not arise upon the pleadings and is not supported by evidence.

5. Husband and Wife §§ 4, 17—

Upon the sale of lands held by entireties the proceeds become personalty and belong to the husband and wife as tenants in common, and although they have the right to dispose of the proceeds by contract *inter se* if they so desire, in the absence of such contract the wife's share remains her sole and separate estate. Constitution of N. C., Article X, section 6, G.S. 52-1.

6. Husband and Wife § 4: Trusts § 4b—

Where land held by the entireties is sold and the purchase price is made by checks payable to both husband and wife, and the wife endorses the checks and turns them over to her husband who endorses and cashes same and invests the proceeds in other property, a trust arises by operation of law in favor of the wife in the absence of evidence that she intended to make a gift of her share of the proceeds to him, and she is entitled to an accounting of the proceeds.

7. Trusts § 4c—

The fact that a beneficiary of a trust acquiesces in the investment of the trust funds does not support an inference or conclusion that she is estopped to assert her rights under the rule of trust pursuit.

8. Divorce and Alimony § 16—

Allegations and evidence to the effect that the husband separated himself from his wife and failed to provide her with necessary subsistence makes out a *prima facie* case for the recovery of alimony without divorce under G.S. 50-16.

9. Same—

The husband is under moral and legal duty to support the wife and, although the earnings and means of the wife are matters to be considered in determining the amount of alimony, the fact that the wife has property or means of her own does not relieve the husband of the duty to furnish her reasonable support according to his ability.

10. Same—

An instruction in an action for alimony without divorce that if the jury answered the issue in the affirmative the amount of alimony which the court would allow would be terminated by a subsequent divorce, must be held for prejudicial error, since a subsequent divorce would terminate the alimony only in certain instances, G.S. 50-11, and the instruction might leave the impression with the jury that a verdict for plaintiff would be less onerous for defendant than the law provides, and might influence them to return a verdict in plaintiff's favor on less evidence than they would have otherwise required.

APPEAL by defendant from *Hobgood, J.*, January 1960 Regular Civil Term, of WAKE.

Defendant and plaintiff are husband and wife.

Plaintiff's complaint states two causes of action.

(1) For alimony without divorce and attorneys fees. It is alleged that plaintiff and defendant were married 3 September 1950, that plaintiff has been a faithful and dutiful wife to defendant, and worked and applied all her earnings "to the joint expenses of maintaining a home for herself and for the defendant," that on or about 2 November 1958 defendant informed plaintiff that he was going to leave her, removed all his clothes and personal belongings from their home while she was absent, separated himself from her, has made only token payments for her support since leaving, and has refused to make adequate provision for her, and that he has an income sufficient to support the plaintiff in keeping with their station in life.

(2) For an accounting for funds of plaintiff held by defendant for her benefit under a resulting trust. It is alleged that plaintiff and defendant owned a farm as tenants by the entirety, they sold the farm and defendant used the net proceeds of $6,000.00 in setting up a dance studio in Wilson, N. C., defendant has sold the studio for $8,000.00 and refuses to account to plaintiff for her half of the proceeds.

Both plaintiff and defendant offered evidence at the trial.

The issues submitted and the jury's responses thereto are as follows:

> "1. Were the plaintiff and defendant married to each other, as alleged in the Complaint? Answer: Yes.
> "2. Did the defendant on 2 November 1958 wrongfully separate himself from plaintiff and thereafter fail to provide her with the necessary subsistence, according to his means and condition in life, until the date of the institution of this action on 24 November 1958? Answer: Yes.
> "3. Did the plaintiff entrust her one-half share of the net proceeds from the sale of said farm to the defendant? Answer: Yes.
> "4. Has the defendant failed to account to the plaintiff for her one-half share of the net proceeds from the sale of said farm? Answer: Yes.
> "5. If issue No. 4 is answered Yes then what amount of money is plaintiff entitled to recover from the defendant? Answer: $4,000.00."

The court entered judgment for plaintiff in the second cause of action in the sum of $4,000.00 with interest, and in the first cause of action decreed alimony of $80.00 per month and allowed attorneys fees of $300.00. Defendant appealed and assigned errors.

William Joslin for plaintiff.
Moore & Moore and Bailey and Dixon for defendant.

MOORE, J. We consider the causes of action in inverse order.

(1) The second cause of action — accounting for funds allegedly held by defendant in trust for plaintiff:

Defendant assigns as error the failure of the judge to submit an issue as to the true ownership of the farm which plaintiff alleges was owned by her and defendant, her husband, as tenants by the entirety. Defendant now contends that plaintiff owned no interest in the farm, that it was purchased from defendant's uncle and paid for by income and rents from the land.

It is alleged in the complaint and admitted in the answer "that the title to said property (farm) was taken in the name of Joseph Wesley Bowling and wife, Bessie Wall Bowling, as evidenced by deed recorded . . ." There is no affirmative allegation of sole ownership by defendant in his answer. At the outset of the trial, plaintiff and defendant stipulated: "C. N. Lawrence and wife, Mary B. Lawrence, executed a deed for a 99.7 acre farm to Joseph Wesley Bowling and wife, Bessie Wall Bowling; . . . and that the purchase price of said farm was $15,000.00" and "that Joseph Wesley Bowling and wife, Bessie Wall Bowling, executed a purchase money deed of trust . . . to J. Russell Nipper, Trustee for C. N. Lawrence and wife, Mary B. Lawrence, for the sum of $15,000.00 payable at the rate of $1,000.00 per year, with interest," and "that Joseph Wesley Bowling and wife, Bessie Wall Bowling, executed a deed for said 99.7 acre farm to C. M. McDaniel and wife, Thelma M. McDaniel . . . and . . . that the sales price of said 99.7 acre farm was $8,000.00."

In apt time defendant tendered issues. He did not tender an issue relating to the ownership of the farm. It is clear that the contention made here was not asserted by defendant below, and the case was tried upon the theory that defendant conceded that he and his wife had owned the farm as tenants by the entirety. Upon the record it is our opinion that the judge was correct in proceeding on this theory. An appeal will be considered here on the theory adopted by the court and parties below. *Waddell v. Carson*, 245 N.C. 669, 673, 97 S.E. 2d 222.

"A deed to a husband and wife, nothing else appearing, vests title in them as tenants by entirety." *Edwards v. Batts*, 245 N.C. 693, 696, 97 S.E. 2d 101; *Byrd v. Patterson*, 229 N.C. 156, 48 S.E. 2d 45. There is no pleading or evidence to the effect that plaintiff's name was inserted in the deed, in the instant case, through fraud or mistake or

that, at the time or prior to the execution and delivery of the deed, plaintiff agreed to hold the land in trust for defendant. There is nothing in this record which takes the transaction out of the well settled doctrine of the common law that when land is conveyed to husband and wife jointly they take by the entirety. *Morton v. Lumber Co.*, 154 N.C. 278, 70 S.E. 467. Where a husband purchases realty and causes the conveyance to be made to him and his wife, the law presumes a gift to the wife and no resulting trust arises; and to rebut the presumption of a gift and establish a resulting trust the evidence must be clear, strong and convincing. *Honeycutt v. Bank*, 242 N.C. 734, 741, 89 S.E. 2d 598.

It is true that the trial judge has the duty to submit to the jury all material issues arising upon the pleadings. G.S. 1-200; *Griffin v. Insurance Co.*, 225 N.C. 684, 686, 36 S.E. 2d 225. But the issue here contended for does not arise either upon the pleadings or the evidence.

Defendant also assigns as error the ruling of the court below that a trust arises by operation of law in favor of the wife when property owned by the entirety is sold and the wife permits the husband to use the entire net proceeds for his own purposes.

We find no error in the court's ruling. When land held as a tenancy by the entirety is sold, the proceeds derived from the sale are personalty and belong to the husband and wife as tenants in common, but they have the right to dispose of the proceeds by contract *inter se* if they so desire. *Wilson v. Ervin*, 227 N.C. 396, 399, 42 S.E. 2d 468. The personal property of a feme covert, to which she may become in any manner entitled, shall be and remain the sole and separate estate and property of such female. Constitution of North Carolina, Article X, section 6. G.S. 52-1. In *Etheredge v. Cochran*, 196 N.C. 681, 146 S.E. 711, a wife received checks from her parents as a personal gift to her, she endorsed and delivered them to her husband and he used the proceeds to purchase property for himself. The Court declared: "The doctrine is clearly stated in *Stickney v. Stickney*, 131 U.S., 227, 33 Law Ed., 136, 143: 'Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him. . . . The transaction raises not the presumption of a gift from the wife to the husband, but the presumption that he received and must account for the money.' " See *Bullman v. Edney*, 232 N.C. 465, 61 S.E. 2d 338.

The fact that a beneficiary of a trust acquiesces in the investment of the trust fund does not support the inference or conclusion that

she is estopped to assert her rights under the rule of trust pursuit. *Trust Co. v. Barrett,* 238 N.C. 579, 588, 78 S.E. 2d 730.

The answer in the case *sub judice* does not allege that there was any contract or agreement with respect to the disposition of the proceeds from the sale of the farm. The evidence relating to the sale and disposition of the proceeds is substantially as follows: (Plaintiff's version). The net proceeds of the sale was approximately $6,000.00. Two checks were given in payment, payable to plaintiff and defendant. Plaintiff endorsed both and defendant deposited the money in a bank account so that they could open a dance studio in Wilson. They discussed selling the farm and plaintiff agreed so that she and her husband could open the dance studio. Defendant never asked her to make a gift of money to him or any part of it. Plaintiff was employed in Raleigh. The dance studio was set up and operated by defendant and two other persons. (Defendant's version). Defendant obtained the necessary capital for opening the studio by sale of the farm. He told plaintiff this was his only means of getting capital for the venture and asked her to sign the necessary papers. He doesn't recall that she made any particular comment, but she did agree to sell and signed the necessary papers. She endorsed the checks. He cannot recall that there was any particular statement made by her, at the time of endorsing the checks, relative to the ownership of the money and checks. She did not demand a property settlement until after they separated. He sold the studio for $8,000.00.

It is clear that there was no legally binding contract or agreement which will bar an accounting on behalf of the plaintiff.

We have examined the other assignments of error relating to the second cause of action and they are overruled. In the trial of the second cause of action we find no prejudicial error.

(2) The first cause of action—for alimony without divorce and attorney fees.

The evidence makes out a *prima facie* case for alimony without divorce. Since there must be a new trial on the first cause of action, we refrain from a discussion of the evidence.

G.S. 50-16 provides in part: "If any husband shall separate himself from his wife and fail to provide her . . . with the necessary subsistence according to his means and condition in life . . . the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid . . ." This action was founded on these provisions. In such case, it is incumbent upon plaintiff to provide allegation and proof, (1) that husband has separated himself from his wife,

and (2) has failed to provide her with the necessary subsistance according to his means and condition in life. *Trull v. Trull,* 229 N.C. 196, 198, 49 S.E. 2d 225.

"It is the duty of a husband to support and maintain his wife . . . There is not only a moral obligation resting on the husband to support his wife, but also a duty imposed by law. . . . The duty of support resting on the husband does not depend on the adequacy or inadequacy of the wife's means or on the ability or inability of the wife to support herself by her own labor or out of her own separate property. The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability. . . . And the mere fact that the wife does not demand that the husband support her does not excuse him from the performance of his duty." 41 C.J.S., Husband and Wife, sec. 15, pp. 404 *et seq.*

The earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony. G.S. 50-16.

In the course of the charge on the second issue, the court instructed the jury: "Now, if you answer the 2nd issue Yes as well as the 1st issue Yes, then the wife would have prevailed in the first cause of action and as a result the Court would sign the judgment wherein a certain amount per month would be set up, legally speaking, that the defendant would have to pay to the plaintiff for support during their coverture, that is, during the time they were married; of course, if they were divorced that would be the end of that payment, there being no children involved here."

In this instruction the court fell into error. A decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment for absolute divorce, except in case of divorce obtained with personal service on the wife, either within or without the State, upon the grounds of the wife's adultery and except in case of divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period. G.S. 50-11. *Porter v. Bank,* 249 N.C. 173, 179, 105 S.E. 2d 669.

In giving the challenged instruction, we think the court might have inadvertently left the impression with the jury that a verdict for plaintiff would be less onerous for defendant than the law provides. Indeed, the jury might have been influenced by this instruction to return a verdict in plaintiff's favor on less evidence than they otherwise would have required.

The defendant is entitled to a new trial on the *second issue.* The verdict is not otherwise disturbed.

The provisions of the judgment below making an allowance of $80.00 per month for the benefit of plaintiff and assessing attorney fees are vacated and set aside. But the judgment is in all other respects affirmed.

Error and remanded.

JOHN WESLEY WARREN v. DIXON AND CHRISTOPHER COMPANY, INC. AND GLOBE INDEMNITY COMPANY.

(Filed 18 May, 1960.)

1. Master and Servant § 1— Contract of employment held to have been completed in this State.

Where a resident contractor, obligated to employ union men from a local union in this State, has its foreman on a job in another state call on the union's manager for workers skilled in certain lines, and the manager calls a resident worker to the union office here and gives him a referral slip, which entitles the employee to travel and reporting time if the employer rejects him because work is not available, and the employee takes the referral slip to the foreman on the job outside the state, and enters upon the job there, *held* the act of the employee in reporting to the union office in this State, accepting the referral slip and starting upon the trip to the job, constitutes an acceptance of the offer of employment, so that the contract of employment is made and completed in this State.

2. Master and Servant § 83—

Where the evidence is sufficient to support findings of the Industrial Commission that the contract of employment was made in this State and that the contract was not expressly for services exclusively outside the State, the North Carolina Industrial Commission correctly exercises jurisdiction over a claim of the employee for injuries resulting in the performance of the work.

3. Master and Servant § 94—

Where the findings of fact by the Industrial Commission are sufficient predicate for its award, the award will not be disturbed even though another finding, immaterial to the decision, is not supported by any evidence.

APPEAL by defendants from *Crissman, J.,* September 28, 1959 Civil Term, GUILFORD Superior Court (Greensboro Division.)

This proceeding originated as a compensation claim before the North Carolina Industrial Commission. John Wesley Warren suffer-

ed an accident while working as a pipe fitter for Dixon and Christopher, Inc., on a construction job at Clarksville, Virginia. The first hearing was held by Deputy Commissioner Thomas in Durham, North Carolina, on July 28, 1958. The parties stipulated that John Wesley Warren and Dixon and Christopher, Inc., on and prior to September 23, 1956, were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act; that Globe Indemnity Company was the compensation insurance carrier; that the claimant was regularly employed by Dixon and Christopher, Inc., in the State of Virginia at an average weekly wage of $173.25; that he was injured in Mecklenburg County, Virginia, on September 23, 1956. "Following said injury parties entered into an agreement on Commission's form 21 . . . by the terms of which compensation at the rate of $32.50 per week was paid for the period October 10, 1956, to October 17, 1956, and from March 27, 1957, to July 30, 1957, in the total sum of $617.50."

The evidence before the hearing commissioner disclosed that Dixon and Christopher, Inc., is a corporation engaged in the plumbing, heating, air conditioning, and other branches of the pipe fitting industry, with its principal office in Greensboro, North Carolina. Workers in the pipe fitting trade are organized in an association of local unions whose territorial jurisdiction does not overlap. The contractor and local union No. 640 located at Greensboro, North Carolina, entered into a working agreement whereby the contractor agreed to employ members of the union. The agreement related to working conditions, wages, etc. It provided: "Failure of Local Union . . . to furnish Journeymen Mechanics at the request of the Contractors within 48 hours; Saturdays, Sundays and Holidays excluded shall give the Contractors the right and privilege of hiring men at their own discretion."

On and prior to September, 1956, the employer, Dixon and Christopher, Inc., was carrying on two projects at Clarksville, Virginia, and one at Camp Butner, North Carolina. The projects were within the territorial jurisdiction of Local Union No. 585, Durham, North Carolina. That union and the employer entered into an agreement to be bound by the terms of the contract between Union No. 640 and the employer.

In 1956, Paul Whitaker was business manager of Local Union No. 585, Durham, North Carolina. He testified: "My primary function is . . . referring men to jobs as the contractors call in for them, job referrals and job placements. . . . Mr. Waynick (contractor's representative at Clarksville, Virginia) called me . . . and informed me that his company, Dixon and Christopher, had a contract for some

renewal work to be done on the plant site of the Clarksville job. . . . As to the procedure followed in referring men to the job, I received a call from the company representative calling for men. . . . He said, 'I need four men, two welders and two fitters.' I in turn selected those men and sent them to the company representative on that job, with an introductory slip, showing his social security number, effective date, his name, and signed and sealed by myself as business manager. . . . I selected Mr. Warren . . . and told him I had a call for fitters on the Clarksville job. He in turn comes by the office and picks up his introductory slip to the company representative. . . . In the event Mr. Warren had reported to the job and had not gone to work for Dixon and Christopher, he would have been entitled to two hours reporting time and one hour's travel time. . . . As to any terms of employment left unsettled for the employees themselves to arrange with the company, the employees have no direct connection with the company at all in so far as working agreement is concerned . . . all the dealings they have with the company are through me . . . Mr. Burnette called . . . and told me . . . 'I need so many men at Clarksvill,' I gave Mr. Warren an introductory slip to Mr. Burnette on the Clarksville job. . . . Mr. Warren could have reported to the Clarksville job and have been sent to Elizabeth City as far as I was concerned. . . . They did have a job . . . at Camp Butner and he could have been sent to the Butner job without my ever knowing about it."

The claimant testified that he is 61 years old, resides in Durham, North Carolina; that he was a member of the pipe fitters union No. 585, Durham. Mr. Whitaker called him to the union office in Durham, gave him a referral slip to Dixon and Christopher which he carried to Clarksville and presented to the foreman on the job. He went to work and while at work was injured. "As to whether I knew I was going to work on that job only when I went to work in Clarksville, Virginia, no, sir, not necessarily, if they had had other jobs I could have worked on it if it had been in my jurisdiction. . . . I worked on two different jobs in Clarksville. . . . I could have worked on them or any other job in our jurisdiction . . . If Dixon and Christopher had had a job in North Carolina, they could transfer me as long as it was in my jurisdiction."

The respondents' only witness, Mr. Burnette, foreman at Clarksville, testified: "There were two jobs in progress at the same time in Clarksville, one was remodeling and the other was new construction. . . . The men sent to me from Local 585 were used interchangeably . . . and I had authority to transfer them . . . back and forth. If Dixon and Christopher . . . told me that they needed some of my

steam fitters or welders on the Butner job (North Carolina) I would have had the authority to take those men to Butner for work there. . . . As far as I knew it would not be necessary for them to go back to Mr. Whitaker and be reassigned by him."

The hearing commissioner made detailed findings of fact and upon them based his conclusions of law that the contract was made in North Carolina, between the employer, Dixon and Christopher, Inc., (whose office and place of business is in Greensboro, North Carolina,) and Mr. Warren, whose residence is in Durham, North Carolina. The contract of employment was not expressly for services exclusively outside the State of North Carolina. Based thereon the hearing commissioner awarded compensation.

Upon appeal and petition for review, the full commission held a hearing, and adopted as its own the findings, conclusions, and award of the hearing commissioner. Upon appeal by the employer, the Superior Court of Guilford County overruled the exceptions and affirmed the award. From the judgment accordingly, the defendants appealed.

Smith, Moore, Smith, Schell & Hunter, for defendants, appellants.

Bryant, Lipton, Strayhorn & Bryant, By: Ralph N. Strayhorn, F. Gordon Battle, for plaintiff, appellee.

HIGGINS, J. The hearing commissioner, the full commission, and the superior court by findings of fact and conclusions of law established the following: (1) Dixon and Christopher, Inc., at all times pertinent to this inquiry was a North Carolina corporation with its principal office in Greensboro, N.C.; (2) The claimant, John Wesley Warren, was a resident of Durham, North Carolina; (3) The contract of employment was made in North Carolina through Local Union No. 585; and (4) The contract was not expressly for services outside North Carolina.

The evidence at the hearing supports the conclusion the contract was made in North Carolina. The contractor was obligated to employ union men from Local No. 585 in Durham. The foreman on the employer's job called Mr. Whitaker, manager of Local 585, and asked him to send a pipe fitter for work at Clarksville, Virginia. Mr. Whitaker selected the claimant and called him to the union office in Durham, told him of the job then open. Claimant obtained a referral slip, giving his name, etc., had it certified by Mr. Whitaker, and reported to the job in Clarksville. The employer had a right to reject him if work was not available, in which case the employer was re-

quired by his contract to pay claimant both travel and reporting time. At the time claimant reported, the job was open. He delivered the referral slip to the foreman and went to work under the foreman's direction. The referral slip was sent to the employer's office in Greensboro where the pay checks were made out and returned to the foreman for delivery to the claimant. The selection of the worker, the details of having him report were already arranged by Mr. Whitaker in Durham at the request of the foreman at Clarksville.

The foregoing findings of fact justified the conclusion the contract was entered into at Durham, North Carolina. Accepting the worker on the job was merely the consummation of what had been previously arranged, that is, the employment. The offer of the job was made to Mr. Warren by Mr. Whitaker at the request of Mr. Burnette. Mr. Warren indicated his acceptance by obtaining the referral slip at Durham and implemented it by going to Clarksville, presenting himself to the foreman, and entering upon the work assigned to him. No part of the contract was arranged by the claimant and the foreman. The claimant's acceptance of the offer is as clearly shown by his conduct in reporting to Mr. Whitaker at the union office in Durham as if he had said, "I accept."

The following is from the case of *Gomez v. Federal Stevedoring Co.*, decided by the Appellate Division of the Superior Court of New Jersey (5 N.J. Super. 100, 68 A. 2d 482): "While it is true that there was no proof of oral acceptance in this State (N.J.) by the petitioner of the offer of employment . . . the offer was accepted in this State (N.J.) by petitioner's acts. His tacit assent when the offer of employment was made, coupled with his compliance of the terms of the offer (a job in New York) . . . constituted an acceptance in this State (N. J.). Although assent must be manifested in order to be legally effective, it need not be expressed in words. Modern law rightly construes both acts and words as having the meaning which a reasonable person present would put upon them in view of the surrounding circumstances."

In *Bowers v. Bridge Co.*, 43 N.J. Super. 48, 127 A. 2d 580, the Court said: "Agency apart, the acceptance by petitioner in Trenton of the employment opportunity offered him so as to fix the *situs* of the contract in New Jersey is adequately established by his action in signifying his assent to the proposal at the union hall in Trenton and in proceeding at once to Morrisville (Pa.)." *Daggett v. Steel Co.*, 334 Mo. 207, 65 S.W. 2d 1036; *Pearson v. Service Co.*, 166 Kan. 300, 201 P. 2d 643.

In discussing a case arising under the Florida Workmen's Compen-

sation Act (similar to ours), the Florida Appellate Court said: "It was clearly known to the employer-offeror that in order to accept the offer the employee would have to leave his employment in Florida and travel to Atlanta. It was equally obvious to the offeror that embarking on that course of action would in itself constitute a substantial detriment to the offeree and, from the outset, that the trip from Miami to Atlanta was a substantial part of the exchange contemplated by the offer of employment." *Peterson v. Ray-Hof Agencies,* Fla., 117 So. 2d 497.

Expressing a contrary view are three cases from Missouri and one from Louisiana: *Deister v. Thompson,* 352 Mo. 871, 180 S.W. 2d 15; *Hunt v. Jefferies,* 236 Mo. App. 476, 156 S.W. 2d 23; *Carpenter v. Wm. S. Lozier, Inc.,* 353 Mo. 864, 184 S.W. 2d 999; *Rushing v. Travelers Ins. Co.,* 85 So. 2d 298 (La.).

Mallard v. Bohannon, 220 N.C. 536, 18 S.E. 2d 189, on rehearing 221 N.C. 227, 19 S.E. 2d 880, in nowise is in conflict with the views herein expressed. In the *Mallard* case the employment (sales agent in a designated territory in north Florida and south Georgia) showed the services were to be rendered exclusively outside North Carolina.

In the case of *Reaves v. Mill Co.,* 216 N.C. 462, 5 S.E. 2d 305, the accident occurred in South Carolina. The claimant was a resident of South Carolina and, therefore, excluded by our statute G.S. 97-36. In *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673, the claimant was found to be *not an employee but an independent contractor* and, therefore, not within our workmen's compensation act.

This proceeding was conducted throughout and argued here upon the issues herein discussed. However, it may well be that the stipulations entered at the hearing that the parties were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act and the execution of the Commission's form No. 21 are conclusive of the questions principally in dispute.

Notwithstanding the stipulation, we have examined the evidence, findings of fact, conclusions of law, and award made in the case in the light of the appellants' assignments of error. The record contained no evidence the employer made payments to the Employment Security Commission of North Carolina on claimant's behalf as found by the hearing commissioner in finding of fact No. 7. There was evidence from which it may be inferred that such payments were made for another employee from the same union on the same job but there is no evidence to indicate payment was made on behalf of the claimant. However, this finding is without significance since the evidence otherwise is amply sufficient to sustain all the findings of fact ma-

terial to decision in the case. The facts found sustain the conclusions of law, and the conclusions support the award.

The judgment of the superior court is

Affirmed.

BRYANT B. WESLEY, BY HIS NEXT FRIEND, JOHN WESLEY v. CHARLIE M. LEA.

(Filed 18 May, 1960.)

1. Master and Servant § 47—

An injury sustained by a member of the North Carolina National Guard while on active duty is compensable under the Workmen's Compensation Act. G.S. 97-2(2).

2. Master and Servant § 84—

The Industrial Commission has exclusive original jurisdiction of a claim by a National guardsman for injuries received while on active duty, resulting from the negligence of another guardsman while on active duty. G.S. 97-10.

3. Same— Injury to guardsman held to have been inflicted during the course of duty and not while the parties were pursuing private purpose.

Where National guardsmen, after reporting for duty, are ordered to travel in convoy to a designated place in the line of duty, some of the guardsmen driving their private cars without compensation in compliance with the request of their commanding officer, the fact that, as the convoy approached its destination, the driver of one of the private cars breaks convoy in violation of regulations and follows the car of a Sergeant on a longer, alternate route in order to avoid the dust thrown up by the preceding army vehicle, is not such a deviation from the course of duty as to constitute an abandonment of drill for the pursuit of a private purpose, since the drivers were not undertaking to do something outside the duty they had been detailed to perform but were merely using an alternate means of performing that duty.

4. Same—

A negligent injury inflicted by one employee upon another in the course of their employments is within the exclusive jurisdiction of the Industrial Commission, notwithstanding that the negligence of the one may have been reckless and wanton, it being required that the injury be intentionally inflicted in order for the injured employee to be entitled to maintain an action at common law against the other.

5. Appeal and Error § 25—

Where plaintiff does not object or except to the issue submitted and tenders no issue, plaintiff may not object to the form of the issue submitted by the court.

6. Trial § 36—

While the trial court is required to submit such issues as are necessary to settle the material controversies arising on the pleadings, where the issue submitted is determinative of the controversy and permits the parties to present all contentions arising upon the pleadings and evidence, an exception to the issue submitted cannot be sustained.

7. Trial § 30—

Where the uncontradicted evidence tends to establish facts precluding recovery, the court may correctly instruct the jury that if they believe the evidence they should answer the issue accordingly.

APPEAL by plaintiff from *Craven, J.*, October 1959 Civil Term, of PERSON.

This is an action to recover damages for personal injuries sustained by plaintiff by reason of the alleged actionable negligence of defendant.

The evidence offered at the trial is summarized as follows:

On Saturday, 25 May 1957, plaintiff and defendant were members of Company D, 139th Infantry, Roxboro National Guard. Plaintiff was a "private" and defendant's rank was "specialist." They reported for duty to Lieutenant G. P. Allen, Commanding Officer, at the Roxboro Armory on the above date at 7:00 A. M.

After muster the Company was ordered to proceed to the training site at Camp Butner for drill on Saturday and Sunday. The kitchen detail was ordered to go ahead, set up equipment and cook dinner. Plaintiff and defendant were in this outfit. There were insufficient military vehicles to transport all personnel. Defendant was requested to drive his private automobile, but the National Guard was to incur no expense for operation of the car and no liability for any damage to the car. Defendant was told to ride in either a military vehicle or a private car. Plaintiff and two others rode with defendant.

The Company rule was that military personnel on drill should proceed in convoy. The kitchen detail left Roxboro in convoy. A National Guard Army truck was in the lead. It was followed by a line of private cars. They traveled the Oxford Road to the Moriah Road and followed that road to Copley's Corner. Copley's Corner is about six miles from Camp Butner.

At Copley's Corner the truck turned off Moriah Road onto a dirt road for the purpose of proceeding to the Range Road and by that road to the training site. The Army truck is a vehicle of two and one-half tons and has dual wheels which throw up a great deal of dust on a dirt road. The Range Road is also a dirt road.

At Copley's Corner Sergeant Gentry broke convoy and continued on Moriah Road, a paved road. Defendant also broke convoy and

followed the Sergeant's car. No one had been given permission to break the convoy. Four miles from Copley's Corner a dirt road intersects Moriah Road. This dirt road leads into the Range Road near Camp Butner. Defendant testified that he planned to follow this route to avoid dust from the Army truck. This route is about two miles longer than the one taken by the truck.

Sergeant Gentry's car proceeded at a rapid rate of speed and the defendant followed apace. In rounding a curve on Moriah Road about three miles from Copley's Corner, defendant's car left the road, struck a telephone pole and overturned. Plaintiff testified that defendant's speed at the time of the accident was 85 to 95 miles per hour. Defendant's version was from 60 to 65 miles per hour. Plaintiff received serious and painful injuries, including severe burns.

The court submitted the following issue to the jury:

"1. Were the plaintiff and defendant each on duty at drill as members of the North Carolina National Guard at the time of the accident and was plaintiff injured by collision arising in the course of and out of the scope of his employment?"

The judge instructed the jury: "If you find the facts to be as all of the evidence in this case tends to show, it would be your duty to answer this issue or question affirmatively, that is to say, 'yes.'"

The jury answered the issue "yes." Judgment was entered declaring that the plaintiff "recover nothing . . . by reason of his action." Plaintiff appealed and assigned errors.

Donald J. Dorey, R. B. Dawes, Jr., and R. B. Dawes, Sr., for plaintiff.
Spears, Spears & Powe for defendant.

MOORE, J. The ultimate question for decision on this appeal is whether the trial court had jurisdiction to proceed to judgment in the common law action for damages for personal injuries arising from alleged actionable negligence, or whether the action is in the exclusive original jurisdiction of the Industrial Commission under the Workmen's Compensation Act, G.S. 97-1 *et seq.*

If the trial court had jurisdiction, plaintiff has made out a *prima facie* case of injury by reason of the actionable negligence of defendant.

An injury sustained by a member of the North Carolina National Guard while on active duty is compensable under the Workmen's Compensation Act. "The term 'employee' shall include members of the North Carolina National Guard . . . and members of the North Carolina State Guard, and members of these organizations shall be

entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty . . ." G.S. 97-2(2).

". . . (a)n employee, subject to the provisions of a Workmen's Compensation Act, whose injury arose out of and in the course of his employment, cannot maintain an action at common law against his co-employee whose negligence caused the injury. . . . To hold otherwise would, in a large measure, defeat the very purposes for which our Workmen's Compensation Act was enacted. Instead of transferring from the worker to the industry, or business in which he is employed, and ultimately to the consuming public, a greater proportion of the economic loss due to accidents sustained by him arising out of and in the course of his employment, we would, under the provisions for subrogation contained in our Workmen's Compensation Act, G.S. 97-10, transfer this burden to those conducting the business of the employer to the extent of their solvency. The Legislature never intended that officers, agents, and employees conducting the business of the employer, should so underwrite this economic loss." *Warner v. Leder,* 234 N.C. 727, 732, 69 S.E. 2d 6.

In the instant case, if plaintiff's injury arose out of and in the course of his duties at drill and was caused by the negligence of defendant, while also performing his duties at drill, claim for compensation for the injury is in the exclusive original jurisdiction of the Industrial Commission. G.S. 97-10.

Plaintiff and defendant were, at the time of the injury complained of, members of the North Carolina National Guard. They reported for duty at the Roxboro Armory at 7:00 A. M. on the day in question. After muster they were ordered by the Commanding Officer to proceed to the training site at Camp Butner and there perform duties as members of the kitchen detail in preparation of the noonday meal. Defendant was requested to drive his private car, without compensation, and consented. Plaintiff had authority to ride with him. Before arrival at Camp Butner there was an accident due to defendant's negligence in the operation of his car and plaintiff was injured. Plaintiff was on duty at drill under orders which he was in the act of carrying out when he was injured. His injury arose out of and in the course of his employment. Defendant was likewise on duty at drill, unless, as contended by plaintiff, he had deviated from the course of his employment and was "on a frolic of his own." *Hunt v. State,* 201 N.C. 707, 161 S.E. 203, has no application to this case. There the National guardsman was using his private car to reach encampment, had not reported for duty and was performing no duty at drill.

The crux of our inquiry is whether defendant had deviated from the course of his duty and, at the time of the accident, had abandoned drill and was in pursuit of purposes of his own. The facts are not in dispute. Company rules provided that vehicles on drill should proceed in convoy. At Copley's Corner Sergeant Gentry broke convoy and defendant, who was immediately behind the Sergeant, also broke convoy and followed the Sergeant. The only explanation of defendant's action in breaking convoy and following the Sergeant is from defendant himself. He stated that he intended to take an alternate route to Camp Butner, about two miles longer than the one followed by the convoy, to avoid the dust which the Army truck would create in traversing the dirt road from Copley's Corner to Camp Butner. Part of the route being followed by defendant was paved. Defendant was driving at a high rate of speed and for this reason his vehicle left the road at a curve and the accident and the injury to plaintiff ensued.

We do not think that these uncontradicted facts are sufficient to show an abandonment of drill and deviation from the course of employment by defendant. "It is universally held that 'the master is not responsible if the wrong done by the servant is done without his authority and not for the purpose of executing his orders or doing his work. So that, if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable.' *Howe v. Newmarch*, 94 Mass., 49." *Martin v. Bus Line*, 197 N.C. 720, 722, 150 S.E. 501. It is conceded that defendant had no authority to break convoy, but there is no evidence that his act in so doing was not for the purpose of executing his orders to proceed to Camp Butner and there engage in his duties as a member of the kitchen detail. Indeed, all of the evidence is to the effect that it was his intention to carry out his orders. Furthermore, he was following his superior, Sergeant Gentry. It does not appear that he was disregarding the object for which he had been detailed. It is true that defendant had the incidental purpose of avoiding dust and thereby was contributing to his own personal comfort. Such purpose does not constitute a deviation from the object of his mission. *Parrish v. Armour & Co.*, 200 N.C. 654, 158 S.E. 188. Defendant broke convoy in violation of the Company rule, but this was nothing more than an act of negligence. He did not undertake thereby to do something outside the duty he had been detailed to perform. It was merely an alternate means of performing that duty and en-

tailed disobedience of a regulation with respect to procedure. *Howell v. Fuel Co.*, 226 N.C. 730, 40 S.E. 2d 197.

Plaintiff contends that the conduct of defendant in the operation of the car was not merely negligent, but was reckless and wanton. But to take the case out of the Workmen's Compensation Act the injury to an employee by a co-employee must be intentional. *Warren v. Leder, supra,* at page 733. There is no evidence of any intention on the part of defendant to injure plaintiff.

Plaintiff assigns as error the submission of the issue set out in the record. He did not object or except to the submission of the issue and tendered none. "Where there are no objections or exceptions in the lower court to the issue submitted, or to the court's refusal to submit issues tendered, appellant may not challenge the issues for the first time on appeal in his assignments of error." 1 Strong: N. C. Index, Appeal and Error, sec. 25, p. 102; *Walker v. Walker,* 238 N.C. 299, 300, 77 S.E. 2d 715.

But plaintiff maintains that the issue is insufficient to determine the question presented. He insists that an issue should have been submitted to determine whether or not plaintiff's injury arose out of and in the course of *defendant's* employment. "It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings." *Griffin v. Insurance Co.,* 225 N.C. 684, 686, 36 S.E. 2d 225. It is our opinion, and we so hold, that the issue was sufficient. In the first place, it is framed so as to determine whether both plaintiff and defendant were on duty at drill at the time of the injury, that is, whether both were engaged in carrying on the work for which they were employed and were co-employees. Next, it inquires whether plaintiff's injury arose out of and in the course of his employment. The answer to the issue determines the question of jurisdiction. The answer was in the affirmative and this deprives the trial court of jurisdiction of the cause of action.

Plaintiff also assigns as error the peremptory instruction given by the court. The facts are not in conflict. "If the evidence is all one way, and there is no conflict, the judge may say to the jury that, if they believe the evidence, they may find a certain verdict, but he cannot direct them that they must so find from the evidence." 2 McIntosh: North Carolina Practice and Procedure, sec. 1516, p. 53; *Bank v. Noble,* 203 N.C. 300, 302, 165 S.E. 722. The trial judge complied with the approved rule of procedure.

In the trial below we find

No error.

IN THE MATTER OF THE WILL OF LEAKE S. COVINGTON, DECEASED.

(Filed 18 May, 1960.)

1. Estoppel § 4—

Equitable estoppel is based on conduct or silence of the party to be estopped which amounts to a false representation or concealment of material facts, calculated to mislead or induce a reasonably prudent person to rely thereon, with knowledge, actual or constructive of the real facts; and the party asserting the estoppel must lack knowledge or the means of knowledge as to the truth, and must rely on the conduct or silence of the party sought to be estopped, to his prejudice.

2. Same: Wills § 17—

The fact that an executor named in a paper writing has qualified under the instrument does not estop him from thereafter filing a caveat to the will upon his discovery of an instrument later executed by the testator, even though he is named sole beneficiary in the later instrument, when he acts in good faith and with due diligence after the discovery of the second paper writing, since it was his legal duty to deliver the second instrument to the court upon its discovery, G.S. 31-15, G.S. 14-77, and since he took no action prejudicial to the heirs after the discovery of the second will.

3. Estoppel § 4—

Knowledge or reckless indifference to the truth is necessary to invoke the doctrine of estoppel.

APPEAL by William Harry Entwistle *et al.* from *Armstrong, J.*, February 1960 Term, of RICHMOND.

This is an appeal from an order denying a motion to dismiss a caveat which alleged a writing dated 20 March 1940, admitted to probate in common form, was not in fact the last will of Leake S. Covington because revoked by a subsequent will.

Appellants are nephews and a niece, and as such, heirs of the deceased. They are hereafter referred to as movants. John W. Covington, Sr., hereafter referred to as caveator, is a brother of deceased.

These are the facts determinative of the appeal: Leake S. Covington died 3 January 1958. On 13 January 1958, caveator, a brother, named as a beneficiary in and executor of a writing dated 20 March 1940 purporting to be the last will and testament of deceased, filed the writing for probate with the clerk of the Superior Court of Richmond County, the home of deceased. The writing was signed by deceased and duly witnessed. It was admitted to probate in common form. Caveator qualified as executor of this will.

A controversy arose between movants and the executor with respect to the interpretation of the residuary clause of the instrument

so probated. Movants asserted they were entitled to one-half of the residuary estate and caveator the other half. To resolve that controversy movants brought suit under the Declaratory Judgment Act against caveator individually and as executor. Movants' interpretation was adjudged correct. An appeal was taken to this Court. The cause was argued here in April 1959. The judgment of the trial court was affirmed in an opinion filed 20 May 1959, *Entwistle v. Covington,* 250 N.C. 315, 108 S.E. 2d 603.

On 21 May 1959 caveator filed with the clerk of the Superior Court of Richmond County a paper writing dated 8 September 1953 purporting to be the last will and testament of Leake S. Covington. The writing purports to be signed by the testator and witnessed in the manner prescribed by G.S. 31-3. It names caveator as the sole beneficiary and as executor. It expressly revokes all prior wills.

On 28 May 1959 caveator, the sole beneficiary named in the writing dated 8 September 1953 and named as executor in each of the instruments, filed a caveat to the paper dated 20 March 1940 which had been admitted to probate in common form. The sole reason assigned for the caveat was the discovery of the paper writing dated 8 September 1953, then claimed to constitute the last will and testament of Leake S. Covington. Caveator says the latter writing was discovered 17 April 1959. The caveat was accompanied by the requisite bond. Thereupon the clerk entered an order suspending the executor's authority to act as required by G.S. 31-36, issued citations to the heirs and interested parties, and transferred the cause to the Superior Court for trial on the issue of *devisavit vel non.*

On 29 May 1959 caveator filed a motion in this Court for a new trial in the case of *Entwistle v. Covington,* assigning as a reason for his motion newly discovered evidence, to wit, the paper writing dated 8 September 1953. He, at the same time, filed a petition to rehear so as to avoid any possibility of a plea of estoppel arising from the admission made by him in the answer in the suit of *Entwistle v. Covington* that the instrument dated 20 March 1940 was the last will and testament of Leake S Covington. Both motions were denied. Denial of the petition to rehear was based on *Coppedge v. Coppedge,* 234 N.C. 747, 66 S.E. 2d 777.

On 2 July 1959 caveator addressed a letter to the clerk of the Superior Court in which he said:

"In view of the fact that I have filed a caveat to the purported will of Leake S. Covington under which I was appointed executor, my attorneys have advised me that I am not in a position to continue longer to act as executor under that purported will and it is my pur-

pose hereby, to relinquish all further functions, if any, under my present letters testamentary."

He further stated that when the paper writing of 8 September 1953 was probated he expected to apply for letters testamentary under the paper.

On 11 July 1959 caveator filed a petition seeking probate in solemn form of the writing dated 8 September 1953 as the last will of Leake S. Covington. In his petition he referred to the caveat proceeding which challenged the validity of the instrument dated 20 March 1940, recognizing the fact that the paper tendered for probate could not be declared the last will and testament of Leake S. Covington until the prior instrument had been declared invalid. He called attention to his qualification as executor of the instrument dated 20 March 1940, pointed to the divergent rights and duties given to and imposed on him by the two writings, and suggested that because of such divergent rights and duties he was disqualified from serving as executor of the instrument dated 20 March 1940.

Movants thereafter sought to dismiss the caveat proceeding. As the basis for their motion they say:

"That John W. Covington, Sr. qualified as Executor of the said Last Will and Testament of Leake S. Covington when the same was admitted to probate on January 13, 1958 and thereupon began to serve as said Executor and ever since that date has been, and is now, the legally qualified and sworn Executor of said Last Will and Testament, and he is therefore barred from maintaining this proceeding in which he undertakes to caveat and attack the said paper writing as being not the Last Will and Testament of Leake S. Covington."

At the hearing movants offered no evidence but relied upon the court records to support their plea of estoppel and motion to dismiss. The motion was denied. Movants excepted and appealed.

Leath and Blount and Blakeney, Alexander & Machen for appellants.

Webb & Lee, Bynum & Bynum, and Robinson, Jones & Hewson for appellee.

RODMAN, J. Courts of equity, to prevent injustice to one who relies on the spoken word or act of another, fashioned a rule of conduct called estoppel in *pais*. The rule prohibits or estops the speaker or actor from controverting what he had previously asserted. Lord Coke said: "It is called an estoppel or conclusion, because a man's own

act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."

Adams, J., said: "Equitable estoppel in *pais* owes its origin and development to the notion of justice promulgated by courts of chancery. It embraces estoppel by conduct which rests upon the necessity of compelling the observance of good faith." *Thomas v. Conyers,* 198 N.C. 229, 151 S.E. 270.

"The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men." *Stacy, C. J.*, in *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114.

The rule has been given recognition and applied in a multitude of cases by this Court. The facts which must be established by the party claiming protection by the rule have likewise been summarized in a multitude of cases. *Johnson, J.*, said in *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669: ". . . in determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. As to these, the essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *Barrow v. Barrow,* 220 N.C. 70, 16 S.E. 2d 460; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Upton v. Ferebee,* 178 N.C. 194, 100 S.E. 310; *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824; *Holmes v. Crowell,* 73 N.C. 613.

The record establishes *prima facie* these facts: Caveator, a few days after the death of his brother, found in deceased's lock box an instrument dated 20 March 1940 admittedly signed by deceased and purporting to be his last will and testament. This paper named caveator as its executor. He had no knowledge of any later will. Assum-

ing its validity he properly offered it for probate and qualified as the executor. Several months after this probate and qualification caveator was informed by one who witnessed it that his brother had executed a will later than 1940. Search was made and the paper writing so witnessed dated 8 September 1953 was discovered among some papers which had been at the home of deceased. This paper was found 17 April 1959, a little more than fourteen months after the discovery of the first paper. On 21 May it was delivered to the clerk of the court.

When the last writing was discovered, caveator had a duty to perform. The Legislature, when it granted the right to dispose of property at death, provided for the enforcement of that right. G.S. 31-15. It became the legal duty of caveator to deliver to the court what purported to be the last will and testament of Leake S. Covington. A fraudulent concealment of this paper would constitute a violation of our criminal laws. G.S. 14-77. Caveator asserts that he acted with reasonable diligence in the performance of his duty when he delivered the two instruments to the court for probate in accordance with the desires of Leake S. Covington as expressed first on 20 March 1940 and later 8 September 1953. Without knowledge or intimation that there was a later will, caveator acted properly when he qualified as executor of the instrument dated 20 March 1940. That qualification does not now estop him as a matter of law from asserting the invalidity of that will because of its subsequent revocation.

Knowledge or reckless indifference to the truth is necessary to invoke the doctrine of estoppel. The absence of that element distinguishes *In re Will of Averett,* 206 N.C. 234, 173 S.E. 621, *In re Lloyd's Will,* 161 N.C. 557, 77 S.E. 955, and the other cases relied upon by movants from this case. Cf. *McClure v. Wade,* 28 A.L.R. 2d 104; *In re Bremer's Estate,* 3 N.W. 2d 411.

The record does not show that caveator as executor took any action after the discovery of the will which was prejudicial to movants or to the estate of Leake S. Covington. He asserts that he acted with reasonable diligence when he acquired knowledge. He called the court's attention to the conflict and his incapacity to serve as executor of both paper writings.

We conclude that Judge Armstrong was correct in ordering: "that all issues made by the caveat and other pleadings herein, including any issue of estoppel, if any is properly raised, be tried at term before a judge and jury, reserving to the trial judge the determination of what issue should be submitted to the jury."

Affirmed.

IN THE MATTER OF THE WILL OF LEAKE S. COVINGTON, DECEASED.

(Filed 18 May, 1960.)

1. Executors and Administrators § 5—

An executor is required to take an oath, G.S. 28-40, and acts in a fiduciary capacity as an officer of the court and a trustee for the beneficiaries of the estate, and when conditions arise which prevent him from faithfully and impartially executing the duties which he has assumed, he should not be expected or permitted to continue to serve.

2. Same—

G.S. 28-8 confers authority on the clerk to revoke letters testamentary not only for the specific causes enumerated therein but also, under its provisions for the removal of a person legally incompetent to serve, the power to remove an executor who is not fit, qualified, or prepared to impartially discharge the duties of the office in the manner directed by the oath.

3. Same—

The statutory provisions for notice and hearing of proceedings for the removal of an executor are for the benefit and protection of the person who may be removed, and he waives notice when he himself calls to the court's attention the matters which justify his removal.

4. Same—

Where an executor who has qualified under a paper writing probated in common form thereafter discovers an instrument later executed by the testator, in which later instrument he is named sole beneficiary, he is under duty to bring such later instrument to the attention of the court, and when he does so and offers it for probate, G.S. 31-12, G.S. 31-13, the clerk properly revokes the letters testamentary theretofore issued under the instrument first probated.

APPEAL by John W. Covington, Sr. from *Armstrong, J.*, February 1960 Term, of RICHMOND.

This appeal is one phase of the litigation pending in Richmond County in which the ultimate question for determination is: Which paper writing is the will of Leake S. Covington, the paper dated 20 March 1940 probated in common form in January 1958 and challenged by caveat filed 20 May 1959, or the paper writing dated 8 September 1953?

Another phase of the litigation was considered and decided today in *In the Matter of the Will of Leake S. Covington, ante,* 546.

The facts there stated will not be here repeated, but so far as necessary to a decision of the question presently considered are incorporated by reference.

Appellant, hereafter called Covington, by letter and in his petition for probate of the writing dated 8 September 1953, called the court's

attention to the conflict necessarily arising if he should attempt to serve as executor of both instruments. He suggested that the court should remove him as executor of the instrument dated 20 March 1940 which had been established as the will by probate in common form.

The nephews and niece, hereafter referred to as Entwistle, opposed his removal. They asserted Covington could only rid himself of his office by an offer to resign and an acceptance of that offer by the court as provided in art. 3, c. 36, of the General Statutes.

The clerk heard the parties and found facts substantially as stated here and *ante*, 546. He thereupon concluded that Covington had a right as beneficiary of the writing dated 8 September 1953 to caveat the instrument dated 20 March 1940 which had been admitted to probate, and "in filing a caveat to the will of March 20th, 1940, the said John W. Covington, Sr., legally disqualified himself as Executor of said Will, and his filing a caveat thereto constituted cause for the recall of his letters and cause for his removal as Executor thereunder. That having repudiated the very instrument creating the trust, the said John W. Covington, Sr., legally disqualified himself to act in the capacity as Executor thereof."

The clerk thereupon recalled and revoked the letters testamentary theretofore issued to Covington and appointed a collector. Entwistle excepted to the findings and conclusions so made and appealed to the Superior Court in term. Judge Armstrong heard the appeal. He declined to review the findings made by the clerk. He declined to rule on Covington's right to offer for probate the writing dated 8 September 1953 while serving as executor of the instrument dated 20 March 1940. He held as a matter of law that Covington must resign as provided by statute if his authority to act as executor was to be terminated. He therefore reversed the order of the clerk which had revoked the letters issued to Covington. Covington excepted and appealed.

Webb & Lee, Bynum & Bynum, Robinson, Jones & Hewson for appellant.

Leath & Blount and Blakeney, Alexander & Machen for appellees.

RODMAN, J. Before one can qualify as an executor he must take an oath (G.S. 28-40) stating his belief that the writing he is to execute is the last will and testament of deceased and that he will well and faithfully execute the office agreeable to the trust and confidence imposed in him. G.S. 11-11.

Mindful of his oath, what is the duty of an executor who, during the course of his administration, discovers a writing which convinces him that the instrument under which he acts is not in fact the last will and testament of deceased? The answer is, we think, obvious. It is the duty of the executor to communicate the facts to the court which appointed him, and if the reason for his changed belief is a writing of later date than the one under which he acts, and purports to be a will, that writing should be delivered to the clerk, who is invested with probate jurisdiction. *Brogden, J.,* said in *Wells v. Odum,* 207 N.C. 226, 176 S.E. 563: "It is a crime in this State to fraudulently suppress or conceal a will. C.S., 4256. Obviously the basis for making such suppression a crime is the fact that it 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 processes of law. Moreover, C.S., 4139 and C.S., 4141, by implication at least, require the probate of a will. Furthermore, C.S., 4140, provides that if the executor fail to prove the will according to law, any devisee or legatee named in the will, 'or any other person interested in the estate, may make such application upon ten days notice thereof to the executor.' "

Covington acted properly when he delivered the writing purporting to be a will, dated 8 September 1953, to the clerk. This writing not only designated him as executor, but it named him as the sole beneficiary. He had a duty as the named executor to offer it for probate, G.S. 31-12, *Wells v. Odum, supra,* and a right as the beneficiary to insist that it be probated, G.S. 31-13. The clerk, in his order revoking the letters issued to Covington, recognized that right to offer the writing for probate.

An executor acts in a fiduciary capacity. *McMichael v. Proctor,* 243 N.C. 479, 91 S.E. 2d 231. He is classified by statute with "guardians, trustees, and other fiduciaries." G.S. 36-9. Both by law and the words of his oath he must faithfully execute the trust imposed in him. He must be impartial. He cannot use his office for his personal benefit. When conditions arise which will prevent him from faithfully and impartially executing the duties which he has assumed, he should not be expected or permitted to continue to serve.

Where a conflict exists between the obligations which one has assumed as executor and his individual rights, he may tender his resignation to the court. G.S. 36-10. If and when the resignation is tendered, the court should proceed as provided in G.S. 36-11, but the fact that a fiduciary appointed by a court does not tender his resignation does not deprive the court which appoints him of authority to act and to

revoke the letters testamentary when cause for removal exists. *Taylor v. Biddle,* 71 N.C. 1; *Edwards v. Cobb,* 95 N.C. 4; *Tulburt v. Hollar,* 102 N.C. 406; *In re Battle,* 158 N.C. 388, 74 S.E. 23; *In re Johnson,* 182 N.C. 522, 109 S.E. 373; *In re Meadows,* 185 N.C. 99, 116 S.E. 257; *In re Estate of Suskin,* 214 N.C. 219, 198 S.E. 661; *In re Estate of Johnson,* 232 N.C. 59, 59 S.E. 2d 223.

Our statute, G.S. 28-32, recognizing the power of the court and prescribing the procedure by which it may be exercised, provides: "If after any letters have been issued, it appears to the clerk . . . that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in due execution of his office . . . the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed . . . if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease."

We have not heretofore been called upon to define the words "legally incompetent" and the other words authorizing removal as used in the statute. Of course any of the disqualifications enumerated in G.S. 28-8 would justify removal, *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421; but we think the language used is entitled to a broader meaning and should be interpreted as meaning not fit, qualified, or prepared to impartially discharge the duties of the office in the manner directed by the oath taken.

The Supreme Court of Nebraska was called upon to define the words "legally competent," used in its statute with respect to qualification of executors. It said: "The lawmakers did not define the term 'legally competent,' but left the interpretation thereof to the courts. In a judicial proceeding an executor of a probated will is not only an officer of the court but is a trustee for the persons entitled to share decedent's estate. The legislature recognized the relation of trustee and beneficiary by providing that letters testamentary shall be issued to the person named executor in the will, 'if he is legally competent, and he shall accept the trust and give bond as required by law.' In the sense used by the lawmakers, the term 'legally competent' means fit or qualified to act as officer of the court and as trustee in administering upon the estate of testator according to judicial standards essential to the proper course of justice in the judicial department of government. . . . A statute directing the probate court to appoint an executor whose official and representative duties would require him to prosecute on behalf of adversary litigants a suit which he would defend as an individual would encroach on a judicial pre-

rogative—the power of the court to appoint a competent officer. That intent is not expressed or implied. A person who would be placed by appointment as executor in the anomalous position indicated would not be 'legally competent' within the meaning of the statute." *In re Blochowitz' Estate,* 245 N.W. 440.

The Court of Appeals of Kentucky said: "A duty to defend a will if possible rests on an executor. (Citation) If a personal representative cannot in good faith and conscience perform his trust in a fair and unbiased manner, he ought to resign voluntarily. If he does not, then he should be removed by the court, under the provisions of K.R.S. 395.160, because he is 'incapable to discharge the trust.' " *Karsner's Ex'r. v. Monterey Christian Church,* 200 S.W. 2d 474.

The Supreme Court of Vermont said: ". . . an executor or administrator has been deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty. (Citations) Without deciding that the phrase 'unsuitable to discharge the trust' may not have a broader meaning, we hold that an executor or administrator is unsuitable when he has such conflicting interest." *In re McGowan's Estate,* 102 A 2d 856.

Previous decisions of this Court upholding decrees revoking the authority of an executor or fiduciary to act because of conflicting interests are, we think, in support of the order of revocation made by the clerk. *In re Sams, supra; In re Battle, supra; In re Will of Gulley,* 186 N.C. 78, 118 S.E. 839; *In re Dixon,* 156 N.C. 26, 72 S.E. 71; *Ury v. Brown,* 129 N.C. 270; *Simpson v. Jones,* 82 N.C. 323; 21 A.J. 461. Such a conflict has been adjudged sufficient to require vacation of a judgment. *White v. Osborne,* 251 N.C. 56.

The statutory provision with respect to notice is for the benefit and protection of the person who may be removed. He may, of course, waive this provision by himself calling to the court's attention the matters which justify his removal.

When Covington filed for probate the writing dated 8 September 1953 which by express language revoked the writing under which he was acting, he disqualified himself from continuing to serve as executor, and the clerk properly directed his removal. The court was in error in holding as a matter of law under the factual situation here presented that Covington could not be removed, and his authority as executor of the paper which he had repudiated could only be terminated by his resignation.

Reversed.

SECURITY NATIONAL BANK OF GREENSBORO, IN ITS OWN RIGHT, AND AS TRUSTEE UNDER THE WILL OF CLAUDE KISER, DECEASED, v. JEAN KISER HANNAH, MARTHA JEAN HANNAH, JAMES HUNT HANNAH, III, A MINOR, MAMIE ANN HANNAH, A MINOR, RICHARD M. KISER, AND ALL PERSONS NOT IN ESSE WHO MAY TAKE UNDER THE WILL OF CLAUDE KISER.

(Filed 18 May, 1960.)

1. **Wills § 31—**
The objective of testamentary construction is to effectuate the intent of testator as ascertained from the four corners of the will.

2. **Evidence § 4: Wills § 34a—**
The law presumes that the possibility of issue is not extinct until death.

3. **Wills § 33d— Trust in this case held to terminate upon the majority of the youngest grandchild living at time of testator's death.**
The will in suit set up a trust estate with provision that each of testator's two children should receive from the income a small amount per month, with provision for emergency medical care and aid in educating their children, and for the distribution of the *corpus* of the estate to each of the children equally when the youngest living grandchild should attain the age of twenty-one, with further provision for payment of a portion of the *corpus* to testator's grandchildren only in the event of the death of a child prior to the termination of the trust. *Held:* It being apparent from the instrument construed as a whole that testator's children were the primary objects of his bounty, the trust terminates when the youngest grandchild living at the time of the testator's death reaches the age of twenty-one, since if the trust should not terminate until the youngest grandchild of testator, whenever born, reaches the age of twenty-one, the children of testator could not participate at all in the *corpus* of the trust and the intent of testator to make them the primary objects of his bounty would be defeated.

4. **Wills § 34a—**
A will is to be construed in favor of those who are the natural or special objects of testator's bounty.

APPEAL by defendants, Martha Jean Hannah and E. D. Kuykendall, Jr., Guardian *ad litem* for James Hunt Hannah, III, and Mamie Ann Hannah, minors, and persons not *in esse*, from *Preyer, J.*, March 14, 1960, Regular Civil Term, of GUILFORD (Greensboro Division).

This is a proceeding pursuant to the Declaratory Judgment Act, G.S. 1-253 *et seq.*, for construction of provisions of the will of Claude Kiser, particularly of paragraph 12, Item Fifth. Claude Kiser died 1 May 1952. His will is dated 9 September 1948 and was admitted to probate in Guilford County on 8 May 1952.

In brief summary, the will provided gifts as follows:

Certain items of personal property to testator's wife and his chil-

dren, Jean Kiser Hannah and Richard M. Kiser; a house and lot to Jean Kiser Hannah; the residue of testator's estate to the Security National Bank of Greensboro in trust.

The more valuable assets of the trust consisted of 580 shares of stock (the majority) in the South Atlantic Lumber Company, 1325 shares of stock of the Bank of Greensboro; and 200 shares of stock of E. L. Kiser Estate, Inc. Provision was made for sale of all these stocks.

From the trust property the wife was given an amount equivalent to what she would have received had testator died intestate. A sister-in-law of testator was given $5,000.00. It was provided that the children, Jean Kiser Hannah and Richard M. Kiser, should each be paid by the trustee the sum of $50.00 per month during the existence of the trust, and in the event of the death of Jean K. Hannah before the termination of the trust the sum of $50.00 per month should "be continued to the guardian of her children." It was further provided that the trustee should pay the college expenses of testator's grandchildren not to exceed $1,000.00 per year for each grandchild. Trustee was directed, in case of emergencies, to supply the needs of any child or grandchild for medical care.

Paragraph 12 of Item Fifth is as follows:

"When my youngest living grandchild becomes twenty-one years of age, the trust property then in the hands of the Trustee shall be distributed. Except for the devise of the house and lot known as 1503 Northfield Street, Greensboro, North Carolina, to my daughter, Jean K. Hannah, as set out in Article FOURTH hereof, it is my desire that my daughter, Jean K. Hannah, and my son, Richard M. Kiser, shall share equally in my estate. I therefore direct that a computation be made of all amounts paid out under Article FIFTH paragraphs 10 and 11 of this will to or for the benefit of Jean K. Hannah and her children and that a similar computation be made of all amounts paid out under the same provisions of this will to or for the benefit of Richard M. Kiser and any children that may be born to him. Out of the trust property on hand at the time my youngest living grandchild becomes twenty-one years of age, the Trustee shall first equalize the amounts paid out to or for the benefit of each of my said children and/or their children, adding any balance that may be due either of my children to his or her equal share in the remainder. Said shares shall then be paid over to each of my said children, if living, and if not living the share of each shall be paid, in equal shares, to his or her surviving children, and to the children of any of his or her deceased children, per stirpes. If either my said

daughter or my said son shall not be living, and shall leave no surviving children or grandchildren, then his or her share shall be paid to the other of them, if living, and if not living, then in equal shares to such other's surviving children, and to the children of any of his or her deceased children, per stirpes. Upon such distribution being made, the trust shall terminate. I hereby state that my two children, Jean K. Hannah and Richard M. Kiser, are adopted children, but for the purpose of this will, they are children of mine, and their children are my grandchildren."

Testator left surviving the two adopted children, Jean Kiser Hannah and Richard M. Kiser. At the time of his death the former was 34 years of age, and the latter 28. At the time of the institution of this proceeding Richard M. Kiser was 36 years of age, had no children and had never been married. At the time of testator's death Jean Kiser Hannah had three children, Martha Jean Hannah, age 14, James Hunt Hannah, III, age 13, and Mamie Ann Hannah, age 11. At the time of the execution of the will they were, and they still are, the only grandchildren of testator. Martha Jean Hannah has now reached her majority; James Hunt Hannah, III, will be twenty-one on 20 December 1960; and Mamie Ann Hannah will be twenty-one on 2 June 1962.

The present value of the trust property is approximately $350,000.00.

Upon the foregoing stipulated facts the court entered judgment, in pertinent part, as follows:

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

"1. That the residuary trust established in the will of Claude Kiser, Deceased, shall terminate on June 2, 1962, the date upon which Mamie Ann Hannah, the youngest grandchild of Claude Kiser, Deceased, living upon the date of his death, will attain the age of twenty-one years; that if the said Mamie Ann Hannah should die before said date, the date upon which James Hunt Hannah, III, the next youngest grandchild living at the time of the death of Claude Kiser, will become twenty-one years of age, or on the date of death of Mamie Ann Hannah, if said date is after December 20, 1960, and before June 2, 1962; and that if both Mamie Ann Hannah and James Hunt Hannah, III, should die prior to attaining the age of twenty-one years, respectively, then the trust shall terminate upon the date of death of the survivor of the said Mamie Ann Hannah and James Hunt Hannah, III, inasmuch as Martha Jean Hannah, the only other grandchild of Claude Kiser, Deceased, living at the time of his death, is already twenty-one years of age."

The grandchildren and guardian *ad litem* appealed and assigned error.

York, Boyd & Flynn for plaintiff, appellee.

Cooke & Cooke for defendants Jean Kiser Hannah and Richard M. Kiser, appellees.

E. D. Kuykendall, Jr., as Guardian Ad Litem and for Martha Jean Hannah, defendant appellants.

MOORE, J. The time of termination of the trust is the sole question for decision on this appeal. The solution depends upon the proper interpretation of the first sentence in paragraph 12, Item Fifth, of the will, which reads as follows: "When my youngest living grandchild becomes twenty-one years of age, the trust property then in the hands of the trustee shall be distributed."

Appellees maintain that the trust terminates when the youngest grandchild of testator living at the time of his death reaches the age of twenty-one. On the other hand, appellants contend that the trust continues until the youngest grandchild, whenever born, reaches the age of twenty-one years.

The controlling objective of testamentary construction is the intent of the testator. *Trust Co. v. Schneider,* 235 N.C. 446, 451, 70 S. E. 2d 578. This intent is ordinarily to be ascertained from an examination of the will from its four corners. *Bullock v. Bullock,* 251 N.C. 559, 563-4, 111 S.E. 2d 837.

From an examination of the will as a whole, it is evident that testator's wife and children were the primary objects of his bounty. The portion of the will involved here makes no direct gift to grandchildren or to any person other than testator's children. The sentence quoted above is only a "measuring rod" for determination of the duration of the trust.

The possibility that Richard M. Kiser will have issue and that Jean Kiser Hannah will have other child or children will continue to exist so long as they live. The law presumes that the possibility of issue is not extinct until death. *McPherson v. Bank,* 240 N.C. 1, 9, 81 S.E. 2d 386. Therefore, if the contention of appellants is correct, the trust must continue and the trust property may not be distributed until after the death of both of testator's children. Either or both may be survived by a child or children of tender years. In such case the property could not be distributed until the youngest of them arrives at the age of twenty-one. The construction urged by appellants would deprive testator's children of all except a small portion of the gift.

They would each realize $50.00 per month for life, emergency help in case of illness and assistance in the college education of their children. When we consider that the trust property has a present value of approximately $350,000.00, it is apparent that testator's children would scarcely receive even the income from the trust estate.

We do not agree that such result is in accord with testator's intention. He declares in Item Fifth, paragraph 12, ". . . it is my desire that my daughter, Jean K. Hannah, and my son, Richard M. Kiser, shall share equally in my estate." Directions are then given to the trustee for arriving at and making an equal distribution between them of the *entire trust property* at the termination of the trust. This language is used: "Said share shall then (after computation so as to arrive at equality) be paid over to each of my said children . . ." (Parentheses ours). The further provision that the shares be paid to testator's children, "if living," shows that the testator did not intend that the termination of the trust await the death of both of his children. It seems clear that testator intended to give the trust property to Jean and Richard.

It is true that the trustee is directed, in arriving at an equal division between Jean and Richard, to take into consideration ". . . all amounts paid out . . . to or for the benefit of Richard M. Kiser and any children that may be born to him." But this relates solely to the accounting for the purposes of distribution at the termination of the trust. References to the possibility that children may be born to Richard have no relation to the duration of the trust. The provisions for "college education" and expenses for "emergency" illness of testator's grandchildren have no significance on the question of duration of the trust, for the amounts expended by the trustee for these purposes are to be charged to the respective parents of the grandchildren so benefited in the final distribution of the trust property. These provisions are direct gifts to Jean and Richard and only indirect gifts to the grandchildren. Testator unquestionably assumed that his children would take primary responsibility for the needs of the grandchildren. The measures provided for in the will were to aid the parents pending the distribution of the trust property. It is suggested that the very fact the trust was created indicates an intention on the part of the testator to provide for all grandchildren whenever born. We do not agree. It is apparent that the purpose of the trust was to give ample time for a competent and orderly liquidation of the assets of the estate. Testator gave detailed instructions for the disposition of the corporate stocks owned by him. Compliance with these instructions requires time, negotiation and deliberate action.

We think the phrase "youngest living grandchild" in the sentence first quoted in this opinion means the youngest grandchild living at testator's death. The provisions of the will we are asked to construe do not seem to us to be ambiguous or subject to more than one interpretation, but, if they are, we feel compelled to adopt the interpretation already indicated. "A man's widow and his children are the primary objects of his bounty. *In re Crozer's Estate,* 336 Pa. 266, 9 A. 2d 535. In the absence of a manifest intention to the contrary, a will is to be construed in favor of beneficiaries appearing to be the natural or special object of testator's bounty." *Coffield v. Peele,* 246 N.C. 661, 666, 100 S.E. 2d 45.

It is unnecessary on this appeal to decide whether or not the bequests to testator's children of shares in the trust property constitute vested or contingent estates.

Appellants did not challenge in their brief or in the argument here the provisions of the judgment below for possible acceleration of the termination of the trust. We therefore express no legal opinion with respect thereto.

The judgment of the trial court in its entirety is

Affirmed.

EVERETT ENOCH SHUE v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA.

(Filed 18 May, 1960.)

1. Automobiles § 25—

The general maximum speed limit of motor vehicles in North Carolina is 55 m.p.h., the provisions of G.S. 20-141(b) 5, authorizing the State Highway Commission to designate a maximum speed limit of 60 m.p.h. for certain vehicles on certain highways, being in the nature of an exception.

2. Statutes § 5a—

The primary purpose in construing a statute is to give effect to the legislative intent.

3. Automobiles § 2—

A conviction of driving an automobile 75 m.p.h. in a zone designated by the State Highway Commission as a 45 m.p.h. speed zone, G.S. 20-141(d), requires a mandatory thirty-day suspension of the driver's license under the provisions of G.S. 20-16.1, since even though the latter statute does not refer to G.S. 20-141(d) it does refer to G.S. 20-141(b) 4, and a speed of 75 m.p.h. is more than 15 m.p.h. in excess of the general maximum speed of 55 m.p.h.

4. Appeal and Error § 2—

The Supreme Court in the exercise of its discretionary jurisdiction may decide a question of pressing public interest on the merits and disregard whether the question is presented by the proper procedure.

5. Automobiles § 1—

The operation of a motor vehicle on a public highway in this State is not a natural right but is a conditional privilege which the State may regulate in the exercise of its police power in the interest of public safety.

APPEAL by defendant from *Preyer, J.*, 16 November 1959 Civil Term, of GUILFORD — Greensboro Division.

Civil action to enjoin permanently defendant, Commissioner of Motor Vehicles of the State of North Carolina, from suspending, pursuant to the provisions of G.S. 20-16.1, the operator's and chauffeur's licenses of plaintiff.

From a judgment permanently enjoining the defendant, as prayed in the complaint, defendant appeals.

Adams, Kleemeier & Hagan and Durward S. Jones for plaintiff, appellee.

T. W. Bruton, Attorney General, and Lucius W. Pullen, Assistant Attorney General, for defendant, appellant.

PARKER, J. The parties, pursuant to the provisions of G.S. 1-184 by written consent filed with the clerk, waived a jury trial.

The court found the facts which were stipulated in writing by the parties. The facts found necessary for a decision of this appeal follow:

On 21 March 1955 defendant, Commissioner of Motor Vehicles of the State of North Carolina, issued to plaintiff, a resident of Guilford County, a renewal operator's license bearing number 78754, and on 4 April 1958 issued to plaintiff a renewal chauffeur's license bearing number 19973. On 20 January 1959 plaintiff was tried and convicted in the Municipal-County Court, Criminal Division, Greensboro, North Carolina, of operating on 27 December 1958 an automobile in Guilford County on a public highway at a speed of 75 miles per hour in a 45-miles per hour speed zone as charged in the warrant, and the clerk of that court sent a record of such conviction to defendant. Whereupon, defendant notified plaintiff that his renewal operator's and chauffeur's licenses had been suspended by him under authority of G.S. 20-16.1, said suspension to become effective 9 February 1959 and to remain in effect until 11 March 1959.

The court concluded that the offense of which plaintiff was convict-

ed is not covered by G.S. 20-16.1, and therefore defendant had no authority by virtue of G.S. 20-16.1 to suspend plaintiff's renewal licenses. Wherefore, the court permanently enjoined defendant from suspending plaintiff's renewal licenses for the offense for which he was convicted as set forth above.

The pertinent part of G.S. 20-16.1, which was in effect at all times relevant to this case, reads: "MANDATORY SUSPENSION OF DRIVER'S LICENSE UPON CONVICTION OF EXCESSIVE SPEEDING AND RECKLESS DRIVING. — Notwithstanding any other provisions of this article, the Department shall suspend for a period of thirty days the license of any operator or chauffeur without preliminary hearing on receiving a record of such operator's or chauffeur's conviction of having violated the laws against speeding by exceeding by more than fifteen miles per hour the speed limit set out in G.S. 20-218 or paragraph 3 or paragraph 4 of subsection (b) of G.S. 20-141." G.S. 20-16.1 was enacted by the General Assembly as Section 1 of Chapter 1223 of the 1953 Session Laws, and this Chapter 1223 is entitled "AN ACT TO FURTHER PROMOTE HIGHWAY SAFETY BY PROVIDING FOR THE MANDATORY SUSPENSION OF A DRIVER'S LICENSE UPON CONVICTION OF EXCESSIVE SPEEDING AND RECKLESS DRIVING."

The court found as a fact that plaintiff was convicted of driving an automobile at a speed of 75 miles per hour in a 45-miles per hour speed zone: his brief states he was driving a passenger automobile. Therefore, G.S. 20-218 relating to the speed of school busses, and paragraph 3 of subsection (b) of G.S. 20-141 referring to other vehicles than passenger automobiles, etc., have no application here. Subsection (b) and paragraph 4 of that subsection read: "Except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of the following speeds: (4) Fifty-five miles per hour in places other than those named in paragraphs 1 (a business district) and 2 (a residential district) of this subsection for passenger cars . . ." The words inserted in parentheses in the above sentence are ours.

Before Chapter 1223, 1953 Session Laws, now codified as G.S. 20-16.1, was enacted, under G.S. 20-16 the licenses of persons convicted of speeding twice within a year were subject to suspension, but a single offense of speeding within a year did not subject a driver to suspension unless he was convicted of speeding more than 75 miles per hour. Chapter 1223 added a new section, G.S. 20-16.1, which requires a 30-day suspension of the license of a driver who is convicted of exceeding by more than 15 miles per hour any of three stated speed limits: the 35-miles per hour speed limit for school busses loaded with

children, and except as otherwise provided in G.S. Chapter 20, the 45-miles per hour speed limit in places other than a business and residential district for motor vehicles other than passenger cars, regular passenger vehicles, pick-up trucks of less than one-ton capacity, and school busses loaded with children, and the 55-miles per hour speed limit in places other than a business and residential district for passenger cars, regular passenger-carrying vehicles, and pick-up trucks of less than one-ton capacity. 31 N.C. Law Review, p. 414 (1953). Certainly a 45-miles per hour speed zone established by the Highway Commission by virtue of G.S. 20-141(d) is a place other than a business or residential district.

The general maximum speed limit of motor vehicles in North Carolina is, and was at the time when plaintiff was convicted of speeding, 55 miles per hour. G.S. 20-141(b) 4; *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. Chapter 214, 1957 Session Laws, now codified as G.S. 20-141(b) 5, authorized the State Highway Commission to designate a speed limit maximum of 60 miles per hour for certain vehicles on certain highways. In *S. v. Brown,* 250 N.C. 209, 108 S.E. 2d 233, this Court held that 55 miles per hour is the general maximum speed limit in this State and that the provisions of G.S. 20-141(b) 5 are in the nature of an exception.

Plaintiff contends that he was convicted of violating the 45-miles per hour speed zone limit established by the State Highway Commission by virtue of G.S. 20-141(d), not the 55-miles per hour speed limit established by G.S. 20-141(b) 4, which applies where no other speed limit has been put into effect. That G.S. 20-141(d) is not made a part of G.S. 20-16.1 expressly or by implication. That G.S. 20-16.1 by mentioning only three specific speed laws excluded all other speed laws from its operation. Therefore, G.S. 20-141(b) 4 has no application here.

In considering the meaning of the first sentence of G.S. 20-16.1 quoted above, "we must ascertain the intention of the Legislature and carry such intention into effect to the fullest degree." *Ballard v. Charlotte,* 235 N.C. 484, 70 S.E. 2d 575. "The legislative intent has been designated the vital part, heart, soul, and essence of the law, and the guiding star in the interpretation" of statutes. 50 Am. Jur., Statutes, Section 223.

"Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute

as meaning what it says, and to avoid giving it any other construction than that which its words demand." 50 Am. Jur., Statutes, Section 225.

The clear, definite and unmistakable language of G.S. 20-16.1, in force at all times relevant here, requires that notwithstanding any other provisions of Article 2, Chapter 20 G.S., the Department of Motor Vehicles shall mandatorily suspend for a period of 30 days the license of any operator or chauffeur without preliminary hearing on receiving a record of such operator's or chauffeur's conviction of having violated the laws against speeding by exceeding by more than 15 miles per hour the speed limit of 55 miles per hour for passenger cars in places other than a business district or a residential district as those districts are named in G.S. 20-141(b) (1) and (2), except a higher speed in places is provided for in G.S. Chapter 20. Plaintiff was convicted of driving his passenger automobile at a speed of 75 miles per hour on a public highway in Guilford County in a 45-miles per hour speed zone, which is a speed exceeding by more than 15 miles per hour the maximum speed limit of the State fixed by G.S. 20-141(b) 4. The fact that the place was a 45-miles per hour speed zone indicates it was not a business or residential district. Certainly according to the facts found, plaintiff was convicted of, and was guilty of speeding by exceeding by more than 15 miles per hour the general maximum speed limit of 55 miles per hour established by G.S. 20-141(b) 4 in a place other than a business or residential district, and this is true even though the place was a 45-miles per hour speed zone. In our opinion, the plain and unambiguous words of the statute demand the interpretation that driving a passenger car in a 45-miles per hour speed zone at a speed of 75 miles per hour is a violation of G.S. 20-141(b) 4, that such was the legislative intent, that such an interpretation clearly comes within the scope of the language used in the statute, and that G.S. 20-141(b) 4 is applicable here. G.S. 20-16.1 was enacted to promote highway safety by providing for the mandatory suspension of a driver's license upon conviction of excessive speeding and reckless driving. To accept plaintiff's contention would require an interpretation of G.S. 20-16.1 and G.S. 20-141(b) 4 to the effect that plaintiff's licenses could be suspended if he had been driving his automobile 75 miles per hour in the open country, but his licenses cannot be suspended because he was driving it at a speed of 75 miles per hour in a 45-miles speed zone. That would be a stinting and narrow interpretation of the statutes not justified by the language used therein, and plainly not the intention of the General Assembly.

The first sentence of G.S. 20-16.1 was rewritten by Section 4 of Chapter 1264, 1959 Session Laws, which became effective 1 October 1959, by adding paragraph (5) of subsection (b) of G.S. 20-141 (fixing a speed under certain conditions not to exceed 60 miles per hour) to paragraphs (3) and (4) of the same subsection, and by adding the following: "or on receiving a record of conviction for speeding within the corporate limits of any city or town where such operator or chauffeur exceeded a speed of fifty-five miles per hour, or a speed of sixty miles per hour if such higher limit was posted and in effect."

We are not inadvertent to the two serious questions presented by the procedure followed in this case: One, can the plaintiff contest the mandatory suspension under G.S. 20-16.1 of his licenses by defendant by a suit in equity, and two, can the defendant appeal from the order entered? Defendant in his brief recognizes the procedural question, and states he does not desire to raise any objection to the procedure adopted, for the reason that for several years the Department of Motor Vehicles has been suspending drivers' licenses for a 30-day period based on a record of speeding conviction similar to the one involved in this case, and he seeks a construction of the pertinent provisions of G.S. 20-16.1 as it was applied here, and if the interpretation placed by him on the statute in the instant case is incorrect, then the plaintiff should not have his licenses suspended for 30 days. Considering that the public interest requires that a prompt and definite answer be given to the question here presented for decision as to whether or not plaintiff's licenses upon the facts found are subject to a 30-day suspension under the relevant provisions of G.S. 20-16.1, we have decided to disregard the procedural problem and decide the appeal.

The operation of a motor vehicle on a public highway is not a natural right. It is a conditional privilege which the State in the interest of public safety acting under its police power may regulate or control, and suspend or revoke the driver's license. *In re Revocation of License of Wright,* 228 N.C. 584, 46 S.E. 2d 696; *Commonwealth v. Ellett,* 174 Va. 403, 4 S.E. 2d 762. As this Court said in *Harvell v. Scheidt, Comr. of Motor Vehicles,* 249 N.C. 699, 107 S.E. 2d 549: ". . . the suspension or revocation of a driver's license is no part of the punishment for the violation or violations of traffic laws. . . . The purpose of the suspension or revocation of a driver's license is to protect the public and not to punish the licensee."

The defendant's assignments of error to the conclusions of law of the trial judge and to the judgment granting the restraining order are sustained, and the judgment below is reversed. The court below

is directed to enter judgment reversing the judgment entered herein, to dismiss the suit and tax plaintiff with the costs.

Reversed.

HONEY PROPERTIES, INC. v. CITY OF GASTONIA.

(Filed 18 May, 1960.)

1. Contracts § 16—

Where a contract is written and signed by one party and delivered to the other party without any conditions or reservations, and the contract is accepted by such other party, the agreement is complete, and the first party may not, in the absence of assent by the other party, thereafter attach conditions and reservations thereto, and a letter setting forth such conditions, even though the letter is written on the same day as the contract, cannot modify the contract when the letter is not received by the other party until after the contract had been accepted.

2. Municipal Corporations § 16—

A contract by the owner of land outside the corporate limits of a municipality that, in consideration of the city's permitting him to connect with the city's sewer system, the city should be the owner in fee simple of the sewer lines whenever the city should extend its limits to include the locus, *held* supported by sufficient consideration and binding, and after acceptance of the agreement by the city by permitting the connection, the owner may not assert that the agreement was conditioned upon whether the city was forced to pay other property owners upon the appropriation of their water and sewer lines.

3. Contracts § 4—

A contract executed under seal imports consideration, *nudum pactum* being applicable only to simple contracts.

4. Municipal Corporations § 16—

A municipality has the right to require that the owner of a sewer line waive any right to compensation in the event the city should later appropriate the line as a condition precedent to permitting such owner to connect his line with the city sewer system, and the permit to make such connection is a sufficient consideration for the owner's agreement.

This cause was heard by *Froneberger, J.*, December Civil Term, 1959, of GASTON. The plaintiff thereafter filed a petition for writ of *certiorari*, which was allowed on 23 February 1960.

In 1952, the plaintiff was the owner of a tract of land lying approximately 2,000 feet more or less, east of the corporate limits of the city

of Gastonia, fronting on Wilkinson Boulevard. The plaintiff owned and operated a restaurant on said premises. At that time the restaurant disposed of its waste and sewage through its own septic tank; however, for sometime the septic tank had proved expensive and unsatisfactory because frequently there was an overflow of liquid waste therefrom on top of the ground behind the restaurant. The Gaston County Health Department recommended to plaintiff that the restaurant be connected to the sewer system of the City of Gastonia and the septic tank abandoned.

The record in this case tends to support these facts: That an attorney for the plaintiff appeared before the City Council of the City of Gastonia on 6 May 1952, and made a request that the plaintiff be permitted to connect a sewer line with the sewer system of the City of Gastonia; that a committee was appointed to consider the matter and submit recommendations with respect thereto at a special meeting to be held at 11:30 a.m., Wednesday, 7 May 1952. The Council adopted the committee's report, which provided substantially as follows:

"1. That before any water or sewer connection is made by any person, firm or corporation, said person, firm or corporation shall agree that the said water lines shall be the property of the City when and if the said territory is taken into the City. 2. That any fees for tapping is a matter between the owner of the line or lines and those making taps prior to coming into the City. 3. That all lines are to be laid under the direction and supervision of the City Engineer. 4. In view of the fact that the owner or owners have agreed to give lines to the City when they are taken into the City, the City should control and maintain said lines."

At said meeting on 7 May 1952, the Council unanimously voted that the City follow the recommendations of the committee above set out and that all such "problems" be handled in accordance therewith.

Thereafter, on 22 May 1952, a contract was executed in the plaintiff's name by its president, attested by its secretary and its corporate seal affixed thereto, and duly acknowledged before a Notary Public in Mecklenburg County, the pertinent part of which contract reads as follows: "In consideration of being permitted to connect with the sewer system of the City of Gastonia, we do hereby agree that whenever the said lines hereinafter described shall be taken into the City of Gastonia, the said City shall be the owner in fee simple of said lines, together with any and all right of ways under said sewer lines owned or acquired by us. Provided said City shall maintain said lines. Said lines are described as follows * * *." This contract was delivered

either by the plaintiff or its agent to the City Council at the meeting of the Council on 22 May 1952, at which meeting the Council ordered that the contract be recorded. The record further reveals that the contract was filed for registration in the office of the Register of Deeds in Gaston County at 9:00 a.m. on the 24th day of May 1952. The plaintiff's sewer line was connected to the sewer system of the City of Gastonia on 23 May 1952.

Thereafter, a letter dated 22 May 1952 and addressed to the City of Gastonia, Gastonia, North Carolina, was received by the City and reads as follows: "Owing to the dire need for sewer lines to my property known as Minute Grill of Gastonia, N. C., which is outside the city limits, and the inadvisability of awaiting the outcome of certain litigation of Gaston County citizens with the City of Gastonia, in which such citizens are taking the same position we have taken—namely that the City should buy the sewer line at depreciated cost when taken into the City—we have signed and mailed you the contract which you asked us to sign. This contract is delivered on the condition that if the position of the City of Gastonia in the pending suits in question is not finally sustained then we shall have the right to bring an action for proper compensation in line with such final ruling of the court."

This letter was sent by registered mail from Dilworth Station in Charlotte, North Carolina, and was not delivered until 26 May 1952. On the following day, 27 May, 1952, the City Manager of the City of Gastonia wrote to the president of the plaintiff corporation as follows: "You executed a contract with the City of Gastonia in regard to a sewer line and the contract has been duly recorded. It is the agreement between your company and the City that the only rights that you have are set forth in that contract notwithstanding your letter that was received yesterday."

On 21 December 1954, the territory in which the sewer line in controversy was located was duly incorporated within the city limits of the City of Gastonia and said sewer line presently constitutes a part of the sewer system of said City. This action was instituted and service obtained on the defendant on 18 December 1957.

The president of the plaintiff corporation testified that according to the best of his knowledge and belief the contract referred to herein was enclosed and mailed to the City in the same envelope in which the letter dated 22 May 1952 was mailed.

At the close of all the evidence of both the plaintiff and the defendant, the defendant moved for judgment as of nonsuit. The motion was allowed and the plaintiff gave notice of appeal to the Su-

preme Court. Later, a petition for writ of *certiorari* was filed in the Supreme Court and allowed as hereinabove indicated.

Hollowell & Stott, Hugh W. Johnston for plaintiff.
J. Mack Holland, Jr., James B. Garland for defendant.

DENNY, J. The plaintiff's sole exception and assignment of error is to the action of the court below in sustaining the defendant's motion for judgment as of nonsuit.

The plaintiff contends that the trial court committed error in refusing to permit the jury to find the facts and determine whether or not the defendant should pay the plaintiff for the sewer line installed by the plaintiff and thereafter made a part of the defendant's sewer system.

We are of the opinion that the ruling of the court below should be upheld for the following reasons: (1) As we construe the record in this case, there were no conditions attached to the delivery of the contract executed by the plaintiff on 22 May 1952. The evidence supports the view that this contract was delivered to the City of Gastonia after its execution on 22 May 1952; that it was accepted by the City Council of the City of Gastonia at a meeting of the Council on the above date and ordered filed for registration; that it was filed for registration in the office of the Register of Deeds for Gaston County on 24 May 1954, two days before the letter dated 22 May 1952 was received by the City, purporting to make the contract previously delivered subject to certain conditions and reservations. This was too late to modify the contract. Therefore, we hold that, the contract having been delivered unconditionally insofar as the record discloses, and the plaintiff having been granted the privilege which was the consideration for the execution of the contract, to wit, the right to connect its sewer line with the sewer system of the City of Gastonia, which connection was made on 23 May 1952, the plaintiff's agreement could not be altered or amended thereafter except by the consent of the defendant and there is no evidence tending to show that the defendant ever consented to any change or modification of the contract. (2) The contention of plaintiff that the contract with the City, which was executed on 22 May 1952, was without consideration and therefore invalid, is without merit on two grounds: First, the contract states, "In consideration of being permitted to connect with the sewer system of the City of Gastonia, we do hereby agree that whenever the said lines * * * shall be taken into the City of Gastonia, the said City shall be the owner in fee simple of said lines * * *."

Second, the contract was executed under seal. A contract executed under seal imports consideration. *McGowan v. Beach,* 242 N.C. 73, 86 S.E. 2d 763, and cited cases. *Pearson, C. J.,* in considering this question in *Harrell v. Watson,* 63 N.C. 454, said: "A bond needs no consideration. The solemn act of sealing and delivering is a *deed, a thing done,* which, by the rule of the common law, has full force and effect, without any consideration. *Nudum pactum* applies only to simple contracts. * * *"

Moreover, the execution of the contract by the plaintiff was a condition which the City had the right to require before permitting the plaintiff to connect its sewer line to the sewer system of the City. *Construction Co. v. Raleigh,* 230 N.C. 365, 53 S.E. 2d 165.

The plaintiff could not compel the City of Gastonia to permit it to connect its sewer line to the sewer system of the City. On the other hand, the City was powerless to compel the plaintiff to construct a sewer line and connect it with the City sewer system. It was purely a matter of contract, on such terms as the City was willing to grant and the plaintiff was willing to accept. *Construction Co. v. Raleigh, supra;* G.S. 160-255.

The fact that the City may have entered into previous contracts in which it had agreed to purchase sewer and water lines if and when the territory was incorporated within the city limits, is not controlling on this record.

In light of the facts revealed in this case, the judgment of the court below is

Affirmed.

J. B. STYERS AND ROLAND E. BRADLEY v. CITY OF GASTONIA

(Filed 18 May, 1960.)

1. Municipal Corporations § 16—

Plaintiffs constructed water mains as a business venture, permitting property owners to tap the mains for a fee. The city sold water to plaintiffs' licensees and agreed to reimburse plaintiff for the mains when the boundaries of the city were enlarged to include the locus. *Held:* Even though the contract with the city is invalid, the plaintiff is entitled, upon the extension of the city limits and the appropriation by the city of the mains, to recover the value of his property so appropriated.

2. Same—

Plaintiffs constructed water mains and licensed land owners to tap into the mains for a fee. The city sold water to plaintiffs' licensees. There was no dedication of the mains to the public, but plaintiffs contemplated that the city should compensate them for the mains when the city should extend its limits to include the locus. *Held:* The city appropriates the mains to its own use when, after the extension of its limits, it first begins to permit new customers to tap the mains without obtaining authority from plaintiffs, and thus exercises complete dominion over the mains, and a claim for compensation filed less than one year after such appropriation is not barred. G.S. 1-52, G.S. 1-53.

This cause was heard by *Froneberger, J.*, December 1959 Civil Term, of GASTON. Plaintiffs thereafter filed a petition for *certiorari* which was allowed 23 February 1960.

Plaintiffs allege they laid water lines in territory adjacent to but outside of the corporate limits of Gastonia. These lines were laid and connected with the city's lines pursuant to an agreement with its officials that when the corporate boundaries were enlarged so as to include the area in which the lines were laid, the city would compensate plaintiffs. They allege the corporate boundaries were so enlarged in 1955, the city had repudiated its contract and refused to pay, and had thereafter taken possession of the water lines.

Defendant denied liability and, as additional defenses, pleaded the protection afforded by the two- and three-year statutes of limitations, G.S. 1-52 and G.S. 1-53.

Defendant's motion for nonsuit was allowed at the conclusion of plaintiffs' evidence. Plaintiffs excepted and gave notice of appeal. Because of delay in fixing the case on appeal, plaintiffs moved for *certiorari*. The motion was allowed, and the cause is here on the writ so issued.

Hollowell & Stott and Hugh W. Johnson for plaintiff appellants.
J. Mack Holland, Jr., and James B. Garland for defendant, appellee.

RODMAN, J. Plaintiffs' evidence is sufficient for a jury to find: Plaintiffs caused to be constructed between 1948 and 1955 the water lines for which they now seek compensation. When constructed, the lines were beyond the corporate limits of Gastonia. The lines were built at the suggestion of Mr. Abernathy, director of utilities of Gastonia, as an investment by which plaintiffs would profit by selling to adjacent property owners the right to tap the lines and thereby receive water from defendant. Construction of the lines benefited defendant by enabling it to sell water to those whom plaintiffs licensed to tap the lines. Defendant had no right to use the lines except to deliver water to plaintiffs' licensees. *Grimes v. Power Co.*, 245 N.C. 583, 96 S.E. 2d 713. Abernathy agreed plaintiffs would be reimbursed the amount expended in constructing the lines if and when the corporate boundaries were enlarged and the lines included within the new boundaries. The boundaries were enlarged in 1955 and as enlarged included the water lines which are the subject of this controversy.

Mr. Yoder succeeded Mr. Abernathy as director of utilities. He served in that capacity from 1 April 1954 through December 1955. While Yoder was director of utilities for defendant, he required a written permit from plaintiffs before making a connection with the lines constructed by them. Sometime after Yoder retired at the end of 1955, the city began making water connections for new customers without obtaining authority from plaintiffs and now exercises control and dominion over the lines so constructed.

On 15 October 1956 plaintiffs filed claim with defendant requesting "to be reimbursed for our investment less depreciation to and plus interest from the date the City confiscated them." On the same day "the Council voted unanimously to refuse this claim." Summons issued 7 July 1958.

Plaintiffs do not contend that the city is bound by the asserted contract with Abernathy to reimburse them for the amounts expended in construction of the lines. They allege and prove this agreement only for the purpose of negativing defendant's contention of an offer to dedicate accepted by the city, thus avoiding the result reached in *Honey Properties v. Gastonia, ante*, 567 and *Spaugh v. Winston-Salem*, 234 N.C. 708, 68 S.E. 2d 838.

Plaintiffs, according to their evidence, owned no property in the area in which the lines were laid, but laid the lines as a business investment pursuant to an agreement that the city would reimburse them for the moneys so expended, if the lines were incorporated within the city's limits. That contract was void. G.S. 143-129; *Hawkins v. Dallas*, 229 N.C. 561; *Raynor v. Commissioners of Louisburg*, 220 N.

C. 348, 17 S.E. 2d 495. The contract being void, the mere extension of the corporate limits created no liability. *Farr v. Asheville,* 205 N. C. 82, 170 S.E. 125. The liability arose when, and only when, the city appropriated plaintiffs' property to its own use. This appropriation imposed on it a duty to pay the fair value of the property taken. N.C. Const., Art. I, sec. 17; *Jackson v. Gastonia,* 246 N.C. 404, 98 S.E. 2d 444; *Manufacturing Co. v. Charlotte,* 242 N.C. 189, 87 S.E. 2d 204; *Hawkins v. Dallas, supra; Construction Co. v. Charlotte,* 208 N.C. 309, 180 S.E. 573; *Realty Co. v. Charlotte,* 198 N.C. 564, 152 S.E. 686.

The taking was subsequent to December 1955. Claim was filed and rejected in October 1956. Summons issued 7 July 1958. On this testimony the action is not barred.

Reversed.

REDA COCHRAN McGINNIS v. CATHERINE ROBINSON AND HAROLD McGHEE.

1. Automobiles § 41d—

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of the negligence of defendant, while attempting to pass a car preceding him in the same direction, in driving over the center line and colliding with the car in which plaintiff was riding, which was traveling in the opposite direction.

2. Automobiles § 41p—

The circumstantial evidence in this case *is held* sufficient to be submitted to the jury on the question of the identity of the defendant as the driver of the car involved in the collision.

3. Automobiles § 46— Charge held for error in instructing the jury on inapplicable statute.

Plaintiff's evidence tended to show that defendant pulled out from behind a preceding car, drove over the center line of the highway, and struck the car in which plaintiff was riding, which was approaching from the opposite direction. Defendant's evidence was to the effect that he started to pass the preceding car, saw the car in which plaintiff was riding, and dropped back into his lane of travel, and was hit by the car in which plaintiff was riding after defendant had regained his right side of the road. The evidence disclosed that defendant's car came in contact with the preceding car, plaintiff contending that such contact was made when defendant attempted to go around the preceding car, and defendant contending that such contact was made as he was dropping back to regain his right side of the road. *Held:* An instruction as to the duty of a motorist to pass at least two feet to the left of an overtaken vehicle and not to again drive to the right until safely clear of such

vehicle, is prejudicial in the absence of allegation and evidence that the contact between defendant's car and the preceding vehicle was a proximate cause of the collision between defendant's car and the car in which plaintiff was riding.

4. Trial § 31b—

It is error for the court to charge upon an abstract principle of law which is not presented by the evidence in the case.

APPEAL by defendant (Catherine Robinson) from *Hobgood, J.*, November Civil Term, 1959, of VANCE.

Civil action instituted June 14, 1954, growing out of a collision that occurred in Vance County about 9:15 p.m. on October 10, 1953, on the two-lane highway designated #158 By-Pass (Northwest Boulevard), near the #39 Overpass, between a 1949 Ford, traveling east toward Henderson, and a 1952 Mercury, traveling west toward Oxford. Plaintiff was a passenger in the Ford, which her husband, Glen W. McGinnis, was operating.

Plaintiff alleged the collision and her injuries were proximately caused by the negligence of the operator of the Mercury in that such operator, in an attempt to overtake and pass a 1947 Dodge, suddenly swerved to the left, crossing the center line, into the left-hand lane of travel and directly in the path of the Ford.

Plaintiff alleged that defendant Catherine Robinson was operating the Mercury with the knowledge, consent and approval of Harold McGhee, the owner thereof; and the action was instituted against said alleged operator and said alleged owner.

Defendants filed separate answers. McGhee's answer consisted of a general denial of the essential allegations of the complaint. Catherine Robinson, in addition to such general denial, alleged McGhee, the owner, was operating the Mercury and she was a passenger and had no control over its operation.

The case first came on for trial at November Civil Term, 1955; but before plaintiff had completed the presentation of her evidence, the court, in its discretion, for reasons not now material, withdrew a juror and ordered a mistrial.

Thereafter, in June, 1957, upon plaintiff's application, judgment of nonsuit was entered as to McGhee; and, pursuant to leave of court, plaintiff amended her complaint by striking therefrom all allegations relating to McGhee. Catherine Robinson became and is the sole defendant.

Upon trial at November Civil Term, 1959 the court submitted, and the jury answered, these issues: "1. Was the defendant Catherine Robinson driving the 1952 Mercury car on October 10, 1953, at the

time of its collision with the 1949 Ford car, as alleged in the Complaint? Answer: Yes. 2. Was the plaintiff injured by the negligence of the defendant, as alleged in the Complaint? Answer: Yes. 3. What amount, if any, is the plaintiff entitled to recover as damages from the defendant. Answer: $22,500.00."

Judgment for plaintiff, in accordance with the verdict, was entered. Defendant excepted and appealed.

George T. Blackburn, John H. Kerr, Jr. and W. Hayes Pettry for plaintiff, appellee.

Charles P. Green and Frank B. Banzet for defendant Catherine Robinson, appellant.

BOBBITT, J. While in sharp conflict with evidence offered by defendant, the evidence offered by plaintiff was sufficient to support her allegations that the collision and her injuries were proximately caused by the negligence of the operator of the Mercury; and, although there was no direct evidence, the circumstantial evidence, when considered in the light most favorable to plaintiff, was, in our opinion, sufficient to support a finding that defendant was operating the Mercury when the collision occurred. See *Stegall v. Sledge,* 247 N.C. 718, 722, 102 S.E. 2d 115; *Bridges v. Graham,* 246 N.C. 371, 377, 98 S.E. 2d 492, and cases cited.

Defendant's motion for judgment of nonsuit was properly overruled. Since a new trial is awarded, we refrain from discussing the evidence presently before us except to the extent necessary to show the reasons for the conclusion reached. *Caudle v. R. R.,* 242 N.C. 466, 88 S.E. 2d 138.

Uncontroverted evidence tended to show these facts: The McGinnis car (Ford) was the last of three cars traveling east on #158 By-Pass. The first was a Chevrolet, owned and operated by Stanley Miller. The second was a Pontiac, bearing a Kentucky license plate, owned and operated by a Mr. Shearin. The Mercury was the second of two cars traveling west on #158 By-Pass. The first was a 1947 Dodge operated by Mrs. Boyd.

Evidence for plaintiff tended to show: The Mercury pulled out to its left from behind the Boyd car. Miller and Shearin, to avoid collision, pulled to the extreme right of their traffic lane. The Mercury crossed the center line, into the path of the McGinnis car. The collision occurred in McGinnis' (south) traffic lane.

Evidence for defendant tended to show: McGhee, the driver of the Mercury, pulled out to go around the Dodge and got alongside of it.

McGhee observed the approaching car(s), saw he could not pass, dropped back behind the 1947 Dodge and in doing so sideswiped its left rear corner. He had gotten back on his (north) side of the road when struck by the McGinnis car.

Plaintiff also offered evidence tending to show damage to the left rear fender of the Dodge and dark green paint on the right door of the Mercury that matched the green paint on the Dodge. McGinnis, plaintiff's husband, testified: "The Mercury was meeting me, going west, and went around another car and hit me."

It appears from the evidence of both plaintiff and defendant that the Mercury struck the left rear of the Dodge. Plaintiff contends this contact occurred when the Mercury pulled out to its left into the lane of traffic of McGinnis, while defendant contends it occurred when McGhee dropped back from a position alongside of the Dodge into the Mercury's lane of traffic.

Defendant, by exceptions to the court's failure to charge in stated particulars, contends the court failed to declare and explain the law arising on the evidence as to all substantial features of the case as required by G.S. 1-180, citing *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913, and similar cases. Defendant emphasizes the failure of the court to give a *positive* instruction to the effect that the jury should answer the second issue, "No," if it found the collision occurred, as defendant's evidence tended to show, on the Mercury's right side of the highway. Whether the asserted deficiency is sufficient to justify a new trial need not be decided. Defendant's exception to a portion of the charge as given is well taken and is deemed sufficiently prejudicial to require a new trial.

Defendant excepted to this portion of the charge: "I instruct you further that we have in North Carolina another section which is entitled G.S. 20-149, which reads as follows: 'A driver of any vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaking *(sic)* vehicle.' The Court instructs you that a violation of that statute is negligence in itself, and if the defendant violated that section of our General Statutes, and it was the proximate cause of the damage and injury to the plaintiff, then you would answer the second issue YES." The court did not attempt to relate this instruction to any state of facts supported by evidence. Moreover, there is neither allegation nor evidence that the contact between the Mercury and the Dodge was a proximate cause of the collision between the Mercury and the Ford.

G.S. 20-149(a), quoted by the court, is inapplicable to the factual situation under consideration. The principal purpose of G.S. 20-149(a) is the protection of the "overtaken vehicle" and its occupants. Hence, it would be relevant if this were an action by Boyd for damages to the Dodge. Absent unusual circumstances, it has no bearing where the collision is between vehicles proceeding in opposite directions. It is noted that the court did not call attention to the provisions of G.S. 20-150.

"It is established by our decisions that an instruction about a material matter not based on sufficient evidence is erroneous. (Citations) And it is an established rule of trial procedure with us that an abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury. (Citations)" *Childress v. Motor Lines*, 235 N.C. 522, 530, 70 S.E. 2d 558. In *Lookabill v. Regan*, 245 N.C. 500, 96 S.E. 2d 421, a new trial was awarded because instructions, based on the provisions of G.S. 20-149, were inapplicable to the factual situation then considered.

The quoted instruction, in relation to the present factual situation, was erroneous and prejudicial. The evidence of both plaintiff and defendant is to the effect that the Mercury made actual contact with the Dodge and hence was not at least two feet to the left thereof. Thus, the uncontroverted evidence supports a finding that the driver of the Mercury violated G.S. 20-149(a); but there is neither allegation nor evidence that such violation was a proximate cause of the collision between the Mercury and the Ford.

While other assignments of error appear to have merit, the questions raised may not recur upon a new trial. Hence, particular consideration thereof upon the present record is deemed inappropriate.

New trial.

STATE v. ONSLOW WILSON RORIE.

(Filed 18 May, 1960.)

Homicide § 30: Assault and Battery § 17: Indictment and Warrant § 18—

A statutory indictment for manslaughter which contains no averment that the manslaughter was committed by an assault, and no independent charge of assault and battery or assault with a deadly weapon, is insufficient to support a conviction of an assault with a deadly weapon, since the lesser offense is not necessarily included in the charge of the graver offense. G.S. 15-170.

APPEAL by defendant from *Phillips, J.*, January Regular "A" Term, 1960, of HOKE.

The defendant was tried upon a bill of indictment, charging that the defendant, Onslow Wilson Rorie, late of the County of Hoke, on or about the 22nd day of August 1959, "unlawfully, wilfully and feloniously did kill and slay one Milton Roper against the form of the statute in such case made and provided and against the peace and dignity of the State."

The evidence tends to show that the defendant is a man 64 years of age, five feet nine inches tall and weighed 150 pounds; that he operated a country store and filling station at a place called Five Points, in Hoke County, some ten miles from Raeford. Farm workers in the area gathered at the store and purchased bologna, bread, and other prepared items, including cold drinks, for lunch. The defendant and his wife lived in the rear of the store. On the morning of 21 August 1959, Milton Roper, who was approximately six feet tall, weighed 170 pounds and was 42 years of age, and who lived in the area came to the store and filling station of the defendant in a drunken condition and was ordered to leave. Later in the day, about noon, he returned and there were about twelve or fifteen customers in the store. His condition was such that most of the customers immediately left. One of the customers who remained in the store was purchasing bologna which the defendant was slicing at the time. The deceased grabbed a slice of bologna and the defendant ordered him out of the store, but gave him the slice of meat he had handled. The defendant obtained another "stick of bologna" and began slicing it for the customer and the deceased again grabbed these slices. The defendant again ordered Roper to leave and when he did not do so the defendant went into an adjoining room and returned with a tire tool or rubber hammer. Upon his return, the deceased was muttering something, holding the meat in one hand and with his other fist balled up. The defendant testified, "I didn't know whether he was knocking at me, trying to grab the hammer, or what; he was fighting toward me." The

defendant, according to his own testimony, hit the deceased on the top of the head, knocking him to a sitting position. The deceased got up, walked out of the store and, as he stepped from the door, staggered and fell against the concrete platform upon which the gasoline tanks were located. In a few minutes he was carried in the direction of his home and died some 36 hours later in the Moore County Hospital.

Marilyn Locklear, who was in the store at the time, testified that after the deceased took some meat a second time, the defendant went out of the store and picked up a tire tool or piece of iron and returned holding it in both hands; that he struck the deceased on the side or back of the head; that the deceased fell to the floor but later got up and staggered out of the store and fell in front of the store, near the gasoline pumps.

The jury returned a verdict of "guilty of assault with a deadly weapon."

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

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

Charles Hostetler; Nance, Barrington & Collier for defendant.

DENNY, J. The defendant's first assignment of error raises this question: Is a verdict of assault with a deadly weapon supported by a statutory indictment for manslaughter which fails to allege that a homicide was committed by means of an assault and battery or assault with a deadly weapon?

It seems that the exact question now before us has not heretofore been decided by this Court. See concurring opinion in the case of *S. v. Watkins*, 200 N.C. 692, 158 S.E. 393.

It is provided in G.S. 15-169: "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding, and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character."

It is likewise provided in G.S. 15-170, as follows: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to com-

mit the crime so charged, or of an attempt to commit a less degree of the same crime."

Notwithstanding the provisions of the above statutes, when it is sought to fall back on the lesser offense of assault and battery or assault with a deadly weapon, in case the greater offense, murder or manslaughter, is not made out, the indictment for murder should be so drawn as necessarily to include an assault and battery or assault with a deadly weapon, or it should contain a separate count to that effect. Re McLeod, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (N.S.) 813; *Watson v. State*, 116 Ga. 607, 43 S.E. 32, 21 L.R.A. (N.S.) 1; *Scott v. State*, 60 Miss. 268 (1882); *Cates v. Com.*, 111 Va. 837, 69 S.E. 520, 44 L.R.A. (N.S.) 1047; *People v. Schleiman*, 197 N.Y. 383, 90 N.E. 950; *Bell v. State*, 149 Miss. 745, 115 So. 896; *S. v. Thomas*, 65 N.J.L. 598, 48 A. 1007; *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410; *S. v. Gibler*, 182 Kan. 578, 322 P. 2d 829; 27 Am. Jur., Indictments and Informations, section 194, page 738, *et seq.;* 42 C.J.S., Indictments and Informations, section 289, page 1317, *et seq.;* Wharton's Criminal Law and Procedure, volume 4, section 1799, page 631.

It is stated in 27 Am. Jur., section 194: "It is a well-established, general rule that when an indictment charges an offense which includes within it another, lesser offense, or one of a lower degree, the defendant, although acquitted of the higher offense, may be convicted of the lesser, or he may be convicted of the major offense without regard to the minor one. This rule is embodied in the statutes in many jurisdictions. The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with which the accused is specifically charged, and that the averment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense. If the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater."

It is likewise said in Wharton's Criminal Law and Procedure, above cited, "It is the common-law rule that when an indictment charges an offense which includes within it another lesser offense, or one of a lower degree of the same general class, the accused, although acquitted of the higher offense, may be convicted of the lesser. It is also the rule, both at common law and under the statutes of many of the states, that an indictment or information is insufficient to charge the accused with the commission of a minor offense, or one of less degree,

unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense, or sufficiently sets them forth by separate allegations in an added count, but that when the indictment or information contains all the essential constituents of the minor offense, it sufficiently alleges that offense. * * *"

It must be conceded that the form of indictment under consideration charges an offense of which assault with a deadly weapon may or may not be an ingredient. *S. v. Thomas, supra.* It does not set out manslaughter by assault and it is certainly insufficient to cover assault and battery or assault with a deadly weapon as an independent charge, separate and apart from the charge of manslaughter. *People v. Adams,* 52 Mich. 24, 17 N.W. 226. Moreover, involuntary manslaughter may be committed without the deceased being assaulted, as for example, where a homicide occurs as result of some negligent or culpable omission of duty. *S. v. Watkins, supra; S. v. Rountree,* 181 N.C. 535, 106 S.E. 669; *S. v. McIver,* 175 N.C. 761, 94 S.E. 682.

Where it is charged that an assault has been made with a deadly weapon, the character of the weapon must be averred. *S. v. Moore,* 82 N.C. 659; *S. v. Russell,* 91 N.C. 624; *S. v. Cunningham,* 94 N.C. 824; *S. v. Porter,* 101 N.C. 713, 7 S.E. 902; *S. v. Myrick,* 202 N.C. 688, 163 S.E. 803.

In view of the authorities cited herein, we are of the opinion that the bill of indictment in the present case is insufficient to support a verdict of assault with a deadly weapon, and we so hold.

In light of the conclusion we have reached, it is unnecessary to discuss the other assignments of error. They may not arise on another hearing.

The verdict below is set aside and the judgment arrested to the end that the solicitor may obtain an appropriate bill of indictment and try the defendant thereon if he so elects.

Judgment arrested.

NED H. MAY AND MIKE D. MAY, DOING BUSINESS AS D. C. MAY COMPANY, A PARTNERSHIP, v. CHARLES C. HAYNES, JR. CONSTRUCTION COMPANY, INC., CHARLES C. HAYNES, JR., AND JANE BARRY HAYNES.

(Filed 18 May, 1960.)

Frauds, Statute of, § 5—

Evidence that plaintiffs agreed to do certain construction work, which agreement was made with an individual who was president of the development company and the owner of practically all its shares of stock, upon his representation to the effect that he would be personally liable for the contract price, *is held* sufficient to be submitted to the jury on the question of whether the individual contracted for the work in his individual capacity, as well as in behalf of the corporation, and his agreement is an original promise not coming within the statute of frauds. G.S. 22-1.

APPEAL by defendant Charles C. Haynes, Jr., from *Hall, J.*, October Term, 1959, of DURHAM.

Civil action to recover $4,154.94, allegedly owing by defendants for work (painting and decorating) performed by plaintiffs pursuant to four separate contracts.

Plaintiffs alleged that Charles C. Haynes, Jr., hereafter called Haynes, "for and on behalf of himself and the said corporation," entered into contracts with plaintiffs for four different jobs; that they completed the work on each job; and that defendants have failed to pay any part of the amounts due plaintiffs under said contracts. Plaintiffs alleged the first of these contracts, entered into on or about May 18, 1956, was for painting on property of the corporate defendant designated Fargo 1 and 2, Rosebriar Subdivision, the contract price being $800.00. The later contracts, so plaintiffs alleged, were entered into on or about August 2, 1956, October 4, 1956, and October 15, 1956, respectively.

The corporate defendant, in its answer, admitted it had contracted with plaintiffs as alleged but denied it was indebted to plaintiffs. However, at the trial, the corporate defendant stipulated it was indebted to plaintiffs in the full amount of $4,154.94.

Haynes, in his answer, alleged the four contracts with plaintiff were made solely by the corporation and denied that he, individually, entered into such contracts with plaintiffs. Although designated a defendant in the caption, Jane Barry Haynes, wife of Charles C. Haynes, Jr., filed no answer. Appellant's brief advises that she was not served with summons.

The only evidence was that offered by plaintiffs. At the conclusion thereof, Haynes moved for judgment of nonsuit. His motion was

allowed as to all but the $800.00 allegedly due under the contract of May 18, 1956. Haynes excepted to the denial of his motion in respect of this $800.00 item.

The court submitted, and the jury answered, these issues: "1. Did the defendant Charles C. Haynes, Jr., contract for the painting job at Fargo 1 and 2, Rosebriar Subdivision? ANSWER: Yes. 2. What amount, if any, is plaintiff *(sic)* entitled to recover of Charles C. Haynes, Jr., in reference to the Fargo 1 and 2, Rosebriar Subdivision painting job? ANSWER: $800.00."

Judgment was entered against the corporation for $4,154.94 and costs and against Haynes for $800.00 and costs, with provisions (not pertinent to this appeal) to the effect that payments on either judgment (up to $800.00, interest and costs) are to be credited on both. Haynes excepted and appealed.

Brooks & Brooks for plaintiffs, appellees.
Daniel K. Edwards for defendant Charles C. Haynes, Jr., appellant.

BOBBITT, J. The only question is whether the court erred in overruling Haynes' motion for judgment of nonsuit in respect of the $800.00 allegedly due under the contract of May 18, 1956.

There is no controversy as to these facts: A contract was entered into under which plaintiffs were to paint two houses on property known as Fargo 1 and 2, Rosebriar Subdivision, for $800.00. Plaintiffs completed this work on or about May 30, 1956, but have not been paid.

The evidence tends to show the contract was entered into at the Haynes home in Hope Valley, the persons present being (plaintiff) Mike D. May, Haynes and Haynes' wife.

May's testimony, summarized, tends to show: Prior to May 18, 1956, Haynes told May "he was going to build a number of houses in a project" and would like for plaintiffs to do the painting. At that time, May advised Haynes he did not think plaintiffs would be interested. Later, as requested by Haynes, May went to the Haynes home. In the course of the conversation, Haynes explained his plans for building houses in the subdivision, stating that "he (Haynes) had already had the houses financed that he was going to build and that there wouldn't be any question as far as money was concerned." May, being advised that the subdivision property was owned by the corporation, said "there had been a question in his mind regarding his position." Thereupon, Haynes stated that the Haynes home in Hope Valley, owned by him and his wife, with the land around it, was worth

$75,000.00. May then asked, "(W)hat about the corporation?" To this inquiry, Haynes replied: "It's the same thing." Haynes then stated that he and his wife owned the Hope Valley property, owned all of the stock in the corporation and that it was all one and the same thing. May stated, "under those conditions," he would be glad to work with Haynes.

The basic fact is that the agreement with plaintiffs was made by Haynes. The only question is whether, in making the agreement, he was acting solely for the corporate defendant or, as plaintiffs alleged, "for and on behalf of himself and the said corporation."

Haynes had a personal, immediate and pecuniary interest in the transaction. He and his wife owned the entire capital stock of the corporation. (Note: It was alleged and admitted that Haynes *owns* 41 of the 43 shares of the corporation's capital stock and *is* its president, managing officer and controlling stockholder.) To dispel May's doubts as to whether credit should be extended, Haynes cited the value of the Hope Valley property and identified the property and interests of himself and his wife and the corporate property and interests as being one and the same thing. Reasonable inferences may be drawn from this evidence to the effect that Haynes represented to May and assured him that Haynes personally, in addition to the corporation, would be obligated for the payment of the contract price and that this was the agreement upon which plaintiffs accepted and performed the contract. Since such agreement involves an original promise or undertaking on the part of Haynes at the time credit was extended, G.S. 22-1 does not apply. *Warren v. White,* 251 N.C. 729, 112 S.E. 2d 522, where prior decisions are cited and discussed.

The evidence, in our view, was sufficient for submission for jury determination as to whether Haynes, when he contracted for the $800.00 job, did so in his individual capacity as well as in behalf of the corporation, and that Haynes' motion for judgment of nonsuit was properly overruled.

The charge of the trial judge was not included in the record on appeal. Hence, it is presumed the jury was instructed correctly on every applicable principle of law. *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104, and cases cited.

It is noted: The only subject discussed in the said conversation at the Haynes home was the work on the two houses on Fargo 1 and 2, Rosebriar Subdivision. There was no evidence of any conversations relating to the work to be done under the three later contracts referred to in the complaint.

It is noted further: The theory on which plaintiffs sought to recover

and on which the trial was conducted was that Haynes, individually, was a principal party to the contract of May 18, 1956. Hence, whether Haynes is liable under the rule applied in *Lester Brothers v. Insurance Co.*, 250 N.C. 565, 109 S.E. 2d 263, was not and is not presented.

No error.

WILLIAM E. WHALEY, AND WILLIAM E. WHALEY, JR., A PARTNERSHIP, D/B/A WILLIAM E. WHALEY COMPANY, v. BROADWAY TAXI COMPANY, INC.

(Filed 18 May, 1960.)

1. Injunctions § 13—

Where defendant denies plaintiffs' basic equity, alleges that the continuance of the temporary restraining order to the hearing would result in irreparable injury to defendant, and alleges that plaintiffs have an adequate remedy at law without resort to the equitable powers of the court, the denial of plaintiffs' motion for continuance of the temporary order to the hearing on the merits will not be disturbed on appeal, plaintiffs having failed to show that the denial of their motion for a continuance was contrary to some rule of equity or the result of an improper exercise of judicial discretion.

2. Costs § 2—

Costs follow the final judgment.

3. Injunctions § 13—

Upon the hearing of an order to show cause why a temporary restraining order should not be continued until the final determination of the action on the merits, the merits of the action are not before the court, and it is error for the court, even though it has properly refused a motion for the continuance of the temporary restraining order, to dismiss the action and tax plaintiffs with the costs.

APPEAL by plaintiffs from *Hobgood, J.*, 7 December 1959 Term, of DURHAM.

Civil action to restrain defendant from displaying advertising on its taxicabs for other persons, in violation of the terms of a contract entered into by them, which violation of the contract by defendant, if not enjoined, will cause them irreparable damage. The prayer for relief in the complaint is for a temporary injunction, and that an order issue for defendant to show cause, if any it can, why the injunction should not be made permanent.

On the day the complaint was filed, the resident judge of the judicial district, upon motion of plaintiffs, issued an order that defendant

appear at the courthouse in Durham, at 2:30 o'clock p.m. on 9 October 1959, or as soon thereafter as the matter may be heard, and show cause, if any there be, why the injunction prayed for by plaintiffs should not be granted *until the final determination of the action.* This order was served upon defendant. It was not heard on 9 October 1959.

Thereafter defendant filed an answer wherein it averred in substance that plaintiffs had breached the contract between them, that defendant had terminated the contract as it had a right to do under the contract, that it had entered into a contract with another advertising agency, and that a restraining order would cause it to breach this later contract and cause it irreparable injury. Defendant further alleged in its answer that if plaintiffs have a cause of action against it, which is denied, it has an adequate remedy at law for damages for breach of contract, and that the court should not resort to its equitable powers.

Plaintiffs filed a reply denying they breached the contract, denying defendant was entitled to terminate the contract according to its terms, and reiterating their prayer for injunctive relief.

The record states the cause came on for hearing before Judge Hobgood "upon the motion of the plaintiffs for an injunction and return of the order to show cause; whereupon the court entered the judgment, as appears in the record, denying plaintiffs' motion, dismissing the action and taxing the plaintiffs with the cost." The case on appeal was agreed upon by counsel. Judge Hobgood's judgment states that it was heard upon the pleadings, and it appeared to the court that the plaintiffs are not entitled to a restraining order in the cause. Whereupon he ordered and decreed that plaintiffs' motion for a restraining order be denied, and that plaintiffs be taxed with the costs of the action. Judge Hobgood found no facts. There is nothing in the record to indicate that any request was made of him to find any facts.

From this judgment, plaintiffs appeal.

Haywood & Denny for plaintiffs, appellants.
Hofler & Mount for defendant, appellee.

PARKER, J. Plaintiffs contend Judge Hobgood erred in denying their motion for an interlocutory injunction until the final determination of the action, and erred in dismissing the action and taxing them with the costs. Defendant contends Judge Hobgood treated the show cause order as a motion for a permanent injunction, and correctly denied the motion for an injunction, and correctly dismissed the action and taxed plaintiffs with the costs.

Judge Hobgood heard this matter "upon the motion of the plaintiffs for an injunction and return of the order to show cause." The show cause order states that defendant was to appear, and "show cause, if any there be, why the injunction as prayed for by the plaintiffs should not be granted *until the final determination of this action.*" The hearing before him was only for that one purpose, and that was whether or not an interlocutory injunction should be issued. *Lewis v. Harris,* 238 N.C. 642, 78 S.E. 2d 715. He heard the matter upon the pleadings alone, and found no facts. It seems manifest from the record that Judge Hobgood's judment denying the motion for a restraining order was merely the denial of a motion for an interlocutory injunction until the final determination of the action.

This Court said in *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116: "The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter of the suit until a trial can be had on the merits. . . . The hearing judge does not issue an interlocutory injunction as a matter of course merely because the plaintiff avowedly bases his application for the writ on a recognized equitable ground. While equity does not permit the judge who hears the application to decide the cause on the merits, it does require him to exercise a sound discretion in determining whether an interlocutory injunction should be granted or refused."

In *Meccano v. Wanamaker,* 253 U.S. 136, 64 L. Ed. 822, the Court said: "The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion." To the same effect: *Yakus v. U. S.,* 321 U.S. 414, 88 L. Ed. 834; *Sinclair Refining Co. v. Midland Oil Co.,* (4 C.C.A.), 55 F. 2d 42; 28 Am. Jur., Injunctions (1959 Ed.) p. 530; 43 C.J.S., Injunctions, §14.

It seems from the pleadings that if an interlocutory injunction had been issued, it would have caused defendant to breach an admitted contract it had with other persons for displaying advertising on its taxicabs in order to enforce a contract between plaintiffs and defendant, which defendant avers it lawfully terminated, before a final determination of the action upon its merits. Appellants have not shown that the denial of their motion for an interlocutory injunction was "contrary to some rule of equity, or the result of improvident exercise of judicial discretion." That part of Judge Hobgood's judgment refusing an interlocutory injunction is affirmed.

Costs follow the final judgment. *Barrier v. Troutman,* 231 N.C. 47,

55 S.E. 2d 923; *Zebulon v. Dawson,* 216 N.C. 520, 5 S.E. 2d 535. Judge Hobgood's judgment in taxing plaintiffs with the costs of the action seems to indicate that he dismissed plaintiffs' action. The statement of the case on appeal agreed to by counsel states Judge Hobgood dismissed the action. It was error to dismiss the action, and tax plaintiffs with the costs. So much of the judgment as dismisses the action and taxes plaintiffs with the costs is vacated, and the cause is remanded with direction it be reinstated upon the civil issue docket for trial. *Mosteller v. R. R.,* 220 N.C. 275, 17 S.E. 2d 133. See *Adams v. College,* 247 N.C. 648, 101 S.E. 2d 809, where it is held that where the complaint in an action for a restraining order contains a defective statement of a good cause of action, judgment sustaining a demurrer should have dissolved the restraining order, but the portion of the judgment dismissing the action and taxing plaintiffs with the costs was reversed. The taxing of plaintiffs with the costs was premature.

As to the portion of the judgment denying the motion for an interlocutory injunction affirmed; as to the part of the judgment dismissing the action and taxing plaintiffs with the costs reversed.

NANCY D. SQUIRES v. LOUIS W. SORAHAN, SOUTHERN AUTO PARTS, INC., CITY MOTORS OF DURHAM, INC., AND EDWARD S. MASSENGILL, D/B/A DURHAM MOTOR SALES.

(Filed 18 May, 1960.)

Judgments § 46: Torts § 6—

Where the insurance carrier of one joint tort-feasor pays the balance due on the tort judgment and has it assigned to a trustee for the insured, the carrier has no right of contribution under G.S. 1-240 against other joint tort-feasors. The carrier's right arises under the subrogation provision of the insurance contract.

APPEAL from *Preyer, J.,* March 14, 1960 Regular Civil Term, GUILFORD Superior Court (Greensboro Division).

Petition and motion under G.S. 1-240 by Southern Auto Parts and Textile Insurance Company to have the court "enter judgment declaring the proportionate part each judgment debtor shall pay in this action." At the March Term, 1958, the plaintiff, Nancy Squires, obtained a judgment for $17,500 against Louis W. Sorahan, Southern Auto Parts, Inc., City Motors of Durham, Inc., and Edward S. Massengill, d/b/a Durham Motor Sales. Upon failure of the defendants

to satisfy the judgment, the plaintiff brought an action against Textile Insurance Company under its policy to indemnify Southern Auto Parts, Inc., against its liability not in excess of $25,000.

Further facts pertinent to this appeal are stated in *Squires v. Insurance Co.*, 250 N.C. 580, 108 S.E. 2d 908. That action established the liability of Textile Insurance Company to the plaintiff. At the trial Textile was permitted, without objection, to introduce a policy Nationwide Insurance Company issued to indemnify City Motors of Durham, Inc., against liability not to exceed $5,000.

On October 1, 1958, Nationwide Insurance Company paid on behalf of City Motors of Durham, Inc., $2,999.28, being one-sixth of the amount due on the plaintiff's judgment. On August 10, 1959, "Textile Insurance Company on behalf of Southern Auto Parts, Inc.," paid to the plaintiff's attorney the sum of $15,752.46, balance due on the judgment. The plaintiff's attorney transferred without recourse the amount paid on the judgment "to C. Theodore Leonard, Trustee, for the benefit of Southern Auto Parts, Inc., under the provisions of G.S. 1-240." The motion in this cause alleges the insurer shall be subrogated to all the rights of the insured to the extent of payments made by the former for the latter's benefit; and that the insured shall execute and deliver all instruments necessary to secure such rights. After hearing, Judge Preyer entered judgment denying the motion. The petitioner appealed.

Smith, Moore, Smith, Schell & Hunter, By: Richmond G. Bernhardt, Jr., for petitioners, Southern Auto Parts, Inc., and Textile Insurance Co., appellants.

Booth & Osteen, By: Fred M. Upchurch, for respondents, City Motors of Durham, Inc., and Edward S. Massengill, D/B/A Durham Motor Sales, appellees.

HIGGINS, J. The record discloses Nationwide Insurance Company, under its policy of $5,000, paid for its insured, City Motors of Durham, one-sixth of the plaintiff's judgment. The judgment (to the extent of that payment) was not assigned. Textile Insurance Company, under its policy of $25,000, paid for its insured, Southern Auto Parts, Inc., five-sixths of the plaintiff's judgment. The judgment, to the extent of that payment, was assigned without recourse to a trustee for Southern Auto Parts, Inc.

If contribution is made, obviously the payment goes to Textile Insurance Company. It was not a party to the tort. Its rights after payment are entirely contractual. They arise under the subrogation clause

of the policy. Prior to 1929 contribution between joint tort-feasors could not be enforced. Provision for enforcement must be in accordance with G.S. 1-240. *Bargeon v. Transportation Co.*, 196 N.C. 776, 147 S.E. 299; *Godfrey v. Tidewater Power Co.*, 223 N.C. 647, 27 S.E. 2d 736; *Wilson v. Massagee*, 224 N.C. 705, 32 S.E. 2d 335, 156 A.L.R. 922; *Norris v. Johnson*, 246 N.C. 179, 97 S.E. 2d 773. "Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury." *White v. Keller*, 242 N.C. 97, 86 S.E. 2d 795.

The insurance carrier of one joint tort-feasor cannot enforce contribution under G.S. 1-240. *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67, 86 S.E. 2d 780. "A most liberal construction of the statute will not permit the writing into it of the liability insurance carrier of tort-feasors when only tort-feasors and judgment debtors are mentioned therein." *Gaffney v. Casualty Co.*, 209 N.C. 515, 184 S.E. 46; *Casualty Co. v. Guaranty Co.*, 211 N.C. 13, 188 S.E. 634; *Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126; *Tarkington v. Printing Co.*, 230 N.C. 354, 53 S.E. 2d 269; *Hobbs v. Goodman*, 240 N.C. 192, 81 S.E. 2d 413; *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673. It may be noted that *Jordan v. Blackwelder*, 250 N.C. 189, 108 S.E. 2d 429, is not in conflict. The payment of medical bills there involved was applied by the court under a stipulation of the parties.

The insurance carrier who pays a joint tort-feasor's obligations to the injured party cannot force contribution from other tort-feasors. G.S. 1-240, as interpreted by the many decisions of this Court, cannot be stretched to include subrogation, which arises by reason of contract, into contribution, which arises by reason of participation in the tort.

The judgment of the Superior Court of Guilford County is

Affirmed.

GLADYS SHELTON v. CLARENCE C. ROBERTS.

(Filed 18 May, 1960.)

APPEAL by defendant from *Sink, E. J.*, November, 1959 Term, ROCKINGHAM Superior Court.

Civil action for personal injury and property damage resulting from an automobile collision at the intersection of Fieldcrest Avenue (north and south) and Virginia Avenue (east and west) in the town of Draper. The accident occurred about 2:00 A.M. on the morning of November 2, 1958. Rain was falling. The signal lights controlling traffic at the intersection had been turned off at 12:30. The plaintiff, as she approached the intersection from the south, was driving about 30 miles per hour and slowed down for the intersection. The evidence disclosed she was almost through the intersection when she was hit by a vehicle just entering from the east. This vehicle was owned by the defendant and was driven by his son as a family purpose car. At the scene, she said to Mr. Roberts, the driver: "Lord have mercy, what's happened? I thought I was in the right." He said, "No doubt about it, lady, it was all my fault."

The investigating officer testified: "I found debris practically in line with the north margin of Virginia Avenue. The debris and glass was practically all the way through the intersection. . . . Mr. Roberts said something about he should have stopped."

The defendant testified he was traveling about 25 miles per hour entering the intersection. "I saw the Shelton car just a second before I hit it. . . . I was convicted of speeding and reckless driving, but I don't recall whether I pleaded guilty or not. I do not recall whether I made any statement to the parties at the scene and I do not recall whether I made such a statement in the presence of Mr. Gibson," (the investigating officer).

The court submitted issues of negligence, contributory negligence, and damages on the plaintiff's cause of action, and negligence and damages on the defendant's counterclaim, all of which were raised by the pleadings. The jury answered the plaintiff's issues in her favor, awarding damages for personal injury in the amount of $500, and property damage in the amount of $1,000. The issues on the counterclaim were not answered. From the judgment on the verdict, the defendant appealed.

Thomas S. Harrington for defendant, appellant.

Price & Osborne, By: J. Hampton Price, William A. Powell, Jr., for plaintiff, appellee.

PER CURIAM. The plaintiff's evidence makes out a case of negligence. The defendant's evidence does not make out a defense. The physical facts and the plaintiff's testimony disclose that the collision occurred when the plaintiff's vehicle was almost completely through, and the defendant's was barely entering the intersection. According to the defendant, "I saw the Shelton car a second before I hit it. I made a swerve to the right when she shot across there. I was over to her right." He admitted his conviction for speeding and reckless driving. The evidence was brief and easily understood. The charge was nontechnical but presented the issues in such focus as left little likelihood that the charge could have been misunderstood. No reason is made to appear why the result should be disturbed.

No error.

NORTH CAROLINA NATURAL GAS CORPORATION, PETITIONER v. EDGAR V. EDENS, RESPONDENT.

(Filed 18 May, 1960.)

APPEAL by petitioner from *McKinnon, J.*, October Term, 1959, of CUMBERLAND.

Proceeding in which respondent admitted petitioner's right to acquire by condemnation an easement across respondent's land for the construction of a pipeline for the transmission of gas. The only issue raised by the pleadings and submitted to the jury was: "What sum, if any, is respondent entitled to recover of petitioner as just compensation for the appropriation of their *(sic)* land, over and above all special benefits, if any, accruing to said lands, by reason of the appropriation by petitioner of the easement described in the Petition?" The jury answered, "$9,000.00."

Judgment, in accordance with the verdict, was entered. Petitioner excepted and appealed.

Sanford, Phillips, McCoy & Weaver for petitioner, appellant.
Clark, Braswell & Hill for respondent, appellee.

PER CURIAM. The case on appeal contains all or a portion of the testimony of two witnesses, one (Mr. Rose) for the respondent and the other (Mr. McCormick) for the petitioner. Indeed, nothing appears to show that any witness testified to the reasonable market value of

the land covered by the easement or to the reasonable market value of respondent's remaining land either before or after petitioner acquired such easement. Obviously, the bulk of the testimony offered at the trial does not appear in the record before us.

Petitioner's three assignments of error relate to the overruling or sustaining of objections to certain questions asked Mr. Rose or Mr. McCormick. Particular discussion of these assignments is deemed unnecessary. Suffice to say, consideration thereof fails to disclose prejudicial error.

No error.

REDEVELOPMENT COMMISSION OF GREENSBORO AND CITY OF GREENSBORO v. SECURITY NATIONAL BANK OF GREENSBORO, AS EXECUTOR AND TRUSTEE UNDER THE WILL OF JACK MILTON, DECEASED.

(Filed 10 June, 1960.)

1. Appeal and Error § 49—

Where there are no exceptions to the court's findings of fact, it will be presumed that the findings are supported by competent evidence and the findings are binding on appeal.

2. Eminent Domain § 1—

Private property may be taken under the power of eminent domain only for a public use and then only upon the payment of just compensation.

3. Eminent Domain § 3—

When the facts are determined, what is a public use is a question of law for the court.

4. Same—

If the condemnation of land is for a public purpose, the General Assembly may select the agency to exercise the power of eminent domain and the method by which the public purpose is to be accomplished.

5. Same: Constitutional Law § 24—

The condemnation of blighted and slum areas within a municipality for redevelopment under safeguards to prevent such areas from reverting to slum areas is in the interest of the public health, safety, morals and welfare, and therefore such condemnation is for a public use and is not a taking of private property in violation of Art. I, Sec. 1, or Art. I, Sec. 17, of the Constitution of North Carolina.

6. Same—

The fact that a municipal redevelopment commission may exchange, sell or transfer to private persons slum property condemned by it for redevelopment does not affect the question of whether the taking is for a public use, since the statute provides safeguards in the use and control of the land by the private developer to prevent the area from again becoming a blighted area, and the sale or transfer to the redeveloper is merely incidental or collateral to the primary purpose of clearing the slum area in the interest of the public health, safety, morals and welfare.

7. Constitutional Law § 7—

While the General Assembly may not delegate the power to make law except as authorized by the Constitution, it may delegate to a state agency the power to find facts or to determine the existence or non-existence of a factual situation or condition upon which the operation of a law is made to depend, provided adequate standards are set forth to guide the agency in so doing. Constitution of North Carolina, Art. II, Sec. 1.

8. Statutes § 5d—

Sections of a statute and statutes *in pari materia* must be construed together.

9. Constitutional Law § 7: Municipal Corporations § 4—

G.S. 160, Art. 34, authorizing each municipality as therein defined to create a redevelopment commission upon its findings that a blighted area exists in such municipality and that the redevelopment of such area is necessary in the interest of the public health, safety, morals or welfare, is a constitutional delegation of power to each such municipality, since the statute defines a "blighted area" with particularity (G.S. 160-456(q)) and therefore provides adequate standards to guide each municipality in determining whether an area exists within its limits which requires redevelopment in the interest of the public health, safety, morals or welfare.

10. Constitutional Law § 19: Municipal Corporations § 4—

The power given a municipal redevelopment commission to sell or transfer lands theretofore condemned by it does not violate the provisions of Art. I, Sec. 7, of the Constitution of North Carolina proscribing exclusive or separate emoluments or privileges except in consideration of public services, since the Act provides that unless the lands are sold or should be transferred to the municipality or other public body, they should be sold only to the highest responsible bidder after public advertisement and that all bids may be rejected, G.S. 160-464(b), (c), and, further, a sale of the land is merely incidental or ancillary to the primary purpose of the Act to eradicate slum areas.

11. Constitutional Law § 6—

If a statute is not proscribed by any section of our State Constitution, the wisdom of its enactment is a legislative and not a judicial question, since the General Assembly has the right to experiment with any modes of dealing with old evils unless prevented by the Constitution.

12. Municipal Corporations § 4: Taxation § 5—

Where funds expended by a municipal redevelopment commission under provisions of the Urban Redevelopment Law are not derived from tax revenues, the provisions of Art. V, Sec. 3, of the Constitution of North Carolina are not applicable.

BOBBITT, J., concurring.

HIGGINS, J., dissenting.

APPEAL by respondent from *Preyer, J.*, 15 February 1960 Civil Term, of GUILFORD — Greensboro Division.

Special proceeding instituted by petitioners, Redevelopment Commission of Greensboro and the city of Greensboro, before the clerk of the Superior Court of Guilford County for the condemnation under the power of eminent domain provided for in G.S. 40-11 *et seq.*, Condemnation Proceedings, and in G.S. Chapter 160, Article 37, known as the Urban Redevelopment Law, of certain land, which is a part

of the *corpus* of the testamentary trusts created by the last will and testament of Jack Milton, deceased, — the last will and testament of Jack Milton, deceased, appointed respondent executor of his will and testamentary trustee of his estate —, heard before Judge Preyer on appeal by respondent from orders of the clerk of the Superior Court of Guilford County appointing commissioners of appraisal, and affirming their report assessing damages for the taking of the land.

Petitioners and respondent, pursuant to G.S. 1-184—1-185, waived trial by jury, and agreed that Judge Preyer might answer the issue as to damages for the taking of the land in the sum of $15,600.00, might find the facts, make conclusions of law, and render judgment thereon.

Judge Preyer's judgment is as follows:

FINDINGS OF FACT

"1. That the city of Greensboro is a Municipal Corporation having and exercising the rights, power and authority conferred by Chapter 37 of the Private Laws of 1923, as Amended, and by applicable General Statutes of North Carolina.

"2. That after due notice, by proper ordinance designated, 'Chapter 75, Redevelopment Commission of Greensboro,' passed by the City Council of the city of Greensboro on the 15th day of October 1951, as shown by petitioners' Exhibit A, the City Council of the city of Greensboro found as a fact that blighted and slum areas existed within the city, and thereafter certified said ordinance to the Secretary of State of North Carolina. That thereafter the Redevelopment Commission of Greensboro was created under G.S. 160-454, *et seq.*, and a certificate of incorporation was issued to the Redevelopment Commission of Greensboro by the Secretary of State on the 23rd day of October 1951, as shown by petitioners' Exhibit B; and that thereafter the Redevelopment Commission of Greensboro was duly organized by the adoption of by-laws and the election of officers, in accordance with Statute.

"3. That thereafter, pursuant to statute, the Greensboro Planning Board, by resolution duly adopted, found that there were blighted and slum areas within the city of Greensboro and designated a section of Greensboro, described in Exhibit E of the Petition, as a blighted and slum area and a redevelopment area; that petitioners' Exhibit D is a map of said area; that the findings of the Greensboro Planning Board were duly approved by the City Council of the city of Greensboro, as shown by petitioners' Exhibit E.

"4. That thereafter, pursuant to the provisions and requirements

of the statutes, the Redevelopment Commission determined that the section known as Area No. 1, a part of said area being known as the Cumberland Project, was most in need of redevelopment, and made certain studies and found certain facts in the manner prescribed by statute, and prepared a plan of redevelopment for the Cumberland Project. That said study and plan produced, among other things, maps showing the present existing use of the area, maps showing the proposed use of the area upon redevelopment, standards of population density, land coverage and building densities, a preliminary site plan of the area, proposed changes in zoning ordinances and maps, maps showing changes in street lay-outs and levels, a statement of the estimated cost and method of financing of the acquisition of the redevelopment area, a statement of such continuing controls as are deemed necessary to effectuate the purpose of the statutes authorizing redevelopment and slum clearance, a statement of the feasible method proposed for the relocation of families displaced in said area, all as shown by petitioners' Exhibits F through M, inclusive. That thereafter said plan was submitted to the Greensboro Planning Board, which Board reaffirmed the fact that said area was a blighted and slum area and approved the plan of redevelopment for the Cumberland Project, as shown by petitioners' Exhibits O and P; and that subsequently thereto the City Council passed a resolution calling for a public hearing on said matter, which was duly held; and by proper resolution subsequently thereto the City Council approved the redevelopment and slum clearance plan as submitted, as shown by petitioners' Exhibits Q and R.

"5. That the respondent is the owner of the land described in the petition and the subject of this eminent domain proceeding; that the property of the respondent, as set forth in the petition, is within the area of the Cumberland Project, and is an integral part of the plan of redevelopment. That the acquisition of said land is necessary to accomplish the plan of redevelopment, and that, if acquired, the city of Greensboro and the Redevelopment Commission of Greensboro will, in good faith, carry out the plan of redevelopment above specified. That the petitioners have attempted to acquire title to said land by purchase, but were unable to do so, due to the fact that the respondent contended the land had more value than had been given it in the appraisal by the petitioners; and that certain constitutional questions had arisen on the basis of which the respondent denies the right of the Redevelopment Commission of Greensboro to acquire and hold title to real estate.

"6. That the area described in the petition, known as the Cumberland Project, in which the land of the respondent is located, is hereby found to be a blighted and slum area as defined by G.S. 160-456(q). That said area is found by the Court to be largely residential, in which the structures are depreciated, dilapidated, deteriorated and substandard in all respects, without necessary provisions for ventilation, light, sanitation and inside plumbing; that throughout the area there exists an unusually high density of population with the entailed overcrowding, unsanitary and unsafe conditions, which constitute an abnormal hazard to the health, safety and welfare of the community; that the existence of such ills is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, crime, and fire hazards, and is detrimental to the public health, safety, morals and welfare of the citizens of the city of Greensboro; that more than 68% of the houses and structures in said area are substandard insofar as their condition relates to the factors above enumerated; and that up to 89% of all structural units in the area have one or more of the elements of deterioration and dilapidation set forth above.

"7. That under the plan of redevelopment the city of Greensboro has appropriated and paid to the Redevelopment Commission of Greensboro sums of money, and the city plans and anticipates the appropriation and payment to the redevelopment Commission of Greensboro further outlays of cash, improvements, etc.; that the money heretofore appropriated and paid to the Redevelopment Commission of Greensboro has come from sources of income to the city of Greensboro other than from *ad valorem* tax revenue. That the city of Greensboro will make additional appropriations in the future and pay additional sums to the Redevelopment Commission of Greensboro for the furtherance of the redevelopment plan, and that the funds for said future appropriations will be derived from funds received by the city other than from *ad valorem* tax revenue.

"8. That the city of Greensboro, in compliance with the Order of Confirmation of the Report of the Commissioners of Appraisal, signed February 10, 1960, by the clerk of the Superior Court of Guilford County, has paid into Court the sum of $15,500.00., this being the figure arrived at by the Commissioners of Appraisal as damage to the respondent for the taking of its property; and that this sum was appropriated and paid by the city of Greensboro from income received by the city from sources other than *ad valorem* tax revenue.

"9. That petitioners' Exhibits T(1) through T(13), being photographs of the Cumberland Project described in the petition and offered in evidence, are fair portrayals of the actual conditions as now exist within the area.

"10. That all meetings, hearings, and notices given and held by the City Council, the Greensboro Planning Board, and the Redevelopment Commission of Greensboro, in compliance with the statutory procedural requirements for the creation of the Redevelopment Commission of Greensboro, and the accomplishment of the redevelopment plan, were properly given and held; and that all statutory requirements have been met and complied with as to giving of notices, holding of public meetings, and passing of ordinances and resolutions.

"11. That the conditions existing in the Cumberland Project area cannot practicably be eliminated by the exercise of the police power of the city of Greensboro, nor alleviated by the anticipated efforts or intervention of private enterprise.

And upon the foregoing Findings of Fact the Court makes the following—

CONCLUSIONS OF LAW

"1. That this condemnation proceeding is properly brought under G.S. 40-11, *et seq.*

"2. That the taking of respondent's property in this proceeding by eminent domain is a taking for a public purpose and use, and that such taking is not in violation of Article I, Section 1, or Article I, Section 17, of the Constitution of the State of North Carolina, but is a taking 'by the law of the land.'

"3. That the Urban Redevelopment Law, Chapter 160, Subchapter 7, Article 37, of the General Statutes of North Carolina, is not an unlawful delegation of legislative power and authority to the Redevelopment Commission of Greensboro, and does not violate Article II, Section 1, of the Constitution of North Carolina, for that said Act specifically, and in detail, sets forth standards and guidances for the creation of redevelopment agencies and the pursuit of their activities thereunder, leaving only to the municipality and the local redevelopment agency the determination of facts which bring the law into operation.

"4. That Chapter 160, Subchapter 7, Article 37, of the General Statutes of North Carolina does not confer upon nor authorize the Redevelopment Commission of Greensboro or the city of Greensboro the power to grant, nor does the plan of redevelopment as set forth in the petition in pursuance of said statute

grant, exclusive and separate emoluments and privileges to persons or sets of persons in violation of Article I, Section 7, of the Constitution of North Carolina.

"5. In the light of the evidence to the effect that only funds derived from sources other than *ad valorem* tax revenue by the city of Greensboro have been used, appropriated, or spent by the city of Greensboro and the Redevelopment Commission of Greensboro, and that sums in the future will be appropriated by the city of Greensboro to the Redevelopment Commission from sources other than *ad valorem* tax revenue, the provisions of Article V, Section 3, of the Constitution of North Carolina are not applicable in the determination of this cause.

"6. That as a matter of law the redevelopment area described in the petition as the Cumberland Project is a blighted and slum area within the meaning of G.S. 160-454, *et seq.;* and that by reason of said blighted and slum condition in the area the redevelopment of such area, under the plan of redevelopment as set forth in the petition, is necessary in the interest of the public health, safety, morals and welfare of the residents of the city of Greensboro.

UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW IT IS ORDERED, ADJUDGED AND DECREED:

"1. That petitioner Redevelopment Commission of Greensboro is entitled to take, and all of the right, title and interest of the respondent in and to, the real property described in paragraph 5 of the petition, is hereby conveyed to said commission.

"2. That Respondent have and recover of Petitioners, as damages for the taking of said property, the sum of $15,600.00.

"3. That, the sum of $15,600.00 having been paid into Court by the city of Greensboro for the use and benefit of the Respondent, the Redevelopment Commission of Greensboro is authorized and empowered to enter into possession of the real property described in paragraph 5 of the petition forthwith.

"4. That counsel fees in the sum of $2,000.00 are hereby awarded to Stern & Rendleman, attorneys for the respondent, pursuant to G.S. 160-456, Subsection (q), which fee is charged as a part of the costs in this proceeding.

"5. That this judgment be recorded in the office of the Register of Deeds of Guilford County as a muniment of title in Redevelopment Commission of Greensboro. Let the costs be taxed against the petitioners."

From the judgment respondent appeals.

J. Archie Cannon, Jr., and Harry Rockwell for Redevelopment Commission of Greensboro, plaintiffs, appellees.

Harper J. Elam, III, for the city of Greensboro, plaintiffs, appellees.

Stern & Rendleman; By John L. Rendleman for respondent, appellant.

Claude V. Jones, attorney for city of Durham.

Daniel K. Edwards and Robinson O. Everett for the Redevelopment Commission of the city of Durham, as amici curiae.

Dickson Phillips for Urban Redevelopment Commission of the city of Laurinburg, as amicus curiae.

Hogue and Hogue; By C. D. Hogue, Jr., for the Redevelopment Commission of the city of Wilmington, as amici curiae.

Weston P. Hatfield for the Redevelopment Commission of the city of Winston-Salem, as amicus curiae.

Cochran, McCleneghan & Miller; By Thomas C. Creasy, Jr., for the Redevelopment Commission of the city of Charlotte, as amici curiae.

Bunn, Hatch, Little & Bunn; By James C. Little for the Redevelopment Commission of the city of Raleigh, as amici curiae.

PARKER, J. Respondent has no exceptions to Judge Preyer's findings of fact. Therefore, it will be presumed that they are supported by competent evidence, and are binding on appeal. *Tanner v. Ervin*, 250 N.C. 602, 109 S.E. 2d 460.

Respondent has excepted to Judge Preyer's second, third, fourth and fifth conclusions of law, to this part of his decree, to wit, "Petitioner Redevelopment Commission of Greensboro is entitled to take, and all of the right, title and interest of the respondent in and to, the real property described in paragraph 5 of the petition, is hereby conveyed to said commission," and to the judgment.

Respondent's first exception is to Judge Preyer's second conclusion of law that the taking of respondent's land in this proceeding under the power of eminent domain is a taking for a public purpose and use, and is not in violation of Article I, Section 1, or of Article I, Section 17, of the North Carolina Constitution.

The relevant part of Article I, Section 1, of the North Carolina Constitution is "That we hold it to be self-evident that all persons . . . are endowed by their Creator with certain inalienable rights; that among these are . . . the enjoyment of the fruits of their own labor." The pertinent part of Article I, Section 17, of the North Carolina Constitution is, "No person ought to be . . . in any manner deprived of his . . . property, but by the law of the land."

In the exercise of the power of eminent domain, private property can be taken only for a public purpose, or more properly speaking a public use, and upon the payment of just compensation. *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600; *Johnston v. Rankin,* 70 N.C. 550. This principle is so grounded in natural equity that it has never been denied to be an essential part of "the law of the land" within the meaning of Article I, Section 17, of the North Carolina Constitution. *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144.

When the facts are determined, what is a public purpose, or more properly speaking a public use, is a question of law for the court. *Charlotte v. Heath, supra; Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563; *Stratford v. Greensboro,* 124 N.C. 127, 32 S.E. 394.

The question of law is distinct and clear. This Court said in *Yarborough v. Park Commission,* ". . . it is settled by our decisions . . . that if a particular use is public the expediency or necessity for establishing it is exclusively for the Legislature." If the redevelopment project here is for "a public use," the grant of the power of eminent domain in G.S. Chapter 160, Article 37, Urban Redevelopment Law, is a clear and valid exercise of legislative power, for the power of eminent domain is merely the means to the end. *Berman v. Parker,* 348 U.S. 26, 99 L. Ed. 27.

The main contention of respondent on its first exception is that the taking of property by the power of eminent domain under G.S. Chapter 160, Article 37, is not for a public use permitted under Article I, Section 1, or Article I, Section 17, of the North Carolina Constitution, but is a taking of private property for a private use, because under G.S. 160-464(a) the Redevelopment Commission is empowered to "sell, exchange or otherwise transfer real property or any interest therein in a redevelopment project area to any redeveloper for residential, recreational, commercial, industrial or other uses or for public use in accordance with the redevelopment plan, subject to such covenants, conditions and restrictions as may be deemed to be in the public interest or to carry out the purposes of this article; provided, that such sale, exchange or other transfer, and any agreement relating thereto, may be made only after, or subject to, the approval of the redevelopment plan by the governing body of the municipality and after public notice and award as hereinafter specified in subsection (b)."

G.S. 160-464(d) provides: "The contract between the commission and a redeveloper shall contain, without being limited to the following provisions: (1) Plans prepared by the redeveloper or otherwise

and other such documents as may be required to show the type, material, structure and general character of the redevelopment project; (2) A statement of the use intended for each part of the project; (3) A guaranty of completion of the redevelopment project within specified time limits; (4) The amount, if known, of the consideration to be paid; (5) Adequate safeguards for proper maintenance of all parts of the project; (6) Such other continuing controls as may be deemed necessary to effectuate the purposes of this article."

G.S. 160-464(e) states: "Any deed to a redeveloper in furtherance of a redevelopment contract shall be executed in the name of the commission, by its proper officers, and shall contain in addition to all other provisions, such conditions, restrictions and provisions as the commission may deem desirable to run with the land in order to effectuate the purposes of this article."

This contention of respondent that the taking of its property is for private use misconceives the nature and extent of the public purpose or public use which is the subject of the Urban Redevelopment statute. The primary purpose of the taking is the eradication of "blighted areas," the reconstruction and rehabilitation of such areas, and the adaption of them for uses which will prevent a recurrence of the blighted conditions. This is lucidly stated in G.S. 160-455, as follows: "FINDINGS AND DECLARATION OF POLICY.—It is hereby determined and declared as a matter of legislative finding: (a) That there exist in urban communities in this State blighted areas as defined herein. (b) That such areas are economic or social liabilities, inimical and injurious to the public health, safety, morals and welfare of the residents of the State, harmful to the social and economic well-being of the entire communities in which they exist, depreciating values therein, reducing tax revenues, and thereby depreciating further the general community-wide values. (c) That the existence of such areas contributes substantially and increasingly to the spread of disease and crime, necessitating excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, for crime prevention, correction, prosecution, punishment and the treatment of juvenile delinquency and for the maintenance of adequate police, fire and accident protection and other public services and facilities, constitutes an economic and social liability, substantially impairs or arrests the sound growth of communities. (d) That the foregoing conditions are beyond remedy or control entirely by regulatory processes in the exercise of the police power and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted.

(e) That the acquisition, preparation, sale, sound replanning, and redevelopment of such areas in accordance with sound and approved plans for their redevelopment will promote the public health, safety, convenience and welfare. Therefore, it is hereby declared to be the policy of the State of North Carolina to promote the health, safety, and welfare of the inhabitants thereof by the creation of bodies corporate and politic to be known as redevelopment commissions, which shall exist and operate for the public purposes of acquiring and replanning such areas and of holding or disposing of them in such manner that they shall become available for economically and socially sound redevelopment. Such purposes are hereby declared to be public uses for which public money may be spent, and private property may be acquired by the exercise of the power of eminent domain."

In *Wells v. Housing Authority*, 213 N.C. 744, 197 S.E. 693, we held that the eradication of slum areas in cities and towns of the State having a population of more than fifteen thousand inhabitants, and the adaptation of the property to a low-cost housing project to be leased to tenants was a public use. See also *Cox v. Kinston*, 217 N.C. 391, 8 S.E. 2d 252. The General Assembly 1941, Chapter 78, amended the original Housing Authorities Law so as to make it apply to "urban and rural areas throughout the State." In *Mallard v. Housing Authority*, 221 N.C. 334, 20 S.E. 2d 281, we held that the *Wells* and *Cox* cases were controlling and the amendment to the original law applicable to rural communities was a public use.

Respondent contends that the *Wells*, *Cox* and *Mallard* cases are no authority here, for the reason that under the Housing Authorities Law title to the property taken remains in the Housing Authority, and under the Urban Redevelopment Law the land taken, or any interest therein, may be sold, exchanged or otherwise transferred to a redeveloper.

The Urban Redevelopment Law, as above set forth, provides that the land taken, or any interest therein, may be sold, exchanged or otherwise transferred to a redeveloper, "subject to such covenants, conditions and restrictions as may be deemed to be in the public interest or to carry out the purposes of this article," and provides further that such sale, exchange or other transfer may be made only after, or subject to, the approval of the redevelopment plan by the governing body of the municipality and after public notice. The Urban Redevelopment Law further provides that the contract between the Redevelopment Commission and the redeveloper (G.S. 160-464(d)) shall contain provisions that the redeveloper shall re-

develop the property not in accordance with his own desires, but in accordance with the redevelopment plan so as to prevent for the foreseeable future a recurrence of the blighted area.

In our opinion, and we so hold, upon the facts established by Judge Preyer's findings of fact the taking of respondent's land was for a public use. This is in accord with the overwhelming weight of opinion. Anno. 44 A.L.R. 2d 1420, *et seq.*

Once the public purpose of the Urban Redevelopment Law has been established, the means of executing the project are for the General Assembly, and the General Assembly alone to determine. The public purpose may be as well or better served by private enterprise with such continuing restrictions and conditions placed by contract upon the redeveloper to effectuate the purposes of the Urban Redevelopment Law, as by a department of the State — and so the General Assembly apparently concluded by placing such safeguards around the redeveloper. We cannot say that the conclusion of the General Assembly is erroneous. *Berman v. Parker, supra.* The sale or transfer to the redeveloper is merely incidental or collateral to the primary purpose of the Urban Redevelopment Law.

In *Hunter v. Norfolk Redevelopment & Housing Authority,* 195 Va. 326, 78 S.E. 2d 893, the Supreme Court of Appeals held that Housing Authorities Law, Code, 1950, Sections 36-1 to 36-55, including provisions therein for redevelopment of blighted areas and acquisition of land through condemnation for such purpose does not violate any constitutional provision, even though authority is empowered by statute to make part of the land thus acquired available to private enterprise for redevelopment.

In *Velishka v. Nashua,* 99 N.H. 161, 106 A. 2d 571, 44 A.L.R. 2d 1406, (1954), it was held that a statute providing for the redevelopment of blighted areas is not rendered an improper exercise of the power of eminent domain by a provision making the land available for sale or lease to private, as well as public, agencies, subject to conditions consistent with the redevelopment plan. The Court said: "The act is specifically challenged because it allows the Authority to make the land in a redevelopment project available for sale or lease to public or private agencies. It is contended that this is an improper exercise of the power of eminent domain, even if the original taking may be for a public purpose because the ultimate disposition of the property is not for a public use. The same contention was made and answered in *Gohld Realty Co. v. City of Hartford,* 104 A2d 365, 369: 'The purpose of the act is not only to remove slums and blighted areas but also to prevent the redeveloped areas

from reverting to their former status . . . .This is accomplished by requiring as a condition of sales and leases of portions of the area to private persons that the property ("be developed or redeveloped for the purposes specified in such plan." Laws 1947, c. 210,§5). If the public use which justifies the exercise of eminent domain in the first instance is the use of the property for purposes other than slums, that same public use continues after the property is transferred to private persons. The public purposes for which the land was taken are still being accomplished.' The resale or lease with conditions consistent with the redevelopment plan are an essential and continuing part of the public purpose. This has been recognized by many jurisdictions. *Hunter v. Norfolk Redevelopment & Housing Authority,* 195 Va. 326, 78 S.E. 2d 893; *Zurn v. Chicago,* 389 Ill. 114, 59 N. E. 2d 18; *State ex rel. Bruestle v. Rich,* 159 *Ohio* St. 13, 110 N.E. 2d 778; Matter of Slum Clearance in the City of Detroit, 331 Mich. 714, 50 N.W. 2d 340."

In Annotation 44 A.L.R. 2d 1421, *et seq.,* (1955), may be found a list of cases from twenty states, and three cases from the United State Courts — including *Berman v. Parker, supra,* in which the Supreme Court of the United States in 1954 upheld the Urban Renewal Act of the District of Columbia, and settled the question of "public use," as far as the due process clause of the federal constitution is concerned — generally upholding the validity of redevelopment laws as serving a "public use," and expressly or implicitly rejecting the contention that a public use or purpose is not served by the redevelopment acts in question because of provisions for the transfer of lands acquired to private interests. See also in accord the scholarly opinion of the Supreme Court of Texas in *Davis v. City of Lubbock and Urban Renewal Agency of the City of Lubbock, Texas,* (15 July 1959), 326 S.W. 2d 699, wherein numerous text and law review articles are cited. In some jurisdictions, constitutional provisions of greater or lesser specificity have helped the Court to reach the conclusion. See especially *Murray v. La Guardia* (1943) 291 N.Y. 320, 52 N.E. 2d 884, cert. denied 321 U.S. 771, 88 L. Ed. 1066.

The Courts of Florida, *Adams v. Housing Authority,* 1952, 60 So. 2d 663; of Georgia, *Housing Authority v. Johnson,* 1953, 209 Ga. 560, 74 S.E. 2d 891; and of South Carolina, *Edens v. City of Columbia,* 1956, 228 S.C. 563, 91 S.E. 2d 280, have held to the contrary. On 18 November 1959 the Supreme Court of Florida in *Grubstein v. Urban Renewal Agency of City of Tampa,* 115 So. 2d 745, by a 4 to 3 decision, held that provisions of the Urban Renewal Law re-

lating to slum clearance and redevelopment are not unconstitutional, even though the law provides for the lease or sale of the property to private interests. The majority opinion said: "It can thus be seen that the real distinction between the statute and project plan involved in the *Adams* case and those involved in the instant case lies in the *purpose* sought to be achieved thereby." Subsequent to the case of *Housing Authority v. Johnson,* 1953, the State of Georgia amended its constitution, and in *Bailey v. Housing Authority of City of Bainbridge,* 1959, 214 Ga. 790, 107 S.E. 2d 812, the Court held that the Urban Redevelopment Law of 1955 is expressly authorized by the constitutional amendment, and the sale or the disposition of such areas to private enterprise for private uses or to public bodies for public uses, are not unconstitutional as providing for the taking of private property for a private use and not for a public purpose.

Judge Preyer's conclusion of law that the taking of respondent's property in this proceeding by eminent domain is for a "public use," and is not in violation of Article I, Section 1 or of Article I, Section 17 of the North Carolina Constitution, is correct, and respondent's assignment of error number 1 is overruled.

Respondent assigns as error Judge Preyer's third conclusion of law to the effect that the Urban Redevelopment Law is not an unlawful delegation of legislative power, in violation of Article II, Section 1, of the State Constitution.

It is, of course, fundamental that under Article II, Section 1, of the North Carolina Constitution all legislative power in this State rests in the General Assembly, except as authorized by the Constitution, as in cases of municipal corporations. *Taylor v. Racing Asso.,* 241 N.C. 80, 84 S.E. 2d 390. The General Assembly, however, for the purpose of carrying its enactment into effect may delegate the power to find facts or to determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, provided adequate standards are set forth to guide the agency in so doing. *Harvell v. Scheidt,* 249 N.C. 699, 107 S.E. 2d 549; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310; *Efird v. Com'rs. of Forsyth,* 219 N.C. 96, 12 S.E. 2d 889.

There is a "distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances . . . it (the General Assembly) cannot vest

in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion." *Coastal Highway v. Turnpike Authority, supra.* See to the same effect 11 Am. Jur., Constitutional Law, Section 234; 16 C.J.S., Constitutional Law, Section 138.

Respondent's contention in this connection is: (1) the language of the Urban Redevelopment Law does not create a standard or guide, and (2) "if the act merely provided that a redevelopment commission was to be created upon the finding that blighted areas existed then there would be no delegation of legislative authority," but the act goes further and vests in the municipality the legislative power to determine in its unbridled discretion whether it is in the best interests of the public to create the redevelopment commission.

G.S. 160-457(a) authorizes each municipality, as defined in the Urban Redevelopment Law to create a redevelopment commission. Subsection (b) provides that the governing body of a municipality shall not create a redevelopment commission unless it finds: "(1) That blighted areas (as herein defined) exist in such municipality, and (2) That the redevelopment of such areas is necessary in the interest of the public health, safety, morals or welfare of the residents of such municipality." A "blighted area" is defined in G.S. 160-456(q) as follows: " 'Blighted area' shall mean an area in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare; provided, no area shall be considered a blighted area nor subject to the power of eminent domain, within the meaning of this article, unless it is determined by the planning commission that at least two-thirds of the number of buildings within the area are of the character described in this subsection and substantially contribute to the conditions making such area a blighted area; provided that if the power of eminent domain shall be exercised under the provisions of this article, the respondent or respondents shall be entitled to be represented by counsel of their own selection and their reasonable counsel fees fixed by the court, taxed as a part of the costs and paid by the petitioners."

It is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other. *Keith v. Lockhart*, 171 N.C. 451, 88 S.E. 640, Ann. Cas. 1918D 916; *Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E. 2d 898; 50 Am. Jur., Statutes, Section 348. If the governing body of a municipality should find that "blighted areas" exist within its corporate limits, it logically follows that it is a finding to the effect "that the redevelopment of such areas is necessary in the interest of the public health, safety, morals or welfare of the residents of such municipality."

The General Assembly has prescribed a definite and adequate guide, and the governing body of the municipality in creating or not creating a redevelopment commission cannot act "in its absolute or unguided discretion." In our opinion, and we so hold, the Urban Redevelopment Law does not confer any illegal delegation of legislative power upon petitioners in violation of Article II, Section 1, of the North Carolina Constitution, as contended by respondent. We find support for the conclusion we have reached in the overwhelming weight of the authorities in other jurisdictions. *Gohld Realty Co. v. City of Hartford*, 141 Conn. 135, 104 N.E. 2d 365; Opinion of the Justices, 254 Ala. 343, 48 So. 2d 757; *Rowe v. Housing Authority*, 220 Ark. 698, 249 S.W. 2d 551; *Redevelopment Agency of San Francisco v. Hayes*, 122 Cal. App. 2d 777, 266 P. 2d 105, cert. den. *Van Hoff v. Redevelopment Agency of San Francisco*, 348 U.S. 897, 99 L. Ed. 705; *State v. Urban Renewal Agency*, 179 Kan. 435, 296 P. 2d 656; *Zurn v. Chicago*, 389 Ill. 114, 59 N.E. 2d 18; *People ex rel. Gutknecht v. Chicago*, 414 Ill. 600, 111 N.E. 2d 626; *People ex rel. Gutknecht v. Chicago*, 3 Ill. 2d 539, 121 N.E. 2d 791; *Zisook v. Maryland Drexel Neighborhood Redevelopment Corp.*, 3 Ill. 2d 570, 121 N.E. 2d 804; *Crommett v. City of Portland*, 150 Me. 217, 107 A. 2d 841; *Herzinger v. Mayor & City Council of Baltimore*, 203 Md. 49, 98 A. 2d 87; *State ex rel. Dalton v. Land Clearance Authority*, 364 Mo. 974, 270 S.W. 2d 44; *Velishka v. Nashua, supra; Sorbino v. New Brunswick*, 43 N.J. Super. 554, 129 A. 2d 473; *Murray v. La Guardia, supra; Foeller v. Housing Authority of Portland*, 198 Ore. 205, 256 P. 2d 752; *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 54 A. 2d 277, 172 A.L.R. 953; Opinion to the Governor, 76 R.I. 249, 69 A. 2d 531; *Ajootian v. Providence Redevelopment Agency*, 80 R.I. 73, 91 A. 2d 21; *Nashville Housing Authority v. Nashville*, 192 Tenn. 103, 237 S.W. 2d 946; *David Jeffrey Co. v. Milwaukee*, 267 Wis. 559, 66 N.W. 2d 362; *Hunter v. Norfolk Redevelopment & Housing Authority, supra; Berman v. Parker, supra;* Anno. 44 A.L.R.

2d 1427, *et seq.* See also *Cox v. Kinston, supra.* Respondent's assignment of error number two in this connection is untenable, and is overruled.

Respondent assigns as error Judge Preyer's fourth conclusion of law to the effect that the Urban Redevelopment Law does not confer upon petitioners the power to grant to a person or set of persons exclusive or separate emoluments or privileges from the community not in consideration of public services, in violation of Article I, Section 7 of the North Carolina Constitution.

G.S. 160-464(a), set forth above, empowers the Redevelopment Commission to sell, exchange or transfer real property or any interest therein to a private person, but such sale, etc., is "subject to such covenants, conditions and restrictions as may be deemed to be in the public interest or to carry out the purposes" of the Urban Redevelopment Law, and "may be made only after, or subject to, the approval of the redevelopment plan by the governing body of the municipality and after public notice and award as specified in" G.S. 160-464(b). G.S. 160-464(b) prescribes, "no sale of any property by the commission . . . or any contract with a developer shall be effected except after advertisement bid and awarded as hereinafter set out," except in case of a private sale to the municipality or other public body as specified in subsection (c) (1), (2) and (3) of G.S. 160-464. Subsection (b) provides all bids may be rejected, and further provides after receipt of all bids the sale shall be made to the highest responsible bidder.

Respondent's contention is that the provision that the property is to be sold "to the highest responsible bidder" means only that there is no discrimination in the selection of the purchasers, and not that ultimately a certain person or set of persons may not receive special benefits, in that the Urban Redevelopment Law does not provide that the property shall be sold at its use value or actual value.

Although the legislative findings and declaration of policy have no magical quality to make valid that which is invalid, and are subject to judicial review, they are entitled to weight in construing the statute and in determining whether the statute promotes a public purpose or use under the Constitution. *Velishka v. Nashua, supra.* The ultimate result which the challenged statute seeks to achieve is to eliminate the injurious consequences caused by a blighted area in a municipality, and to substitute for them a use of the area which will render impossible future blight and its injurious consequences. The challenged statute is a preventive measure. A sale in a redevelopment area to a redeveloper, subject to the restrictions placed around the

sale, etc., by the statute, is proper, for normally property should not be kept in public ownership but should be restored to the tax rolls when the public use has no further need for it. The sale is not the primary purpose of the project, but is only incidental or ancillary to it, and does not affect the public nature of the transaction as a whole. Such a sale, exchange, etc., cannot confer exclusive or separate emoluments or privileges to a person or set of persons, for the sale is to be made after public notice to the highest responsible bidder, and all bids may be rejected: a sale, exchange, etc., in which all persons are entitled to bid, and it is a logical inference that at such a sale, exchange, etc., the property will bring its fair market value. If not, the bid can be rejected. The great cities of Europe have been largely rebuilt through the expenditure of public moneys by the edicts of their rulers. If our cities are to be held unable, under our Constitution, to plan and construct such reconstruction projects, our cities must continue to be marred by areas, which are centers of disease and crime, constitute vicious influences for the young, and while contributing little to the tax income to our cities, consume an excessive proportion of its revenues because of the extra services required for police, fire, health and other forms of protection. It may be that the measure may prove eventually to be a disappointment, and is ill advised, but the wisdom of the enactment is a legislative and not a judicial question. The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution.

We find support for the conclusion we have reached in the following cases: Opinion of the Justices (Ala.), *supra; Rowe v. Housing Authority,* (Ark.), *supra; Redevelopment Agency of San Francisco v. Hayes,* (Cal.), *supra, cert. den Van Hoff v. Redevelopment Agency of San Francisco,* 348 U.S. 897, 99 L. Ed. 705; *State v. Urban Renewal Agency of Kansas City,* (Kan.), *supra; Chicago Land Clearance Commission v. White,* 411 Ill. 310, 104 N.E. 2d 236; *State ex rel. Dalton v. Land Clearance Authority,* (Mo.), *supra; Velishka v. Nashua,* (N.H.), *supra; Foeller v. Housing Authority of Portland,* (Ore.), *supra; Ajootian v. Providence Redevelopment Agency,* (R.I.), *supra; Hunter v. Norfolk Redevelopment & Housing Authority,* (Va.), *supra; David Jeffrey Co. v. Milwaukee,* (Wis.), *supra.* See Anno. 44 A.L.R. 2d, p. 1445-6, "Value of property transferred compared to price."

In this connection the Supreme Court of Pennsylvania said in *Belovsky v. Redevelopment Authority, supra:* "One of the objections urged against the constitutionality of the Urban Redevelopment Act is the feature of the 'redevelopment project' which contemplates the sale by the Authority of the property involved in the redevelopment,

it being claimed that thereby the final result of the operation is to take property from one or more individuals and give it to another or others. Nothing, of course, is better settled than that property cannot be taken by government without the owner's consent for the mere purpose of devoting it to the private use of another, even though there be involved in the transaction an incidental benefit to the public. But plaintiff misconceives the nature and extent of the public purpose which is the object of this legislation. That purpose, as before pointed out, is not one requiring a continuing ownership of the property as it is in the case of the Housing Authorities Law in order to carry out the full purpose of that act, but is directed solely to the clearance, reconstruction and rehabilitation of the blighted area, and after that is accomplished the public purpose is completely realized. When, therefore, the need for public ownership has terminated, it is proper that the land be re-transferred to private ownership, subject only to such restrictions and controls as are necessary to effectuate the purposes of the act. It is not the object of the statute to transfer property from one individual to another; such transfers, so far as they may actually occur, are purely incidental to the accomplishment of the real or fundamental purpose."

Respondent's assignment of error number three to Judge Preyer's conclusion of law number four is overruled.

Respondent assigns as error Judge Preyer's fifth conclusion of law to the effect that as only funds derived from sources other than *ad valorem* tax revenue by the city of Greensboro have been used, appropriated or spent by petitioners, and that sums in the future will be appropriated from sources other than *ad valorem* tax revenue, the provisions of Article V, Section 3, of the North Carolina Constitution, are not applicable to the determination of this proceeding. The findings of fact do not show that the funds spent or appropriated by petitioners here came from taxes levied, therefore, Article V, Section 3, of our Constitution is not applicable to a decision here. This assignment of error is overruled. A determination of the question whether or not the further provision of G.S. 160-470, that "to obtain funds for the purpose, the municipality may levy taxes and may in the manner prescribed by law issue and sell its bonds" is constitutional is not before us for decision, and must await another day and another suit, when the question is squarely presented.

We find no constitutional infirmity in the Urban Redevelopment Law to the extent that it has been challenged by assignments of error in this proceeding. Respondent's assignments of error numbers five

and six are overruled. Judge Preyer's unchallenged findings of fact, support his conclusions of law, and his judgment based thereon.

Affirmed.

BOBBITT, J., concurring. I agree fully that the condemnation of defendant's property may not be defeated on any ground asserted by defendant.

While defendant pleaded the several constitutional provisions referred to in the Court's opinion, it did not plead Article VII, Section 7, Constitution of North Carolina, which provides: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose." Defendant's failure to plead Article VII, Section 7, lends support to the view expressed in the dissenting opinion of *Justice Higgins.*

Whether the City of Greensboro has authority to contract any debt, or to pledge its faith or loan its credit, or to levy or collect any tax, to provide funds to effectuate the redevelopment project, unless approved by a majority of the voters, is not presented for decision on this appeal. Assuming approval by a majority of the voters in such election is required, it would be futile as well as expensive to conduct such election if, after approval by a majority of the voters, it were then decided that plaintiffs have no right to condemn for reasons now asserted by defendant. Hence, I am persuaded the present decision is justified even though all pertinent questions were not raised by defendant. Defendant, in my opinion, has fully and fairly presented on this appeal all available arguments bearing upon the questions presently considered and decided.

With this explanation, I concur.

HIGGINS, J., dissenting. The records in this case and in its predecessor, *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413, show a comprehensive and far-reaching redevelopment plan for the City of Greensboro. To carry out the plan will require the city and its agencies to levy taxes and to issue bonds.

The city has available the sum of $15,600 for the purchase of the lot 20 x 90 feet here involved. In a highly technical sense the transaction, therefore, may stop half a step short of butting head-on into the constitutional prohibition against expenditures of tax and bond money without an approving vote. This little transaction involves a lot which the city does not need except as a part of the plan. This

proceeding, therefore, appears to me to be a trial balloon to see if perchance this Court may be led along step by step to the approval of the plan without requiring the city to submit the issue to the voters. The city should be required to face up to the real issue. I vote to reverse the judgment and dismiss this action on the ground that it does not present a real controversy.

CHARLES M. IVEY, JR., ADMINISTRATOR OF THE ESTATE OF CECIL G. KING, DECEASED, V. NORTH CAROLINA PRISON DEPARTMENT.

(Filed 10 June, 1960.)

1. State § 3a—

Under the State Tort Claims Act, the State waives its immunity from liability for injuries resulting from the negligence of its officers, employees and servants if under the same conditions a private person would be liable, and the Industrial Commission is given jurisdiction to hear and pass on such tort claims.

2. Same: Master and Servant § 49—

The State Tort Claims Act expressly repealed all prior laws in conflict therewith, G.S. 143-291, and therefore this Act repealed any repugnant provisions of G.S. 97-13(c) prior to the 1957 amendment.

3. Same—

The personal representative of a prisoner who is fatally injured while performing an assigned task as the result of the negligent act of an employee of the State is entitled to prosecute a claim under the Tort Claims Act unless such right is withdrawn by the 1957 amendment to G.S. 97-13(c).

4. Same—

The 1957 amendment to G.S. 97-13(c) (Chap. 809, Public Laws, 1957) does not have the effect of limiting the liability of the State for the death of a prisoner resulting from the negligence of a state employee to the payment of funeral expenses under G.S. 97-13(c), but the personal representative of the deceased prisoner may prosecute a claim under the State Tort Claims Act, since the payment of funeral expenses, even though a part of compensation, is not the payment of compensation as defined in G.S. 97-2(11) and the 1957 amendment applies by its express terms only to prisoners and discharged prisoners entitled to compensation.

5. Statutes § 13—

Repeals by implication are not favored by the law and will not be indulged if there is any other reasonable construction.

RODMAN, J., dissenting.

DENNY, J., joins in dissenting opinion.

APPEAL by plaintiff from *Carr, J.*, November, 1959 Civil Term, CHATHAM Superior Court.

This proceeding was instituted before the North Carolina Industrial Commission under the Tort Claims Act to recover for the death of Cecil G. King alleged to have been caused by the negligent act of Edward Wright, an employee of the North Carolina Prison Department. The defendant filed a demurrer to the claim and asked that it be dismissed on the ground the personal representative of the deceased prisoner cannot maintain a tort claim action for that his remedy under the Workmen's Compensation Act is exclusive.

The hearing commissioner, upon stipulations and the evidence, made findings of fact that in 1950 the deceased was committed to prison for armed robbery to serve a sentence of 17 to 25 years. Prior to his imprisonment he earned from $40 to $100 per week. As a prisoner he earned a substantial income from the manufacture of leather goods and by taking still and moving photographs of prison activities. On the night of March 21-22, 1958, the deceased prisoner was ordered to accompany Edward Wright, an employee of the defendant, to Raleigh for the purpose of taking a sick prisoner to the prison hospital. The hearing commissioner found:

"4. During the night of 21-22 March 1958 the Lincolnton Prison Camp was under the command of Hugh A. Logan, Jr., Assistant Superintendent of the prison camp. Shortly before midnight on such night Mr. Logan had the deceased awakened and ordered or directed that the deceased go with Edward Wright, an employee of the prison camp, to Raleigh in order to take a sick prisoner to the prison hospital. The deceased was ordered to make the trip as an assistant to Wright and to assist Wright on the trip in any way possible. The trip to Raleigh commenced at approximately midnight, with Wright driving a prison pickup truck with cage on the back. The deceased rode with Wright in the cab of the truck and the sick prisoner was placed on a mattress in the cage at the back of the truck.

"5. While driving the prison truck towards Raleigh and in an easterly direction on U. S. Highway 64, Wright failed to slow down before approaching the proximity of a stop sign on U. S. Highway 64 at the intersection of U. S. Highway 64-A, despite two or three signs warning of the intersection. Wright applied the brakes of the truck suddenly while driving 55 miles per hour, lost control of the truck, it went off the road and turned end over end near the junction of the intersecting highways.

"6. The above named employee of the defendant, Wright, did

other than a reasonably prudent person would have done under the same or similar conditions. This constituted negligence upon his part and such negligence was the proximate cause of the accident giving rise hereto.

"7. As a result of the accident giving rise hereto deceased sustained severe injuries. The injuries resulted in the death of deceased at 5:40 p m., on 22 March 1958."

The hearing commissioner sustained the demurrer. The full commission and the superior court upon review sustained the ruling on the demurrer. From the order accordingly entered in the Superior Court of Chatham County, the plaintiff appealed.

T. W. Bruton, Attorney General, Bernard A. Harrell, Trial Attorney, for the State.

Martin & Whitley, By: Robert M. Martin for plaintiff, appellant.

HIGGINS, J. The General Assembly, by Article 31 of Chapter 143, General Statutes, has constituted the North Carolina Industrial Commission a court with jurisdiction to hear and pass on tort claims against the State Board of Education, State Highway Commission, and all other departments, institutions and agencies of the State. The State is made liable up to $10,000 for the negligent act of its officers, employees and servants if under the same conditions a private person would be liable. *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211; *Lawson v. State Highway & Public Works Commission,* 248 N.C. 276, 103 S.E. 2d 366; *Alliance Co. v. State Hospital,* 241 N.C. 329, 85 S.E. 2d 386; *Lyon & Sons, Inc. v. N. C. State Board of Education,* 238 N.C. 24, 76 S.E. 2d 553.

The Industrial Commission's findings of fact established that the plaintiff's intestate, a prisoner, while performing an assigned task, met his death as result of the negligent act of Edward Wright, an employee of the State, while acting within the scope of his employment. Thus the findings established the plaintiff's right to assert this claim on behalf of his intestate unless some other provision of law withdraws the right.

The plaintiff contends that nowhere in the law is the right to maintain the tort action withdrawn. On the other hand, the defendant contends that G.S. 97-10 and G.S. 97-13, subsection (c) as amended, provide a remedy under the Workmen's Compensation Act which is exclusive. G.S. 97-10 grants rights and remedies where the employer and employee have accepted the provisions of the Workmen's Compensation Act. G.S. 97-13 exempts from the provisions of the Work-

men's Compensation Act the following: (a) railroad employees; (b) casual employees, domestic servants, farm laborers, Federal government employees, employers of less than five employees; (c) "Prisoners.—This article (Workmen's Compensation) shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Prison Department shall suffer accidental injury arising out of and in the course of the employment to which he has been assigned, if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this article, then such discharged prisoner *may* (emphasis added) have the benefit of this article by applying to the Industrial Commission as any other employee; provided, such application is made within 12 months from the date of discharge; and provided, further, . . . (here follow provisions not here material) and no award other than burial expenses shall be made for any prisoner whose accident results in death. . . ." The foregoing provisions of G.S. 97-10 and G.S. 97-13 were in effect when the Tort Claims Act (G.S. 143-291) was passed in 1951, repealing all inconsistent provisions of law.

In 1957, Public Laws, Ch. 809, amended G.S. 97-13, subsection (c) by the following: "The provisions of G.S. 97-10 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said section applies to employees and employers." As stated by *Bobbitt, J.*, in *Lawson v. Highway Commission*, 248 N.C. 276, 103 S.E. 2d 288, "G.S. 97-13(c) conferred limited rights upon prisoners *in a special classification*, to wit, those assigned to work under the supervision of the State Highway & Public Works Commission, in the event they suffered 'accidental injury arising out of and in the course of employment to which . . . assigned.' No provision was made for other prisoners."

. . .

"With knowledge, actual or presumed, of the limited rights theretofore conferred upon prisoners in this special classification, the General Assembly of 1951 enacted the Tort Claims Act. . . . It did not exempt any prisoners from its provisions. In *Gould v. Highway Commission*, 245 N.C. 350, 95 S.E. 2d 910, this Court held that a prisoner not in said special classification was entitled to recovery under the Tort Claims Act." The case then raised the question whether the 1957 amendment to G.S. 97-13(c) denied to prisoners on assigned tasks rights conferred by the Tort Claims Act.

As stated by *Justice Bobbitt* in the *Lawson* case, G.S. 97-13 (c) is

not free from ambiguity. The purpose and meaning of the 1957 amendment were not directly involved in that case. Here it is involved. Any inconsistencies between subsection (c) before the amendment and the Tort Claims Act were repealed by the latter. The question now is whether the 1957 amendment withdraws the plaintiff's right to assert a tort claim.

If the Legislature intended to withdraw altogether a prisoner's right to pursue a tort claim, the logical procedure would be by amendment to the section of the Tort Claims Act which gave the right. No valid reason is suggested why the withdrawal, if such were intended, should be by an amendment tucked away in a jumbled and confusing subsection which is an exception followed by two provisos to the section of the Workmen's Compensation Act, entitled, "Exceptions from provisions of article." Interpretation of §97-13, subsection (c), originally and after the amendment, presents a problem in legal quadratics. The amendment makes no reference to the Tort Claims Act. "Repeals by implication are not favored by the law and will not be indulged if there is any other reasonable construction." *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433. "The presumption is against the intention to repeal where express terms are not used, and will not be indulged if by any other reasonable construction the statutes may be reconciled and declared to be operative without repugnance. 'To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed.'" *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E. 2d 748; *McLean v. Board of Elections*, 222 N.C. 6, 21 S.E. 2d 842; *Kelly v. Hunsucker*, 211 N.C. 153, 189 S.E. 664; *Story v. Commissioners*, 184 N.C. 336, 114 S.E. 493.

Actually, by its own terms, the 1957 amendment applies only to prisoners and discharged prisoners *entitled to compensation under this subsection*. The limitation in the amendment that it shall apply to prisoners and discharged prisoners *entitled to compensation* does not require — even if it permits — the interpretation placed upon it by the Prison Department that the payment of burial expenses constitutes the payment of compensation. The term compensation as used in the Workmen's Compensation Act is defined in G.S. 97-2(11): "When used in this article unless the context otherwise requires . . . means the money allowance payable to an employee or to his dependents as provided for in this article, and includes funeral benefits provided herein." As defined by this Court in *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865: "Compensation in the connection in which it is used in this Act means money relief afforded according to a scale es-

tablished and for the person designated in the Act." In *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E. 2d 109, the Court said: "Compensation is defined in our statutes as the money allowance payable to an employee or his dependents, including funeral expenses."

To be sure, the definition includes burial expenses, but it takes the whole to constitute compensation and not one of its parts. A vest is a part of a suit of clothes, but a vest cannot be called a suit. Surely compensation for wrongful death involves more than the burial of the body.

The rule against repeal by implication requires us to hold the plaintiff's right to have the tort claim heard and passed on has not been withdrawn. If the Legislature intended to exclude prisoners, all it had to do was pass a simple amendment to the Tort Claims Act saying, "prisoners assigned by the courts to work under the State Prison Department are excluded." Intention to withdraw a prisoner's right to assert a tort claim cannot be presumed as a result of the amendment to the Workmen's Compensation Act in its present form and setting.

The claimant administrator is entitled to have the North Carolina Industrial Commission hear and pass on his tort claim against the Prison Department. The judgment of the Superior Court sustaining the demurrer is

Reversed.

RODMAN, J., dissenting. To determine plaintiff's right to recover it is necessary, I think, to see what rights he possessed at common law and how those rights may have been enlarged by statute.

At common law an employee who was negligently injured by another had a right of action against the party causing the injury. The common law held an employer liable for the acts of his employees when done in the course of their employment. Hence when an employee was negligently injured by another employee, not a fellow servant, he had a right of action against the employee who inflicted the injury or against the employer or against both.

The rule of *respondeat superior* did not apply when the State or one of its agencies was the employer. The doctrine of governmental immunity forbade the injured party to sue. This rule of governmental immunity was applied in *Clodfelter v. State,* 86 N.C. 51, to defeat recovery by a convict who was injured by the negligence of his supervisor. The rule of governmental immunity declared in the *Clodfelter* case has been applied indiscriminately in denying claims made by employees of the Prison Department and by prisoners. *Moody v. State*

Prison, 128 N.C. 12; *Gentry v. Hot Springs,* 227 N.C. 665, 44 S.E. 2d 85.

In 1929 a new public policy was declared by the State with respect to compensation of workers for injuries sustained in the performance of tasks to which they were assigned. The Legislature enacted our Workmen's Compensation Act, c. 120, P.L. 1929. After 1 July 1929, the effective date of that Act, an employee working for an employer who had not rejected the provisions of the Act was not required to prove negligence proximately causing his injuries. Common law defenses of contributory negligence, assumption of risk, and fellow servant could no longer be used to defeat his claim. It was sufficient to show injury arising out of and in the course of his employment. The amount to be paid was fixed by statute to provide fair compensation based on the nature and extent of the injuries. The original Act with the subsequent amendments now appears as c. 97 of the General Statutes.

By express language the word "employer" included the State and all its political subdivisions. Sec. 2(c), c. 120, P.L. 1929, G.S. 97-2(3). This section likewise defined employment and employee. Doubtless because of the breadth of these definitions and the single reason of governmental immunity assigned for denying liability in the *Clodfelter* and *Moody* cases, *supra,* the Legislature deemed it wise to make it clear that the Act was not intended to permit a prisoner to claim compensation even though he might be assigned to work with free labor. Hence the Act expressly provided in sec. 14(c), (G.S. 97-13(c)): "This act shall not apply to State prisoners nor to County convicts."

Court decisions and legislative history establish beyond peradventure that a prisoner could not, prior to 1941, collect compensation from the State or its subdivisions for injuries negligently inflicted while serving his sentence. The Legislature of 1941, as it had a right to do, elected to permit certain prisoners to receive compensation for disabilities which continued after the prison term had expired.

C. 295, P.L. 1941, is entitled: "AN ACT TO AMEND CHAPTER ONE HUNDRED AND TWENTY OF THE PUBLIC LAWS OF ONE THOUSAND NINE HUNDRED AND TWENTY-NINE, SO AS TO PROVIDE CERTAIN BENEFITS OF THE WORKMEN'S COMPENSATION ACT FOR PRISONERS INJURED WHILE ENGAGED IN HIGHWAY WORK." It rewrote subsection (c) of section 14 of the original Act and made it read: "This act shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Highway and Public Works Commission shall suffer ac-

cidental injury arising out of and in the course of the employment to which he had been assigned, if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this act, then such discharged prisoner may have the benefit of this act by applying to the Industrial Commission as any other employee . . ."

The language of both the caption and the statute itself are important. The original statute made no distinction between prisoners who were assigned to work and those confined without such assignment, this for the sound reason that a right did not accrue to any worker unless the injury arose out of and in the course of employment. The intent of the Legislature is, I think, plain. It said that the mere fact that one was a prisoner did not defeat his right to compensation for injuries sustained when under like circumstances a worker not a prisoner would be entitled to recover; but it made it equally plain that no right to compensation existed so long as the worker was serving his prison term. The benefits accrue only in the event the disability continues beyond the prison term. Governmental immunity was waived in a limited area.

Increasing governmental activity in the broad field of communications—the construction and maintenance of highways and the transportation of school children—partly performed by private contractors and partly by the State with prisoners or hired labor, inevitably resulted in injuries to citizens other than those at work. Each session of the Legislature was confronted with an increasing number of claims with respect to which it was requested to waive governmental immunity and pay for losses sustained resulting from the negligence of some agent or employee of the State.

By 1951 the number of such claims so presented to the Legislature exceeded 200. Its committees did not have time to investigate the facts on which the obligation to pay was based. Hence the enactment of c. 1059, Session Laws 1951, the so-called Tort Claims Act.

That Act authorized the Industrial Commission to investigate the claims there listed, in excess of 200, and if the injuries asserted "arose as a result of a negligent act of a State employee while acting within the scope of his employment" to award compensation. Not only was the Commission authorized to investigate the claims listed, but it was authorized to determine if claims subsequently asserted were the result of negligent acts of a State employee.

To properly determine the character of claims thereafter arising as to which the Commission was authorized to investigate and award compensation, it is, I think, important to look at the character of the

claims expressly referred to the Commission for determination. A casual examination of the claims listed in the Act of 1951 will show their nature and character. There is no suggestion in those claims that the State should compensate a prisoner for injuries sustained by him. I do not believe the Legislature would give to the Industrial Commission authority to award compensation to a prisoner for injuries sustained by the negligence of his supervisor without clearly and expressly so stating.

My thought that the Legislature did not intend that the Tort Claims Act should have the sweeping effect attributed to it is fortified, I think, by the provisions of c. 1314, Session Laws 1953, where it expressly declared that the Tort Claims Act did not apply to claims based on the negligence of doctors, surgeons, nurses, and other employees where medical or surgical treatment is given.

Alliance Co. v. State Hospital, 241 N.C. 329, 85 S.E. 2d 386, involved the liability of the State for damage sustained by plaintiff when struck by a motor vehicle operated by a prisoner on business for the State. Except for the fact that the driver was a prisoner, the claim fell squarely in the class of claims expressly referred to the Industrial Commission by the Legislature in 1951. When claim was presented, the State denied liability because the driver of the State's motor vehicle was a prisoner and because a prisoner was not an employee. Hence, said the State, the Tort Claims Act had no application. This Court held no liability existed. *Justice Bobbitt*, in concurring in the opinion written by the present Chief Justice, said: "In my opinion, our Tort Claims Act should be strictly construed. This is in accord with the rulings of most courts. 49 Am. Jur., States, Territories, and Dependencies, sec. 97; 81 C.J.S., States, sec. 215. Waiver of immunity beyond the provisions of the Act as strictly construed is a matter for determination by the General Assembly." This rule of construction was given express approval by the entire Court in *Floyd v. Highway Com.*, 241 N.C. 461, 85 S.E. 2d 703.

The Legislature was in session when the case of *Alliance v. State Hospital, supra*, was decided. It disagreed with the conclusion of this Court that the operator of the State's vehicle was not an employee within the meaning of the Tort Claims Act. Hence it enacted c. 400, Session Laws 1955, ratified 31 March 1955.

The original Act authorizing compensation where the "result of a negligent act of a State employee acting within the scope of his employment" was by the 1955 Act changed to authorize compensation for injuries which "arose as a result of a negligent act or omission of any officer, employee, voluntary or involuntary servant or agent of

the State." The Legislature clearly expressed its intent to enlarge the class for whose acts the State would be liable and for the character of the acts, whether acts of commission or omission, but it did not intimate that it intended to enlarge the class of those entitled to receive compensation and to shift those entitled to compensation under the workmen's Compensation Act to claimants under the Tort Claims Act. It is, I think, important to note the distinction which *Justice Bobbitt* points to in the case of *Alliance Co. v. State Hospital, supra,* between agents and employees. Fearful that these two words might not suffice to cover all who acted for the State, the Legislature expressly included officers and servants.

This Act was amended later in the session to delete the provision making the State liable for acts of omission and the words "voluntary or" as applied to servants. C. 1361, S.L. 1955.

It will be noted that no exemption is made for injuries resulting from the negligence of surgeons, nurses, and other employees at hospitals at Chapel Hill, Raleigh, Morganton, or other places where surgical and medical treatment is rendered. Notwithstanding this omission, recalling the reason which led to the enactment of c. 400, S.L. 1955, I doubt if the Legislature intended to repeal the exemption expressly declared in 1953.

I do not think the Legislature intended to deny to a prisoner the benefit of the Workmen's Compensation Act because the negligence of the prisoner and a supervisor caused the injury. I think the Legislature meant, as the 1941 amendment to the Workmen's Compensation Act declared, that a prisoner injured in work which he was assigned to do should have the benefit of that Act.

Eleanor Rush, a prisoner in Women's Prison, died in August 1954. The administratrix of her estate filed claim for compensation with the Industrial Commission, asserting her death was caused by the negligent act of prison officials and employees. The Commission heard the claim, found the asserted negligence, and awarded compensation. The award so made was affirmed by this Court. The right to recover under the Tort Claims Act was not raised or debated. Liability was made to depend on the question of whether there was any evidence of negligence, and if so, did the evidence establish as a matter of law the prisoner's contributory negligence. This Court sustained the findings of the Industrial Commission on the debated issues of negligence and contributory negligence. See *Gould v. Highway Com.*, 245 N.C. 350, 95 S.E. 2d 910.

Eleanor Rush's death could not by any stretch of the imagination be said to be an injury "arising out of and in the course of the em-

ployment to which (s)he had been assigned." The provisions of the Workmen's Compensation Act could not possibly apply to her. But that case has importance here only because of the reliance placed on it in the subsequent case of *Lawson v. Highway Com.*, 248 N.C. 276, 103 S.E. 2d 366, holding that the Tort Claims Act was intended to permit any prisoner to sue for injuries negligently inflicted.

The opinion in the *Rush* case *(Gould v. Highway Com., supra)* was published in the Advance Sheets on 1 February 1957. The Legislature then in session enacted c. 809, S.L. 1957. The Act was ratified in May 1957. The caption reads: "AN ACT TO AMEND G.S. 97-13(C) AS IT RELATES TO COMPENSATION TO BE PAID PRISONERS WHO ARE INJURED WHILE PERFORMING ASSIGNED WORK." Sec. 2 provides: "Subsection (c) of Section 97-13 of the General Statutes is hereby amended by adding at the end thereof the following:

'The provisions of G.S. 97-10 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said Section applies to employees and employers.' "

I cannot conceive the Legislature intended to give prisoners the right to choose between the Workmen's Compensation and the Tort Claims Act. If it did not and the Tort Claims Act repealed the right of prisoners to claim the benefit of the Workmen's Compensation Act, c. 809, S.L. 1957, was and is meaningless. Certainly the Legislature had some purpose in mind when it enacted the quoted statute. To me the statute says this: Prisoners who are assigned to work and while performing the task to which they are assigned are entitled to the basic rights of the Workmen's Compensation Act. This right is their sole right against the State. They need not establish negligence on the part of the State, nor will contributory negligence defeat the claim. They are not required to wait until the term of confinement has expired. They are entitled to compensation from the date of disability. The amount of compensation is, however, limited to ten dollars per week.

If the statute does have that meaning, it follows that plaintiff cannot recover under the Tort Claims Act. His intestate was at the time of the injury resulting in his death engaged in work to which he was specifically assigned.

Because recovery under the Workmen's Compensation Act is limited to funeral expenses is insufficient reason, in my opinion, for casting aside legislative language. I can think of no meaning which can be

given to the 1957 language unless it is to be read with the 1941 Act and is given the meaning ascribed above.

The views which I have expressed are, I recognize, contrary to what was decided in *Lawson v. Highway Com., supra.* Further study of the question convinces me we then misinterpreted legislative intent as expressed in enactments prior to 1957. It is to be noted that the opinion in the *Lawson* case expressly declares that it is based on legislative intent as expressed prior to 1957 and does not undertake to give effect to the 1957 statute.

The conflict between G.S. 97-13, as amended in 1957, and the Tort Claims Act, as amended in 1955, as interpreted by the majority, is, I think, certain to call for the ascertainment of legislative intent in cases to arise in the future. The Legislature may, when it convenes in February, feel the subject justifies a clear and unmistakable expression of its intent.

DENNY, J., joins in dissenting opinion.

ROBERT L. JONES, JR., THROUGH HIS GUARDIAN, BLANCHE I. JONES (HOLTZ), AND BLANCHE I. JONES (HOLTZ), INDIVIDUALLY, v. HOME BUILDING & LOAN ASSOCIATION OF THOMASVILLE, NORTH CAROLINA.

(Filed 10 June, 1960.)

1. Appeal and Error § 7—

A defendant may file a demurrer *ore tenus* in the Supreme Court on the ground that the complaint, together with any amendment thereto, fails to state facts sufficient to constitute a cause of action.

2. Waters and Water Courses § 5a—

Subterranean waters are generally classified as (1) streams or bodies of water flowing in fixed or definite channels, the existence and location of which are known or ascertainable from surface indications or other means without excavations for that purpose, and (2) percolating waters, which ooze, seep or filter through the soil beneath the surface, or which flow in a course that is unknown or undefined, and not discoverable from surface indications without excavations for that purpose.

3. Waters and Water Courses § 5b—

The rights and liabilities of adjacent land owners in regard to subterranean streams are governed, so far as practical, by the rules governing surface streams.

4. Waters and Water Courses § 5a—

In order for the law of subterranean streams to be applicable in de-

termining the rights and liabilities of adjacent land owners, it is required not only that such streams flow in a well defined channel but also that the owner of the land through which they flow know of their existence or that their existence be discoverable from the surface of the earth without the necessity of any excavation.

5. Waters and Water Courses § 5b—

A person who obstructs the flow of a subterranean stream, in like manner as a person who obstructs the flow of a surface stream, is liable in damages for the resulting flooding of lands of a contiguous owner, since ordinarily he knows to a substantial certainty that such action will result in the flooding of the adjacent land.

6. Waters and Water Courses § 5c—

A land owner who obstructs or diverts percolating waters ordinarily does not know to a substantial certainty what the consequences will be, and he is not liable for damage resulting to a contiguous land owner so long as his acts do not exceed the bounds of a reasonable exercise of his proprietary rights or a reasonable use of such percolating waters, and therefore do not violate the maxim *"sic utere tuo ut alienum non laedas."*

7. Pleadings § 2—

The function of a complaint is to state in a plain and concise manner the material, essential or ultimate facts which constitute the cause of action; the pleader is not required to plead the law and should not plead the evidence to prove the ultimate facts. G.S. 1-122(2).

8. Pleadings § 12—

Upon demurrer, the complaint will be liberally construed with a view to substantial justice between the parties. G.S. 1-151.

9. Waters and Water Courses § 5a—

Allegations to the effect that defendant obstructed a subterranean stream, resulting in the flooding of the basement of plaintiff's house on an adjacent lot, *are held* sufficient to state a cause of action for the obstruction of a subterranean stream, it not being required that the complaint set forth the legal definition of a subterranean stream.

10. Same—

The complaint in this action, together with its amendment, *is held* to state facts sufficient to constitute a cause of action for the obstruction of percolating water in a negligent manner and the failure to use reasonable care to provide adequate drainage.

11. Waters and Water Courses § 5b—

Plaintiffs' evidence in this case *is held* insufficient to establish a predicate for the application of the law of subterranean streams, there being no evidence that there was anything on the surface of the ground to indicate a subterranean stream, except the entrance of a stream into a nearby manhole, and plaintiffs' testimony of a civil engineer to the effect that he knew nothing of the depth or width of the stream or where it originates or terminates, but that he platted the stream as a

conclusion from his observation of water in the manhole together with the contour of the land, etc., being no more than abstruse speculations of an expert.

12. Waters and Water Courses § 5c— Evidence held sufficient to make out cause of action for negligent obstruction of percolating waters.

Plaintiffs' evidence to the effect that defendant's lot was lower than plaintiffs' adjacent lot, that defendant in constructing a building on its lot dug footings several feet below the level of plaintiffs' basement and constructed a brick wall on the concrete footings, that immediately upon the construction of the wall water began to seep in plaintiffs' basement, that defendant pumped water from the excavation for his footings and from plaintiffs' basement, that defendant's contractor then constructed a terra cotta tile drain, which stopped the seepage of water into plaintiffs' basement for a short while, but which was insufficient to prevent the almost constant seepage of water into plaintiffs' basement thereafter, *is held* sufficient to show a negligent obstruction of percolating waters by defendant, precluding nonsuit in plaintiffs' action to recover damages to his property from the resulting flooding.

13. Appeal and Error § 55—

When a case has been tried under a misapprehension of the pertinent principles of law and of the facts, the verdict and judgment will be vacated and a new trial ordered.

APPEAL by defendant from *Olive, J.*, September 1959 Civil Term, of DAVIDSON.

The jury found by its verdict that defendant wrongfully obstructed a subterranean stream or streams of water flowing through its lands from the lands of plaintiffs, and awarded $7,000.00 as damages.

From judgment on the verdict, defendant appeals.

Stoner & Wilson and Wilson & Saintsing for plaintiffs, appellees.

E. W. Hooper, L. Roy Hughes and Charles W. Mauze for defendant, appellant.

PARKER, J. Defendant, as it had a right to do (G.S. 1-134; *Howze v. McCall*, 249 N.C. 250, 106 S.E. 2d 236), filed in the Supreme Court a demurrer *ore tenus* to the complaint, and an amendment thereto allowed by the trial court in its discretion after the close of all the evidence introduced by plaintiffs and defendant, for the reason that the complaint, and the amendment thereto, does not state facts sufficient to constitute a cause of action, in that the complaint, and the amendment thereto, fails to allege that defendant had any knowledge of an underground stream running through its land or that any underground stream could be ascertained from surface indications, and prays that the action be dismissed.

The facts alleged in the complaint are in substance as follows: Plaintiffs own in fee a lot of land fronting 60 feet on Winston Street in the city of Thomasville, and having a depth of 113 feet. Situate on this lot is an eight-room dwelling house, which they rent. Defendant owns a lot of land situate on the north side of plaintiffs' lot, and running 89 feet on Winston Street and parallel with West Guilford Street 120 feet. When defendant purchased this lot of land, it was much lower than plaintiffs' lot, and water from springs located on plaintiffs' lot and the lot purchased by defendant flowed through a channel or channels across the lot purchased by defendant into a storm drain of the city of Thomasville, and that surface water accumulated from the surrounding property and emptied into such drain. Such conditions had existed for 20 years, and were well known to defendant at the time it purchased its lot. In May 1958 defendant made excavations for the construction of a brick building on its lot. For the south wall of its building defendant dug footings several feet below the level of the basement of plaintiffs' house, and then erected a brick wall several feet above the surface of the land, thereby cutting off the flow of the springs and surface water, and causing water to back up in plaintiffs' basement and permanently damage plaintiffs' house, the particulars of which damage are alleged in detail.

In making excavation for the footings and the building of the south wall defendant failed to use due diligence to ascertain the nature and character of the soil to be excavated, the extent of the excavations to be made, and the footings necessary. Defendant failed to use reasonable care to make provisions for carrying off the underground and surface waters. Defendant, by digging the footings several feet below plaintiffs' basement for the south wall of its building, negligently failed to use reasonable care to provide adequate drainage for the surface waters coming on its lot from plaintiffs' lot. That all this caused damage to plaintiffs' house.

Defendant filled in its lot higher than plaintiffs' lot without making adequate provisions to take care of the waters which accumulated through underground streams, springs, and surface waters which has caused damage to plaintiffs' house to the extent that it is becoming unfit for use as residential property.

The amendment to the complaint alleges in substance the following: Defendant well knew before it began in April and May 1958 the construction of a building on its lot adjacent to plaintiffs' house that plaintiffs' land was south of and higher in elevation than its own, and defendant knew, or in the exercise of due diligence should have known, that surface and underground water would flow in its natural

course from the land of plaintiffs onto and across its own land. To construct this building defendant dug adjacent to plaintiffs' land a foundation wall ditch 12 to 15 inches wide, about 9 feet deep, and about 60 feet long into which underground water in large quantities flowed from the south side. Defendant knew, or in the exercise of due diligence should have known, that the building of a foundation wall in this ditch would cause underground water to back upon the premises of plaintiffs on which was located a dwelling house with a basement about 4 to 5 feet below the ground level and higher than the bottom of the foundation wall. Notwithstanding these facts, defendant built a foundation wall in the ditch which obstructed the passage of underground water or a subterranean stream from plaintiffs' land onto and across its own land, causing the water to back up upon plaintiffs' premises resulting in damages to plaintiffs' land and the dwelling house thereon, and constituting an unlawful invasion of plaintiffs' property.

Defendant assigns as error the denial of its motion for judgment of nonsuit renewed at the close of all the evidence. Defendant also assigns as error the denial by the trial court of its prayer for a directed verdict in its favor for the following reasons: One, plaintiffs introduced no evidence tending to show any damage resulting from the obstruction of surface water. Second, plaintiffs' evidence tends only to show the presence of subsurface water on their premises, which it is well settled, will be presumed to be percolating water. Plaintiffs have no evidence tending to show a clearly defined channel containing subterranean water, the location and existence of which are known or ascertainable from surface indications. Therefore, plaintiffs are not entitled to recover anything for damages due to underground waters. Defendant also demurred *ore tenus* in the trial court to the complaint, and further assigns as error the allowance by the trial court of plaintiffs' motion to amend their complaint made at the close of all the evidence.

Plaintiffs' evidence favorable to them tends to show the following facts: Plaintiffs own an eight-room dwelling house with bath and basement, which they rent, situate about eight feet from their north property line, which line is adjacent to defendant's line, on Winston Street in the city of Thomasville. The basement is built of reinforced concrete with a brick foundation and a three-inch thick concrete floor, and has in it two rooms and a bath. The south wall of defendant's building is erected right on its south property line, and runs the entire length of plaintiffs' house.

Defendant's lot, which is north of plaintiffs' lot, extends from plain-

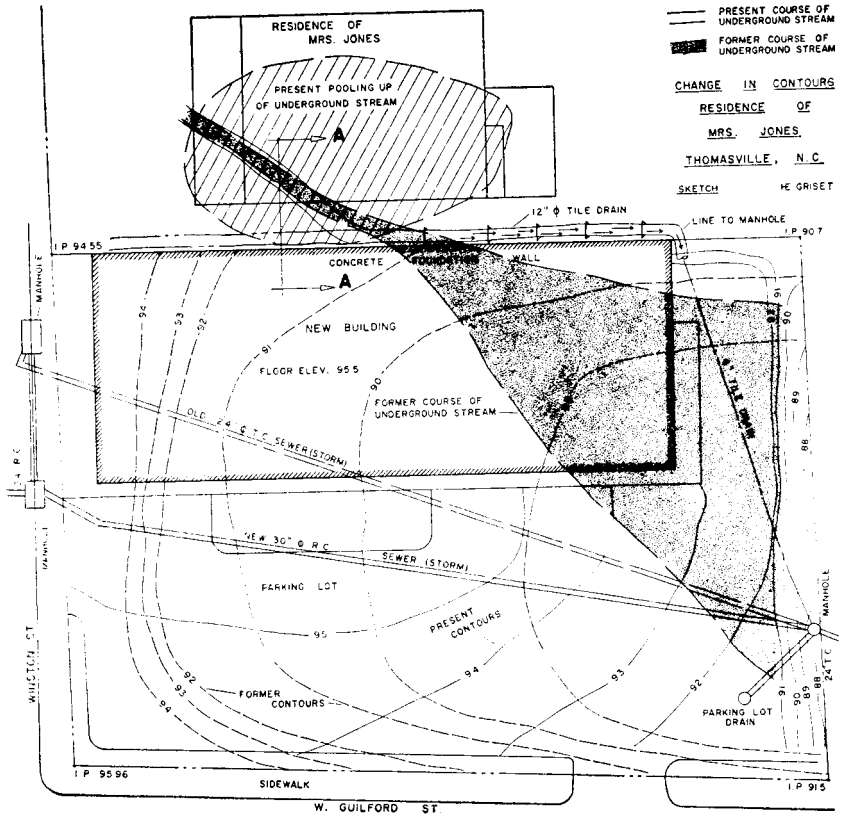
tiffs' north line to West Guilford Street. From plaintiffs' lot to West Guilford Street there is a decline or slope of about eight feet: the change in elevation from plaintiffs' house to the south wall of defendant's building is about three feet. Defendant's lot had been filled in with dirt by the city of Thomasville, and was damp and wet all the time. West of defendant's property and northwest of plaintiffs' property the land was grown up with willows, and the soil was wet, and water stood there a good deal of the time. The land south of plaintiffs' lot is much higher than their lot. Across defendant's lot was a storm sewer or drain.

The depth of plaintiffs' basement is around four or five feet below the ground level. From 1950 until April or May 1958 it was a dry basement, though two weeks before the trial during a heavy rain water came into the basement for a few minutes through a basement window on the south side level with the ground.

In April or May 1958 defendant began the construction of a building on its lot. At that time Mrs. Blanche Jones Holtz, a plaintiff, told Mr. Phillips, secretary and treasurer of defendant, there was a water situation there, and she wanted him to take care of it. He stated he knew water from the whole section turned onto defendant's lot. In April or May 1958 defendant cut a ditch eight or nine feet deep and about 50 inches wide on its south line to get a footing for the south wall of its building. While this ditch was being cut, water was rising in the ditch all the time, and a pump was installed to pump the water out. After the ditch was cut, concrete was poured in it all Friday afternoon. On Saturday water was coming up on the concrete base and in the ditch. Sunday morning water was in plaintiffs' basement, in some places two inches deep, and plaintiffs' tenant called defendant's secretary and treasurer, Mr. Phillips. Mr. Phillips came, looked at the water in the basement, and said the situation was very bad, and he would try to do something about it. On Monday water was still rising in the basement, and defendant put a pump in the basement and pumped it out. Defendant pumped the water out of the ditch, and the water went down in the basement. Shortly after that defendant's contractor dug a ditch along the south wall of defendant's building, and placed therein terra cotta tiling as a drain and covered it with burlap and stone. The water in the basement then went down again, but in a day or two it was back in the basement. Mr. Phillips looked at the water in the basement on several occasions, but defendant has done nothing about it.

Plaintiffs had F. J. York to install a pump in their basement to pump the water out. He dug a hole in the basement floor to install the pump, and water started coming in. He put in a pump with a capacity of 4,000 gallons per hour, which he ran six or seven hours, so he could install the pump for the plaintiffs. Since the south wall of defendant's building was erected, plaintiffs' basement has had water in it practically every day. Plaintiffs' pump in the basement with a capacity of about six gallons to the minute runs every day about two or three times a day, averaging three or four minutes per run.

Henry Griset, a civil engineer, holding degrees in civil engineering and mechanical engineering from New York University and New York Tech, and now in the contracting business in Salisbury, inspected plaintiffs' premises in July 1958, at which time defendant's building had its walls up, the roof on, and the floor was being installed. He went in plaintiffs' basement, and there was water in the basement coming up through cracks in the floor, seeping in very slowly, and running out of one end of the building. The land outside was sloping to a paved street. There was a catch basin almost in front of plaintiffs' house and another down there, with indications one had been removed. He noticed a surface drain, and went over and looked in it, and there was a 24 to 30-inch line running into the manhole or surface drain. There was also a small drain running in from the south side of this manhole which was flowing, and that flow came from the direction of the back of defendant's building and plaintiffs' house. Griset and a Mr. Myers located a point right here (pointing), which is about halfway of the residence and south of the south wall of defendant's building, a distance of 18 to 24 inches, which was the source of the water running through the manhole. It was an underground subterranean stream, and running into a 12-inch tile running south of defendant's building, and then into a 4-inch drain. The connections were open connecting right at the corner of defendant's building. Griset checked back one manhole, and determined that the flow of the two were almost identical, indicating there was no leak in the storm sewer line. This was the point where the subterranean water was emptied on the land. In Griset's opinion, when the south wall of defendant's building was erected, it stopped up the subterranean stream causing it to pond up, and come through the floor of the basement. Griset made a plat of the premises of plaintiffs and defendant showing the course of the subterranean stream, which is plaintiffs' Exhibit 1, and which the court admitted for the sole purpose of illustrating the testimony of the witness



In respect to this plat Griset, pointing out lines on it, testified: "These lines are contour lines. They indicate levels of the ground. This is the outline of the new building of the defendant and these lines up here are the lines of the terra cotta drain that was put in there against the footing. This dotted red line is the course that the subterranean stream followed before. There is no way of seeing it and you can only do it by getting the contour of the land. That course formerly spread out here and went on out there through the ground and that was changed by the entrance of this solid concrete wall. That diverted the stream into the tile here and around into the catch basins. It is a question as to whether the capacity of that tile drain is sufficient to carry off the stream of water the way it had previously been carried off before. The water backed up in here from that underground point. The stream was flowing heavily now but it has to vary. Sometimes it will flow heavily and sometimes light. This was flowing fairly

heavily for what appeared to be a virtually dry season. Even while there was some water in the basement it was conceivable that more water would come into the basement if the flow increased."

Griset testified in substance on cross-examination: He was on the premises four times during a period of about three weeks. He never saw the premises "in its natural state." The area shown in red (shown on the printed plat as shaded area) on plaintiffs' Exhibit 1 is the subterranean stream. It has two points. This point and the general contour of the land. It had to come from this direction. It followed in general the natural contour of the earth. Where he indicated on the map the subterranean stream is, there is nothing on the surface of the earth to indicate a subterranean stream. He made no excavations to determine the course of the subterranean stream. He said, "I know of my own knowledge where the water came from because a part of the line was exposed. I saw some water in two places that was being conducted through a concrete conduit." He saw no evidence of springs on plaintiffs' lot. When he was there, it was a relatively dry period. He testified: "I don't know of my own knowledge the depth of the water in the subterranean stream. I do not know the width of any stream if it is there. I do not know where the whole stream originates or terminates. I do not know whether or not there are any streams in this area. My opinion and my drawing is based solely upon some water that I observed at this point and at this point and in the manhole taken in connection with the contour of the land and that is the way you determine underground streams." He was then asked this question: "And I believe you formerly said there was no indication visible to me or a person not technically trained in the science as you are as to the location of this stream?" He replied: "I believe the only point that would be visible would be at the entrance of the stream into the manhole." At the edge of defendant's building there is no surface indications whatever of the subterranean stream.

Evidence to this effect was elicited from defendant's witnesses, who have known defendant's lot for periods of time from ten to fifteen to twenty years before the construction of defendant's building thereon: part of the lot was a muddy swamp, and stayed wet like a mud hole at times.

Plaintiffs' evidence clearly shows that the damage by water to their house was caused solely by subterranean water, and not by surface water. Then this question is presented by the evidence: Was the subterranean water a subterranean stream or percolating waters?

Subterranean waters are generally classified as (1) streams or bodies of water flowing in fixed or definite channels, the existence and loca-

tion of which are known or ascertainable from surface indications or other means without excavations for that purpose, and (2) percolating waters, which ooze, seep or filter through the soil beneath the surface, or which flow in a course that is unknown or undefined, and not discoverable from surface indications without excavations for that purpose. *C. & W. Coal Corp. v. Salyer,* 200 Va. 18, 104 S.E. 2d 50; *Clinchfield Coal Corp. v. Compton,* 148 Va. 437, 139 S.E. 308, 55 A.L.R. 1376; *Hayes v. Adams,* 109 Or. 51, 218 P. 933; *Pence v. Carney,* 58 W. Va. 296, 52 S.E. 702, 6 A.L.R. (N.S.) 266, 112 Am. St. Rep. 963; 56 Am. Jur., Waters, Sections 102, 108 and 111; 93 C.J.S., Waters, Sec. 86; Anno. 55 A.L.R. 1386, 109 A.L.R. 397, 29 A.L.R. 2d 1354, Sections 2, 3 and 10. See *Rouse v. Kinston,* 188 N.C. 1, 123 S.E. 482, 35 A.L.R. 1203 — interference with percolating waters.

"It is well settled that unless it appears that underground water in a given case flows in a defined and known channel, it will be presumed to be percolating water, and that the burden of establishing the existence of an underground stream rests upon the party who alleges such fact." 56 Am. Jur., Waters, Sec. 103.

Rights and liabilities in respect to subterranean streams, above defined, and distinguished from percolating waters, are generally governed, so far as practicable, by the rules of law applicable to surface streams. *Tampa Waterworks Co. v. Cline,* 37 Fla. 586, 20 So. 780, 33 L.R.A. 376, 53 Am. St. Rep. 262; *Saddler v. Lee,* 66 Ga. 45, 42 Am. Rep. 62; *Stoner v. Patten,* 132 Ga. 178, 63 S.E. 897; *Wyandot Club v. Sells,* 6 Ohio N.P. 64, 9 Ohio Dec. N.P. 106 (quoted at length in appellant's brief); *Hayes v. Adams, supra;* 56 Am. Jur., Waters, Sec. 109; Gould on Waters, 3rd Ed., Sec. 281; Thompson on Real Property, Per. Ed., Vol. I, Sec. 75, p. 87; Tiffany on Real Property, 3rd Ed. Vol. III, Sec. 748.

"In most of the cases dealing with the subject, questions as to liability for the incidental obstruction or diversion of a subterranean stream in the use of one's own property have been made to depend primarily upon whether the existence and course of the stream are known or ascertainable from surface indications. If so known or ascertainable, liability is determined, ordinarily, by the rules applicable in the case of surface streams; but if unknown or unascertainable, by the rules applicable in the case of percolating waters." 29 A.L.R. 2d 1373-4.

In *Clinchfield Coal Corp. v. Compton, supra,* the Supreme Court of Appeals of Virginia said at p. 447 of their reports: "It is a mistake, however, to suppose that only those waters which ooze or percolate through the soil are subject to the law of percolating waters. They

may flow in a well defined channel and be such as if on the surface would answer the description of a water course, but in order to be subject to the law of surface water, the existence, location and flow of the water must be known to the owner of the land through which it flows, or it must be discoverable from the surface of the earth. Otherwise, no one could with safety make excavations on his own land. Furthermore, 'the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel, but must be knowledge by reasonable inference, from existing and observed facts in the natural or rather preexisting condition of the surface of the ground. The *onus* of proof lies, of course, on the plaintiff claiming the right, and it lies upon him to show that, without opening the ground by excavation, or having recourse to abstruse speculation of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream, when it emerges into light, comes from, and has flowed through, a defined subterranean channel.' "

It has long been settled in North Carolina that a lower owner cannot obstruct a surface stream of water, so as to prevent the water from flowing as it naturally would, and thereby flood the lands and buildings above him, and if he does so, he incurs liability for the damage done by such flooding. *Pugh v. Wheeler*, 19 N.C. 50; *Overton v. Sawyer*, 46 N.C. 308; *R. R. v. Wicker*, 74 N.C. 220; *Porter v. Durham*, 74 N.C. 767; *Cagle v. Parker*, 97 N.C. 271, 2 S.E. 76; *Ridley v. R. R.*, 118 N.C. 996, 24 S.E. 730; *Mullen v. Canal Co.*, 130 N.C. 496, 41 S.E. 1027; *Chaffin v. Mfg. Co.*, 135 N.C. 95, 47 S.E. 226; *Clark v. Guano Co.*, 144 N.C. 64, 56 S.E. 858; *Winchester v. Byers*, 196 N.C. 383, 145 S.E. 774; *Braswell v. Highway Comm.*, 250 N.C. 508, 108 S.E. 2d 912. To the same effect see 56 Am. Jur., Waters, Sec. 18; 93 C.J.S., Waters, Sec. 17; Tiffany on Real Property, 3rd Ed., Vol. III, Sec. 731.

A person who obstructs the flow of a known subterranean stream, ordinarily knows to a substantial certainty that he will prevent the water from flowing as it naturally would, and his obstruction is therefore intentional. On the other hand, a person who obstructs the flow of mere percolating waters ordinarily does not know to a substantial certainty what the consequences will be, and the harm which does result is not intentional. Restatement of the Law of Torts, Vol. IV, p. 333.

The most accurate statement that we have found, after an exhaustive search, as to the conflict of opinion in the cases as to the obstruction of percolating waters is found in Annotation 29 A.L.R. 2d 1358, which is as follows: "In the cases dealing with liability for the

obstruction or diversion of percolating waters in the use of one's own premises, such liability, or immunity therefrom, has usually been based, in the absence of contract or statute, on one or both of the fundamental principles governing rights and liabilities as between adjoining or neighboring landowners generally. One of these principles or doctrines is that the owner of the soil owns everything above or below the surface, upward to the sky and downward to the center of the earth, expressed in the maxim *'cujus est solum, ejus est usque ad coelum et ad inferos.'* The other is that one must so use his own as not to injure another, expressed in the maxim *'sic utere tuo ut alienum non laedas.'* Some courts have applied or emphasized one of these principles to the exclusion or minimization of the other, while others have sought to give effect to both in harmony. In England, where the question first arose, the view was taken that the ownership and control of land, under the maxim *'cujus est solum,'* etc., applied to and included the percolating water therein, and, consequently, that any obstruction or diversion thereof by the owner or occupant of land, incident to the use thereof, to the injury of an adjoining or neighboring owner or occupant, was, at least in the absence of negligence or malice, *damnum absque injuria.* This rule, which has been referred to as the 'common-law' or 'English' rule, was followed in many of the early cases in this country, and apparently still prevails in a slight majority of the jurisdictions in which the question has been adjudicated." A multitude of cases are cited in support of the text. To the same general effect, see 56 Am. Jur., Waters, Sec. 120, interference with percolating waters; 93 C.J.S., Waters, pp. 774-5.

In *Rouse v. Kinston, supra,* the city of Kinston diverted percolating waters from plaintiff's land drying up his artesian wells for the purpose of supplying its inhabitants with water. In that case this Court took the view that the so-called common law or English rule involved an unnecessary denial or restriction of the principle expressed in the maxim *"sic utere tuo ut alienum non laedas,"* and imposed thereon the limitation or qualification that, in order to confer immunity from liability for the diversion, the causative activity or conduct must be a reasonable exercise of a proprietary right. In that case this Court said on page 23 of our reports: "We think the American rule, adopted in most of the States where this question has arisen, the 'reasonable use' of percolating water, the correct rule." As to American Rule—Doctrines of Reasonable Use and Correlative Rights—see 56 Am. Jur., Waters, Sec. 114; 93 C. J. S., Waters, Sec. 93 c(3); Anno. 55 A.L.R., p. 1398; 109 A.L.R. p. 399; 29 A.L.R. 2d pp. 1361-1373. The same rule is applicable to the obstruction of

percolating water as to its diversion. Anno. 29 A.L.R. 2d pp. 1361-1373.

Plaintiffs allege, *inter alia,* in their complaint, and the amendment thereto, facts showing an obstruction by defendant of a subterranean stream flowing through their lot, causing such stream to back up on their premises resulting in damage to their house. Defendant contends that the demurrer *ore tenus* filed in this Court should be sustained, for the reason that their complaint, and the amendment thereto, "fails to allege that defendant had any knowledge of an underground stream running through its land or that any underground stream could be ascertained from surface indications."

The function of a complaint is to state in a plain and concise manner the material, essential or ultimate facts which constitute the cause of action, but not the evidence to prove them. G.S. 1-122 (2); *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615. It is not necessary to plead the law. The law arises upon the facts alleged, and the court is presumed to know the law. McIntosh, N. C. Practice & Procedure, 2d Ed., p. 528. Plaintiffs are not required to allege in their complaint, and the amendment thereto, the legal definition of a subterranean stream. Construing the complaint, and the amendment thereto, liberally with a view to substantial justice between the parties, as we are required to do by G.S. 1-151, it is our opinion, that though inartistically drafted and confused, the complaint, and the amendment thereto, suffices in stating facts sufficient to constitute a cause of action for the obstruction of a subterranean stream, and also for the obstruction of percolating water in negligently failing to use reasonable care to provide adequate drainage for percolating water under the doctrines of reasonable use and correlative rights, which we adopted in *Rouse v. Kinston, supra.* The demurrer *ore tenus* filed in this Court and a similar demurrer *ore tenus* filed in the trial court were properly overruled.

Defendant assigns as error the denial of its motion for judgment of nonsuit, renewed at the close of all the evidence. Plaintiffs have no evidence showing damage by surface water: their evidence shows damage by subterranean water. The case was tried on the theory as to whether or not defendant wrongfully obstructed a subterranean stream or streams, and on the motion for judgment of nonsuit it is briefed on that theory.

In considering plaintiffs' evidence and so much of defendant's evidence, if any, favorable to them (*Polansky v. Insurance Ass'n.,* 238 N.C. 427, 78 S.E. 2d 213) as to a subterranean stream, it is well settled law that all underground waters are presumed to be percolating, and to overcome this presumption the burden of proof rests upon the

plaintiffs, who contend that defendant wrongfully obstructed a subterranean stream or streams, to show the existence of a stream or body of water flowing in fixed or definite channels, the location of which is known or ascertainable by men of ordinary powers and attainments from surface indications or other means without excavations for that purpose or without having recourse to "abstruse speculations of scientific persons." 56 Am. Jur., Waters, Sec. 103; 93 C.J.S., Waters, Sec. 87; Thompson on Real Property, Per. Ed., Vol. I, p. 85; Tiffany on Real Property, 3rd Ed., Vol. III, p. 180; Gould on Waters, 3rd Ed., p. 557; *Clinchfield Coal Corp. v. Compton, supra.*

Plaintiffs' evidence shows there was nothing on the surface of the ground to indicate a subterranean stream, except at the entrance of a stream in a manhole. Plaintiffs' evidence as to a subterranean stream is based upon "the abstruse speculations" of their witness Henry Griset, a civil and mechanical engineer, who testified he knew nothing of the depth or width of the stream, or where it originates or terminates, and who solely bases his opinion and the drawing of the subterranean stream on his plat, Plaintiffs' Exhibit 1, "upon some water that I observed at this point and at this point and in the manhole taken in connection with the contour of the land." From the evidence offered by plaintiffs men of ordinary powers and attainments could not know or could not with reasonable diligence ascertain that the water was a subterranean stream flowing in fixed or definite channels without opening the ground for excavations or having recourse to "abstruse speculations of scientific persons." Plaintiffs have no proof that the subterranean waters were other than percolating waters. However, plaintiffs' evidence, considering it in the light most favorable to them and giving to them every legitimate inference to be drawn therefrom, does tend to show a negligent obstruction of percolating waters, and that suffices to overcome defendant's motion for judgment of nonsuit, and the case should have been submitted to the jury on that theory.

When a case has been tried under a misapprehension of the pertinent principles of law and of the facts, the verdict and judgment will be vacated and a new trial ordered. *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923; *Credit Corp. v. Saunders,* 235 N.C. 369, 70 S.E. 2d 176; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477. Therefore, the verdict and judgment will be vacated, and a new trial is ordered.

New trial.

STATE OF NORTH CAROLINA, EX REL NORTH CAROLINA UTILITIES COMMISSION v. CITY OF WILSON AND CITY OF ROCKY MOUNT.

(Filed 10 June, 1960.)

1. Appeal and Error § 21—

An exception to the judgment presents whether the facts found support the judgment and whether error of law appears on the face of the record, but it does not challenge the sufficiency of the evidence to support the findings, and the findings of fact are thus binding on appeal.

2. Telephone Companies § 1c: Utilities Commission § 3—

The Utilities Commission properly requires that a public utility should make no unreasonable discrimination in its rates or tariffs, but should charge the same rates to all customers within a particular classification who receive the same kind and degree of service. G.S. 62-68, G.S. 62-69, G.S. 62-72.

3. Same—

The Utilities Commission properly proscribes a telephone company from furnishing service to certain municipalities within its territory free or at a reduced rate, and contractual agreements of a telephone company to do so in consideration for franchise rights to use the streets, alleys and roads in such municipalities for its pole lines and underground conduits, are void, since such concessions constitute discrimination against other customers similarly situated, G.S. 62-69, and, further, since such concessions are not in accord with the rates and tariffs filed with the Utilities Commission. G.S. 62-68.

4. Same: Taxation § 14: Municipal Corporations § 18—

The requirement by a municipality that a telephone company, in exchange for the privilege of using the municipal streets, alleys and roads for its pole lines and underground conduits, should furnish the municipality telephone service free or at a reduced rate amounts to the levy of a franchise or privilege tax on the business of the telephone company by the municipality in violation of G.S. 105-120(f).

5. Telephone Companies § 1c: Utilities Commission § 3—

Chap. 685, Session Laws of 1959, undertaking to authorize and validate franchise agreements under which a telephone company furnishes municipalities telephone service free or at reduced rates, *is held* unconstitutional in that it violates the due process provisions of both the State and Federal Constitutions, results in a discriminatory tax, interferes with vested rights, and attempts to surrender the police power of the State.

6. Appeal and Error § 55—

Where judgment is predicated upon a misapprehension of the pertinent law, the cause must be remanded for appropriate proceedings.

APPEAL by plaintiff, North Carolina Utilities Commission, from

Bone, J., in Nashville, N. C., September 19, 1959 (judgment signed October 9, 1959), of EDGECOMBE.

This proceeding originated before the North Carolina Utilities Commission upon application of the Carolina Telephone & Telegraph Company for a general increase in its local service telephone rates in North Carolina. On 4 September, 1958 the North Carolina Utilities Commission entered an order approving in part and denying in part the application for increases in telephone rates and by the same order prohibited the further practice of rendering telephone service to municipalities at other than tariff rates.

Thereafter the city of Wilson on 6 October 1958, filed a petition for rehearing of so much of the order of 4 September 1958 as affects franchise service and gave notice of appeal from said order insofar as it relates to franchise service. And on 15 October 1958 the Utilities Commission ordered the proceeding reopened only to the extent that franchise service in the way of free telephone service to the cities and towns is involved within the company's territory. The matter was heard before the Commission on 13 November 1958, at which time both the City of Wilson and the City of Rocky Mount were present and offered evidence.

On 13 January 1958, the Commission entered an order reaffirming its conclusion in respect to franchise telephone service as set forth in its original order of 4 September 1958. The Commission made *inter alia* the following findings of fact:

"1. Carolina Telephone & Telegraph Company * * * has granted concession telephone service, without charge, or at lower rates than the rates which it has on file with the North Carolina Utilities Commission for similar service, under similar conditions, to certain municipal corporations and other users of its service.

"2. The granting of concession telephone service, without charge, or at rates less than those on file with the North Carolina Utilities Commission for similar service, under similar conditions, creates an unreasonable preference or advantage to the receiver of such service under such circumstances and subjects other persons and corporations which received service at regular scheduled tariff rates to unreasonable prejudice or disadvantage and establishes an unreasonable difference as to rates between localities receiving the same class of service.

"3. Concession telephone service, without charge, or at rates lower than those which the utility has on file with the North Carolina Utilities Commission for similar service under similar conditions, has been granted by the utility company to the municipalities and required by the municipality of the utility company in consideration for fran-

chise rights to the utility to operate in the municipality and use the streets, alleys and roads for its pole lines and underground conduits."

Upon the foregoing findings of fact the Commission reached the following conclusions set out in pertinent part:

"We find three compelling reasons to support our original order denying the company the right to continue furnishing concession telephone service to the municipalities.

"In the first place, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, schedules showing all rates established by it and collected or enforced, or to be collected or enforced within the jurisdiction of the Commission. This is a provision of G.S. 62-68."

"The Carolina Telephone & Telegraph Company has on file with the North Carolina Utilities Commission schedules of rates and charges for all of its service. These rates and charges were established and fixed by the Commission in its order of 4 September 1958, the very case in which this controversy arose. Those schedules of rates and charges did not provide for a concession service, either without charge or at lower rates than the specified rate. Thus, the granting of a concession rate, without charge, or at a rate lower than the regular scheduled rates for similar service under similar conditions, is in direct contravention of G.S. 62-69 and is not permissible."

"In the second place, G. S. 62-70 provides that: 'No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section.' "

"All the testimony offered at the hearing is to the effect that telephone service is rendered to some municipalities, without charge, or at lower rates than that particular service is rendered under similar conditions to other like municipalities and that some municipalities using the same phone service and under the same operating conditions receive service, without charge, while other municipalities so situate are paying for this service * * * At the same time no effort has been made to arrive at any standard by which the concession service is allowed * * * In other words, the public utility company with rates on file with the North Carolina Utilities Commission has engaged in bargaining away part of its available revenues for service with some municipalities, driving the best bargain it could, while other munici-

palities receiving similar phone service under similar conditions have not received any concession service."

"In the third place, it is quite clear from the testimony that the municipalities have required a certain amount of concession service for the franchise right of the utility to carry on its business in the municipality * * * The general law is embodied in G.S. 105-120 * * * Counties, cities and towns shall not levy any franchise, license, or privilege tax on the business taxed under this section."

"While it is contended by the municipalities that they are not levying a franchise or privilege tax upon the telephone company but are in effect receiving certain telephone service, without charge, in payment of actual services rendered by the municipality to the company for which it is entitled to be paid, it is well to note the written language used in the franchise ordinance or agreement: 'In consideration of the rights and franchises herein granted, the said company shall furnish to the said city, free of cost, space for its fire alarm and police telegraph wires, upon all poles and in all underground conduits, erected, constructed and maintained by the said company under this ordinance; the said company shall further and also furnish to the said city—telephone stations, free of cost.' "

"We conclude that our order of 4 September, 1958, with respect to charity discounts and franchise services should be sustained and adhered to."

In apt time the City of Wilson and the City of Rocky Mount gave notice of appeal to the Superior Court. The cause was heard before Judge Bone on 19 September 1959, out of term.

Thereafter on 5 October 1959 judgment was entered reversing the order of the Utilities Commission, Judge Bone finding the following:

"After hearing argument of counsel for each of the parties hereto and after consideration of the record before the Utilities Commission, the court is of the opinion that Chapter 685 of the 1959 Session Laws is not unconstitutional;

"And the court is of the further opinion that in reviewing the order of the Utilities Commission it must consider the law in effect at the time of the review rather than the law that was in effect at the time of the Commission's decision;

"And, in that light, the court is of the opinion that each and every exception of the City of Wilson and the City of Rocky Mount should be sustained and that the order of the North Carolina Utilities Commission of January 13, 1959, should be reversed.

"It is, therefore, considered, ordered and adjudged that the exceptions of the City of Wilson and the City of Rocky Mount to the order

of the North Carolina Utilities Commission, dated January 13, 1959, in this cause, be and the same are hereby sustained, and that the order of the Commission be reversed, and the cause remanded to said Commission for further proceedings not inconsistent with this judgment."

To the foregoing judgment the North Carolina Utilities Commission excepts and appeals to the Supreme Court, and assigns error.

Attorney General Seawell, Assistant Attorney General F. Kent Burns for North Carolina Utilities Commission.

Lucas, Rand & Rose for City of Wilson.

Thorp, Spruill, Thorp & Trotter for City of Rocky Mount.

WINBORNE, C. J. Decision on this appeal turns upon the answer to this question: Did the Judge of Superior Court err as matters of law in holding that Chapter 685 of the 1959 Session Laws is constitutional and of retroactive effect.

This act is captioned "An Act to validate certain agreements between telephone companies and municipalities and to make provision for future agreements." Sec. 1 of the act provides that "any franchise agreement or other arrangement heretofore made between any telephone company and any municipality in which the telephone company has agreed to furnish certain telephone service or facilities to the municipality is hereby in all respect validated during the life or term of such agreement or arrangement." And the General Assembly declared in Sec. 2 that "All laws and clauses of laws in conflict with this Act are hereby repealed, but nothing herein shall be construed as repealing, modifying, altering, or amending subsection (b) of G.S. 105-120"; and in Sec. 3 that "This Act shall become effective upon its ratification" * * * the 2nd day of June, 1959.

The above question arises upon exceptions 15, 16 and 17 to matters of law on which assignments of error are predicated. See *Lowie v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271; *S. v. Dew,* 240 N.C. 595, 83 S.E. 2d 462; *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405, as to sufficiency of the grouping of exceptions and assignments of error to comply with Rule 21 of the Rules of Practice in the Supreme Court. 221 N.C. 544, at page 558.

In respect to the above question the facts found on which the judgment from which appeal is taken is based are binding on this appeal,—the exception to the judgment raising only the questions as to whether the facts found support the judgment, and whether error in law appears upon the face of the record.

It is therefore appropriate to review the record in the light of pertinent principles of law.

Appellant at the outset contends that the Utilities Commission properly concluded that the Carolina Telephone & Telegraph Company was rendering service free or at reduced rates to some municipalities in violation of G.S. 62-69, which provides: "No public utility shall directly or indirectly, by any device whatsoever or in any wise charge, demand, collect or receive from any person a greater or less compensation for any service, rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this article, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules."

And G.S. 62-68 requires all public utilities to keep on file with the Commission schedules which show "all rates established by it and collected or enforced within the jurisdiction of the Commission."

In this connection, there is evidence in this record which discloses that concession telephone service (i.e., service for which no charge is made or for which the charge is less than the tariff or schedule charge) is extended to various municipalities served by the Carolina Telephone & Telegraph Company. There is no tariff on file with the Commission, providing for such service, nor is such tariff on file which permits it. To the extent of granting this service either free or at a reduced rate without a schedule of rates permitting such service the Commission held that the company was in violation of G.S. 62-68 and 62-69.

However, it is the contention of the municipalities that their franchise agreements with the company do not fall within the purview of the Commission's jurisdiction. They contend that the franchise agreements are in reality "private" contracts, and by the terms thereunder the cities grant the company the privilege, during the life of the franchise, of the use of the streets for erection of company poles and transmission lines, etc., in exchange for a designated number of telephones without cost or at a reduced rate.

The municipalities cite *Paper Co. v. Sanitary Dist.*, 232 N.C. 421, 61 S.E. 2d 378 (1950) for the proposition that the type of "private" contract at hand has been held to be outside of the jurisdiction of the Commission. However it should be noted that the contract in the *Sanitary District* case was between a private corporation and a quasi-municipal corporation, which by provision of G.S. 130-39 is not under the jurisdiction, control or supervision of the North Carolina

Utilities Commission as to service or rates. G.S. 62-30 (3). In the factual situation at hand, the Carolina Telephone & Telegraph Company is clearly under the supervision of the Commission by terms of G.S. 62-30 (2). Thus the *Sanitary District* case is clearly distinguishable factually from the instant case.

Indeed the Utilities Commission contends and properly concludes that the practice of rendering service to the municipalities either free or at a reduced rate is discriminatory.

A fundamental basis for the regulation of public utilities is to assure that once monopoly powers have been granted, the utility will provide all of its customers similarly situated with service on a reasonably equal basis. Prior to the Public Utilities Act of 1933 discrimination by a public utility was unlawful. *R. R. Discrimination* Case, 136 N.C. 479; *Lumber Co. v. R. R.*, 141 N.C. 171; *Garrison v. R. R.*, 150 N.C. 575, 64 S.E. 578.

G.S. 62-70 provides: "No public utility shall, as to rates or service, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this Section."

In *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290, opinion by *Devin, C. J.*, the Court said: "The obligation of a public service corporation to serve impartially and without unjust discrimination is fundamental * * * (citing cases) * * * It is not essential that consumers who are charged different rates for service should be competitors in order to invoke this principle * * * (citing cases) There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. *Horner v. Elec. Co.*, 153 N.C. 535, 69 S.E. 607; *Postal Tel. Cable Co. v. Associated Press*, 228 N.Y. 370." This statement was quoted with approval in *Utilities Comm. v. Municipal Corporations*, 243 N.C. 193, 90 S.E. 2d 519.

Appellant cites 43 Am. Jur., Public Utilities and Services, Sec. 175, p. 687, for the majority rule that: "The majority of the cases take the view that the furnishing of free service for municipal purposes in compliance with franchise provisions constitutes an unjust and illegal discrimination."

Having made the determination that discrimination existed the Commission was bound by the terms of G.S. 62-72 which in pertinent

part provide: "Whenever the Commission, after a hearing * * * finds that the existing rates in effect * * * are unjust, unreasonable, insufficient or discriminatory * * * the Commission shall determine the just, reasonable and sufficient rates to be thereafter observed and in force, and, shall, fix the same by order as hereinafter provided. (1933, C. 307, S. 8)"

In *Corporation Comm. v. Water Co.*, 190 N.C. 70, 128 S.E. 465, the City of Henderson, North Carolina, brought suit against the Corporation Commission (now the Utilities Commission) and moved to enjoin the Commission from fixing rates for water supplied the City of Henderson by the Henderson Water Company, different from those rates stipulated in a prior existing franchise granted to the company by the city. The city's motion rested on the ground that the city's contract rights were being violated, and that neither the commission nor the court had the power or authority to change the rates during the life of the contract. The motion was denied and sustained on appeal, the Court holding: "The power conferred by its charter upon the City of Henderson to provide water and lights and to contract for same * * * is subject to the police power of the State, with respect to rates to be charged under such contracts as the city may make under its charter by a public service corporation. Constitution of N. C. Article VII, Sec. 12, Sec. 14; Art. VIII, Sec. 1."

In an earlier decision *In re Utilities Co.*, 179 N.C. 151, 101 S.E. 619 (upon which the court in the *Corporation Comm. v. Water Co., supra,* relied), the Court was presented with a petition for an increase in street car fares to a level exceeding that fixed by a franchise agreement between the City of Charlotte and the street car company. Our Court held that the public interest as set forth in the Commission's order is paramount over any contract the city may have for a lower rate. *Hoke, J.*, speaking for the Court, observed: "Not only is the judgment of his Honor sustained by the principle more directly involved, but any other ruling in its practical application would likely and almost necessarily offend against the principle which forbids discrimination on the part of these companies towards patrons in like condition and circumstance. If a quasi-public company of this kind could evade or escape regulation establishing fixed rates that are found to be reasonable and just by making long-time contracts or other, this regulation might be made to operate in furtherance of the very evil it is in part designed to prevent."

Indeed the Commission properly concluded that the requirement of free or reduced rate service by the municipalities as a condition precedent to the granting of franchises amounted to a tax in violation of

G.S. 105-120 (f), which provides: "Counties, cities and towns shall not levy any franchise, license, or privilege tax on the business taxed under this section." This provision has been in effect in one form or another since 1899 (Public Laws of 1899, C. 11, Sec. 60), and was made a part of the permanent Revenue Act when it was adopted in 1939 (Public Laws of 1939, C. 158).

The Commission held that in effect the means employed by the cities in granting franchise agreements constituted a levy of a tax. The Commission went on to find, however, that if it should be later determined that the concession service does not constitute the levy of a tax, but rather is a service for which the municipality is entitled to be paid, "it is in the public interest that each municipality bill the utility company for the service it renders and the utility company furnish telephone service to the municipality at the regular and applicable rates for the service rendered."

The Commission's findings are further substantiated by the franchise ordinance of the City of Rocky Mount where it sought to waive its presumed right to levy a privilege tax for occupancy of the streets and alleys of Rocky Mount in consideration of the company "furnishing to the town * * * the above free telephones."

The municipalities argue that the tax imposed by G.S. 105-120 (a) —(d) is a franchise or privilege tax to engage in business, and not a tax for the use of the streets and therefore the prohibition contained in G.S. 105-120 (f) does not apply. Our Court in opinion by *Barnhill, J., later C. J.*, in *Britt v. Wilmington*, 236 N.C. 446, 73 S.E. 2d 289, held that a nickel exacted by a municipality from drivers for parking meters is only a consideration for use of the streets for a limited time: "The revenue derived from the on-street parking facilities is exacted in the performance of a governmental function. It must be set apart and used for a specific purpose. By whatever name called it is in the nature of a tax."

Adopting the view of either the municipalities or the Commission it becomes manifest that this is a franchise or privilege tax. Construing G.S. 160-2 (6) which authorizes municipalities to grant franchises upon reasonable terms, *in pari materia* with G.S. 105-120 (f) it becomes clear that no authorization of additional tax was intended.

Now coming to ruling of the Superior Court that Chap. 685 of the 1959 Session Laws is not unconstitutional and is effective retroactively, the Commission urges that the court erred since free or reduced telephone service to municipalities is a tax prohibited by law, and is discriminatory both as between towns which are similarly situated and as between those towns and individual rate payers living in towns

or in the country. Hence the Commission stressfully contends that the act is unconstitutional (1) because it offends the due process provisions of both State and Federal Constitutions, (2) because it is not a uniform tax, (3) because it interferes with vested rights, and (4) because it is an attempt to surrender the police power of the State.

In the light of these principles the Court holds that the 1959 act above referred to is unconstitutional. Moreover, since the effective date is fixed at June 2, 1959, its effect is prospective only.

Thus it is patent that the judge of the Superior Court in reaching the conclusion on which judgment below is predicated acted under a misapprehension of the law. Therefore the judgment will be and is hereby set aside and vacated, and the cause remanded for appropriate proceedings. See *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324, and cases cited. See also Strong's N. C. Index, Vol. 1, p. 140, Appeal and Error, Sec. 49.

Reversed and remanded.

CLOVER MINK HILL v. FEDERAL LIFE AND CASUALTY COMPANY.

(Filed 10 June, 1960.)

1. Insurance § 26—

The right to avoid a policy of life insurance on the ground of false representations in the application is an affirmative defense upon which the insurer has the burden of proof.

2. Trial § 24a—

In passing upon a motion to nonsuit based upon an affirmative defense, the court must examine all the evidence and may not rely upon defendant's evidence only, and nonsuit on this ground may not be allowed if different inferences arise upon the entire evidence.

3. Insurance §§ 17, 26— Evidence held not to establish misrepresentations as matter of law in policy application.

The evidence tended to show that insured was discharged from a hospital some two years and three weeks prior to executing application for the policy, although he was not then completely cured and thereafter consulted his physician over a period of some two months with respect to the treatment prescribed. Insured's application stated that he had not been treated by a physician during the prior two years. *Held:* The evidence does not compel the conclusion that the statement in the application was false to applicant's knowledge, and therefore insurer was not entitled to nonsuit on the affirmative defense of false and fraudulent representations, since the expression "two years" as used in the application may be understood as an approximate statement.

4. Insurance § 26: Appeal and Error § 1—

Where insurer denies liability solely on the ground of false and fraudulent representations in the application for the insurance, defends the action solely on this ground and tenders no other issues, insurer may not contend on appeal that its motion to nonsuit should have been allowed for plaintiff's failure to offer evidence that she was the person entitled to the proceeds, even though insurer had made a formal denial of plaintiff's allegations in this respect, since in such instance insurer has waived such defense and its objections and exceptions must be considered in the light of the theory of trial below.

5. Insurance §§ 17, 26—

A rider on a policy upon the life of applicant's son, which rider provides for waiver of further premiums on such policy in the event of applicant's death, constitutes insurance on applicant's life for the benefit of his son; therefore, in an action on a subsequent policy issued by another insurer upon the applicant's life, such insurer is entitled to show by competent evidence that the application for such rider on the prior policy had been rejected for the purpose of establishing the falsity of applicant's averment to the contrary in the application for the subsequent policy.

APPEAL by defendant from *Crissman, J.*, November 9, 1959 Regular Civil Term, of GUILFORD (High Point Division).

Defendant issued its policy of insurance on the life of Clarence E. Hill. The effective date was 4 October 1956. The policy obligated the defendant to pay, upon proof of death, "to Investors Syndicate of America, Inc., Minneapolis, Minnesota, as payee, for the account of that certain Investment Certificate No. 15-67092 of the designated maturity amount of $12,500.00, and maturity date of October 4, 1971, issued to the Insured, by said Investors Syndicate of America, Inc., the then holder of said Certificate being the beneficiary under this Policy." The policy required payment of an annual premium of $45. The amount payable under the policy decreased as the amount paid in premiums increased. At the expiration of the 15-year period it had no value.

The policy was approved for issue on 30 October 1956 and was mailed from the home office of the company to the insured on 2 November 1956.

The policy was issued pursuant to an application made by the insured. The application consists of two parts, Part 1 dated 4 October 1956 and Part 2 dated 24 October 1956. Both parts were signed by the insured. In Part 1 the insured was called upon to answer some eleven questions. The first seven call for the name, address, and other information not here material. Question 8 reads: "Have you ever applied for any life, accident and health, or hospital insurance which

has been rejected or rated up?" The insured answered this by checking the answer "No." Question 10 reads: "To the best of your knowledge and belief do you have any sickness or physical defect?" The insured answered this question "No." Question 11 reads: "a. Have you ever been confined to a Hospital or Sanitorium within the past 5 years? Yes. b. Have you consulted or been treated by a physician within the past 2 years? No. If either answer is "YES" give full details below.

Name and Address of Physician *Reasons for Consulting Physician*
Dr. Carl Sheppard Physical Check up
Date Examined 10-3-56
In High Point Memorial Hosp., High Point, N. C.—1953 app."

Part 2 of the application, dated 24 October 1956, calls for answers to 15 questions. Material to the present controversy are questions 6, 7, 10, 11, 12, 13, 14, and 15 The questions so asked and answers given are as follows:

"6. Has any company ever RATED UP, REJECTED your application, CANCELLED or DECLINED to renew your policy? No.

"7. Have you ever used alcoholic liquor to excess: No."

"10. When did you last consult a physician and for what?
Date 10-3-56
Illness None—Routine Physical Examination
Physician Karl Shepard, M.D.
Address High Point, N. C."

"11. Have you ever undergone or been advised to have a surgical operation?
Date 1939.
Type Appendectomy.
Surgeon Dr. H. L. Brockman
Address High Point, N. C."

"12. Are you now, to the best of your knowledge and belief, in sound health? Yes."

"13. Have you ever had or been told you had any of the following:
(a) Epilepsy, chronic Headaches, Dizziness or disease of the brain or nerves? No.
(b) Any disease of Skin, Ears, or Eyes? No.
(c) Asthma, Tuberculosis, Pleurisy? No.
(d) Goitre, or any Thyroid Disturbance? No.
(e) Cancer, or any Tumor? No.
(f) Dropsy, Heart Trouble, Angina, or High or Low Blood Pressure? No.
(g) Gout, Arthritis, Rheumatism? No.

(h) Stomach or Duodenal Ulcer, *Appendicitis,* Hernia, Gall Bladder, Disease or Stone, Fistula? Yes.
(i) Kidney Disease, Colic, Gravel, Diabetes or Albumin or sugar in urine? No.
(j) Syphilis? No.
(k) Any Disease, Disorder, Accident or Injury other than mentioned above? (This question was not answered.)

"14. Have you had a Routine Physical Check-up? Yes. See #10 above.

"15. Within the last five years, have you consulted or been treated by any physician not named above, for any illness or ailment? Yes."

In line with and to the right of question 13 was the statement: "If 'Yes' give Complete Information, Including Date and Name and Street Address of Doctor." Below this was a blank space. The only information appearing in this space was "13 (h)—Appendectomy—High Point Memorial Hospital, High Point, N. C. Dr. H. L. Brockman; uneventful recovery."

Insured died at Duke Hospital, Durham, 1 August 1958. He was admitted to the hospital on 12 July 1958. He was suffering from internal hemmorrhages. His trouble was diagnosed as cirrhosis of the liver. The hemorrhaging was due to the diseased condition of the liver. In an effort to stop the bleeding, an operation was performed. The immediate cause of death was failure of the kidneys. This was produced by the cirrhosis of the liver.

Plaintiff, upon the death of her husband, the insured, filed claim with defendant for the amount owing pursuant to the policy provisions. On 9 December 1958 defendant declined to make payment, giving as its reasons for refusing to pay asserted misrepresentations contained in the application on which the policy was based. The material misrepresentations relied upon by the company were described in defendant's letter to plaintiff that "your late husband was under the care of Doctor W. J. Hunt from September 1954 to December 1954 for a condition diagnosed as cirrhosis of the liver. Furthermore, in 1955 another company did either write up or reject an application for insurance made by the late Mr. Hill." It then refers to the pertinent questions in the application and transmitted its check covering the premiums paid. Plaintiff, insisting that the policy was a binding obligation, refused to accept the check and brought suit. She alleged in section 4 of her complaint the death of her husband and that she was beneficiary under the policy. Defendant in its answer admitted that her husband died on the date alleged but denied the remaining allegations of section 4. As a further and additional de-

fense it pleaded in detail asserted false and material representations in the application inducing it to issue the policy of insurance.

As determinative of the controversy, the court submitted and the jury answered twelve issues as follows:

"1. Did Clarence Edward Hill represent in Part One of his written application to the defendant that to the best of his knowledge and belief he did not have any sickness or physical defect?

Answer: Yes.

"2. Was said representation false?

Answer: No.

"3. Did Clarence Edward Hill represent in Part One of his written application to the defendant that he had not consulted or been treated by a physician or practitioner within the past two years?

Answer: Yes.

"4. Was said representation false?

Answer: No.

"5. Did Clarence Edward Hill represent in Part Two of his written application to the defendant that he was, to the best of his knowledge and belief, in sound health?

Answer: Yes.

"6. Was said representation false?

Answer: No.

"7. Did Clarence Edward Hill represent in Part Two of his written application to the defendant that he had never had or been told that he had any disease, disorder, accident or injury except appendicitis?

Answer: No.

"8. Was said representation false?

Answer: No.

"9. Did Clarence Edward Hill represent in Part Two of his written application to the defendant that within the last five years, he had not consulted or been treated by any physician except Dr. H. L. Brockman for appendicitis and Dr. Karl Shepard for a routine physical examination?

Answer: No.

"10. Was said representation false?

Answer: No.

"11. Did Clarence Edward Hill represent in Part Two of his written application to the defendant that he was not then and had never been on a diet for his health?

Answer: Yes.

"12. Was said representation false?

Answer: No."

The parties having stipulated the amount payable under the policy if valid, the court based on the verdict and stipulation, entered judgment in favor of plaintiff; and defendant appealed.

James W. Clontz for plaintiff, appellee.
Smith, Moore, Smith, Schell & Hunter for defendant, appellant.

RODMAN, J. Defendant's first assignment of error is based on its motion to nonsuit. Two reasons are urged in support of the motion: first, the defense of material false representation rendering the policy void is established by the evidence, and second, plaintiff failed to prove her allegation that she was the holder of the certificate issued by Investors Syndicate and because of such failure has not shown that she is entitled to the proceeds of the policy, if valid.

The charges of false representation permitting defendant to avoid its contract are affirmative defenses as to which it had the burden of proof.

When a motion to nonsuit is based on asserted proof of an affirmative defense, the court cannot rely on defendant's evidence only. It must examine all of the evidence. If such an examination permits different inferences, some supporting and others negativing the defense, the motion must be overruled. *Solon Lodge v. Ionic Lodge,* 247 N.C. 310, 101 S.E. 2d 8; *Howard v. Bingham,* 231 N.C. 420, 57 S.E. 2d 401; *MacClure v. Accident Ins. Co.,* 229 N.C. 305, 49 S.E. 2d 742; *Barnes v. Trust Co.,* 229 N.C. 409, 50 S.E. 2d 2.

Defendant relies on the testimony of Dr. J. W. Hunt, a medical expert specializing in internal medicine, that insured had consulted him. The witness had no independent recollection of the date when he first saw the insured. According to his records it was 20 September 1954. He sent insured to the hospital on 21 September where he made certain tests and diagnosed insured's trouble as cirrhosis of the liver. The insured was under treatment by Dr. Hunt from 21 September to 2 October when he was discharged from the hospital. His condition had at that time improved, but he was not completely cured. The insured saw Dr. Hunt on 7 October, 25 October, and 8 December 1954 with respect to treatment which had been prescribed by Dr. Hunt. The insured was running fever when discharged from the hospital and his liver was still enlarged. The witness stated that he would not consider the insured's condition serious at the time he examined him, testifying: "Even with cirrhosis of the liver, he could have still lived, in my opinion, a natural span of lifetime with proper diet and treatment."

Plaintiff also testified that her husband consulted and was under treatment by Dr. Hunt in September or October 1954, and for a period of time thereafter went back to the hospital for checkups but not for treatment.

Dr. Karl Shepard, a specialist in internal medicine and medical examiner for defendant, testified that he examined him on 3 October 1956. He again examined him on 24 October 1956 in connection with the policy of insurance in question. Dr. Shepard testified: "If I were called upon to give an opinion as of October 24, 1956, I would say that he did not have cirrhosis of the liver. Cirrhosis is not necessarily fatal in every case, certainly not during its early stages. Folks live a long time with cirrhosis if they follow the rules."

Insured's answers to questions 11, Part 1, and 15, Part 2, of the application would, we think, justify a jury in finding that Mr. Hill recollected his treatment by Dr. Hunt as occurring more than two years prior to the application, and he did not by his answers intend to conceal his treatment by Dr. Hunt.

The official who examined the application and authorized the issuance of the policy testified that the answers given were sufficient to enable him to ascertain the reason for the hospitalization which applicant stated occurred about 1953.

The rule applicable to the facts of this case is, we think, correctly stated in *Owen v. Metropolitan Life Ins. Co.*, 67 A 25, 122 Am. St. Rep. 413. It is there said: "The expression 'two years,' as colloquially used, is always understood as an approximate statement. In this sense we think it must be interpreted in this application. An attendance by the physician beginning one year and nine months and ending one year and seven months before the application was not necessarily, and as a matter of law, a breach of the warranty."

It follows, we think, that defendant was not entitled to have its motion for nonsuit allowed for the reason first assigned by it.

Was defendant entitled to have the action dismissed because of plaintiff's failure to offer evidence showing that she was the holder of the certificate numbered and described in the policy? She alleged and defendant in effect denied that fact. Hence the burden of proof was on plaintiff, and the motion should have been allowed unless defendant has waived proof of that fact. Plaintiff insists that it has. To support her claim of waiver she points to these facts: When the claim was first made defendant refused to pay, not because she had not established that she was the holder of the certificate but because of asserted misrepresentations which rendered the policy invalid. The answer does not in express language deny that plaintiff is the holder.

The denial is indirect and defendant further says in its answer "that it has rightfully refused to make such payment because said policy of insurance is void and without effect for the reasons hereinafter set forth."

The manner in which defendant denied liability led not only plaintiff's counsel but the court to believe that the only disputed facts related to the asserted misrepresentations, and the case was tried on that theory. During the trial the company's official who handled the claim testified: "There is no question about the payment of these premiums. There is no question about the fact that we got proof of claim and notice of his death properly given. I have the figures as to the amount that would be due under this policy if it were valid. I had it figured out. $8,088.73 was the amount payable on the date of death, August 1, 1958." Certainly that evidence is subject to the inference that plaintiff had satisfied the defendant in her proof of claim that she was the holder of the certificate, and the only reason for failing to pay was the asserted invalidity.

Counsel for defendant, recognizing the responsibility imposed on him (G.S. 1-200), prepared and tendered issues which he thought necessary for a determination of the controversy. Defendant tendered no issue which questioned the fact that plaintiff was the holder of the certificate nor did it except to the failure of the court to submit such an issue. It is, we think, apparent from the record that the case was, with the acquiescence of defendant, tried on the assumption that the only disputed factual questions were those pleaded by defendant as affirmative defenses. The case having been tried on that theory, defendant cannot now urge, to defeat plaintiff, a defense which it waived. *Bowling v. Bowling, ante,* 527; *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222; *Paul v. Neece,* 244 N.C. 565, 94 S.E. 2d 596; *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 256; *Crowell v. Air Lines,* 240 N.C. 20, 81 S.E. 2d 178; *Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90; *Gorham v. Ins. Co.,* 214 N.C. 526, 200 S.E. 5; *Ammons v. Fisher,* 208 N.C. 712, 182 S.E. 479.

Since the cause must go back for a new trial for the reasons hereafter given, defendant can on such trial, if it so desires, require plaintiff to establish the fact that she is the holder of the certificate referred to in the policy.

Defendant's second assignment of error is directed to the defense asserted in its answer that the insured, by his answers to questions 8, Part 1, and 6, Part 2, of his application had made material misrepresentations with respect to the rejection of his application for

insurance by another company. That such a misrepresentation, if made, is material is not controverted.

Marvin Garner, District Manager of Woodmen of the World, witness for defendant, testified without objection that Clarence Edward Hill applied to him for policies of insurance on the lives of Mr. Hill's two minor sons. He made the applications on 9 March and 20 March 1955, "and at the same time applied for a payor benefit on himself which was in case anything should happen to him, it would be paid for. Under the insurance that he applied for, Mr. Hill was to pay the premiums. This payor benefit is generally considered as a rider that is put on the life of the applicant that should he die prior to the completion of the payment on the certificate, or in our particular case, before the child reaches the age of 21, that the payments would either be — in other words, the payments would be completed before the child reached 21, and the certificates of policy would be paid up . . . Mr. Hill applied for the payor benefit type thing on each of those policies. He was the applicant in relation to this application. He was the one that signed the application. I was the one who presented the application to him. If Mr. Hill died some short time after these type policies came into being with this payor benfit provision in effect, that would mean that the company would waive the premiums upon his death." The witness further testified that he was concerned with Mr. Hill's insurability. The application contained questions relating to Mr. Hill's health and consultations with doctors.

The witness was then asked: "And what did you do with the application after it was filled in and signed by Mr. Hill?" Plaintiff objected and the objection was sustained. Counsel for plaintiff in support of his objection said: "My objection is founded on the way this question is phrased in their application. Of course, they put this terminology together, and therefore the laws says if there is any ambiguity, it would be interpreted against the Federal Life and Casualty Company." Whereupon the court directed the jury to retire and then said: "Put in the record that the Court sustained the objection made by the plaintiff, and that the Court sustained it on the ground that according to this witness' testimony the application that he refers to is not for insurance upon himself but something in connection with insurance for his sons." Thereafter, in the absence of the jury, the witness was permitted to testify that the application Mr. Hill signed contained a question with respect to treatment by physicians, that he asked the question and Mr. Hill answered it. He secured the name of the physician who had treated Mr. Hill. He inquired if Mr. Hill had had any sickness, and he answered that he had an enlarged liver.

After the application was completed and signed, the witness mailed it to the home office of Woodmen of the World. Woodmen of the World issued the policies of insurance on the lives of the sons but refused to issue the payor benefit provision by which it would waive payment of premiums in the event of Mr. Hill's death.

Dr. Hunt had previously testified that on 30 March 1955 in response to an inquiry directed to him by Woodmen of the World he informed it of the treatment given and Mr. Hill's condition as diagnosed by the witness.

Based on the testimony of Garner and Dr. Hunt, defendant tendered the following issues:

"1. Did Clarence Edward Hill represent in Part One of his written application to the defendant that he had never applied for any life, accident and health, or hospital insurance which had been rejected or rated up?

"2. Was said representation false?"

"7. Did Clarence Edward Hill represent in Part Two of his written application to the defendant that no company had ever rated up, rejected his application, canceled or declined to renew his policy?

"8. Was said representation false?"

The court declined to submit these issues.

No question is raised with respect to the competency of Garner to testify to the contents of the application which Mr. Hill made to Woodmen of the World. We are not called upon to decide whether under the best evidence rule the contents of that application could be shown by parol. Since plaintiff limited her objection and the court ruled on the evidence upon the theory that the application for waiver of premiums in the event of the death of Mr. Hill did not constitute an application for insurance within the meaning of questions 8 and 6, that became the theory of the trial, and we pass on the assignments excluding the evidence and refusing to submit the issues tendered on that theory.

The court, we think, failed to appreciate the full import of Garner's testimony. According to Garner, Mr. Hill made two applications for insurance for each son. One application provided for the payment of a fixed sum to an undisclosed beneficiary upon the death of the son. Presumably inquiries were made with respect to the health of the son and a physical examination of the son was required. A contract rejected on that application would not be material to insurance on the life of Mr. Hill, and the questions asked in the application made to defendant were not directed to the contract of insurance on the life of the son. But insurance on the life of the son was not the only,

or rather the full contract which Mr. Hill sought to make with Woodmen of the World. He sought insurance on his life for the benefit of his son. True, no payment would be made directly to the son, but he would benefit by the waiver of payment of the premium which Mr. Hill expected to pay if he lived. Such an application is an application for life insurance and required an affirmative answer to questions 8 and 6 asked by defendant. *Fox v. Swartz,* 30 A.L.R. 2d 739; *Prudential Ins. Co. v. Green,* 141 A.L.R. 1401; *Ritter v. Mutual Life Ins. Co.,* 169 U.S. 139, 42 L. Ed. 693; *In re Hamilton's Estate,* 154 P. 2d 1008; 44 C.J.S. 484; 29 Am. Jur. 435.

The court was in error in excluding the evidence for the reasons given by it and in declining to submit the issues tendered.

New trial.

BETTY ANN LENNON v. JOHN A. LENNON.

(Filed 10 June, 1960.)

1. Constitutional Law § 26—

The full faith and credit clause of the Federal Constitution does not entitle a judgment *in personam* to extra-territorial effect when such judgment is rendered without jurisdiction over the person sought to be bound.

2. Same: Habeas Corpus § 3: Infants § 8— Decree of foreign court held not to oust jurisdiction of our court to award custody of children.

Where husband and wife are domiciled in this State and the husband surreptitiously removes the children of the marriage from this State to another state for the purpose of depriving our courts of jurisdiction over the children, a decree of divorce obtained by the husband in such other state awarding the custody of the children to him, obtained without personal service on the wife and without her appearance either in person or by attorney, does not deprive the courts of this State of jurisdiction to determine the right of custody of the children in *habeas corpus* proceedings instituted by the wife after the children had been brought back into this State and are residing here with her. *Richter v. Harmon,* 243 N.C. 373, cited and modified.

3. Appeal and Error § 49—

A judgment on findings will not be disturbed because one of the findings is not supported by evidence when such finding is not necessary to support the judgment and does not affect the conclusion reached.

4. Infants § 9— Findings held to support decree awarding custody of children to mother.

In this *habeas corpus* proceeding to determine the right to the cus-

tody of the children of the marriage as between their divorced parents, findings to the effect that the mother was providing a suitable and healthful domicile for them with her in the home of her parents, that the mother was a woman of excellent character and reputation, that the children in a private interview expressed their desire to remain with their mother, that the home of the husband, presided over by his second wife, would not provide a suitable or happy environment for them, is tantamount to a finding that the best interest of the children would be served by placing them in the custody of their mother in the home of her parents, and supports decree to this effect.

APPEAL by defendant from *Sharp, Special Judge,* 19 October Term, 1960, of GUILFORD (Greensboro Division).

This is a proceeding instituted pursuant to the provisions of our Habeas Corpus Act, G.S. 17-39.1, to determine the custody of plaintiff's and defendant's children.

The plaintiff petitioner and the defendant respondent will be referred to hereinafter as plaintiff and defendant respectively, or by name.

The parties were married on 12 September 1944 in Winston-Salem, North Carolina. Barbara Ann Lennon, born 19 December 1947, and John A. Lennon, III, born 14 January 1950, are the children of the marriage and their custody is the matter in controversy.

On 16 October 1958, the defendant, without the knowledge or consent of the plaintiff, took the children in controversy and left the State of North Carolina and went to Reno, Nevada, in which State he still resides. He instituted an action for divorce in the State of Nevada on 5 December 1958 and obtained a final decree of absolute divorce on 6 January 1959. The Nevada court also awarded custody of the two children of the marriage to the defendant. The plaintiff was served with a copy of the summons and complaint by a Deputy Sheriff in Sumter, South Carolina, on 10 December 1958, but no appearance was made by the plaintiff in person or by attorney in the Nevada court.

On 26 January 1959, the defendant and Mrs. Mickie Gardner (who had obtained a divorce from her husband about the middle of October 1958) were married in Reno, Nevada, and have lived there since that time.

The defendant returned the children to North Carolina to visit their mother during the summer of 1959, and he contends he did so pursuant to a promise of the plaintiff to return them to him when he came for them later in the summer. The plaintiff denies that she promised to return them.

In the hearing below the court made 23 separate findings of fact.

The defendant excepted to and assigns as error findings of fact Nos. 5, 6, 7, 8, 9, 11, 14, 19 and 22, which are as follows:

"(5) That in February, 1955, the defendant met Mrs. Mickie Gardner at a dinner party in Greensboro, at which he and the plaintiff were guests; that he was immediately attracted to her and sometime between that date and June 22, 1957, an illicit, adulterous love affair began between Mrs. Gardner and the defendant; that this affair began and continued up to the time that the defendant departed the State of North Carolina, on October 16, 1958.

"(6) That as a result of this affair, which became known to the plaintiff, the married life of the plaintiff and the defendant was thereafter punctuated with violent quarrels and serious emotional disturbances on the part of the plaintiff; that these upheavals brought on excessive use of alcohol by the plaintiff, which in turn resulted in stormy quarrels and separations between them; that the parties separated during the latter part of December, 1957, and remained separate and apart until sometime in July or early August of 1958; that during this period of separation, the defendant continued his affair with Mrs. Gardner; that during this period the plaintiff's parents requested the defendant to send her to a sanatorium for treatment, but he refused to do so, and the plaintiff's parents sent her to a sanatorium at St. Albans in January, 1958, and later to a sanatorium at Pine Bluff and paid the bills when the defendant refused to pay them; that although the plaintiff was being treated for alcoholism, on one occasion when the defendant visited her at Cone Memorial Hospital in Greensboro he took whiskey to her; that while the plaintiff was hospitalized, the plaintiff's parents, Mr. and Mrs. P. O. Barber, looked after and cared for the children.

"(7) That on July 3, 1958, the plaintiff filed a suit against the defendant, under G.S. 50-16, in the Superior Court of Guilford County, Greensboro Division, in which the plaintiff sought custody of the children, permanent alimony, alimony *pendente lite,* and attorney's fees; that in said action, the Judge of the Superior Court had entered an order, temporarily restraining the defendant from removing any of his property from the State of North Carolina; that within minutes after the defendant was served with summons and a copy of the complaint in that action, he went to the home where the plaintiff and the children were then residing on West Greenway South, in Greensboro, North Carolina, and announced to the plaintiff that he desired to become reconciled with her and was coming back home; that the plaintiff continued to be very much in love with her husband and greatly desired a reconciliation provided he would break off his affair with

Mrs. Gardner; that he promised to do this if the plaintiff would permit him to return and if she promised to stop drinking; that as a result the defendant moved back into the home on West Greenway South, late in July or early August of 1959; that on October 13, 1958, the action instituted under G.S. 50-16, and the restraining order ancillary to it, was dismissed for the reason that the parties reported to the Court that they had become reconciled; that in returning to the plaintiff and in securing the dismissal of the action the defendant did not act in good faith, that he did not intend to become reconciled with the plaintiff at the time he returned home but sought the reconciliation in order to dissolve the injunction which forbade him to remove his property from North Carolina and in order to deprive the courts of North Carolina of their rightful jurisdiction over the children.

"(8) That shortly after the purported reconciliation in July or August, 1958, the defendant renewed his adulterous affair with Mrs. Gardner and continued to live in the same house with the plaintiff while so doing; that as a result the plaintiff again verged on emotional collapse and turned to alcohol; that although defendant shared the responsibility for plaintiff's alcoholism, and although the defendant continued to berate the plaintiff for her alcoholism and to complain that that was the sole cause of their matrimonial difficulties, he, himself, continued his habit of social drinking and did nothing whatever to help the plaintiff overcome her problem; that in August, 1958, he brought alcohol into the home, well knowing that if he did so, the plaintiff would drink it; that on September 26, 1958, the plaintiff was tried and convicted of drunken driving in the Greensboro Municipal Court; that although the defendant paid her fine, he did not employ counsel to represent her but did employ a court reporter to take down and transcribe the evidence against her; that the conduct of the defendant during this entire period justifies the inference that he had decided to encourage the plaintiff's alcoholism as an apparent justification and escape from a marriage which had become hateful to him; that he refused to cooperate with the plaintiff's family in their efforts to rehabilitate her.

"(9) That on October 16, 1958, the plaintiff was emotionally and mentally ill and as a result had become an alcoholic; that the defendant's unlawful conduct had, in large measures, contributed to her condition.

"(11) That the first place the defendant went to when he arrived in Reno on October 21, 1958, was to the office of a lawyer in order to make arrangements to obtain a divorce from the plaintiff; that

through the lawyer's secretary he secured a furnished apartment in Reno; that the defendant put the children in school in Nevada, where they finished out the school year; that the defendant left North Carolina and went to Nevada for the purpose of obtaining a Nevada decree of absolute divorce from the plaintiff and to remove the children from the jurisdiction of courts of North Carolina; that at the time he left, he did not intend to return to North Carolina to live, and he intended to remain in Nevada long enough to obtain a divorce which he believed would not be subject to attack; that at the present time he still maintains an apartment in Reno, Nevada.

"(14) That after the marriage between the defendant and Mrs. Gardner, she came to live with the defendant and the children in the apartment and the children were in her care and custody during the defendant's absence from town on his business trips; that regularly in the evening of each day the defendant and Mrs. Gardner drank one or two cocktails in the presence of the children and allowed the children to sample the drinks; that the twenty-one-year-old daughter of Mrs. Gardner, as a result of Mrs. Gardner's marriage to the defendant, has become a member of the defendant's household and he has assumed responsibility for her education; that in the early part of 1959, defendant leased an apartment in Mill Valley, California, which has been furnished with Mrs. Gardner's furniture, which was shipped from North Carolina; that this apartment is occupied from time to time by the defendant and Mrs. Gardner; that in June of 1959, the defendant went to a parochial school, located a short distance from the apartment in Mill Valley, California, and made preliminary inquiries with reference to entering the children in that school for the school year of 1959-60; that defendant's business address since he left Greensboro, North Carolina, has been in San Francisco, California, where his employer maintains an office; that the defendant is connected with the furniture business and travels in eleven western states; that defendant's work, which requires him to travel extensively, necessitates his absence from his home much of the time.

"(19) That the plaintiff is no longer addicted to the use of alcohol and is now a fit, suitable, and proper person to have the care and custody of her children; that the best interests and welfare of the children will be served and promoted by placing them in the custody of the plaintiff, in the home of Mr. and Mrs. P. O. Barber.

"(22) That since the entry of the decree in Nevada on January 6, 1959, there has been a change in the condition of both the plaintiff and defendant in that:

"(a) The defendant has since married Mrs. Mickie Gardner, the woman with whom he had the affair which caused the break-up of his marriage with the plaintiff;

"(b) That the plaintiff is no longer addicted to the use of alcohol, which excessive use was brought on by the affair between the defendant and Mrs. Gardner;

"(c) That the plaintiff is now able to assume the responsibility and care of her children and that the best interests of the children require that their custody and upbringing be given to their own mother rather than to Mrs. Mickie Gardner and the defendant."

Upon the foregoing findings of fact and other unchallenged facts, the court below concluded as a matter of law:

"(1) The plaintiff and the defendant are properly before the court for the adjudication of their rights in this proceeding.

"(2) Matrimonial domicile of the plaintiff and the defendant is the State of North Carolina, and both were residents of and domiciled in North Carolina at the time the defendant left the plaintiff and fled the State in October, 1958.

"(3) That the plaintiff is now a resident and domiciled in North Carolina; that except for the short duration of her stay in Virginia with the defendant, in the fall of 1957, she has been a resident of North Carolina since 1949; that the two children, who are the subjects of this action, are now residents of and domiciled in North Carolina.

"(4) That said children are subject to the jurisdiction of the courts of North Carolina and are now properly before this court for the determination of their custody and welfare.

"(5) That the conduct of the defendant in securing the dismissal of the action which was instituted in Guilford County, North Carolina, in 1958, and surreptitiously removing the children from North Carolina in October, 1958, was the result of a fraudulent scheme to deprive the courts of North Carolina of jurisdiction of said children; that as a result, the Superior Court of North Carolina did not lose its jurisdiction over the children because their father surreptitiously took them to Nevada and kept them there from the fall of 1958 until the summer of 1959. That under all the circumstances of this case the Nevada decree is not entitled to full faith and credit in North Carolina.

"(6) That Mrs. Betty Ann Lennon, the plaintiff in this action, is not bound by the decree of the Nevada court depriving her of the custody of her children.

"(7) That the conditions and circumstances, with reference to the

care, custody and welfare of the children have changed radically since the entry of the Nevada decree on January 6, 1959, and, in any event, this court now has jurisdiction to determine the best interests of the children and award their custody accordingly."

The court thereupon entered an order awarding the custody of the children to the plaintiff, Betty Ann Lennon, upon condition that she continue to reside in the home of her parents, Mr. and Mrs. P. O. Barber, and upon the further condition that she totally abstain from the use of alcoholic beverages. The defendant was awarded visitation rights at the home of Mr. and Mrs. P. O. Barber, as set out in the order, and the further right to have the children visit him in his father's home in San Francisco upon the execution of a bond or by depositing securities in the office of the Clerk of the Superior Court of Guilford County, as required by the judgment, to guarantee that said children will be returned to North Carolina at the end of each visit authorized by the judgment.

The defendant appeals, assigning error.

Harry E. Stanley; Jordan, Wright, Henson & Nichols, for plaintiff.
Thomas Turner; Joyner & Howison, for defendant.

DENNY, J. It would seem that under the facts and circumstances revealed on this record, the appellant should not prevail unless this Court must give full faith and credit to the custody decree entered by the Nevada court at the time the divorce decree was entered dissolving the marriage between the plaintiff and the defendant on 6 January 1959. The validity of the divorce decree is not challenged in this proceeding. *Estin v. Estin,* 334 U.S. 541, 92 L. Ed. 1561, 1 A.L.R. 2d 1412; *Williams v. North Carolina,* 317 U.S. 287, 87 L. Ed. 279, 143 A.L.R. 1273.

In *May v. Anderson,* 345 U.S. 528, 97 L. Ed. 1221, the facts were these: Mrs. Anderson (now Mrs. May) was a native of Wisconsin. She married Anderson in that State and lived with him continuously until 1946. They had three children. In December 1946, as a result of growing marital unhappiness, Mrs. Anderson considered getting a divorce, and with the consent and approval of her husband, she took the children to Lisbon, Ohio, "to think over her future course." On New Year's Day 1947 she informed her husband by telephone that she was not coming back to him.

Within a few days thereafter her husband filed suit in Wisconsin, seeking an absolute divorce and custody of the children The only service of process upon the wife in Ohio consisted of the delivery to

her personally, in Ohio, of a copy of the Wisconsin summons and petition. Mrs. Anderson entered no appearance and took no part in the Wisconsin proceeding. Thereafter, a decree divorcing the parties from the bonds of matrimony and a decree purporting to award the custody of the children to their father were entered.

Armed with a copy of the decree and accompanied by a local police officer in Lisbon, Ohio, the husband demanded and obtained the children from Mrs. Anderson. The children remained with their father in Wisconsin from 1947 until 1 July 1951. The father then took the children to visit their mother in Lisbon. When he demanded their return she refused to surrender them.

Relying upon the Wisconsin decree, he promptly filed a petition in the proper forum in Ohio for a writ of *habeas corpus*. The Ohio court held that it was compelled to give full faith and credit to the Wisconsin decree, and, therefore, the decree was binding on Mrs. May and ordered the children discharged from further restraint by her. On appeal to the Court of Appeals and to the Supreme Court of Ohio, the order of the trial court was affirmed. On appeal, the Supreme Court of the United States said: * * * (W)e have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.

" 'It is now too well settled to be open to further dispute that the "full faith and credit" clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam* to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.' *Baker v. Baker, E & Co.*, 242 U.S. 394, 401, and see 403, 61 L.ed. 386, 391, 37 S.Ct. 152; *Thompson v. Whitman* (U.S.) 18 Wall 457, 21 L.ed. 897; *D'Arcy v. Ketchum* (U.S.) 11 How. 165, 13 L.ed. 648.

"In *Estin v. Estin*, * * * *(supra)* this Court upheld the validity of a Nevada divorce obtained *ex parte* by a husband, resident in Nevada, insofar as it dissolved the bonds of matrimony. At the same time, we held Nevada powerless to cut off, in that proceeding, a spouse's right to financial support under the prior decree of another state. In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.

"In the instant case, the Ohio courts gave weight to appellee's contention that the Wisconsin award of custody binds appellant

because, at the time it was issued, her children had a technical domicile in Wisconsin, although they were neither resident nor present there. We find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession.

"The judgment of the Supreme Court of Ohio, accordingly, is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion."

In view of the fact that the plaintiff herein was not personally served with summons in the State of Nevada and did not appear in said court in person or by attorney, based on the decision of the Supreme Court of the United States in *May v. Anderson, supra,* we hold that the courts of North Carolina are not bound by the custody decree entered in the Nevada court and that the court below had jurisdiction to determine the custody of the children involved in this controversy.

The facts set out hereinabove are more in detail than necessary to determine the full faith and credit question raised. However, they, together with other facts found and not challenged by defendant, disclose the factual situation essential to a disposition of the case on its merits.

The appellant contends there is no evidence upon which the charge of adultery can be sustained, as set out in finding of fact No. 5. In light of the facts and circumstances revealed on this record, we think it is immaterial whether or not the defendant maintained an illicit and adulterous love affair with Mrs. Gardner while living with his wife. It must be admitted, however, that the letters written by Mrs. Gardner to the defendant, some of which came into the possession of the plaintiff while she was living with the defendant, were indicative of such an amorous, intimate and passionate relationship between Mrs. Gardner and the defendant, which the offended wife, the plaintiff, was not required by law to condone or tolerate.

In our opinion, since North Carolina is the home of the plaintiff and the matrimonial domicile of the parties, and, furthermore, since the defendant surreptitiously removed the children from North Carolina in 1958 to deprive the courts of North Carolina of jurisdiction of said children, the courts of North Carolina did not lose jurisdiction over the children. *In re Means,* 176 N.C. 307, 97 S.E. 39.

It appears from the record that the court below, with the consent of the parties, interviewed the children privately and each child expressed the desire to remain in North Carolina with the plaintiff.

Moreover, the court found that the home of the defendant, presided over by the second wife, the former Mrs. Gardner, would not provide as suitable or happy environment for the children as the home of their mother and her parents. Hence, the court found as a fact that the best interests of the children would be served and promoted by placing them in the custody of the plaintiff in the home of Mr. and Mrs. P. O. Barber.

The court further found that since July 1959 the plaintiff and children have lived in the home of plaintiff's parents, Mr. and Mrs. P. O. Barber, who own a large and comfortable nine-room house on Starmount Drive in one of the best residential areas of Greensboro, North Carolina; that the children have separate bedrooms and there is a separate bath for their use; that Mr. and Mrs. Barber are persons of excellent character and reputation and neither of them uses intoxicants in any form whatsoever; that the plaintiff is likewise a woman of good character and reputation; that Mr. and Mrs. Barber are people of means; that Mrs. Barber has an independent income and Mr. Barber has a good income from his business as a general contractor; that since returning to North Carolina, the children have been regularly taken to church and Sunday School; that since the opening of school on September 2, 1959, they have regularly enrolled in the Sternberger School, a primary school, operated by the Greensboro City Board of Education in the Starmount Forest Subdivision; that the Barber home provides a happy Christian environment and possesses an excellent moral tone; that the children are happy and well adjusted at present in the care and custody of their mother in the home of her parents and do not wish to leave.

This decision does not conflict with our decisions in *Allman v. Register,* 233 N.C. 531, 64 S.E. 2d 861 or *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744, except in the latter case it is stated: "If the petitioner were still a citizen and resident of the State of Florida, the decree in that State awarding the custody of the minor child * * * to her * * * would be binding on our courts under the full faith and credit clause of the Constitution of the United States." The foregoing statement seems to be in conflict with the decision of the Supreme Court of the United States in *May v. Anderson, supra.* Even so, such statement was not necessary to decision in the *Richter* case.

The judgment of the court below will be upheld.

Affirmed.

OXENDINE *v.* LEWIS.

ROY OXENDINE (ORIGINAL PLAINTIFF), WILLIAM L. OXENDINE, ADMR. OF ROY OXENDINE, DECEASED; WILLIAM L OXENDINE AND WIFE, LOU HENRY LOWRY OXENDINE, JAMES W. OXENDINE AND WIFE, LOUISE SMITH OXENDINE (ADDITIONAL PLAINTIFFS), v. H. S. LEWIS (ORIGINAL DEFENDANT), GERTRUDE MITCHELL HUNT AND HUSBAND, GRADDY HUNT, JAMES MITCHELL AND WIFE, MARGARET MITCHELL, ADDIE MAE MITCHELL BARNES AND HUSBAND, CLEVELAND BARNES, CLETUS MITCHELL PULOS AND HUSBAND, GEORGE PULOS, EARL RAY MITCHELL AND WIFE, LENA BELLE MITCHELL, BEARL DAVID MITCHELL AND WIFE, MARILYN MITCHELL, VARDELL OXENDINE AND WIFE, HELEN OXENDINE, JAMES CLEO FREEMAN, UNMARRIED, AND LENA MAE FREEMAN, UNMARRIED, AND W. H. HUMPHREY, JR., GUARDIAN AD LITEM FOR JAMES CLEO FREEMAN AND LENA MAE FREEMAN, MINORS (ADDITIONAL DEFENDANTS).

(Filed 10 June, 1960.)

Deeds § 12—

Where the granting clause of a deed, evidently filled in by typewriter upon a deed form, conveys an unqualified fee and the *habendum* and warranty clauses are in harmony with the granting clause, a provision inserted immediately before the description in that part of the form intended for the description, that the conveyance was of "A life estate in and to the following described tract of land, to wit:", and a provision immediately following the description that it was understood between the parties that the grantee was to have a life estate, will be rejected as repugnant to the fee simple estate granted.

BOBBITT, J., dissenting.

RODMAN, J., joins in dissent.

APPEAL by defendants from *McKinnon, J.*, in chambers 18 April 1960 at Lumberton. From ROBESON.

Civil action to enforce specific performance of a written contract to purchase real property.

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

On 24 November 1924 S. R. Webster and wife conveyed the land, which is the subject of this suit, by deed to Roy Oxendine, vesting in him a fee simple title. On 10 May 1932 Roy Oxendine and wife conveyed the land to Malinda Oxendine Hunt by deed of record in Robeson County. A copy of this deed is in the record. During the argument of this suit in this Court the parties by consent filed a photostatic copy of this deed, which shows it was a printed blank form deed apparently filled in by use of a typewriter.

The relevant parts of this deed with the words apparently written in with a typewriter italicized by us, are as follows:

"STATE OF NORTH CAROLINA
Robeson County

THIS DEED, made this the *10th* day of *May 1932*, by *Roy Oxendine and wife, Bettie Oxendine* of the County of *Robeson*, and State of *North Carolina*, of the first part to *Malinda Oxendine Hunt* of the County of *Robeson*, and State of *North Carolina*, of the second part, WITNESSETH: That the said parties of the first part, in consideration of the sum of *Ten Dollars and other valuable considerations* in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do - hereby bargain, sell and convey unto the said party of the second part, and to *her* heirs and assigns forever, the following lands in *Fairmont* Township, Robeson County, North Carolina, bounded and described as follows, to wit:

"A life estate in and to the following described tract of land, to wit:

"In Fairmont Township - BEGINNING at a stake under the bridge in the Old Field Swamp in the Lumberton and Fairmont road and runs South 20 degrees 20 minutes West 810 feet to a stake in the run of Old Field Swamp; thence S. 60 degrees and 50 minutes East 694 feet to a stake in the run of Old Field Swamp; thence up the run of Old Field Swamp to the BEGINNING, containing 9.4 acres. Same being part of land owned by F. S. Floyd, Sr., deceased, and being on west side of Old Field Swamp about a mile north of the town of Fairmont and being same conveyed to Barnum Hunt and Wife, Malinda Hunt, by F. S. Floyd, Jr., et ux Sarah Floyd.

"It is distinctly understood between the parties of the first part and the party of the second part that the said Malinda Oxendine Hunt is to have a lifetime right and full control of the possession of the property herein conveyed, and 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. And the said parties of the first part, for *themselves, their* heirs, executors and administrators, do covenant with the party of the second part, *her* heirs and assigns, that *they are* lawfully seized in fee of the said lands; that *they* have good right to sell and convey the same; that they are free from all encumbrance; and that *they* will and *their* heirs, executors and administrators shall warrant and defend the title to the same against the lawful claims of all persons whomsoever."

Roy Oxendine was the son of Malinda Oxendine Hunt. Prior to December 1958 Malinda Oxendine Hunt died leaving her surviving as heirs Roy Oxendine, and certain children and grandchildren who are defendants.

On 1 December 1958 Roy Oxendine contracted to sell to defendant H. S. Lewis, and defendant H. S. Lewis contracted to buy the land described in the deed from Roy Oxendine to Malinda Oxendine Hunt at the price of $5,000.00. The contract contemplated that the grantor should convey a good and sufficient marketable title in fee. Roy Oxendine executed a deed of conveyance of the land to defendant H. S. Lewis, tendered it to him, and made demand for payment of the purchase price in accord with the contract, and defendant H. S. Lewis refused to accept said deed and comply with the contract for the reason that Roy Oxendine is not possessed of and cannot convey a fee simple title to the property. Thereafter Roy Oxendine, original plaintiff, died intestate leaving as his only heirs at law his sons, William L. Oxendine and James W. Oxendine. William L. Oxendine has been duly appointed administrator of his estate. His heirs at law and administrator have made themselves parties to the suit as additional plaintiffs.

Judge McKinnon upon the facts found by him concluded as a matter of law that "the deed from Roy Oxendine, original plaintiff, to Malinda Oxendine Hunt . . . by the terms of its grant clause limited the estate conveyed therein to Malinda Oxendine Hunt to an estate for life, with the remainder being reserved to the grantor, Roy Oxendine, and the life estate is now terminated, so that the original plaintiff, Roy Oxendine, was capable, and his administrator, William L. Oxendine, is capable of conveying the lands in fee simple to the original defendant, H. S. Lewis." Judge McKinnon further concluded as a matter of law that William L. Oxendine, as administrator of the estate of Roy Oxendine, is legally entitled to enforce the contract of sale and purchase against the original defendant, H. S. Lewis. Wherefore, Judge McKinnon entered judgment decreeing specific performance. Defendant excepted and appealed.

Johnson & Biggs By E. M. Johnson for plaintiffs, appellees.

Britt, Campbell & Britt By David M. Britt for additional Defendants, appellants.

W. H. Humphrey, Jr., for original defendant, appellant, and guardian ad litem for James Cleo Freeman and Lena Mae Freeman, minors, defendants, appellants.

PARKER, J. A former appeal in this case, wherein Roy Oxendine

was plaintiff and H. S. Lewis was defendant, is reported in 251 N.C. 702, 111 S.E. 2d 870, and was remanded for additional parties. Since the former appeal, Roy Oxendine has died. In the former appeal, and in parts of the record the christian name of Malinda Oxendine Hunt is set forth as Melinda. We use here Malinda as it appears in the photostatic copy of the deed.

The granting clause in the Roy Oxendine deed conveys to Malinda Oxendine Hunt an unqualified fee simple estate. The *habendum* clause contains no limitation on the fee thus conveyed, and a fee simple title is warranted in the covenants of title.

Jeffries v. Parker, 236 N.C. 756, 73 S.E. 2d 783, was a suit to enforce specific performance of a contract to purchase land. These are the facts in that suit: On 21 January 1919, Mary J. Jeffries conveyed land to E. Worth Jeffries and James H. Jeffries by recorded deed. The granting clause in the deed conveyed an unqualified fee and the *habendum* clause contains no limitation on the fee thus conveyed and a fee simple title is warranted in the covenants of title. The paragraph describing the land conveyed contains the following at the end and as a part thereof: "It is understood that in case of the death of James H. Jeffries before he otherwise disposes of his part of this land, that his share is to be the property of E. Worth Jeffries in fee simple, subject to the dower right of James H. Jeffries' wife, Mandy Jeffries." Mandy Jeffries predeceased James H. Jeffries. On 21 March 1942, James H. Jeffries died intestate, leaving surviving certain collateral heirs. At the time of his death he had not disposed of or conveyed his interest in said land. The trial court held that the deed "vested in James H. Jeffries a defeasible fee subjected to be defeated upon his having not disposed of same prior to his death and in which event the said title vested in the survivor, E. Worth Jeffries, and the said E. Worth Jeffries now holds an absolute fee simple title to the said property," and decreed specific performance. This Court reversed the judgment below, saying: "When the granting clause in a deed to real property conveys an unqualified fee and the *habendum* contains no limitation on the fee thus conveyed and a fee simple title is warranted in the covenants of title, any additional clause or provision repugnant thereto and not by reference made a part thereof, inserted in the instrument as a part of, or following the description of the property conveyed, or eleswhere other than in the granting or *habendum* clause, which tends to delimit the estate thus conveyed, will be deemed mere surplusage without force or effect. *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228, and cases cited; *Kennedy v. Kennedy,* 236 N.C. 419; *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906; *McNeill v. Blevins,*

222 N.C. 170, 22 S.E. 2d 268. This is now settled law in this jurisdiction. *Krites v. Plott,* 222 N.C. 679, 24 S.E. 2d 531, and *Jefferson v. Jefferson,* 219 N.C. 333, 13 S.E. 2d 745, to the extent they conflict with this conclusion, have been overruled."

The relevant facts for our decision here in *Edwards v. Butler,* 244 N.C. 205, 92 S.E. 2d 922, are: On 19 January 1912, Joseph G. Edwards executed a warranty deed to his wife "Lilly Mae Edwards, her lifetime and then to my children . . .," conveying the premises described in the petition. The granting clause, the *habendum* and the warranty in the deed are in the usual form and fully sufficient to pass a fee simple title. Following the description of the land, the grantor inserted the following: "It is known and understood that I, Joseph G. Edwards, hereby except my life estate in the above conveyed premises." In its opinion, this Court said: "The first question to be determined is whether or not the attempted reservation of a life estate in the grantor in the deed from Joseph G. Edwards to Lilly Mae Edwards, his wife, was valid. We have repeatedly held that when the granting clause, the *habendum,* and the warranty in a deed are clear and unambiguous and fully sufficient to pass immediately a fee simple estate to the grantee or grantees, that a paragraph inserted between the description and the *habendum,* in which the grantor seeks to reserve a life estate in himself or another, or to otherwise limit the estate conveyed, will be rejected as repugnant to the estate and interest therein conveyed. *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391; *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783; *Kennedy v. Kennedy,* 236 N.C. 419, 72 S.E. 2d 869; *Swaim v. Swaim,* 235 N.C. 277, 69 S.E. 2d 534; *Pilley v. Smith,* 230 N.C. 62, 51 S.E. 2d 923; *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228. In the deed under consideration, the words in the granting clause, the *habendum,* and warranty are clear and unambiguous and are sufficient to pass immediately a fee simple title to the land described therein. These portions of the deed contained nothing that might even suggest an intention on the part of the grantor to convey an estate of less dignity than a fee simple, indefeasible title to the premises described therein, subject to the life estate of his wife. Hence, we hold that the attempt of the grantor to create a life estate in himself by the method used was ineffective and will be rejected as mere surplusage. *Jeffries v. Parker, supra.*"

In *McCotter v. Barnes,* 247 N.C. 480, 101 S.E. 2d 330, a printed form deed was used with written words inserted. The granting clause in the deed conveys an unqualified fee simple estate. The *habendum* clause places no limitation on the estate conveyed by the granting clause. A fee simple estate is warranted in the covenants of title. The

description in writing inserted in the deed is: "A right of way 100 feet wide (To be located by said party of second part and when so located to become a part of this description) across the homestead tract. The said location to be through the southwest corner of said tract of land. There shall be no building other than for railroad use." The defendants contended that the use of the term "right of way" in the description limits the conveyance to an easement. The Court said: "But in any event, under application of the rule of construction that the granting clause will prevail in case of repugnancy, the term 'right of way' as here used in the description must yield to the granting clause in fee, and especially so in view of the fact that the granting clause harmonizes with the *habendum* and with the covenants of seizin and warranty. *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228; *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783; *Griffin v. Springer,* 244 N.C. 95, 92 S.E. 2d 682; *Edwards v. Butler,* 244 N.C. 205, 92 S. E. 2d 922. In *Artis v. Artis, supra,* at p. 761, it is stated: 'Hence it may be stated as a rule of law that where the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and *habendum,* the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected.' Here the fact that the description was inserted in a form deed is without controlling significance. *Jeffries v. Parker, supra.*"

Shephard v. Horton, 188 N.C. 787, 125 S.E. 539, is clearly distinguishable. The granting clause of the deed was "to the said party of the second part during her natural life and — heirs and assigns," a tract of land describing it. The *habendum* clause reads, "To have and to hold the aforesaid tract or parcel of land during her natural life, with any and all privileges and appurtenances thereto belonging to the said Victory Horton, — heirs and assigns, to her only use and behoof forever." A fee simple title is warranted in the covenants of title. The deed was written on a printed blank form prepared for general use and the words "during her natural life" were written by the draftsman. In the deed in that case the written words and the printed words in the granting clause and in the *habendum* are inconsistent, and it was held that the written words "during her natural life" controlled the construction, and that the grantee took a life estate.

The words in the deed in the instant case, apparently written in with a typewriter, appearing before and after the description of the land conveyed in fee simple and which tend to delimit the fee simple estate conveyed are not in the granting or *habendum* clause, and under a long line of our decisions as above set forth will be deemed surplusage without force or effect.

Malinda Oxendine Hunt took a fee simple estate under the deed. Defendants' assignments of error to the Judge's conclusions of law and to the judgment are sustained. The judgment below is

Reversed.

BOBBITT, J., dissenting. The deed is from a son to his mother. Obviously, the conveyance of a life estate was intended. This intention should control unless "in conflict with some unyielding canon of construction, or settled rule of property, or fixed rule of law, or is repugnant to the terms of the grant." *Griffin v. Springer,* 244 N.C. 95, 98, 92 S.E. 2d 682, and cases cited. In my opinion, the rules of law enunciated in the cases cited in the Court's opinion do not require that the intention of the parties be thwarted.

"The heart of a deed is the granting clause." *Griffin v. Springer, supra,* and cases cited. The granting clause designates the grantee *and the thing granted. Artis v. Artis,* 228 N.C. 754, 760, 47 S.E. 2d 228. Consideration of the granting clause requires the construction that the thing granted is not a described tract of land but "a life estate in and to the following described tract of land." The factual situation is distinguishable from cases where, after conveyance of a described tract of land in fee, a subsequent provision, not an integral part of the granting clause, purports to delimit the fee theretofore explicitly conveyed.

A rule of law which supersedes and frustrates the intention of the parties should not be extended to encompass the present factual situation but should be restricted to factual situations undistinguishable from those heretofore considered.

RODMAN, J., joins in dissent.

W. C. UPCHURCH, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE CITY OF RALEIGH v. CITY OF RALEIGH, A MUNICIPAL CORPORATION.

(Filed 10 June, 1960.)

1. Elections § 4: Municipal Corporations § 37— Proceeds of water and sewer bonds may be expended in newly annexed areas notwithstanding neither bond ordinance nor ballots disclosed such intent.

Where there is no irregularity in the authorization of municipal bonds for its water and sewer systems, G.S. 160-379(b)(1), G.S. 160-379(d), G.S. 160-382, and in the city's notice of intent to annex certain areas it is stated that it intended to use certain of the proceeds of the bonds for the construction of water and sewer lines in areas intended to be annexed, the fact that neither the bond ordinance nor the ballots used in the election at which the issuance of the bonds was approved disclosed such intent does not affect the validity of the bonds, the city being authorized by its charter and G.S. 160-255 to extend its water and sewer facilities beyond its corporate limits and the Annexation Act specifically providing that it should not be necessary for the City to specify the location of any contemplated improvements.

2. Pleadings § 24—

Notwithstanding that a demurrer comes on to be heard prior to the expiration of time for filing answer, G.S. 1-161, the court may refuse plaintiff's motion for a continuance, interposed in order that he might file an amended complaint, when the hearing is more than five days after acceptance of service of the demurrer by the plaintiff, G.S. 1-129, although plaintiff, upon the sustaining of the demurrer, may thereafter apply for leave to amend. G.S. 1-131.

APPEAL by plaintiff from *Clark, J.*, March Civil Term, 1960 of WAKE.

This action was instituted on 11 March 1960 in the Superior Court of Wake County, North Carolina, by W. C. Upchurch, on behalf of himself and all other taxpayers of the City of Raleigh, against the City of Raleigh, a municipal corporation, for the purpose of having declared invalid two bond issues hereinafter referred to, and to restrain the City from applying or using the proceeds from said bond issues to construct water and sewer lines in areas which the City of Raleigh proposed to annex.

On 21 December 1959, the City adopted Ordinances Nos. 851 and 852, said ordinances authorized the issuance of $1,360,000 of water supply system bonds and $540,000 of sanitary sewer system bonds, respectively, and by its Resolution No. 950, called a special election on 23 February 1960 for the qualified voters of Raleigh to pass upon said bond issues.

On 22 and 29 December 1959, pursuant to statute, the City caused to be published in The Raleigh Times, a newspaper of general cir-

culation in said City, its "Notice of Intention to Apply to the Local Government Commission for Approval of Bonds" subject to the approval of the voters, the declared and stated purpose of said bonds being as follows:

"(1) $1,360,000 of bonds for the improvement and enlargement of the water supply system established and operated by the City to supply water to the City and its inhabitants, * * *.

"(2) $540,000 of bonds for the improvement and enlargement of the sanitary sewer system established and operated by the City, * * *."

Pursuant to the aforesaid notice the City on 31 December 1959, made written application to the Local Government Commission for approval of the aforesaid bond issues, and in its Exhibit A attached to said application, it declared that:

"The City now has authority to finance water system extension and improvement (to the extent of) $1,742,000 (1959 Bond Program). This program was designed to provide for some plant improvement, projects to strengthen the internal city system (Pitometer Study 1953 & 58) and to extend into those areas previously considered for annexation; i. e., areas to the northwest, north and southeast. As the total picture developed and the meaning of the new annexation law cleared, it became necessary to prepare for future extension and financing in the areas to the south and southwest as the City Council decided they should be included in this major annexation action. Thus, $700,000 is proposed to carry the large main system into the last two areas mentioned and $660,000 is to be used in all areas to begin the program of small line extension up and down the streets when needed and requested. Whereas the large main extension into these areas should satisfy the system need, some few years will be required to complete the small line system.

"Authority already exists which should satisfy the financing of the large sewer outfalls into the new areas (1959 Bond Program). $540,000 will begin the program of installing the small line system up and down the streets. Some few years will be required to complete the small line system."

Pursuant to said ordinances and resolution, a special election was held on 23 February 1960, at which the qualified voters of the City voted in favor of said bond issues in separate questions, the stated purposes of said bonds appearing on the ballots used at said election as recited in the ordinances. None of the bonds had, at the time of the institution of this suit, been issued, sold or delivered.

Thereafter, on 1 February 1960, acting pursuant to a new annexa-

tion law (G.S. 160-453.13 *et seq.*), the City adopted resolutions of intent to consider the question of annexing five certain areas to the City; and on 15 February 1960, as required by said law, it approved and made public its Annexation Report, dated February 1960, declaring its intent to annex certain designated areas then beyond the corporate limits of the City and to expend and use certain of the proceeds of the water and sewer bond issues to be voted on at the 23 February 1960 election as follows: (estimated costs of water and sewer lines into the designated areas omitted).

Neither in the bond ordinances nor on the ballots used at said election was there included any statement or declaration of the purpose or intent of the City to use the proceeds of said bond issues for the future annexation of said areas, as was contained in said Annexation Report and Notice of Intent.

The complaint alleges that it was the duty of the City in the conduct of said special election to submit the bond issues in plain, unambiguous and certain language clearly stating that the true intent and purpose of the City, if said election carried, to undertake to provide for the annexation of said areas into the City's corporate limits; and that such was the actual design and purpose for the City, for that:

"(a) In June and July 1959, it had conducted actual field surveys of the dwelling units in said areas;

"(b) On or about 26 November 1959, it had entered into a contract with an engineering firm to perform field surveys, investigations, plans and specifications for sewer outfall lines in certain of said areas;

"(c) At a special election held on 11 August 1959, the voters of the City had approved $1,742,000 of water bonds and $1,357,800 of sewer bonds, no part of which had yet been sold, issued or delivered."

The defendant filed a demurrer to the complaint on 16 March 1960 and caused the same to be set for hearing on the Motion Calendar for 28 March 1960. When the matter came on for hearing, the plaintiff orally moved for a continuance in order that he might file an amended complaint or an amendment to his complaint, pursuant to G.S. 1-161, before defendant's time for answering expired. The court denied plaintiff's motion and proceeded with the hearing. The defendant, in addition to its written demurrer, interposed a demurrer *ore tenus*. The court sustained both demurrers, and the plaintiff appeals, assigning error.

Emanuel & Emanuel for plaintiff.

Paul F. Smith, William Joslin, Manning & Fulton for defendant.

DENNY, J. The complaint does not allege any irregularities in the legal procedures followed by the defendant in connection with the adoption of the bond ordinances involved, the publication of such ordinances, the ordinance calling for the bond election on 23 February 1960, or in the conduct of such election.

The plaintiff alleges the series of bonds approved at the election held on 23 February 1960 are not valid and legal obligations of the City of Raleigh because the bond ordinances, the publication of notice thereof and the ballots did not disclose that the proceeds to be derived therefrom were to be used for the construction of water and sewer lines in areas to be annexed within the corporate limits of the City of Raleigh, pursuant to G.S. 160-453.17.

The question posed for determination is simply this: May the proceeds from water and sewer bonds duly authorized by the voters of a municipality or any portion of such funds, be expended within areas annexed to the City after the date of such election when neither the bond ordinances nor the ballots used in said election disclosed an intent on the part of the municipality to so use such proceeds?

There is no contention that there was any irregularity in the authorization of the bonds approved by the voters of the City of Raleigh on 23 February 1960, provided the proceeds therefrom are expended for water and sewer lines within the corporate limits of Raleigh as such corporate limits existed on 23 February 1960. Even so, the defendant notified the citizens and taxpayers of the City of Raleigh when it published, as it was required by law to do, its Notice of Intent to annex certain areas, and further stated therein that it intended to use certain of the proceeds of the water and sewer bond issues to be voted on at the 23 February 1960 election, and gave the estimated amounts that would be expended for the construction of water and sewer lines in the areas designated therein. Therefore, the question for determination is limited to that posed hereinabove.

In order for a municipality, having a population of 5,000 or more persons, to comply with the provisions of Chapter 1009 of the 1959 Session Laws of North Carolina, it must follow the procedure outlined in the annexation statutes, G.S. 160-453.13 *et seq.* Section (e), subsection (3) of G.S. 160-453.17, provides that when a municipality passes its annexation ordinance pursuant to its Notice of Intent it must make, "A specific finding that on the effective date of annexation the municipality will have funds appropriated in sufficient amount to finance construction of any major trunk water mains and sewer outfalls found necessary in the report required by § 160-453.15

to extend the basic water and/or sewer system of the municipality into the area to be annexed, or that on the effective date of annexation the municipality will have authority to issue bonds in an amount sufficient to finance such construction. If authority to issue such bonds must be secured from the electorate of the municipality prior to the effective date of annexation, then the effective date of annexation shall be no earlier than the day following the statement of the successful result of the bond election."

It is provided in section (f) of G.S. 160-453.17: "From and after the effective date of the annexation ordinance, the territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in such municipality and shall be entitled to the same privileges and benefits as other parts of such municipality. * * *"

The defendant City of Raleigh in its charter as set forth in Chapter 1184 of the Session Laws of 1949, has been given the express authority in section 22, subsection (65), as follows: "To acquire, provide, construct, establish, maintain and operate a system of waterworks and a system of sewerage for the city and the citizens thereof, and to protect, control, and regulate the same by such adequate rules and regulations as may be deemed appropriate and expedient by the city counsel; and to extend the systems of waterworks and/or sewerage beyond the corporate limits; * * *" Moreover, all municipalities in North Carolina have been given the right to extend water and sewer facilities beyond the corporate limits of the municipality. G.S. 160-255 (1959 Cumulative Supplement).

The 1959 Annexation Act does not purport to require or authorize the expenditure of any funds in an area to be annexed when such proposed annexation is made subject to a favorable result in a bond election for funds with which to construct water and sewer lines in such area, until after the effective date of such annexation. However, we have been unable to find any requirement in the municipal Finance Act or any other statute which requires the bond ordinance or the ballot to specify in what area the funds are to be used if such funds are to be used in connection with an annexation plan pursuant to the 1959 Annexation Act.

It appears that the defendant has complied with G.S. 160-379 (b) (1), G.S. 160-379 (d), and all other pertinent statutes in connection with the authorization of the issuance of the bonds involved herein. It will be noted that G.S. 160-379 (b) (1) provides: "What Ordinance Must Show. — The ordinance shall state: (1) In brief and general terms the purpose for which the bonds are to be issued,

* * *"; and G.S. 160-379 (d) provides: "Need Not Specify Location of Improvement. — In stating the purpose of a bond issue, a bond ordinance need not specify the location of any improvement or property, or the kind of pavement or other material to be used in the construction or reconstruction of streets, highways, sidewalks, curbs, or gutters, or the kind of construction or reconstruction to be adopted for any building, for which the bonds are to be issued. A description in a bond ordinance of a property or improvement substantially in the language employed in § 160-382 of this subchapter to describe such a property or improvement, shall be a sufficiently definite statement of the purpose for which the bonds authorized by the ordinance are to be issued."

In *Thomasson v. Smith,* 249 N.C. 84, 105 S.E. 2d 416, the annexation procedure and the authorization of bonds to be issued pursuant thereto were set out in Chapter 802 of the Session Laws of 1957, which provided that in the event of a favorable election result on the question of annexation, the City of Charlotte was then authorized to call an election to determine whether or not the citizens of Charlotte would approve the issuance of approximately $4,500,000 worth of water and sewer bonds for the purpose of constructing water and sewer lines into the area to be annexed before the effective date of the annexation. Therefore, the intent to so use such proceeds was incorporated in the bond ordinance and on the ballot. The general law, however, as heretofore pointed out, does not require such information to be incorporated in the bond ordinance or to be set forth on the ballot. The statute requires the effective date of the annexation to be at least one day after the favorable result of the bond election, where the proceeds from the bond issue or issues are to be used in connection with the annexation plan. However, the effective date of an annexation may be fixed for any date within twelve months from the date of the adoption of the annexation ordinance. Subsection (4) of section (e), G.S. 160-453.17. In the instant case, it was stated in the oral argument before this Court that the areas described in the Notice of Intent to annex have been annexed by the City of Raleigh and that the effective date of such annexation was 31 March 1960. Furthermore, it has been made to appear that the Notice of Intent to annex these areas was published in the manner required by law.

There is no question raised in this action with respect to the validity of the annexation of the areas by the City of Raleigh pursuant to the provisions of our 1959 Annexation Act, this action having been instituted prior to the adoption of the annexation ordinance.

The plaintiff seeks, however, to restrain the issuance of the bonds authorized on 23 February 1960 in order to prevent the expenditures planned in the construction of water and sewer lines into the annexed areas for the reasons heretofore stated.

It is a matter of common knowledge that the City of Raleigh has heretofore issued and has outstanding many millions of dollars in bonds covering the cost of the construction of paved streets, sidewalks, waterworks, and sewer systems, not one dollar of which was expended for street paving or the construction of sidewalks in the annexed areas, and but little if any of the proceeds from water and sewer bonds heretofore issued by the City of Raleigh have been expended for water or sewer lines in the annexed areas. However, the citizens, firms and corporations located within these annexed areas will be required in the future to pay their full share of the taxes necessary for the payment of the interest on these outstanding bonds and for the payment of the principal on such bonds as they fall due. *Dunn v. Tew*, 219 N.C. 286, 13 S.E. 2d 536; *Thomasson v. Smith, supra.* Unquestionably, it was this fact that led the General Assembly to require a municipality to make provision for the extension of water and sewer lines into such annexed areas before permitting the proposed annexation or annexations to be made pursuant to the 1959 Annexation Act.

In our opinion, the court below properly sustained the demurrers interposed by the defendant.

The second question posed on this appeal is whether or not the court below committed error in refusing to continue the hearing on the demurrers, calendared on the Motion Docket of the Superior Court of Wake County for hearing 28 March 1960, in order to give the plaintiff time to file an emended complaint or an amendment to his complaint.

We are not inadvertent to the provisions of G.S. 1-161. Neither are we unmindful of the provisions of G.S. 1-129, which provide: "If a demurrer is filed the plaintiff may be allowed to amend. If plaintiff fail to amend within five days after notice, the parties may agree to a time and place of hearing the same before some judge of the superior court, and upon such agreement it shall be the duty of the clerk of the superior court forthwith to send the complaint and demurrer to the judge holding the courts of the district, or to the resident judge of the district, who shall hear and pass upon the demurrer: Provided, if there be no agreement between the parties as to the time and place of hearing the same before the judge of the superior court, then it shall be the duty of the clerk of the superior court to

send the complaint and demurrer to the judge holding the next term of the superior court in the county where the action is pending, who shall hear and pass upon the demurrer at that term of the court. * * *"

The plaintiff not having amended his complaint within five days after the demurrer was filed on 16 March 1960, on which date his attorneys accepted service of a copy of the written demurrer, the defendant had the right to have the demurrer ruled upon after the lapse of five days therefrom.

Therefore, the ruling of the court below in declining to continue the hearing on the demurrers interposed by the defendant will be upheld without prejudice to the right of the plaintiff to apply for leave to amend, as provided in G.S. 1-131.

The judgment of the court below is

Affirmed.

R. H. EAKLEY, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE CITY OF RALEIGH v. CITY OF RALEIGH, A MUNICIPAL CORPORATION.

(Filed 10 June, 1960.)

1. Appeal and Error § 49—

Where a jury trial is waived, the findings of fact of the court are as conclusive and binding as a jury verdict if the findings are supported by any evidence.

2. Elections § 4: Municipal Corporations § 37—

Proceeds of water and sewer bonds may be expended in newly annexed areas notwithstanding that neither the bond ordinance nor the ballots in the election authorizing the issuance of the bonds disclosed such intent.

3. Taxation § 4—

The contention that the issuance of water and sewer bonds by a municipality for improvements within annexed areas would violate Art. VII, Sec. 7 of the State Constitution because the residents of the areas annexed had not voted in the bond election, is untenable when the bonds have been approved by the electors residing within the city limits as they existed at the time of the election.

4. Same: Municipal Corporations § 36—

A municipality has the power to expend funds for the construction and operation of water and sewer facilities without a vote when such facilities are for the benefit of the citizens of the municipality, G.S. 160-239, G.S. 160-255, but extension of such facilities outside its corporate limits for the purpose of profit is a proprietary function requiring a vote of its citizens.

5. Same—

When a bond election authorizes the issuance of water and sewer bonds for the benefit of the citizens of the municipality, but does not authorize such bonds for financial gain by the city from the sale of such services to those residing beyond its corporate limits, the expenditure of the proceeds in areas intended to be annexed by the city is properly restrained until the date such annexation is effected.

APPEAL by plaintiffs and defendant from *Craven, S. J.,* February 1960 Assigned Civil Term, of WAKE.

This action was begun by plaintiff Eakley on 18 February 1960. He seeks to enjoin the issuance and sale of bonds of the City of Raleigh authorized at an election held 11 August 1959, and if the sale of the bonds is not enjoined, to enjoin the use of the proceeds in any area which was not a part of the City when the electorate gave its approval to the proposed bond issue.

As the basis for the relief sought he alleges the City Council in June 1959 adopted ordinances authorizing the issuance of bonds (a) for the improvement and enlargement of the City's water system to supply water to the City, (b) for the construction or reconstruction of the streets of the City, (c) for the improvement and enlargement of the sanitary sewer system as operated by the City, (d) for the improvement and enlargement of the recreational system established and operated by the City including the acquisition of parks and playgrounds and other recreational facilities, (e) for the erection and enlargement of buildings for the use of the City's fire department and the furnishing of such buildings, (f) for the acquisition of fire engines, fire trucks, and other vehicles for use by the City's fire department, (g) for the extension of the City's fire alarm system; that the ordinances so adopted provided for the levying of a tax for the payment of the bonds and required submission to the citizens of Raleigh for their approval at an election to be held on 11 August 1959; that the election was called and held in accordance with the ordinances, at which election the citizens voted for issuance of the bonds, the vote in each instance being substantially two to one in favor of the issuance of the bonds; that the Board of Elections duly canvassed the votes and certified the result as required by law; that none of the bonds have been sold and delivered. He further alleges that at the time the City Council adopted the ordinances authorizing the submission of the question of issuing bonds to the people, the Council contemplated and intended to use the proceeds from the sale of said bonds in areas to be annexed to and incorporated within the City boundaries; that this intended use

by the City council was not on the ballots, the ballots merely stating in each instance the general purpose for which the bonds would be authorized without indicating in any manner the particular area in which the expenditures would be made; that the manner in which the questions were submitted to the voters did not disclose the true purposes of the proposed bond issues but concealed from the voters the true purposes thereof and lulled them into the belief that they were voting for the issuance of bonds for services and improvements within the then existing corporate limits of Raleigh; that pursuant to the plan of the City Council it caused a survey to be made for the purpose of annexing areas adjacent to the City as provided by G.S. 160-453.13 *et seq.*, and on 15 February 1960 approved an anexation report theretofore filed with it, which report set out in detail the intent to expend the proceeds or a part thereof from the sale of the bonds in areas to be annexed to the City; that the City caused notice to be published and fixed a date for the hearing on the proposed annexation plan as provided in G.S. 160-453.17. He alleged that the proposed use of funds in any area which was not within the corporate boundaries of Raleigh when the bond issue was submitted to the people would be an unlawful diversion and a misapplication of the proceeds of the bonds authorized by the people.

Frank Parker, Allen T. Stevens, W. N. H. Jones, George J. Moore, Jr., and W. C. Upchurch, citizens of Raleigh, were permitted to make themselves parties plaintiff and to adopt the complaint.

The City of Raleigh answered and admitted the allegations with respect to the adoption of ordinances approved by the electorate, the proposal to annex areas adjacent to the City and following the annexation to expend designated portions of the monies which would be derived from the sale of bonds in the areas so annexed. It denied the electorate was deceived by the form in which the questions were submitted to it and denied that the expenditures in the areas to be subsequently incorporated into the City, if made after they were brought within the corporate limits, would constitute a diversion or unlawful use of funds. It alleged the time limits to challenge the validity of the ordinance and election fixed by G.S. 160-385 and 160-387 had elapsed and that no proceeding had been instituted within the times so fixed.

The cause came on to be heard at the February 1960 Term of Wake on Plaintiffs' motion for a permanent restraining order. The parties waived a jury trial and agreed that the court might find the facts from the pleadings, affidavits, and other evidence offered by the parties and render final judgment on the facts found. To support

their respective contentions the parties offered evidence including pleadings, affidavits, copies of ordinances, notices published, and the form of the ballot submitted to the electorate. Typifying the questions submitted is the one relating to the water system:

"QUESTION NO. 1

FOR AGAINST

"Shall the qualified voters of the City of Raleigh approve the bond ordinance which was adopted by the City Council of said City on June 1, 1959, and which (1) authorizes bonds of said City in an aggregate amount not exceeding $1,742,000 for the improvement and enlargement of the water supply system established and operated by the City to supply water to the City, including the acquisition of land or rights in land or equipment or apparatus required therefor, and (2) authorizes the levy and collection of an annual tax sufficient to pay the principal of and interest on said bonds; and also approve the indebtedness to be incurred by the issuance of said bonds?"

On the evidence submitted the court found these facts:

"4. That Bond Ordinances Nos. 807, 808, 809, 810, 815, 816 and 817 referred to in plaintiff's complaint and amendment to his complaint, and defendant's answer, were duly adopted by the City Council of the City of Raleigh on June 1 and June 15, 1959 and were published in the manner and as required by the Charter of the City of Raleigh and by G.S. 160-384. The first publication was made more than thirty days prior to the commencement of this action.

"5. The question of the approval of the bonds provided for in the bond ordinances above referred to was submitted to the voters of the City of Raleigh at an election held August 11, 1959, at which election all of said bonds were approved. Publication of the result of the election was duly made as required by law more than thirty days prior to the commencement of this action.

"6. That the bond ordinances adopted by the City and the ballots used at said election clearly and fairly stated the questions to be voted upon by the electors of the City of Raleigh. There is no evidence of fraud, deceit, bad faith or misrepresentation on the part of the governing body of the City of Raleigh in submitting the questions to be voted upon at said election.

"7. That on February 1, 1960 the City Council of Raleigh adopted resolutions of intent to consider for annexation to the City of Raleigh of five separate areas adjacent to the City of Raleigh, described in said resolutions, and set March 7, 1960 as the date for a public hearing on the question of annexation of said areas in conformity with the provisions of G.S. 160-453.17.

"8. That on February 15, 1960 the City Council of Raleigh approved reports setting forth plans to provide services to said areas under consideration for annexation in conformity with G.S. 160-453.15 and as required by G.S. 160-453.17(c). There is nothing in the reports or in the evidence to indicate that the City of Raleigh proposes or intends to make expenditures of public funds to provide services to any of said areas prior to their annexation, but does propose and intend to make such expenditures after annexation, as set out in the plan, in the areas annexed.

"9. The City of Raleigh has for a number of years past maintained and operated water, sewer, park and recreation facilities both within and without the corporate limits of the City.

"10. That since the bond election held August 11, 1959 several areas adjacent to the City of Raleigh have been lawfully annexed to the City."

Based on these findings the court adjudged:

"1. That the bonds authorized by the City Council of Raleigh and approved by the voters of Raleigh at the election held August 11, 1959 are valid and when issued will be a binding obligation of the City of Raleigh.

"2. That the proceeds from the sale of all of said bonds may be expended within the City limits of Raleigh as they exist at the time the expenditure is authorized and are not limited to the City limits of Raleigh at the time of the bond election.

"(3. That the defendant is restrained from making any expenditure of the funds realized from the sale of any of the bonds within the areas under consideration for annexation by the City of Raleigh, according to the plan of annexation, until the effective date of annexation), at which time they may be expended in said areas."

The restraining order sought was denied. Plaintiffs excepted to findings #6, 9, and 10, and to the judgment and appealed. Defendant excepted to that portion of section 3 of the judgment in parentheses, as quoted above.

Emanuel & Emanuel for plaintiffs.

Paul F. Smith, William Joslin, and Manning & Fulton for defendant.

RODMAN, J. Plaintiffs' Appeal: When a jury trial is waived and the court is authorized to find the facts, its findings are as conclusive and binding as a jury verdict, if there is any evidence to support the findings. *Cotton Mills v. Local 584*, 251 N.C. 335, 111 S.E. 2d 484; *Seminary, Inc. v. Wake County*, 251 N.C. 775, 112 S.E. 2d 528;

Goldsboro v. R. R., 246 N.C. 101, 97 S.E. 2d 486. There was evidence to support each of the findings. In fact, no evidence contrary to the findings was offered unless it necessarily follows as a matter of law that the form of the question submitted to the electorate was intentionally false and misleading and in fact deceived the public who, because of such form of question, understood that they were voting for bonds to provide monies to be expended solely within the corporate limits as they existed at the moment of the election. We do not think that such an intent or result should be implied by reason of the form in which the question was submitted.

Plaintiffs' exceptions then present these and only these questions: (1) Does the fact that the City Council contemplated when it passed the bond ordinance the annexation of additional territory and expenditures of a portion of the bond monies in the annexed territory subsequent to the annexation invalidate the bonds authorized by a majority of the citizens? (2) If not, will expenditure for water and other specified purposes in the areas within the corporate limits at the time of the expenditure but beyond the corporate limits when the ordinance was passed and the election held constitute an unlawful expenditure?

The answer to each question is no for the reasons so clearly stated in the opinion of *Denny, J.*, in *Upchurch v. City of Raleigh, ante*, 676.

Plaintiffs say to give recognition to these bonds as valid obligations of Raleigh would do violence to Art. VII, sec. 7 of our Constitution. The contention is without merit. Each bond issue has been approved by the electorate at an election called for the purpose of authorizing the issuance of the bonds.

Defendants Appeal: Defendant excepted to that portion of the judgment which enjoined it from spending any portion of the bond monies in the areas under consideration for annexation before they became a part of the City. Literally construed and taken out of context the language used is, we think, unduly restrictive; but when considered in relation to the questions which the court was called upon to decide we think it manifest that the court did not intend to enjoin expenditures by the City for direct benefit by its citizens. It intended to prohibit expenditures which would only indirectly benefit the citizens of the City by providing a profit from the furnishing of services to those outside its boundaries.

Municipalities have legislative permission to extend their sewer and water lines beyond corporate boundaries. G.S. 160-239 and 255. Such extentions may be made either because necessary to the effect-

ive operation of the improvement within the City or to provide services for a profit beyond the corporate limits. Bonds for the latter purpose may be issued only when the electorate has expressly so authorized. *S. v. McGraw,* 249 N.C. 205, 105 S.E. 2d 659; *Grimesland v. Washington,* 234 N.C. 117, 66 S.E. 2d 794; *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624.

Expenditures for parks and recreational facilities seem to fall within the class of water and sewer facilities when operated in a governmental capacity, that is, for direct benefit by the citizens of the municipality. G.S. 160-200(12), art. 12, c. 160 of the General Statutes.

Here the bond ordinances for water, sewer, and park facilities, submitted to and approved by the citizens, authorized expenditures for the construction and operation of such facilities for the benefit of the citizens of the municipality. The right to expend money for work outside the City to accomplish these purposes is recognized by plaintiffs. They say in their brief: "It is admitted that the City has authority to expend moneys outside of the city's corporate limits for the purpose of implementing, enlarging and improving the fundamental municipal services which are necessary for the citizens and inhabitants within its corporate limits."

The electorate was not called upon to and did not authorize expenditures for financial gain by the City from the sale of such services to those residing beyond the corporate limits when the expenditures were made. Because not so authorized the court enjoined the use of the funds for such proprietary purposes. When the judgment is read as a single pronouncement and not as disjointed parts, we think the portion objected to merely prohibits expenditures for those purposes, and because we so interpret it, it follows that the judgment is affirmed.

Plaintiffs' appeal—Affirmed.

Defendant's appeal—Affirmed.

STATE v. E. D. WARREN.

(Filed 10 June, 1960.)

1. Constitutional Law § 12—

The right to engage in the ordinary trades and occupations is a property right which may not be circumscribed by the General Assembly.

2. Same—

A business or occupation may not be regulated solely to protect the public against fraud and dishonesty, but resort in such instances must be had under the criminal laws.

3. Same: Constitutional Law § 19—

Persons engaged in a particular occupation may not procure the regulation of such calling in order to keep others out, since such legislation would tend to create a monopoly in contravention of Art. I, Sec. 31 of the State Constitution.

4. Constitutional Law § 11—

The police power is inherent in sovereignty and may be exercised by the General Assembly within constitutional limits to protect or promote the health, morals, order, safety and general welfare of society, and within the constitutional limitations the expediency of an enactment is within the exclusive province of the Legislature.

5. Constitutional Law § 12—

The regulation of an occupation in the exercise of the police power may be sustained only if it affirmatively appears that the occupation is clothed with a substantial public interest and the regulatory act has a rational, real or substantial relation to one or more of the purposes for which the police power may be exercised and is reasonably necessary to accomplish its purposes.

6. Same—

G.S. 93A regulating real estate brokers and salesmen is a constitutional exercise of the police power in the interest of the public welfare, since the relation of real estate broker and client involves a measure of trust and the business affords peculiar opportunities to such agents to extract illicit gains by concealment and collusion, and such business affects a substantial public interest in that it relates to a basic element of the economy.

7. Constitutional Law § 10: Statutes § 6—

An act of the General Assembly is presumed constitutional and must be upheld by the courts unless it is in conflict with some constitutional prohibition.

8. Constitutional Law §§ 6, 10—

The expediency of legislation within constitutional limitations is within the sole province of the General Assembly; whether an act controvenes some constitutional proscription is a matter for the courts.

9. Constitutional Law §§ 12, 19—

The Act regulating real estate brokers and salesmen prescribes reasonable and non-discriminatory standards applicable to all alike, and provides for the licensing of all who possess the requisite competency and good character, who can pass the examination exacted of all applicants, with provision for notice and a hearing to all whose licenses are revoked, and therefore the Act does not contravene Art. I, Sections 1, 7, 17, and 31 of the State Constitution nor the Fourteenth Amendment of the Federal Constitution.

10. Constitutional Law § 12: Taxation § 1c—

Even if the fee charged applicants for real estate brokers' and agents' licenses be regarded as a tax, it is equal and uniform in application upon all of the same class, and places no arbitrary or unreasonable burden upon the pursuit of the occupation, and is valid.

11. Criminal Law § 135—

Where the judgment below recites that sentence was suspended with the consent of the defendant and there is no specific exception to this portion of the judgment, the recital of defendant's consent will be accepted as true in the absence of anything to indicate a withdrawal of his consent, G.S. 15-180.1, and the defendant may not upon appeal contend that he did not consent to the suspension of the sentence.

RODMAN, J., dissenting.

APPEAL by defendant from *Preyer, J.,* November 1959 Criminal Term, of GUILFORD (Greensboro Division).

This is a criminal action. The bill of indictment charges that defendant, E. D. Warren, violated G.S. 93A-1, in that he engaged in business as a real estate broker and salesman without a license from the North Carolina Real Estate Licensing Board, by negotiating the purchase and sale of a parcel of land for compensation.

Plea: Not guilty. Verdict: Guilty.

Judgment: 12 months prison sentence, suspended (with defendant's consent) for five years on condition defendant pay a fine of $1,000.00 and costs and not engage in business as a real estate broker or salesman without a license for a period of five years.

Defendant appealed and assigned errors.

Attorney General Bruton and Assistant Attorney McGalliard for the State.

Adam Younce for defendant, appellant.

MOORE, J. Defendant assigns as error the refusal of the court to grant his motions for nonsuit and in arrest of judgment. These motions call into question the constitutionality of Chapter 93A of the General Statutes of North Carolina entitled "Real Estate Brokers and Salesmen," under which defendant was indicted.

The chapter in question makes it unlawful, and punishable by fine or imprisonment, for any person, partnership, association or corporation to engage in business as a real estate broker or salesman without a license. It defines the terms "broker" and "salesman" and the definition includes the negotiation of a sale or exchange of real estate for compensation. The Act (Chapter 744 of the Session Laws of 1957) created the North Carolina Real Estate Licensing Board, composed of five members, appointed by the Governor. Only two of the members may be licensed real estate brokers or salesmen. The compensation of members is a per diem and expenses. The Board has the power to make by-laws, rules and regulations "as it shall deem best, that are not inconsistent with the provisions of this chapter and the laws of North Carolina . . ." In order to obtain a license an applicant must take an oral or written examination "to determine his qualifications with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant." Applicants for "broker" license pay a fee of $25.00, for "salesman" license, $15.00. Licenses are renewed annually upon payment of a fee of $10.00. Any surplus from fees shall go to the general fund of the State. Licenses may be revoked upon any of eleven grounds set out in the Act. Before a license is revoked licensee shall be granted a hearing before the Board after 10 days notice and may be represented by counsel. If the decision of the Board is adverse to licensee, he may appeal to the Superior Court, where there shall be a trial *de novo*.

Defendant was licensed by the Board on 1 July 1957 under the grandfather clause of the Act. His license was renewed 1 July 1958 and revoked by the Board 16 May 1959 after a hearing. Defendant did not appeal from the decision of the Board. The cause of revocation does not appear in the record. On 28 August 1959 defendant negotiated the real estate transaction referred to in the bill of indictment. He requested re-instatement of his license on 3 September 1959 and action on this request is still pending.

Defendant attacks no particular provision of the Real Estate Act. He insists that the Act as a whole is not a valid exercise of the police power and contravenes sections 1, 7, 17 and 31 of Article I and section 5 of Article V of the North Carolina Constitution and the Fourteenth Amendment of the Constitution of the United States. We may consider the Act only in its general purport and effect since it does not appear that any specific provision is called into question. *Cyphers v. Allyn* (Conn. 1955), 118 A. 2d 318, 323.

Section 1, Article I, of the Constitution of North Carolina guaran-

tees to the citizens of the State "the enjoyment of the fruits of their own labor" and declares this an inalienable right.

The basic constitutional principle of personal liberty and freedom embraces the right of the individual to be free to enjoy the faculties with which he has been endowed by his Creator, to live and work where he will, to earn his livelihood by any lawful calling, and to pursue any legitimate business, trade or vocation. This precept emphasizes the dignity, integrity and liberty of the individual, the primary concern of our democracy. It is the antithesis of the totalitarian concept of government. The right to work and earn a livelihood is a property right that may not be denied except under the police power of the State in the public interest for reasons of health, safety, morals or public welfare. Arbitrary interference with private business and unnecessary restrictions upon lawful occupations are not within the police powers of the State. Restrictions and regulatory standards may not be applied so as to prevent individuals from freely engaging in ordinary trades and occupations in which men have immemorially engaged as a matter of common right. *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E. 2d 851; *State v. Ballance*, 229 N.C. 764, 769, 51 S.E. 2d 731; *State v. Harris*, 216 N.C. 746, 753, 6 S.E. 2d 854; *State v. Realty Experts* (Ala. 1942), 10 So. 2d 461, 462; *State v. Rose* (Fla. 1929), 122 So. 225, 238.

A regulatory act justified only by reason of a desire to protect the public against fraud and dishonesty may not be sustained. There is no business or occupation which is not likely to have its quota of dishonest men. The limits of police power are exceeded when government undertakes by regulation to rid ordinary occupations and callings of the dishonest and morally decadent. Resort in this area must be had to the criminal laws. Furthermore, laws may not be procured by men already engaged in an occupation in order to keep others out. The exclusion of others from a common right is a prominent feature of monopolistic action forbidden by our fundamental law. North Carolina Constitution, Article I, section 31. *State v. Harris, supra,* at page 761; *State v. Ballance, supra,* at page 771.

Our Court has in several instances declared unconstitutional acts seeking to regulate vocations. *Roller v. Allen, supra* (tile contractors); *State v. Ballance, supra,* overruling *State v. Lawrence,* 213 N.C. 674, 197 S.E. 586 (photography); *Palmer v. Smith,* 229 N.C. 612, 51 S.E. 2d 8 (a phase of optometry); *State v. Harris, supra,* (dry cleaning).

But liberty and freedom in an orderly democratic society are of necessity relative terms. Government is necessary to the preserva-

tion of liberty. And government must be vested with sufficient power and authority to maintain its own existence and provide for the general welfare. The police power of the State is exercised for the protection of the health, safety, morals, comfort and quiet of all persons and the protection of all property within the commonwealth. According to the maxim, *Sic utere tuo ut alienum non laedas,* which is universally applied, it must be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. *State v. Rose, supra.*

The State possesses the police power in its capacity as a sovereign, and in the exercise thereof the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety and general welfare of society. Before an Act regulating an occupation can be sustained it must affirmatively appear that the Act has a rational, real or substantial relation to one or more of the purposes for which police power is exercised and that the occupation to be regulated is clothed with a substantial public interest. The Act must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of public harm. *State v. Ballance, supra.* "In attempting to maintain the delicate balance between individual rights and the public need, the courts . . . have evolved the following rules as guides in the judicial determination of such conflicts: (1) the purpose of the statute must be within the scope of the police power, (2) the act must be reasonably designed to accomplish this purpose, and (3) the act must not be arbitrary, discriminatory, oppressive or otherwise unreasonable." *In re Russo* (Ohio 1958), 150 N.E. 2d 327, 331.

There are professions and occupations so affected with the public interest as to warrant their regulation for the public good. *Roller v. Allen, supra.* More than fifty professions and occupations are regulated by statute in North Carolina. 17 N. C. Law Review 1. Cases dealing with some of these are: *Roach v. Durham,* 204 N.C. 587, 169 S.E. 149 (plumbing and heating); *State v. Scott,* 182 N.C. 865, 109 S.E. 789 (accountants); *State v. Siler,* 169 N.C. 314, 84 S.E. 1015 (chiropractic and suggesto-therapy); *State v. Hicks,* 143 N.C. 689, 57 S.E. 441 (dentistry); *State v. Call,* 121 N.C. 643, 28 S.E. 517, and *State v. Van Doran,* 109 N.C. 864, 14 S.E. 32 (physicians); *Ex Parte Schenck,* 65 N.C. 353, (lawyers).

Two former enactments of our General Assembly designed to regulate real estate business were declared unconstitutional. *State v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521; *State v. Warren,* 211 N.C. 75, 189 S.E. 108. These Acts were held to be unconstitutional for the reason that

they applied only to real estate brokers and salesmen in designated counties and not to those in the other counties of the State and were therefore discriminatory. In the *Warren* case it is said: "The State can, no doubt, in a State-wide act, make reasonable regulations in regard to the real estate business." The Act under consideration in the instant case is a State-wide Act.

It is our opinion that the real estate business affects a substantial public interest and may be regulated for the purpose of protecting and promoting the general welfare of the people. "Real estate is one of the two great divisions of property rights, and bears as close a relation to public peace and welfare in our civilization as any species of private rights. The business of acting as intermediary between seller and purchaser in real estate transactions, the business of a real estate broker or salesman, is a lawful business, or calling, and any one has a right under constitutional guaranties of liberty and pursuit of happiness to follow it, but it is nevertheless a business which may be conducted in such manner as to promote an undesirable state of local, economic excitement and unrest, which may easily result in a degree of public distress analogous to that produced by mismanagement of a banking institution. There is involved in the relation of real estate broker and client a measure of trust analogous to that of an attorney at law to his client, or agent to his principal. The activities of persons engaged in such business are largely directed toward developing the trading abilities of the parties concerned and creating a sales value as distinguished from a conservative or substantial value of the lands involved, which not infrequently results in expensive litigation injurious to all concerned. If motives for the enactment of laws regulating such business are to be sought there would seem to be sufficient to justify them." *State v. Rose, supra*, at page 231. "The intrinsic nature of the business combines with practice and tradition to attest the need of regulation. The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost. With temptation so aggressive, the dishonest or untrustworthy may not reasonably complain if they are told to stand aside. Less obtrusive, but not negligible, are the perils of incompetence. The safeguards against incompetence need not long detain us, for they were added to the statute after the services were rendered. We recall them at this time for the light that they cast upon the Legislature's conception of the mischief to be remedied. The broker should know his duty. To that end, he should have 'a

general and fair understanding of the obligations between principal and agent.' . . . Disloyalty may have its origin in ignorance as well as fraud. . . . He (real estate broker) is accredited by his calling in the minds of the inexperienced or the ignorant with a knowledge greater than their own." *Roman v. Lobe* (N.Y. 1926), 152 N.E. 461, 50 A.L.R. 1329.

It is within the police powers of the State that the standard of "honesty, truthfulness, integrity and competency" be established and maintained by legislative act for dealers in real estate. G.S. 93A-4(b).

With the possible exception of Alaska, all the States and the District of Columbia have statutes, similar to the North Carolina enactment, regulating real estate brokers and salesmen. The constitutional validity of these regulatory Acts has been upheld by the appellate courts of twenty-one States, the District of Columbia, and the Supreme Court of the United States. Most of these decisions are discussed and classified in Annotation, 39 A.L.R. 2d, Brokers-License Law - Validity, pp. 606-624. Also see: *Bratton v. Chandler,* 260 U.S. 110; *Benham v. Heyde* (Colo. 1950), 221 P. 2d 1078; *Cyphers v. Allyn* (Conn. 1955), 118 A. 2d 318; *In re Russo, supra;* Appeal of *Young & Co.* (Pa. 1932), 160 A. 151; *Eberman v. Insurance Co.* (D. C. 1945), 41 A. 2d 844. Only the Supreme Court of Kentucky has ruled such Act unconstitutional. *Rawles v. Jenkins,* (Ky. 1925), 279 S.W. 350. But it later overruled this decision. *Miller v. Real Estate Com.* (Ky. 1952), 251 S.W. 2d 845; *Shelton v. McCarroll* (Ky. 1948), 214 S.W. 2d 396.

We are not bound by the decisions of the Courts of the other States, but should this Court hold the Act unconstitutional, North Carolina would be the only State to maintain this position. Such overwhelming authority is highly persuasive.

The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. *Roller v. Allen, supra; State v. Dixon, supra; State v. Hurlock* (Ark. 1932), 49 S.W. 2d 611, 612. The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts — it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts. *State v. Harris, supra;*

State v. Rose, supra; State v. Hurlock, supra; Cyphers v. Allyn, supra.

The Legislature has interpreted the needs of the State and declared its policy. The Act is within the police powers of the State. It does not contravene the "fruits of labor" or "law of the land" clauses of our Constitution. It does not violate the Fourteenth Amendment of the Constitution of the United States. The Act is not unreasonable, arbitrary, destructive or confiscatory. The standard set is reasonable and nondiscriminatory. All who qualify according to the established standard are free to pursue the vocation of real estate broker and salesman. All whose licenses are revoked have the right to be heard and may be represented by counsel; their cause may be heard *de novo* in Superior Court and the right of further appeal is not denied. See also G.S. 143-306 *et seq.* It is observed here that defendant did not avail himself of the right to appeal from the decision of the Licensing Board.

A majority of the Licensing Board are not real estate brokers or salesmen. The Act creates no special privileges or emoluments except in consideration of public service. It does not create a monopoly. The door is open to all who possess the requisite competency, good character and can pass the examination which is exacted of all applicants alike. *Roach v. Durham, supra.*

In our opinion the fee charged applicants for license is not a tax. It is imposed to defray the expenses of regulation and is not excessive. It is true the surplus, if any, goes into the general fund of the State. It makes no difference that revenue results incidentally. *Davis v. Hailey* (Tenn. 1921), 227 S.W. 1021, 1022. But assuming that it is a tax, it is equal and uniform in application to all in the same class. It places no arbitrary and unreasonable burden upon the pursuit of the occupation. *Roach v. Durham, supra; Urban v. Riley* (Cal. 1942), 131 P. 2d 4, 6.

Appellant finally contends that he did not consent to the suspension of the prison sentence, that his exception to the judgment and notice of appeal therefrom negatives consent, and that the judgment below should be stricken and the cause remanded for proper sentence, should the Act be declared constitutional. *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548. Chapter 1017, Session Laws of 1959 (G.S. 15-180.1) provides that a defendant may appeal from a suspended sentence. It further provides "that by giving notice of appeal the defendant does not waive his acceptance of the terms of suspension of a sentence." The judgment below recites that the sentence was suspended by and with the consent of the defendant.

There was no specific exception to this portion of the judgment; there is only an exception to the judgment generally. In the absence of anything to indicate withdrawal of consent, the recital by the court is accepted as correct and true.

In the trial of the cause and the entry of judgment in accordance with the verdict, we find

No error.

RODMAN, J., dissenting: The Court declares its approval of the principles enunciated in *S. v. Harris,* 216 N.C. 746; *Palmer v. Smith,* 229 N.C. 612; *S. v. Ballance,* 229 N.C. 764; *Roller v. Allen,* 245 N.C. 516; and *S. v. Brown,* 250 N.C. 54. I likewise express my complete approval of what is said in those cases, and because I am unable to draw any logical distinction between the act here upheld and the acts there held void, my vote is to reverse.

I think an additional reason requiring reversal is the failure of the act to prescribe any standards which the Board must employ in determining the right to a license. The Legislature cannot delegate its discretionary power. It must prescribe standards and, having prescribed the standards, may authorize an agency to ascertain the facts. *Harvell v. Scheidt,* 249 N.C. 699; *Utilities Com. v. State* and *Utilities Com. v. Telegraph Co.,* 239 N.C. 333; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52. The Licensing Board is authorized to require an examination to determine applicants' "honesty, truthfulness, integrity and competency." Unless competency is synonymous with honesty, truthfulness, and integrity, no standard is prescribed to measure competency, and such failure under our decisions is fatal.

JOHN E. McCOMBS, ADMINISTRATOR OF THE ESTATE OF JOE WASHINGTON SCOTT, JR., v. McLEAN TRUCKING COMPANY AND WILLIAM LESTER OLIVER

AND

DAVID V. MILLER, DOING BUSINESS AS INTERSTATE MOTOR LINES, v. McLEAN TRUCKING COMPANY AND WILLIAM LESTER OLIVER.

(Filed 10 June, 1960.)

1. Courts § 20—

In action based on a collision in another state, the law of the road of such other state governs the substantive rights, while matters of procedure, including the rules of evidence and the sufficiency of the evidence to take the case to the jury, are to be determined by the laws of this State.

2. Trial § 22a—

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, giving him the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, and defendant's evidence is not to be considered except in so far as it is not in conflict with that of plaintiff, but tends to explain or make clear plaintiff's evidence.

3. Automobiles § 15—

Under the laws of the State of Virginia, governing these actions, the drivers of vehicles proceeding in opposite directions are required to keep to the right side of the highway, each giving the other, as nearly as possible, one-half of the main traveled portion of the highway, and each driver has the right to assume that the other will obey the law, and it is only when he apprehends that the other is going to fail to do so that he should take other action in an attempt to avoid collision.

4. Automobiles § 41c— Whether defendant driver was justified in turning left across the highway in effort to avoid colliding with approaching vehicle held for jury.

Defendants' evidence, together with the physical facts at the scene of the accident, tended to show that as the respective vehicles of the parties, traveling in opposite directions, approached each other on the highway, plaintiffs' vehicle began to veer in a direct line toward the center of the highway and toward defendants' vehicle, that defendant driver dimmed his lights, received no response, and, when the vehicles were some thirty feet away, turned sharply to his left across the center line of the highway in an effort to avoid collision, but that the right side of defendants' tractor collided with the left front of plaintiffs' tractor. *Held:* Defendants' motions for nonsuit and a directed verdict in their favor were properly denied, it being for the jury to determine upon the evidence whether defendant driver was justified under the circumstances in turning to his left across the center line of the highway.

5. Trial § 7—

Any impropriety in permitting counsel to read portions of irrelevant statutes to the jury is cured by the action of the court in instructing

the jury to answer the issues submitted under instructions of law by the court without reference to the irrelevant statutes.

6. Automobiles § 39a: Evidence § 16: Appeal and Error § 41—
Toy models of vehicles, while they may be competent for the purpose of permitting a witness to explain his testimony, are not competent as substantive evidence and, therefore, the exclusion of the testimony of a witness in respect to the use of such toy models cannot be held for error when the record fails to disclose on what ground the use of the models was excluded.

7. Appeal and Error § 42—
While it is error for the court to charge law which is inapplicable to the facts in evidence, the charge of the court in this case, involving voluminous pleadings and evidence, *is held* not to contain prejudicial error in this respect.

Appeal by defendants from *Thompson, S. J.*, at June 22, 1959 Civil Term, of Guilford (High Point Division), argued as No. 600 at Fall Term 1959, now appearing on docket as No. 594 at Spring Term 1960.

Two civil actions arising out of a collision between two tractor-trailer units.

In the first case John E. McCombs, as Administrator of the Joe Washington Scott, Jr., estate, seeks recovery for the alleged wrongful death of his intestate.

In the second, David V. Miller seeks recovery of property damage to his vehicle.

Both cases are predicated upon the alleged negligence of the defendant William Lester Oliver, hereinafter referred to as Oliver, who operated the 1952 GMC tractor-trailer as agent for the defendant McLean Trucking Company, hereinafter referred to as McLean. In both cases the defendants deny negligence on their part and plead contributory negligence of plaintiff's intestate by way of defense.

In the action brought by David V. Miller for property damage defendant Oliver and defendant McLean Trucking Company enter counterclaims alleging personal injuries and property damage, respectively, resulting from the alleged negligence of plaintiff's intestate. In the wrongful death action brought by John E. McCombs both defendants submitted to a voluntary nonsuit of their counterclaims.

Considering the admitted allegations of the plaintiff and the evidence offered at the trial taken in the light most favorable to the plaintiff, it tends to show: The collision occurred about five o'clock A. M., 27 July 1958, in Halifax County, Virginia, on Virginia Highway No. 304, near the town of South Boston. The plaintiff's intes-

tate was driving a 1955 International tractor, pulling a Great Dane trailer, which was owned by the plaintiff David V. Miller, doing business as Interstate Motor Lines, hereinafter referred to as Interstate. At the time of the collision the plaintiff's intestate was the agent of Miller and acting within the scope of his employment. The defendant Oliver was driving a 1952 GMC tractor, pulling a Fruehauf-Carter trailer, and was proceeding north on highway No. 304, acting within the course and scope of his employment as the employee of McLean.

Plaintiff's intestate was returning to High Point, North Carolina, from New York, N. Y., with a cargo of used furniture. Testimony elicited at the trial indicated that the McLean trailer was carrying a load of cotton cloth and chemicals weighing 32,000 pounds, and the McLean tractor-trailer vehicle weighed 19,000 pounds. The Miller tractor-trailor vehicle weighed approximately 13,700 pounds, and was loaded with furniture, — "a bulky commodity, considerably lighter * * * 15% lighter than a load of textiles would be."

The defendant Oliver had been awakened from his sleep at midnight some five hours before the collision, and had had only three and a half or four hours of sleep that night prior to the wreck. Oliver's co-driver, Lee, was asleep at the time of the collision.

The collision occurred in open country in a valley between two hills, — one hill to the north and the other to the south of the valley which is "basically level." The highway is constructed on a fill some 10 to 12 feet high. The highway is paved with asphalt, and is 20 feet in width. The point of collision is just north of the Wolf Creek Bridge. The wrecked vehicles were found some 100 feet north of the bridge. There are guard rails on both sides of the highway north of the bridge. The guard rails ran from the bridge north for some distance past the wreckage. South of the wreck scene there were broken white center lines painted on the surface of the highway; but at or near the wreck scene there began a solid white line on the east side of the center of the highway. The defendant Oliver testified: "I testified that the collision did occur in the general area where the double white lines began as you proceed north, as best I recall."

When the vehicles came to rest after the collision the McLean trailer was situated diagonally across the entire highway with its front end on the west side as far as the guard rail with more of its equipment on the west side than on the east. Broken tire (skid) marks were found leading up to the left rear wheels of the McLean trailer. These skid marks pointed diagonally toward the center of

the highway looking north and reached the center line but did not cross over into the west lane but got closer to the white center line as they proceeded north. The length of the skid marks was about the length of the bridge, 22 feet 4 inches. The McLean tractor was off the highway on the west side, — the collision having severed the tractor from its trailer. The McLean tractor was the northern-most of the four units and its separated trailer was the southern-most of the four units of equipment.

The Miller trailer was across the highway facing west with its front end near the center line and its rear end off the edge of the pavement to the east of the highway near the guard rail of the bridge. It was between the McLean trailer and tractor. The Miller tractor was almost completely demolished under the front end and to the north of the McLean tractor. It was in the west lane of traffic except for a small protrusion of its left rear corner into the east lane, and was pointed south or southwest.

The McLean tractor received its principal damage from the impact on the right side into the door area and sleeper compartment located to the rear of the door area. The left side of the McLean tractor was undamaged.

The principal damage to the Miller tractor from the impact of the collision apparently was to its left front. The wreckage caught fire almost immediately after the collision.

The body of plaintiff's intestate was found in the west lane badly burned, and decomposed under the wreckage and debris.

On the other hand, defendants aver in their answers, and upon the trial in Superior Court Oliver testified that as the oncoming tractor and trailer neared it began to veer in direct line toward the center of the highway and the McLean tractor and trailer; that he dimmed his lights, but received no response, and when the Interstate equipment was thirty feet away, having no other place to go, he turned his, the McLean's equipment, sharply to the left, across the center line at the moment of impact; that he acted in an emergency — created by the oncoming vehicle.

At the close of plaintiff's evidence and again at the close of all the evidence the defendants moved for judgment as of nonsuit. Motion denied.

The McCombs case was submitted to the jury upon these four issues, which the jury answered as indicated.

I. Was plaintiff's intestate, Joe Washington Scott, Jr., killed by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

II. If so, did Joe Washington Scott, Jr., by his own negligence, contribute to his death? Answer: No.

III. What amount, if any, is the plaintiff entitled to recover by reason of the death of Joe Washington Scott, Jr.? Answer: $27,000.00.

IV. In what manner shall the sum, if any, set forth in answer to issue No. III be divided between the wife and children of Joe Washington Scott, Jr.?

Norma Jean Scott, wife —	$2,000.00
Barbara Louise Scott, daughter —	$5,000.00
Robert Carl Scott, son —	$5,000.00
Karen Ann Scott, daughter —	$5,000.00
Jack Dempsey Scott, son —	$5,000.00
Carolyn Marie Scott, daughter —	$5,000.00

In the Miller case the jury answered these issues as indicated:

I. Was the plaintiff's equipment damaged by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

II. If so, did the plaintiff's agent and employee Joe Washington Scott, Jr., by his negligence, contribute to the plaintiff's damage? Answer: No.

III. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $4,000.00.

Judgment was entered in accordance therewith in favor of plaintiffs. The defendants except and appeal to Supreme Court, and assign error.

Smith, Moore, Smith, Schell & Hunter, Haworth, Riggs & Kuhn for plaintiffs appellees.

Richmond Rucker, Spry & Hamrick for defendants, appellants.

Winborne, C. J. Appellants present on this appeal six questions for decision. We treat them in the order in which they are presented. The first challenges the ruling of the trial judge in denying defendants' motions for judgments as of nonsuit renewed at the close of all the evidence, G.S. 1-183.

It being admitted that the collision involved in this action occurred in Virginia, "the question of liability for negligence must be determned by the law of that State. The rule in such cases is that matters of substantive law are controlled by the law of the place— the *lex loci*, whereas matters of procedure are controlled by the law of the forum — the *lex fori*. Thus the methods by which the parties are required to prove their allegations, such as the rule of evidence, and the quan-

tum of proofs necessary to make out a *prima facie* case are matters of procedure governed by the law of the place of trial * * * Therefore the question whether the evidence offered was sufficient to carry the case to the jury over defendants' motion for judgment as of nonsuit is to be determined under application of principles of law prevailing in this jurisdiction." So wrote *Johnson, J.*, for the Court in *Childress v. Motor Lines*, 235 N.C. 522, 70 S.E. 2d 558. See also *Harrison v. ACL R. Co.*, 168 N.C. 382, 84 S.E. 519; *Clodfelter v. Wells*, 212 N.C. 823, 195 S.E. 11.

In this State on a motion to nonsuit under provisions of G.S. 1-183, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. Indeed in considering such motion "the defendant's evidence, unless favorable to the plaintiff is not to be taken into consideration except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff," *Stacy, C. J.*, in *Harrison v. R.R.*, 194 N.C. 656, 140 S.E. 598, citing cases. See also *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543.

Therefore, taking the evidence offered by the plaintiffs, in the main predicated on physical facts, upon which they rely, (*Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88, and cases cited), and so much of the defendants' evidence as is favorable to the plaintiffs, or tends to explain and make clear that which has been offered by the plaintiffs, in the light most favorable to plaintiffs, this Court is of opinion, and holds that there is sufficient evidence to take the case to the jury on the issue of negligence of defendant Oliver, imputed to defendant McLean.

And it is appropriate to note that the General Assembly of Virginia declares in respect to rules of the road, Code of Virginia, Chap. 46.1-207, "drivers of vehicles proceeding in opposite direction shall pass each other to the right, each giving to the other, as nearly as possible, one-half of the main traveled portion of the roadway."

And while the driver of an automobile along a public highway, who sees another automobile approaching on the wrong side of the road, has the right to assume that the driver of such vehicle will observe the law and seasonably move over to his right side so as to pass safely, and further has a right to this presumption until he sees that such driver is not going to turn to his right side, it then becomes his duty to exercise ordinary care to avoid a collision. *Johnson v. Kellam*, 162 Va. 757, 175 S.E. 634.

And in this State the holding of this Court in that respect is epito-

mized in headnote in *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598, reading as follows: "The failure of a motorist to keep his car on his right side of the highway in passing a vehicle traveling in the opposite direction is negligence *per se,* and whether such negligence is a proximate cause of a collision is ordinarily for the jury to determine." G. S. 20-146 and G.S. 20-148.

The second clause of the first question is without merit. For reason stated hereinabove in respect to the question as to nonsuit, a directed verdict would have been error. See McIntosh N.C.P. & P., Vol. 2, Sec. 1516, pages 52-53.

The third question relates to the action of the Court in overruling defendants' objection to plaintiffs' counsel in argument to jury, reading that portion of G.S. 97-41 which provides: "In all other cases the total compensation paid including the funeral benefits, shall not exceed ten thousand dollars," and the statement of counsel as to the amount of the award to which dependents of intestate are entitled.

The record in this respect shows that during the argument to the jury counsel for defendant read portions of G.S. 97-10 concluding with comment "that under those circumstances it was unlikely that the widow and children of deceased would be given any part of the recovery." Then counsel for plaintiffs, in his argument to jury read the portion to which reference is first above quoted. And the counsel for plaintiffs contends that what he read was invited by the remarks of counsel for defendant so related. Be that as it may, it appears that the trial judge in his charge to the jury laid the matter to rest in this manner: "* * * Now, none of the issues to be answered by you in this cause have any reference to that statute, and you therefore will not be concerned by that aspect of the case in any manner whatsoever, but you will answer these issues presented to you as you find the facts to be under the instructions of law to be given to you by the court without regard whatever to the situation that obtains in these actions by virtue of the statute and by virtue of the allegations with reference thereto, that being a matter with which you are not concerned and that your issues will not in any manner affect or reflect when you answer the issues of fact in this cause." And the record does not show that anybody objected.

The fourth relates to the exclusion of testimony of defendant Oliver in respect to use of toy vehicles to show relative locations of vehicles upon the highway. In Stanbury's North Carolina Evidence, Sec. 34, it is stated that "The North Carolina Court has often said that materials of this sort are not evidence, or are not substantive evidence, and that they can be used only to 'illustrate' or 'explain' the testi-

mony of a witness." The record fails to disclose on what ground the use of the material was excluded. It will, therefore, be assumed that the court had a valid reason. In any event it does not appear that defendants have been prejudiced by the ruling of the court.

The fifth and sixth questions purport to point to the reading and summarizing by the court statutory provisions as to rules of the road as inapplicable to the facts of the case at bar, and as not supported by the evidence.

In this connection it is worthy of note that in a record of more than sixty pages of pleadings and more than 100 pages of testimony, a charge of sixty-six pages is clear and free from error. It may be that sporadic instances of slight error may be found. Yet a careful reading of all evidence and the entire charge fails to make error appear for which the verdicts and judgments below should be disturbed.

Hence in the trial below, there is

No error.

RICHARD O. GAMBLE, ADMINISTRATOR OF THE ESTATE OF CHARLES F. ROGERS, DECEASED v. DORIS SEARS AND RAEFORD L. SEARS.

(Filed 10 June, 1960.)

1. Trial § 22a—

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff.

2. Automobiles § 33—

It is not unlawful for a pedestrian to cross a public highway, but in crossing a highway at a point other than a marked crosswalk or an unmarked crosswalk at an intersection, a pedestrian is required to yield the right of way to vehicular traffic, although the failure to do so is not negligence *per se*, but only evidence of negligence to be considered by the jury with other facts and circumstances. G.S. 20-174(a).

3. Same—

A motorist, even in those instances in which he has the right of way over a pedestrian, is under the common law duty to exercise due care to avoid colliding with the pedestrian and is under statutory duty to give warning by sounding his horn when necessary and the duty to exercise proper precaution upon observing any child or confused person upon the highway. G.S. 20-174(e).

4. Trial § 22c—

While discrepancies and contradictions in the evidence are for the jury and not the court to resolve, where the evidence is insufficient to make out a cause of action in plaintiff's favor under any version of the evidence, nonsuit is proper.

5. Automobiles § 33—

Where a motorist having the right of way observes a pedestrian, apparently in possession of his faculties, standing in a place of safety, the motorist has the right to assume and act upon the assumption that the pedestrian will recognize her right of way in the absence of anything which should give notice to the contrary.

6. Automobiles §§ 41l, 42k— Evidence held insufficient to show negligence on part of motorist colliding with pedestrian and to show contributory negligence on the part of the pedestrian.

The evidence tended to show that defendant was traveling east upon a two lane highway both lanes of which were for east bound traffic, that the east lanes diverged into two highways of two lanes each and had, from the point of divergence, a triangular paved portion some seven or eight feet wide at the base, not intended for vehicular traffic. The evidence considered in the light most favorable to plaintiff tended to show that, as defendant approached the point where the highways diverged, intending to take the highway to her left, she saw plaintiff's intestate, a man some seventy-seven years old, cross the right highway at a kind of trot, that he stopped on the triangular paved portion between the highways at a point where it was some six feet wide, that defendant slowed her vehicle and blew her horn, that intestate seemed to look around and then began a quickened walk across her lane of traffic, that immediately she apprehended the pedestrian was going to leave his place of safety defendant applied her brakes and swerved to the left lane of the highway, that the front of her car passed intestate, but that he continued forward and collided with the right side of her car, that she stopped her car in about 25 feet after the impact, and that intestate gave the appearance of a man capable of looking after himself. *Held:* The evidence discloses that defendant did all she could to avoid striking the pedestrian after she was put on notice that he was going to leave a place of safety and walk into the highway in the path of her vehicle, and further shows contributory negligence as a matter of law on the part of the pedestrian.

PARKER, J., dissents.

APPEAL by plaintiff from *Hobgood, J.*, February Regular Civil Term, 1960, of WAKE.

Civil action instituted May 8, 1959, in which plaintiff alleged, but did not separately state, two causes of action: (1) a cause of action for personal injuries suffered by Charles F. Rogers, the intestate, from his injury until his death, and (2) a cause of action for the wrongful death of the intestate. (See *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585.)

It was stipulated that Rogers, a pedestrian, died as the result of injuries received from a collision with a 1953 Oldsmobile owned by defendant Raeford L. Sears and operated by defendant Doris Sears.

Issues of negligence, contributory negligence, last clear chance and damages are raised by the pleadings.

At the conclusion of plaintiff's evidence, the motion of Raeford L. Sears for judgment of nonsuit was allowed. Plaintiff did not except to this ruling. Hereafter, "defendant" refers to (Mrs.) Doris Sears.

The accident occurred about 7:45 a.m. on Tuesday, September 30, 1958, on U.S. Highway #1, approximately three miles west of the city limits of Raleigh. Defendant, accompanied by Mrs. Janet Harding Carpenter, was driving east toward Raleigh.

In approaching the scene of accident, defendant had traveled on a 24 foot, two-lane highway, a section of two U.S. highways, to wit, #1 and #64. A short distance east of the Jones-Franklin Road, an intersecting highway, #1 and #64 separate in this manner: (1) #64, a 24 foot, two-lane highway, extends straight toward Western Boulevard, and (2) #1, a 24 foot, two-lane highway, diverges from #64, curves gradually to the left and extends toward Hillsboro Street. All lanes of these highways are exclusively for eastbound traffic.

Beginning 75 feet east of the *point* where #1 and #64 diverge, a "grassy plot" separates the two highways. Between said point of divergence and the grassy plot there is a paved triangular area outside the traffic lanes of #1 and of #64. The composition of the paving in this triangular area is somewhat different from that of #1 and of #64. However, this triangular area is not separated from #1 or from #64 by any barrier, elevation or sign.

The base of the triangle, where this triangular area abuts the grassy plot, is 7 or 8 feet in width. Extending west from this base, the triangular area gradually narrows until it reaches said point where the two highways diverge. To illustrate, 69 feet west of the grassy plot the width of the triangular area is only 7¼ inches.

When the accident occurred defendant was on #1, having passed the point where the highways diverge. After the accident, Rogers was lying in the north lane of #1 (the left of the two lanes for eastbound traffic and farthest from said triangular area), with his head 18 inches north of the line dividing the two lanes of #1 and his body extending north from that point.

Rogers had "a slightly swelled place with a break in the skin" on the left side of his head. No mark, indicating the point of contact, was found on defendant's car.

Rogers was 77 years of age. A witness for plaintiff testified: "He could get about right good for a man of his age."

Sheriff Pleasants and Deputy Sheriff Midgette, en route to Raleigh, happened to arrive at the scene some ten minutes after the accident.

Rogers was lying on the road, ". . . a crowd of folks around him". Several cars were parked nearby. Pleasants testified: "He (Rogers) was conscious and he talked, asking a question or two. He asked, 'What happened?' " There was no evidence as to any other statement made by Rogers.

After Rogers was taken from the scene by ambulance, defendant made certain statements to Pleasants and Midgette, which, together with other evidence, will be set forth in the opinion.

The record indicates defendant made no motion for judgment of nonsuit at the conclusion of plaintiff's evidence, but proceeded to offer her own testimony and the testimony of Mrs. Janet Harding Carpenter, a passenger in the Oldsmobile.

At the conclusion of all the evidence, defendant moved for judgment of nonsuit. (G.S. 1-183) Allowing this motion, the court entered judgment of nonsuit and dismissed the action. Plaintiff excepted and appealed.

Charles F. Blanchard for plaintiff, appellant.
Smith, Leach, Anderson & Dorsett for defendant, appellee.

BOBBITT, J. Only one question is presented: Was the evidence, when considered in the light most favorable to plaintiff, sufficient to require submission to the jury? *Murray v. Wyatt,* 245 N.C. 123, 128, 95 S.E. 2d 541.

It is not unlawful for a pedestrian to cross a public highway. If while so engaged, he is injured or killed from contact with a motor vehicle on such public highway, the statutory rule as to right of way is relevant.

Relevant to the alleged (contributory) negligence of Rogers, G.S. 20-174(a) provides: "Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right-of-way to all vehicles upon the roadway." However, a pedestrian's failure to yield the right of way is not (contributory) negligence *per se,* but only evidence thereof for consideration with other facts and circumstances. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323, and cases cited; *Simpson v. Curry,* 237 N.C. 260, 74 S.E. 2d 649; *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762; *Moore v. Bezalla,* 241 N.C. 190, 84 S.E. 2d 817; *Landini v. Steelman,* 243 N.C. 146, 90 S.E. 2d 377, and cases cited.

Relevant to the alleged negligence of defendant, G.S. 20-174(e) provides: "Notwithstanding the provisions of this section, every driver

of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway." Independent of statute it is the duty of the motorist at common law to "exercise due care to avoid colliding with" a pedestrian. *Landini v. Steelman, supra.*

With these well-settled principles in mind, a critical analysis of the evidence is necessary to decision.

Apart from testimony as to physical facts, the evidence consists of the testimony of Sheriff Pleasants and Deputy Sheriff Midgette (plaintiff's evidence) and of the testimony of defendant and Mrs. Carpenter (defendant's evidence).

It is noted that Pleasants and Midgette stated frankly they were not quoting defendant "verbatim" or "exactly" but were testifying to the substance of what defendant told them.

Pleasants, whose testimony was brief, testified: "Mrs. Sears said that she was driving north on Highway No. 1 and saw a man crossing from the right side of the road to the left side, from her right to the left . . . she said it was from the right side that he came going east toward Raleigh and she stated that Mr. Rogers ran into her car from the right side of the road going across to the left side."

Midgette, on direct examination, testified: "She (Mrs. Sears) said she was going east on No. 1 at about 45 M.P.H. and when she saw him she took her foot off the accelerator. She said she was *in the north lane, the left lane, the one farthest north* . . . she said she was some 200 or 300 feet away when she first saw the pedestrian. She said when she first saw him he was stepping into *the southern lane* going across the highway, going in a northern direction. She said he looked like he was kind of off balance, kind of running or trotting like he was trying to catch up himself, like he was going forward . . . she said . . . when she saw this man she took her foot off the accelerator and slowed down somewhat and *when he got to the center portion of the road where there is no lane,* that he gave her the impression that he slowed up and she hit the gas again and was going to go by him when she realized that he was going out there and she swerved to the left to miss him. She said she had slowed down to about 30 M.P.H. when she hit the gas again; that she didn't know about how fast she was going but not too much faster, that she had just hit the gas and that she swerved and heard something, some sound, hit the side of her car and that she didn't know just what it was." (Our italics)

Midgette, on cross-examination, testified as follows: "She stated . . . when she saw the man, that after she saw the man, he came *to the center of that road on that V-part.* She said that when he reached that part in the center he straightened up. I wouldn't say that she said he stopped, but I got the impression she meant that, but I don't know. . . . After he, the pedestrian, was in a position in the middle of that V-portion he was then outside of Mrs. Sears' lane of travel. After that time, she said he then started forward again towards her car after she had put her foot back on the gas to proceed. At that time, she attempted to swerve to her left, she said. She said the pedestrian's body brushed against her car, but she didn't know where, but somewhere against the side of the car. . . . Mrs. Sears said that there was a car proceeding ahead of her to her right on Highway No. 64 in the southern lane, the furtherest lane. She told me that there was a car in that lane and that when she first saw the man he came out from behind the car. When she referred to the man coming from behind that car, that would mean he came from behind the car from her, that would be in front of the car as it was proceeding." (Our italics)

When all of Midgette's testimony is considered, it is clear the expression, "the north lane, the left lane, the one farthest north," as used in his testimony on direct examination, refers to #1 as distinguished from #64 rather than to the dividing line between the two lanes of #1; and his expression, "the center portion of the road where there is no lane," as used in his testimony on direct examination, refers to the "V" or triangular area separating #1 and #64.

Defendant, in substance, testified: When approaching the point where #1 and #64 diverge, and when about 75 feet therefrom, she saw Rogers "standing on or near the pavement that divides these two main highways." He "was walking more or less in the same direction (she) was going . . ." He was on her right, had crossed #64; but she did not see him cross #64. She took the right lane of #1. She took her foot off the gas; and, when she blew her horn, he seemed to look around. Then "he began in a quickened walk or headlong motion onto (her) travelled portion of the road." She then applied her brakes "stronger" and swerved to the left lane of #1. The front of her car missed his body but something struck the car "about middleway". She continued to apply her brakes and stopped in about 25 feet. Looking back she saw the blow had been strong enough to cause him to fall to the pavement. She then parked her car and went back to see if there was anything she could do to help. When she saw the man (Rogers), "he looked like any ordinary man that was capable of

looking after himself . . ." She was "real surprised to hear that he was 77 years old. He seemed to be very active."

On cross-examination, defendant testified she didn't apply her brakes until she was "two car lengths away from him. He was in no danger from me whatsoever." She did not blow her horn until she was within 75 feet of him and did not "let off" her accelerator until she was within four car lengths. She was going about 15 miles per hour when the collision occurred. Pleasants and Midgette misunderstood her if they got the impression she said she saw this man "walking in a northerly direction from the southern edge of this highway across 54 feet of pavement to the northern edge of the highway." Rogers was not weaving or unsteady and did not give that appearance. He gave no indication that he was going to or was likely to go upon the highway in front of her until he actually did so.

Mrs. Carpenter's testimony was substantially in accord with that of defendant. According to Mrs. Carpenter: When she first observed Rogers he was "in the little paved portion" between the two highways. He "seemed to be walking, but not toward our lane." When he quickened his pace and "started on to our travelled portion of the road," defendant applied her brakes, swerved to the left and the front of her car passed him; but Rogers "kept right on coming toward the side of the car" and "walked into the right hand side of the door where (she) was sitting." Defendant stopped within "about two car lengths" beyond the point of collision. At the time of collision, the two left wheels of defendant's car were "off the highway".

Obviously, the testimony as to what defendant told the officers at the scene of the accident differs in several respects from evidence offered in behalf of defendant at the trial. While advertent to the rule that discrepancies and contradictions in the evidence must be resolved by the jury and not by the court, *White v. Lacey*, 245 N.C. 364, 369, 96 S.E. 2d 1, the question here is whether, under either version of what occurred, the evidence was sufficient for submission to the jury.

We think it clear, if defendant's evidence is accepted, there was no reason for defendant to anticipate that Rogers would walk from his place of safety, outside the traffic lanes, into the path of defendant's approaching car. Unless and until put on notice to the contrary, she had a right to act on the assumption the pedestrian would recognize her right of way and not obstruct it. *Grant v. Royal*, 250 N.C. 366, 368, 108 S.E. 2d 627, and cases cited. If defendant's evidence is accepted, she did all she reasonably could have done to

avoid striking Rogers after he stepped from his place of safety into the path of her car.

When we consider plaintiff's evidence, that is, the testimony as to defendant's statements to the officers at the scene of accident, this occurred: Defendant saw Rogers cross #64, from the south to the north side of #64, in front of a car proceeding on #64, at which time "he looked like he was kind of off balance, kind of running or trotting like he was trying to catch up himself," but he straightened up and stopped when he reached the center of the road "on that V-part." Nothing in the statement attributed to the defendant indicates Rogers was off balance or otherwise incapacitated or confused after he reached "that V-part". The only reasonable inference to be drawn from plaintiff's evidence is that Rogers gave such appearance when hurrying across #64 in front of a car proceeding thereon. We think it equally clear, if plaintiff's evidence is accepted, that defendant had no reason to anticipate that Rogers would walk from his place of safety, outside the traffic lanes, into the path of defendant's approaching car, and that defendant did all she reasonably could have done to avoid striking Rogers after he stepped from his place of safety into the path of her car.

Defendant was traveling in a 45 mile speed zone. She did not exceed this speed at any time and her speed was less when Rogers walked into her lane of travel. Whether defendant first saw Rogers when he was 200-300 feet away or when he was 75 feet away is immaterial. In either event, defendant, after she first saw Rogers, could have stopped her car before she reached the scene of accident if she had then undertaken to do so. The crucial question is whether she could have stopped before reaching the scene of accident after she saw or should have seen that Rogers was leaving or likely to leave his place of safety and walk into the traffic lane on which she was proceeding. We think the evidence insufficient to show that she could have done so.

If negligence on the part of defendant were conceded, we think the evidence so clearly establishes contributory negligence on the part of Rogers that no other reasonable inference or conclusion can be drawn therefrom. *Dennis v. Albemarle,* 242 N.C. 263, 87 S.E. 2d 561.

If Rogers had remained on the "V-part," outside the traffic lanes, he would have suffered no injury. He could and should have observed defendant's car, lawfully approaching in its lane of travel, fully as well as defendant could and should have observed him. Instead of first looking to ascertain whether he could do so in safety, he left his place of safety and walked into defendant's lane of travel. Not-

withstanding defendant swerved into the left lane, and thereby avoided striking him, Rogers continued to walk until he crossed the center line and walked into the right side of defendant's passing car.

While it appears defendant was unable to stop her car in time to avoid the accident, Rogers himself, by failing to take a single step, could have halted his forward progress sufficiently to have done so. Indeed, it appears he had the last clear chance to avoid the accident. As stated by *Higgins, J.*, in *Barnes v. Horney,* 247 N.C. 495, 498, 101 S.E. 2d 315: "Defendant's liability (under the last clear chance doctrine) is based upon a new act of negligence arising after negligence and contributory negligence have canceled each other out of the case."

The factual situation here is similar to that considered in *Jenkins v. Johnson,* 186 Va. 191, 42 S.E. 2d 319, cited with approval in *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589. This is a much stronger case for defendant than *Garmon v. Thomas, supra,* where plaintiff was held contributorily negligent as a matter of law. There, the plaintiff walked across the highway, without stopping, and had nearly reached the opposite side of the highway when struck by the right front portion of defendant's truck. The defendant did not swerve to his left or otherwise undertake to avoid striking plaintiff but continued in a direct line in his lane of travel. There, the defendant's truck struck a pedestrian who was walking across his line of travel. Here, defendant's car did not strike the pedestrian and no injury would have occurred but for the fact that Rogers continued to walk until he collided with the right side of defendant's car.

We have not overlooked the contention in plaintiff's brief that the triangular area, at the point from which Rogers entered the (south) traffic lane of #1, was only 9 inches wide, and hence could not be reasonably considered a place of safety. The only basis for this contention is indicated below.

Plaintiff offered in evidence a map made February 6, 1960, based on a survey, which shows the area from the Jones-Franklin intersection to and beyond (east) the "grassy plot" between #1 and #64. The surveyor indicated by an "X" the point where #1 and #64 diverge.

Midgette testified that he, while at the scene of collision on the morning of September 30, 1958, assisted by a State Highway patrolman, measured with a steel tape "the total width of the paved portion of the highway at the point where (he) found the man lying and that measured across there a total of 54 feet." Again: "This left 6 feet in the middle of those four lanes of travel which was a vacant place not used for vehicular traffic."

At plaintiff's request, Midgette put a mark on the map, an en-

circled "X" with the letter "A" beside it, indicating the point where Rogers was lying. Midgette's testimony, considered in context, shows plainly that he was indicating the position of Rogers with reference to the line dividing the two lanes of #1, that is, as being (as he testified) 18 inches north thereof. His testimony was explicit to the effect that the width of the triangular area at the place where Rogers was lying was 6 feet.

Plaintiff points out that the over-all width of the pavement at the point indicated on the map by Midgette as the place where Rogers was found, applying the scale of the map, measures 48.75 feet. Upon this basis, plaintiff contends, contrary to Midgette's explicit testimony, that the portion of the triangular area on which Rogers was standing or walking before he entered upon the traffic lanes of #1 was only 9 inches wide. Suffice to say, the evidence of Midgette, when considered in context, is insufficient to support this ingenious contention. The positive testimony of Midgette shows the width of the paved triangular area opposite the point where Rogers was lying on the road was six feet.

For the reasons stated, the judgment of nonsuit is affirmed.

Affirmed.

PARKER, J., dissents.

LUCILLE PRATT, EMPLOYEE v. CENTRAL UPHOLSTERY CO., INC., EMPLOYER, AND TEXTILE INSURANCE CO., INSURANCE CARRIER.

(Filed 10 June, 1960.)

1. Master and Servant § 93—

Where there are no exceptions by any of the parties to the findings of fact by the hearing commissioner, the findings are final and conclusive. G.S. 97-86.

2. Master and Servant § 94—

Claimant's exception to the judgment of the Superior Court upon appeal from an award of the Industrial Commission presents the sole question whether the findings of fact support the judgment.

3. Master and Servant § 91—

Approval by the Industrial Commission of an agreement of the parties for payment of compensation is a judicial act, and the approved agreement becomes an award of the Industrial Commission. G.S. 97-87.

4. Same: Master and Servant §§ 82, 88—

The approval by the Industrial Commission of an agreement of the parties for compensation for a stipulated amount to begin on a specified date and "continuing for legal weeks", which agreement is executed before the employee returns to work and has blank spaces for showing the date of return to work and the wages earned upon such return, and without the submission to the Commission of a medical report, *is held* not a final award, but an interlocutory award, and the Industrial Commission retains jurisdiction to enter a final award upon the filing of a full and complete medical report. G.S. 97-82.

5. Master and Servant § 67: Evidence § 4—

The presumption that disability ends when an employee returns to work is a presumption of fact and not of law and is rebuttable, and such presumption is without weight in the face of facts establishing that an employee had partial incapacity during the healing period after her return to work and partial permanent disability thereafter.

6. Master and Servant §§ 74, 82, 88, 91—The Industrial Commission retains jurisdiction until a final award is entered.

The Industrial Commission approved an agreement of the parties for the payment of compensation made prior to the filing of any medical report and prior to the time the employee returned to work. Thereafter the employee returned to work after a medical report had been made answering the question of whether the accident resulted in permanent disability with question marks. Upon returning to work, the employee was assigned other duties at reduced wages because of disability preventing her from sitting for long periods of time. The employee remained under the care of a physician for some eight months, at which time she was discharged, and the physician filed an additional medical report stating that the employee had sustained a ten per cent permanent disability as a result of the accident. The employee, upon learning of the final report some seven months after it had been delivered to the car-

rier, requested a hearing. *Held:* The hearing was not for change of condition and G.S. 97-47 has no application, and since no final award had been made, the Industrial Commission has jurisdiction to award additional compensation for the period from the date the employee returned to work to the end of the healing period, and to award further compensation for partial permanent disability thereafter.

7. Master and Servant § 90—

The fact that an employee has accepted a check marked as final payment of temporary total disability does not estop the employee from prosecuting a claim for partial permanent disability when the employee has signed no "closing receipt".

APPEAL by plaintiff from *Crissman, J.*, November 1959 Term, of GUILFORD (High Point Division).

This is a proceeding under the Workmen's Compensation Act, G.S. 97-1 *et seq.*

Claimant: Lucille Pratt, employee.

Defendants: Central Upholstery Company, Inc., employer, and Textile Insurance Company, insurance carrier.

Employer and employee are subject to and bound by the provisions of the Workmen's Compensation Act. On 29 April 1957 claimant was injured by accident arising out of and in the course of her employment. Her average weekly wage at the time of injury was $73.07. Defendants admitted liability and they and employee entered into an agreement on Industrial Commission form 21, pursuant to which compensation was to be paid at the rate of $32.50 per week beginning 7 May 1957 and "continuing for legal weeks." The agreement was approved by the Commission on 20 May 1957.

Employee suffered injury to the coccyx (tail bone) in falling on a concrete floor. Surgery was necessary. A coccygectomy was performed and the distal two segments of the tail bone were removed.

On 12 August 1957 Dr. Schafer submitted to carrier on I. C. form 25 a medical report outlining procedures including the coccygectomy and answered the question, "Has this accident resulted in any permanent disability?", with three question marks. This report was approved by the Commission on 20 August 1957.

Under Dr. Schafer's instructions claimant returned to work for defendant employer on 19 August 1957, but was unable to perform her regular duties for the reason that she could not sit for a long period of time. She was assigned other duties that permitted her to stand while working. For more than a year she continued in jobs that could be performed while standing.

Claimant remained under the care of Dr. Schafer. He examined and treated her on fifteen occasions from 23 September 1957 to 3

April 1958. She reached the end of the healing period and was discharged from the doctor's care on 3 April 1958. On 4 April 1958 Dr. Schafer prepared an additional report on form 25, and stated that the accident resulted in permanent injury to claimant because of loss of coccyx, she has ten percent permanent disability of the spine, and she may require further treatment. This report was received by carrier on 8 April 1958. It was approved by the Commission on 20 November 1958.

Claimant, during the period from 19 August 1957 to 3 April 1958, because of the injury had partial incapacity for work and earned an average of $60.60 per week. Impairment of her wage-earning capacity was $12.47 per week.

As a result of the injury claimant has ten percent permanent loss of use of her back.

The last payment of compensation was made to claimant on 19 August 1957 by check dated 16 August 1957. There was a notation on the check: "Final payment of temporary total disability."

About two weeks before claimant returned to work carrier's adjuster told her that carrier would advise her in the event Dr. Schafer gave her a permanent disability rating. She had no knowledge of the permanent disability rating until November 1958. Carrier then advised that her claim was barred by statute.

On 25 November 1958 claimant by letter requested a hearing. The request was received by the Commission on 2 December 1958. Hearing was held 13 April 1959 before Deputy Commissioner Thomas.

After finding the facts above related, the Deputy Commissioner concluded that the Commission has jurisdiction, the claim does not involve a "change of condition" and is not barred by G.S. 97-47, she is entitled to additional compensation which has not been adjudicated, she is entitled to compensation of $7.48 per week for the period from the date of her return to work to the end of the healing period, and $10.00 per week for 300 weeks beginning 4 April 1958 for partial permanent loss of use of her back. The Deputy Commissioner entered an award accordingly.

Defendants appeal to the Full Commission. By award of a divided Commission, it was concluded that claimant's incapacity to earn her former wages constitutes a "change of condition" and her claim is barred by G.S. 97-47 since it was filed more than a year after final payment under the agreement. Compensation was denied.

On claimant's appeal to Superior Court the Commission's award was affirmed. Claimant appealed and assigned error.

Harold I. Spainhour for plaintiff, appellant.
Charles W. McAnally for defendants, appellees.

MOORE, J. There are no exceptions by any of the parties to the findings of fact by the Deputy Commissioner and they are final and conclusive. G.S. 97-86. *Winslow v. Carolina Conference Association,* 211 N.C. 571, 582, 191 S.E. 403. Claimant's exception to the judgment below raises the question: Do the facts found support the judgment? *Wyatt v. Sharp,* 239 N.C. 655, 658, 80 S.E. 2d 762; *Rader v. Coach Co.,* 225 N.C. 537, 539, 35 S.E. 2d 609. So our inquiry is whether the findings of fact support the legal conclusion that employee's claim for additional compensation is barred by G.S. 97-47 and the award denying compensation.

The pertinent provisions of G.S. 97-47 are as follows: "Upon its own motion or upon application of any party in interest on the grounds of a *change in condition,* the Industrial Commission may *review any award,* and on such review may make an award ending, diminishing or increasing the compensation *previously* awarded . . . but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article . . ." (Emphasis ours).

Decision here requires answers to three questions: (1) Was there a full and final award of all compensation to which claimant was entitled by virtue of her initial claim? (2) If not, has claimant waived her right to a final award of compensation? (3) Do the facts found disclose a change of claimant's condition prior to her final request for hearing?

Defendants admitted liability and entered into an agreement with employee on I. C. Form 21 for payment of compensation. This agreement was approved by the Commission. When, pursuant to G.S. 97-82, an agreement by employer and employee is submitted to the Commission for approval, the judicial authority of the Commission is invoked. In the process of considering and approving the agreement the Commission is engaged in a judicial act. An approved agreement becomes an award of the Commission enforceable by a court decree. G.S. 97-87. *Biddix v. Rex Mills,* 237 N.C. 660, 663, 75 S.E. 2d 777.

An examination of the agreement signed by employer and employee and approved by the Commission is necessary to an understanding of the problem here presented. The agreement was introduced in evidence both by claimant and defendants and its contents will be given the same effect as if stipulated. It admits liability on the part of employer, states that employee injured the "lower end of spine," and

declares that payment of compensation at the rate of $32.50 per week shall begin 7 May 1957 and continue "for legal weeks." It shows that the first payment was received 20 May 1957. Paragraph 7 of the agreement provides spaces for showing the date of return to work and the wages earned upon return to work. These spaces are blank. The agreement was approved by the Commission 31 May 1957. G.S. 97-82 provides that the memorandum of agreement (form 21) submitted to the Commission for approval shall be "accompanied by a full and complete medical report." No medical report was submitted to the Commission with the agreement. The agreement was approved by the Commission two months and nineteen days before claimant returned to work and without a medical report having been submitted. It was approved at a time when the post-coccygectomy condition of claimant had not been determined with sufficient definiteness to form the basis for a complete determination of all employee's right to compensation. G.S. 97-82 and I. C. Form 21 contemplate that the agreement will not be finally approved and compensation determined until the Commission has before it a *full* and *complete* medical report. "An accident resulting in compensable injuries to an employee . . . gives only one right of action or claim to the employee, and an award made should, within the statutory limits, compensate for the disability, irrespective of the number of elements which go to make up the disability." *Smith v. Red Cross,* 245 N.C. 116, 119, 95 S.E. 2d 559. The Commission is not in a position to make a proper award, approve an agreement, until the extent of incapacity and permanent impairment, if any, are determined. The Commission did not have in hand a full and complete medical report until November 1958.

The approval of the agreement on 31 May 1957 was an adjudication that employer was liable for such compensation as employee was entitled to receive under the Act, the date when compensation began, the amount of weekly payments for temporary total disability, and nothing more. It was only a preliminary and interlocutory award. It does not purport to fix and determine the full amount of compensation to which employee was entitled. It does not contain sufficient information from which the Superior Court could have entered judgment in accordance with the provisions of G.S. 97-87. The blank spaces in paragraph 7 of the agreement indicate that employee had not returned to work and the extent of partial incapacity and permanent disability, if any, had not been determined. After the approval of the agreement on 31 May 1957 the action was still pending for a final award. "A claim for compensation lawfully constituted and pending before the Commission may not be dismissed without a hearing

and without some proper form of final adjudication. No statute of limitations runs against a litigant while his case is pending in court." *Hanks v. Utilities Co.*, 210 N.C. 312, 320, 186 S.E. 252.

It is true that there is a presumption that disability ends when the employee returns to work. *Tucker v. Lowdermilk*, 233 N.C. 185, 189, 63 S.E. 2d 109. But this is a presumption of fact and not of law. This Court has held that a rebuttable presumption may not under certain circumstances be weighed against the evidence. *In re Will of Wall*, 223 N.C. 591, 596, 27 S.E. 2d 728. The facts found conclusively establish in this case that employee had partial incapacity during the healing period after her return to work and partial permanent loss of use of her back. The parties are bound by these findings and the presumption is without weight.

The employer had knowledge from the date of claimant's return to work that she did not have capacity to earn her former wages. From the doctor's report of 12 August 1957 employer, carrier and the Commission knew that the healing period had not ended and the amount of permanent disability, if any, had not been determined. The inquiry relating to permanent disability in the doctor's report, I. C. Form 25, had been answered with three question marks. This could have but one meaning — the doctor had not yet been able to make the determination. From the doctor's report of 4 April 1958 employer and carrier knew that employee had ten percent permanent loss of the use of her back. Carrier withheld this information from claimant and the Commission for more than seven months. We conclude that carrier hoped to find acquittal in G.S. 97-47.

Claimant's action was pending for final award. She promptly asked for a hearing when she learned the content of the doctor's report of 4 April 1958. She had done nothing to waive her right to a proper and final award. The acceptance and endorsement of the check dated 16 August 1957 does not constitute a waiver or estoppel. The notation on the check, "Final payment of temporary total disability," is not and does not purport to be final payment of the additional compensation to which she was entitled. It is significant that claimant was not requested to sign a closing receipt, I. C. Form 27. A closing receipt purports to be a final settlement and indicates that no further compensation will be paid unless request for hearing for change of condition is made within a year from date of the receipt. It states: "The use of this form is required under the provisions of the Workmen's Compensation Act." *Smith v. Red Cross, supra.* Rule XI(3) promulgated by the Commission pursuant to G.S. 97-80 provides that "no agreement for permanent disability nor any closing receipt will

be approved until all medical reports in the case have been filed with the Commission." Claimant did not sign a closing receipt. Had she signed such receipt with the approval of the Commission it would have acquitted the employer. G.S. 97-48(b).

It all comes to this: The agreement presented to the Commission invoked the judicial authority of the Commission, a preliminary and interlocutory award was made by approval of the agreement, there has been no final determination of compensation, and claimant has not waived her right to such adjudication. The Commission does not exceed its authority when it retains jurisdiction for futher adjustments pending final award. *Branham v. Panel Co.*, 223 N.C. 233, 238, 25 S.E. 2d 865. G.S. 97-47 is inapplicable if there has been no final award. *Biddix v. Rex Mills, supra,* at page 666.

But it is asserted that there was a change in claimant's condition within the meaning of G.S. 97-47. No case decided by this Court has come to our attention in which the factual situation here involved has been termed a "change of condition." Change of condition "refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition." 101 C.J.S., Workman's Compensation, sec. 854(c), pp. 211-2. Whether there has been a change of condition is a question of fact; whether the facts found amount to a change of condition is a question of law. Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings. *Hill v. DuBose,* 234 N.C. 446, 67 S.E. 2d 371; *Knight v. Body Co.*, 214 N.C. 7, 197 S.E. 563; *Smith v. Swift & Co.*, 212 N.C. 608, 194 S.E. 106. Changes of condition occurring during the healing period and prior to the time of maximum recovery and the permanent disability, if any, found to exist at the end of the period of healing are not changes of condition within the meaning of G.S. 97-47.

It is our opinion, and we so hold, in the instant case that G.S. 97-47 does not bar employee's claim in that, at the time she requested a hearing there had been no final award of compensation which could be ended, increased or diminished by review, no change of condition was involved, and she had not waived her right to a final adjudication.

We observe parenthetically that the equities are strongly in favor of employee.

Our decision here is factually distinguishable from the cases cited by appellees. In *Smith v. Red Cross, supra,* employee returned to

work two months after the accident at the same wage she was receiving prior to the injury, she signed a closing receipt (Form 27) when she returned to work, and she worked regularly for more than a year before filing claim for permanent disability. "The agreement . . . approved by the Commission . . . (and) the *closing receipt* by plaintiff employee more than a year prior to filing application . . . puts the case beyond the time given by G.S. 97-47 . . ." (Emphasis ours). Other cases are: *Tucker v. Lowdermilk, supra* (closing receipt and recurrence of temporary total disability after return to work); *Paris v. Builders Corp.*, 244 N.C. 35, 92 S.E. 2d 405 (lump sum settlement for permanent partial disability, followed by change of condition more than a year later); *Smith v. Swift & Co., supra* (partial permanent disability awarded following temporary total disability, later employed by different employer, increase in wages shows change of condition after final award); *Lee v. Rose's Stores, Inc.*, 205 N.C. 310, 171 S.E. 87 (recurrence of disability nearly two years after return to work).

The judgment below is reversed and the cause is remanded to Superior Court that judgment be entered directing the Industrial Commission to award compensation in compliance with G.S. 97-31 and the facts found and proceed to a conclusion of the cause as provided by the Act.

Reversed and remanded.

GILES BYRD AND WIFE, ELOISE W. BYRD v. LLOYD FREEMAN AND WIFE, VIOLA FREEMAN; J. K. YOUNG AND WIFE, LETCY YOUNG; AND W. J. BAREFOOT AND WIFE, FRANCES W. BAREFOOT.

(Filed 10 June, 1960.)

1. Vendor and Purchaser § 23—

A contract whereby the owner of land grants to another for a valuable consideration the right to purchase the land within a specified time upon stated terms and conditions, is irrevocable, and upon acceptance in accordance with its terms gives rise to a contract specifically enforceable.

2. Appeal and Error § 35—

Where the charge of the court is not in the record, it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts.

3. Vendor and Purchaser § 23— Evidence held to disclose acceptance by purchasers in accordance with terms of option contract.

The purchasers' evidence to the effect that prior to the execution of the option contract the parties went upon the land and pointed out the physical boundaries of that part of the tract which was to be excepted from the conveyance, that the option agreement provided for the conveyance of the tract, except ten acres more or less, that the purchasers' surveyor made a map of the portion to be excepted, containing 9.2 acres, in accordance with the boundaries thus pointed out, that the vendors contended that this map was not in accordance with the physical boundaries as pointed out, but that a correct survey thereof would show a tract of 11.5 acres, and that prior to the expiration of the option the purchasers tendered the balance of the agreed purchase price and agreed to accept deed excepting the 11.5 acres from the conveyance, *is held* sufficient to be submitted to the jury in the purchasers' action for specific performance on the propositions as to whether the 9.2 acre tract was in accordance with the physical boundaries agreed upon by the parties, and, if not, whether the purchasers agreed to accept deed excepting from the conveyance 11.5 acres in accordance with the vendors' contentions.

4. Same— Purchasers waiving agreement for division of agricultural allotments inserted in contract for their benefit may enforce specific performance.

The option agreement in suit provided for the sale of a part of a tract of land with provision for division of cotton and tobacco allotments in specified amounts as a material part of the consideration for the agreement. *Held:* In the purchasers' action for specific performance, vendors are not entitled to nonsuit on the ground that the division of the crop allotments was precluded by regulations under the Agricultural Adjustment Act when the evidence discloses that the provisions relating thereto were inserted at the instance and for the benefit of the purchasers, that the purchasers rather than the vendors were adversely affected in that the regulations precluded the transfer to them

of the entire tobacco allotment agreed upon while giving the vendors a higher tobacco allotment and a smaller cotton allotment, and that the purchasers agreed to accept deed in accordance with the agricultural regulations, the value of the additional tobacco allotment gained by vendors being much greater than the value of the cotton allotment lost to them under the regulations.

5. Same—

The right to specific performance must be determined by the court in accordance with the equities arising upon consideration of all the facts and circumstances of each particular case.

APPEAL by defendants from *McKinnon, J.*, September-October Term, 1959, of COLUMBUS.

Civil action to enforce specific performance of a contract (option) dated September 26, 1958, and recorded in Book 216, page 115, in the office of the Register of Deeds of Columbus County, North Carolina, in which defendants Freeman, for the consideration and upon the conditions stated, agreed to convey certain described lands (68 acres, more or less) in Waccamaw Township except the dwelling house of defendants Freeman and "ten acres, more or less, on which same is located," to be "run off by a surveyor and properly identified by courses and distances." The record does not show when the contract was filed for registration.

The contract provided that, if the option granted to plaintiffs was exercised on or before 12:00 o'clock noon on October 11, 1958, by the (additional) payment of $7,400.00 ($100.00 having been paid when the contract was executed), defendants Freeman would then convey the lands to plaintiffs in fee simple, free and clear of encumbrances, by warranty deed.

The contract contains this provision: "It is further understood and agreed that, if this option is exercised, the parties hereto will execute such instruments as may be necessary to transfer and assure to parties of the second part (plaintiffs) three acres of the present tobacco allotment, and to the parties of the first part (defendants Freeman) one tenth of an acre of the present tobacco allotment, one acre of the peanut allotment, 1.7 acres of the cotton allotment, and all corn allotment; it being understood that the division of said allotments set forth is a material part of the consideration for this transaction and that such leases or other instruments as may be necessary to effect said intention will be executed."

Uncontradicted evidence is to the effect that plaintiffs, on October 11, 1958, and in apt time, tendered the (additional) $7,400.00, and that defendants Freeman refused to accept such tender and execute a deed as demanded by plaintiffs.

Thereafter, all or part of the land described in the contract was purportedly conveyed by deed dated October 22, 1958, and recorded in Book 212, page 341, said Registry, from defendants Freeman to defendants Young. This deed was filed for registration on October 23, 1958.

This action was instituted against defendants Freeman and Young on December 19, 1958; and, simultaneously with the commencement of this action, a notice of *lis pendens* in the usual and proper form was filed and spread upon the records in the office of the Clerk of Superior Court of Columbus County. Subsequently, defendants Barefoot were made parties.

All of the land described in the contract, except a tract of 11.5 acres referred to in the opinion, was purportedly conveyed by a deed dated December 18, 1958, and recorded in Book 216, page 440, said Registry, from defendants Young to defendants Barefoot. This deed was filed for registration on December 22, 1958.

Plaintiffs, in substance, alleged: They had fully complied with the contract. The purported deed from defendants Freeman to defendants Young was void as to plaintiffs for that it was made by defendants Freeman without consideration, for the fraudulent purpose of breaching their contract with plaintiffs, and defendants Young acquired no beneficial interest in the lands described therein. In addition to specific performance, they were entitled to recover for loss of rents and profits for the period subsequent to October 11, 1958.

A joint answer was filed by defendants Freeman and Young. A separate answer was filed by defendants Barefoot.

In addition to general denials, all defendants, in substance, alleged that plaintiffs were not entitled to specific performance or other relief for two reasons: (1) Prior to the execution of the contract of September 26, 1958, Giles Byrd and Lloyd Freeman marked off and agreed upon the boundaries of the tract to be excepted from the conveyance, namely, a tract of 11.5 acres, but plaintiffs refused to accept the deed and pay the purchase price if the deed were so drawn. (2) The provisions with reference to crop allotments were in violation of the regulations of the Agricultural Stabilization "Corporation" and "impossible of performance."

Evidence was offered by plaintiffs and by defendants.

The court submitted, and the jury answered, these issues: 1. Did the plaintiff Byrd sufficiently comply with the terms of the Option Agreement? ANSWER: Yes. 2. Was the deed from Lloyd Freeman and wife to J. K. Young and wife executed without consideration for

the fraudulent purpose of breaching an agreement with the plaintiffs Byrd? ANSWER: Yes. 3. What amount if any, is *(sic)* the plaintiffs entitled to recover from the defendants Barefoot for loss of rents and profits? ANSWER: $600.00."

From a judgment for plaintiffs, decreeing specific performance and for the recovery from defendants Barefoot of $600.00 as rents and profits for the use of the lands for the year 1959, and taxing defendants with the costs, defendants excepted and appealed.

Powell, Lee & Lee for plaintiffs, appellees.
Proctor & Proctor and Powell & Powell for defendants, appellants.

BOBBITT, J. Defendants present one question: Did the court err in refusing to grant the motion for judgment of nonsuit made by defendants at the close of all the evidence?

All grounds asserted by defendants in support of their contention that their said motion for judgment of nonsuit should have been granted relate solely to matters involved in the first issue. Hence, discussion of evidence relevant only to the second and third issues is unnecessary.

"A contract, whereby one party, for a valuable consideration, grants to another an option on terms, conditions, and for a time, specified, to call for the doing of a certain act, constitutes an irrevocable offer which, on acceptance in accordance with its terms, gives rise to a contract that may be specifically enforced." 81 C.J.S., Specific Performance § 47; 49 Am. Jur., Specific Performance § 117; Williston on Contracts, Revised Edition, Vol. 5, § 1441; *Timber Co. v. Wilson,* 151 N.C. 154, 65 S.E. 932; *Samonds v. Cloninger,* 189 N.C. 610, 127 S.E. 706; *Trust Co. v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367.

Uncontradicted evidence tends to show these facts: On the morning of September 26, 1958, Giles Byrd and Lloyd Freeman went upon the Freeman lands and identified the physical boundaries of the tract of ten acres, more or less, to be retained by the Freemans. The lines of this tract were to be surveyed in order to get the calls for a description by course and distance. Thereafter, the contract of September 26, 1958, was drafted by R. H. Burns, Jr., an attorney, and executed by defendants Freeman in Burns' office.

After execution of the contract, Bland, a registered surveyor, made a map of the tract to be retained by the Freemans in accordance with the physical boundaries *as pointed out to him by Byrd.* The tract shown on the Bland map contains 9.2 acres.

Prior to and on October 11, 1958, Freeman contended the Bland

map was not in accord with the physical boundaries upon which he and Byrd had agreed; that the tract to be retained by the Freemans, if surveyed according to the agreed physical boundaries, contained 11.5 acres; and that the tract of 11.5 acres is shown on a map made by Schnibben, registered surveyor.

The difference between the two tracts is that the Schnibben map shows a triangular area south of the south line of the 9.2 acre tract shown on the Bland map. (Note: The evidence tends to show this triangular area of 2.3 acres was "woodsland" and was not relevant in determining the division of the crop allotments.)

The charge of the trial court was not included in the record on appeal. Hence, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104.

A provision in the judgment indicates the jury found the 9.2-acre tract shown on the Bland map was in accordance with the physical boundaries upon which Byrd and Freeman had agreed. Moreover, there was evidence to the effect that, on the occasion of their tender on October 11, 1958, plaintiffs agreed to accept "the deed for the same lands that were later deeded to Barefoot," that is, a deed providing that the tract of 11.5 acres shown on the Schnibben map was excepted from the conveyance.

On this phase of the case, there was ample evidence for submission to the jury in connection with the first issue on these propositions: (1) Was the 9.2-acre tract surveyed in accordance with the physical boundaries agreed upon by plaintiffs and defendants Freeman prior to the execution of the contract of September 26, 1958? (2) If not, did plaintiffs, on the occasion of their tender, agree to accept a deed excepting from the conveyance the 11.5 acres shown on the Schnibben map? It appears that the jury resolved one or both of these questions against defendants.

As to crop allotments, uncontradicted evidence tends to show: Under regulations issued by the Secretary of Agriculture pursuant to the Agricultural Adjustment Act of 1938, as amended, U.S.C.A., Title 7, § 1281 *et seq.,* referred to hereafter as the ASS (Agricultural Stabilization Service) regulations, the division of crop allotments is made on the basis of *cleared* land. The Freeman lands included a total of nineteen acres of cleared land. The lands to be conveyed by defendants Freeman to plaintiffs included thirteen acres of cleared land and the land to be retained by defendants Freeman included six acres of cleared land. Each farm, after division, would have an allotment of one acre for peanuts. There were no corn allotments after 1958. The entire

tobacco allotment was 3.1 acres and the entire cotton allotment was 1.7 acres. Upon division, the thirteen acres would have a tobacco allotment of 2.12 acres and a cotton allotment of 1.2 acres and the six acres would have a tobacco allotment of .98 acre and a cotton allotment of .5 acre. Thus, under ASS regulations, plaintiffs would acquire a tobacco allotment of 2.12 acres instead of 3 acres and a cotton allotment of 1.2 acres instead of .0 acre. Conversely, defendants Freeman would retain a tobacco allotment of .98 acre instead of .1 acre and a cotton allotment of .5 acre instead of 1.7 acres.

Defendants contend the contract provisions as to crop allotments are in conflict with ASS regulations and therefore "impossible of performance." On the other hand, plaintiffs contend it does not appear that leases or other legal instruments sufficient to perform the contract provisions and at the same time comply with ASS regulations could not have been drafted. Suffice to say, we accept, for present purposes, defendants' contention.

There was evidence tending to show that Byrd "wanted as much tobacco as (he) could get"; that in order to acquire a tobacco allotment of 3 acres he was willing for defendants Freeman to have the benefit of any and all allotments in respect of other crops; and that the provisions as to leases or other instruments were included in the contract to make effective this feature of the agreement.

When plaintiffs made their tender and demanded the deed on October 11, 1958, defendants Freeman refused to execute a lease. Freeman testified that, although he and Byrd had agreed upon a division of crop allotments as set forth in the contract, there had been no discussion of lease provisions and he did not know provisions relating thereto were in the contract until after he had signed it. Mrs. Freeman testified: "Mr. Byrd mentioned about a lease and he said he could get that tobacco if we leased it to him and I told him and my husband told him we would not lease it to him. We told him we wouldn't make any leases. We wanted our land in the clear. We wanted no ties on him, him no ties on us."

There was evidence that plaintiffs and defendants Freeman, prior to October 11, 1958, had been advised as to the division of crop allotments under ASS regulations. When Freeman refused to execute a lease, Byrd testified that he (Byrd) agreed to take the land "without a lease," notwithstanding he would receive a tobacco allotment of 2.12 acres instead of 3 acres, but defendants Freeman still refused to comply with plaintiffs' demand for a deed.

This question is presented: May defendants now avoid the obligations of defendants Freeman under their contract with plaintiffs sole-

ly on the ground that, under ASS regulations, their cotton allotment was smaller and their tobacco allotment was larger than contemplated by their agreement with plaintiffs?

Defendants Freeman did not at any time attribute their refusal to make a deed to plaintiffs to the fact that they would have less cotton allotment under ASS regulations. On this phase of the case, the asserted ground of their refusal was their unwillingness to execute a lease (relating to the tobacco allotment) which would or might complicate their title to the retained acreage. Moreover, there is no evidence that defendants Freeman were adversely affected by said differences in the cotton and tobacco allotments. It is common knowledge that the value of the additional tobacco allotment of .88 acre to be gained by defendants Freeman under ASS regulations was greater than the value of the cotton allotment of 1.2 acres to be lost. Indeed, this was frankly stated by counsel for defendants on oral argument.

"The remedy of specific performance will be granted or withheld by the court according to the equities of the situation as disclosed by a just consideration of all the circumstances of the particular case, and no positive rule can be laid down by which the action of the court can be determined in all cases." 49 Am. Jur., Specific Performance § 8; 81 C.J.S., Specific Performance § 3.

The contract of September 26, 1958, in its basic provisions, provided for the conveyance of described land for an agreed consideration. The provisions as to crop allotments were declared to be "a material part of the consideration" for the transaction. It was discovered that, in the event of such conveyance, ASS regulations rather than the contract provisions would control the division of crop allotments. If performance were possible, these contract provisions would be advantageous to plaintiffs. Under these circumstances, it would be inequitable to deny to plaintiffs the remedy of specific performance on the unsubstantial ground that contractual provisions advantageous to plaintiffs rather than to defendants Freeman were "impossible of performance."

There was evidence tending to support a jury finding that the provisions of the contract of September 26, 1958, relating to crop allotments were inserted therein at the instance and for the benefit of plaintiffs; that plaintiffs, rather than defendants Freeman, were adversely affected by the fact that these contractual provisions could not be performed; and that plaintiffs waived such provisions and offered to accept a deed under which the division of crop allotments would be as provided in ASS regulations. It must be assumed that the jury so found. Under these conditions, defendants Freeman had

no legal right to refuse compliance with their contract to convey the lands simply because the contract provisions and ASS regulations were in conflict in respect of crop allotments to the extent stated above.

It is noteworthy that, under agreement by plaintiffs, the decree of specific performance excepts the tract of 11.5 acres shown on the Schnibben map rather than the 9.2 acres shown on the Bland map.

After full consideration, we are of opinion, and so hold, that the evidence was sufficient for submission to the jury under appropriate instructions.

No error.

WILLIAM ROBERT DINKINS, JR. v.
BOBBY BOOE AND FRED TRAVIS DRIVER.

(Filed 10 June, 1960.)

1. Appeal and Error § 38—

Exceptions not supported by reason or argument in the brief are deemed abandoned.

2. Automobiles § 53—

An owner of an automobile who entrusts its operation to a person he knows, or should know in the exercise of due care, to be an incompetent or reckless driver, may be held liable for his own negligence in so doing in an action instituted by a person injured as a result of the negligence of such driver.

3. Same—

Testimony of an owner of a motor vehicle that he knew that a certain person had been convicted of driving without an operator's license, and that such person had thereafter been involved in two separate automobile accidents, but that he had no knowledge of the fact that such person had been convicted of other violations of the traffic laws, *is held* sufficient to be submitted to the jury on the issue of the owner's negligence in entrusting the operation of his vehicle to such person.

4. Automobiles § 54h: Appeal and Error § 45—

An affirmative answer to the jury on the issue of the negligence of the owner of a motor vehicle in entrusting its operation to a person whom he knew or should have known to be a reckless driver, is sufficient to charge the owner with liability for injuries resulting from the negligence of such driver irrespective of agency, and therefore the submission of an issue of agency cannot be prejudicial to such owner.

5. Automobiles § 46: Appeal and Error § 20—

An instruction to answer the issue of negligence in the affirmative

if the jury should find that defendant's negligence was the proximate, rather than a proximate cause, of the accident, is favorable to defendant, and defendant, not being prejudiced thereby, will not be heard to complain.

6. Trial § 32—

The court is not required to give requested instructions in the exact language of the request, but it is sufficient if the court gives such instructions in substance.

7. Automobiles §§ 15, 46—

In this action involving a collision of vehicles traveling in opposite directions, defendant contended that he was confronted with plaintiff's vehicle on its left side of the highway, and, in the emergency, drove to his left in an effort to avoid collision. An instruction of the court as to the law of the road in passing a vehicle traveling in the opposite direction, as to sudden emergencies, and applying the law to the facts in evidence, with further instructions that if defendant's conduct was that of an ordinarily prudent person under similar circumstances he would not be guilty of negligence even though he pulled his vehicle to the left of the road, *is held* without error.

8. Appeal and Error § 42—

An exception to the charge of the court will not be sustained when the charge is without prejudicial error when construed contextually.

9. Damages § 15—

Where the court reviews in detail the evidence of plaintiff's injuries, the failure of the court to repeat such evidence in stating the rule for the admeasurement of damages for personal injury will not be held for error.

APPEAL by defendants from *Gambill, J.*, at November 1959 Civil Term, of YADKIN.

Civil action to recover for alleged personal injuries proximately resulting from actionable negligence of defendants; to which defendants, answering, deny negligence on their part, and plead in bar of recovery contributory negligence of plaintiff, and set up cross-action for personal injury and property damage, allegedly resulting from negligence of plaintiff.

The collision involved here occurred on 27 January 1959, at approximately 6:30 A.M., on the Courtney-Huntsville highway in Yadkin County. In the vicinity of the Huntsville Baptist Church the Courtney-Huntsville highway is generally straight and level for a distance of 2000 feet or more, runs in an east-west direction, and is about 18 ½ feet wide. About 500 feet or more in an easterly direction from the western end of this section of the road there was a defective condition described as a broken place extending all the way across the

road and running from 20 to 30 feet along the road. The broken place had been in existence for a month or more and had grown progressively worse. The existence of the defective condition was known to the operators of both automobiles. An automobile could cross the broken place in either the eastbound or westbound traffic lane but due to the deeper holes near the shoulders on each side, the broken place was in better condition for passage in the center of the road. The collision occurred a short distance east of the broken section.

Plaintiff was the owner and operator of the Ford automobile involved. The other automobile, a Frazier, was owned by defendant Fred Driver and was being operated at the time by defendant Bobby Booe. Both drivers were injured in the collision. Plaintiff alleged that defendant Booe was negligent in that he operated the Frazier automobile carelessly and heedlessly at an excessive rate of speed, with only one headlight, with inadequate brakes, on the wrong side of the highway, without keeping a proper lookout and without keeping the automobile under control, and that such negligence was the proximate cause of the collision and the resulting damages. Plaintiff alleges that the negligence of defendant Booe should be imputed to defendant Fred Driver for that at the time of the collision the defendant Booe was using the automobile as agent, servant and employee of defendant Fred Driver, and within the course and scope of his employment by defendant Fred Driver. Plaintiff further alleges that defendant Fred Driver was negligent in permitting defendant Booe to operate the automobile when he knew or by the exercise of reasonable care should have known that defendant Booe was an incompetent and irresponsible driver.

Defendant Booe denies negligence on his part and alleges that plaintiff was negligent in that he operated his automobile carelessly and heedlessly on the wrong side of the road, that he failed to keep a proper lookout, and failed to have his automobile under proper control, and that plaintiff's negligence was the proximate cause of the collision. Defendant Fred Driver admits ownership of the Frazier automobile, but denies (1) that defendant Booe was negligent, (2) that defendant Booe was acting as his agent at the time of the collision, and (3) that he was negligent in permitting defendant Booe to operate his automobile, and alleges negligence on the part of plaintiff in several particulars proximately causing the collision.

Plaintiff's evidence tends to show that on the morning in question he was proceeding along the Courtney-Huntsville road in his Ford automobile in an easterly direction on his way to work; that the weather was foggy; that the road was damp; and that he was driving

with the headlights of his automobile on; that as he approached the above described broken place in the highway, he observed no one coming from the opposite direction; that he slowed down to about 25 miles per hour; that he turned his automobile to the left in order to cross the broken place near the center of the highway; that his left wheels were approximately two feet over the center of the highway and in the westbound traffic lane; that while his automobile was still in the broken section he saw a single light glowing in the center of the highway several hundred feet ahead of him; that he did not at first distinguish the object as being an automobile; that he proceeded to return his automobile to his eastbound traffic lane; that after he had crossed over the broken place and had returned to his side of the road his headlights illuminated an automobile approaching him at a rapid rate of speed traveling west in the eastbound traffic lane with only the left headlight on; that he pulled off to his right-hand side of the road as far as he could go without driving into the ditch and stopped; and that then the left front portion of the approaching automobile struck the left front portion of his automobile, and he was injured in the collision.

The defendants' evidence tends to show that defendant Booe was proceeding along the highway in a westerly direction in the Frazier automobile which he had borrowed for his own use; that he was driving about 50 or 55 miles per hour; that "as far as defendant knew" both headlights were on; that he observed an automobile approaching five or six hundred feet ahead of him; that when the automobiles had approached to within 150 or 200 feet of each other the automobile that was meeting him pulled over to his (the defendant's) side of the road; that he thought the approaching automobile was stopping or had stopped in his lane of travel; that he slowed down and pulled over into the eastbound traffic lane in order to pass it; that he then observed the approaching automobile pulling back into the eastbound lane; that he then applied his brakes and attempted to return to his westbound lane; that he had "slowed down close to 35"; that the automobiles collided, and that he was injured in the collision. A witness for defendant testified that the right headlight of the Frazier automobile was on when he arrived at the scene of the collision. Defendant Booe testified that the collision occurred in the center of the highway.

The issues raised by the pleadings were submitted to the jury. The issues of negligence and contributory negligence were answered in favor of the plaintiff, and the issue as to the negligence of the defendant Fred Driver in entrusting his automobile to the defendant

Booe was answered against defendant Fred Driver. Both defendants excepted to and appeal from the judgment entered in accordance therewith to Supreme Court, and assign error.

Walter Zachary, R. Lewis Alexander, Hudson, Ferrell, Carter, Petree & Stockton for plaintiff, appellee.

Womble, Carlyle, Sandridge & Rice, H. Grady Barnhill, Jr., F. D. B. Harding for defendants, appellants.

WINBORNE, C. J. Careful consideration of the record and case on appeal in case in hand fails to reveal prejudicial error.

Appellant Fred Driver's exceptions 1, 2, 8, and 19, and appellant Booe's exceptions 2, 4, and 13 are expressly abandoned by appellants. Fred Driver's exceptions 9 and 18 are taken as abandoned, no reason or argument having been stated nor authorities cited in support of the assignments based upon them. *Harmon v. Harmon,* 245 N.C. 83, 95 S.E. 2d 355; *Cotton Mills v. Local* 584, 251 N.C. 240, 111 S.E. 2d 471.

Appellant Fred Driver assigned as error the court's submission of the issue as to his negligence in entrusting his automobile to appellant Booe, and the court's denial of his motion for peremptory instructions on the issue. Driver testified that he had known Booe all his life, that he "saw him pretty often" prior to the time of the wreck, that he owned the automobile being operated by Booe at the time of the collision, and that he had given Booe permission to use the automobile. He further testified that he knew at the time that Booe had had a "very serious" automobile accident in 1956, an automobile accident in June 1958, and that Booe had been convicted of driving without an operator's license in 1953. He denied prior knowledge of other violations of the motor vehicle laws by Booe, for which violations convictions had been admitted by Booe. One of these violations was operating an automobile on the wrong side of the highway at the time of the "very serious" accident in 1956.

This Court said in *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104, that "We recognize the principle that the owner of a motor vehicle who entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, thereby becomes liable for such person's negligence in the operation thereof; and in such case the liability of the owner is predicated upon his own negligence in entrusting the operation of the motor vehicle to such a person. 60 C.J.S. p. 1057, Motor Vehicles, Sec. 431; 5 Am. Jur. 696, Automobiles, Sec. 355; *Bogen v. Bogen,* 220

N.C. 648, 18 S.E. 2d 162; *McIlroy v. Akers Motor Lines,* 229 N.C. 509, 50 S.E. 2d 530." In *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373, the principle is again recognized and discussed. The evidence in the case at hand was sufficient to take this issue to the jury. The court properly denied the motion for peremptory instructions on the issue. *Gouldin v. Ins. Co.,* 248 N.C. 161, 102 S.E. 2d 846.

Appellant Fred Driver moved that the jury be peremptorily instructed on the issue of agency, and for a directed verdict on that issue. He excepted to the denial of the motions and assigned error thereto. The jury did not answer this issue. Its answer to the issue of Fred Driver's negligence in entrusting his automobile to appellant, Booe, together with its answers to the general issues of negligence and contributory negligence, was sufficient to support the judgment against appellant Fred Driver. If error were made to appear in the submission of the issue of agency, it would not be prejudicial to appellant. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Squires v. Ins. Co.,* 250 N.C. 580, 108 S.E. 2d 908.

Error is assigned to the court's charge on proximate cause. The court correctly instructed the jury that negligence, to be actionable, must proximately cause the injury complained of. *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411; *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459. The court defined proximate cause in substantial accord with the decisions of this Court. *Chambers v. Edney,* 247 N.C. 165, 100 S.E. 2d 343; *Adams v. Bd. of Education,* 248 N.C. 506, 103 S.E. 2d 854. In applying the law to the evidence in this case relating to the issue of defendant Booe's negligence, the court instructed the jury that in order to answer the first issue in the affirmative it must find that defendant was negligent and, that defendant's negligence was *the* proximate cause of plaintiff's injury. This instruction placed an undue burden on plaintiff. "This instruction was favorable to the defendants. They were not prejudiced thereby and cannot be heard to complain." *Price v. Gray,* 246 N.C. 162, 97 S.E. 2d 844. The court's charge relating to proximate cause on the issue of contributory negligence is approved on authority of this Court's decision in *Price v. Gray, supra.*

The defendants below submitted a request for special instructions on the standard of care required of defendant Booe when confronted with the automobile on his side of the road, and on the conduct of plaintiff in driving to the left as constituting contributory negligence. Appellants assign the court's failure to give the requested instruction as error.

This Court said in *In Re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1,

that "where the prayer for special instructions is properly presented, the court ' * * * is not required to give them in the exact words used, and a substantial compliance with the request is sufficient.' 2 N.C.P. &P McIntosh, Sec. 1517, p. 56; *Michaux v. Rubber Co.*, 190 N.C. 617, 619, 130 S.E. 306." The court below explained the provisions of G.S. 20-148, applied them to the evidence, and fairly stated the contentions of the defendants relating thereto. In charging on the first issue the court instructed the jury "that if you find that (the defendant Booe) was acting in a sudden emergency and that his conduct was the conduct of an ordinary prudent person under similar circumstances, even though he pulled to the left of the road, he would not be guilty of negligence. An automobile driver who, by the negligence of another and not by his own negligence, is suddenly confronted with an emergency, compelled to act instantly, is not guilty of negligence if he makes an unwise choice * * * whether he used reasonable care under the circumstances is for you to say * * *. If you find that he did act as an ordinary prudent person, you would answer the issue 'No', even though he pulled to the left side of the highway." And in charging on the issue of contributory negligence the court instructed the jury that if it should find that the plaintiff pulled to the left of the highway and failed to yield at least one-half of the main traveled portion of the highway, he would be guilty of contributory negligence, and that if the jury should find that plaintiff's negligence was a proximate cause of the injuries, it would answer the issue "Yes". The court further charged with respect to the conduct of the plaintiff in pulling to the left thereby creating a sudden emergency facing defendant, and instructed the jury that such conduct would constitute negligence. When the entire charge is read contextually, it appears that the court's instructions on these points substantially complied with the request, and in the light of the pertinent decisions of this Court, *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593; *Journigan v. Ice Co.*, 233 N.C. 180, 63 S.E. 2d 183; *Henderson v. Henderson*, 239 N.C. 487, 80 S.E. 2d 383; *Lucas v. White*, 248 N.C. 38, 102 S.E. 2d 387; *Blackwell v. Lee*, 248 N.C. 354, 103 S.E. 2d 703; *Bondurant v. Mastin*, 252 N.C. 190, 113 S.E. 2d 292, do not contain error prejudicial to appellants.

Appellant Fred Driver's assignment of error number 18 and appellant Booe's assignment number 11 are that the court erred in failing to apply the law to the evidence in that the court made no reference to any of the evidence concerning injuries in its charge on the issue of damages. It is apparent that the court based its charge on this issue upon the charge approved in *Hunter v. Fisher*, 247 N.C.

226, 100 S.E. 2d 321. Here as in the *Hunter* case the court reviewed in detail the evidence of plaintiff's injuries. The charge approved in the *Hunter* case was given to the jury. The assignments of error relating thereto are overruled.

Other assignments of error to the charge have been considered. When the charge is read and considered as a composite whole, prejudicial error as to appellants sufficient to warrant a new trial is not shown. *Kennedy v. James*, 252 N.C. 434.

No error.

MR. LESTER E. SHEALY, HUSBAND; MRS. C. J. SUTTON, MOTHER, OF LEE O. SHEALY, DECEASED EMPLOYEE

v.

ASSOCIATED TRANSPORT, INC., EMPLOYER, SELF-INSURER.

(Filed 10 June, 1960)

1. Master and Servant § 76—

Those conclusively presumed to be wholly dependent under the Compensation Act are not given any priority over those wholly dependent in fact within the meaning of the Act, and therefore where an employee leaves a mother who has been wholly dependent upon the employee for a number of years and also leaves her husband surviving, the mother of the employee and the widower are entitled to share equally in the compensation for the death of the employee. G.S. 97-38, G.S. 97-39.

2. Master and Servant § 45—

The Workmen's Compensation Act is to be liberally construed to effectuate its purposes to provide a measure of relief for those dependent upon employees who have unfortunately been injured or killed by accident in industry.

APPEAL by plaintiff, Lester E. Shealy, from *Sharp, S. J.*, October 1959 Special Civil Term, of MECKLENBURG.

Lee O. Shealy was an employee of defendant, Associated Transport, Inc., self-insurer. On 19 July 1958 she died as a result of an accident arising out of and in the course of her employment. Defendant admits that the death is compensable according to the provisions of the Workmen's Compensation Act, G.S. 97-1 *et seq.*, and stands ready to pay benefits to the person or persons legally entitled thereto.

Lee O. Shealy was survived by her husband, Lester E. Shealy, and her mother, Mrs. C. J. Sutton. She and Lester E. Shealy were married in 1919. She had no children. Her mother is 85 years old,

has been wholly dependent on deceased for several years, and has lived in the home of deceased for 37 years.

The widower and mother both filed claims with the Industrial Commission. The cause was heard by Commissioner Shuford on 30 January 1959. He found as a fact that the mother was wholly dependent on deceased employee for support. He entered an award dividing the compensation equally between the widower and mother. On appeal by the widower the Full Commission affirmed the findings of fact and award of the Hearing Commissioner.

The cause was then appealed to Superior Court where the award of the Full Commission was "in all respects confirmed." Widower, Lester E. Shealy, appealed to Supreme Court and assigned error.

J. M. Scarborough for plaintiff Lester E. Shealy, appellant.
Hedrick and McKnight for plaintiff Mrs. C. J. Sutton, appellee.

MOORE, J. It is our opinion that the mother of the deceased employee is entitled to share equally with appellant in the compensation under the facts in this case, and we so hold.

The pertinent provisions of the Workmen's Compensation Act are as follows:

G.S. 97-38: "If death results . . . the employer shall pay compensation . . . to the person or persons entitled thereto as follows:

"(1) Persons wholly dependent . . . at the time of the accident shall be entitled to receive the entire compensation . . . share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

"(2) If there is no person wholly dependent, then any person partially dependent . . . shall be entitled to receive . . . compensation . . ."

G.S. 97-39. "A widow, a widower, and/or child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. *In all other cases* questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; . . . and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. (Emphasis ours) If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

"The widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled to receive the benefits of this article for the full periods specified herein."

G.S. 97-40. ". . . (i)f the deceased employee leaves neither whole nor partial dependents, then the compensation . . . shall be . . . paid in a lump sum to the next of kin as herein defined. . . . 'next of kin' shall include only child, father, mother, brother or sister of the deceased employee."

The Act, with regard to those entitled to receive benefits because of the death of employees, seems unambiguous. The legislative intent embraces the following: Beneficiaries are given three classifications—(1) those wholly dependent; (2) those partially dependent; (3) those defined by the statute as "next of kin." Those wholly dependent take to the exclusion of partial dependents. Widows, widowers and children of deceased employees are relieved of the necessity of proving actual dependency and are conclusively presumed to be wholly dependent. In any event, benefits are limited to those related to deceased employees as widows, widowers, children, fathers, mothers, brothers and sisters (having due regard to the definitions contained in G.S. 97-2).

Lester E. Shealy, widower of Lee O. Shealy, is conclusively presumed to be a whole dependent of deceased and is entitled to compensation. *Martin v. Sanatorium,* 200 N.C. 221, 224, 156 S.E. 849. He contends that he is entitled to receive the entire compensation to the exclusion of deceased's mother who was wholly dependent in fact but not favored by the conclusive presumption clause of G.S. 97-39. In short, he asserts that if there are those who are conclusively presumed to be wholly dependent, they are a preferred class and take the entire compensation notwithstanding there may be others wholly dependent in fact. He insists that the phrase, "In all other cases," contained in the second sentence of G.S. 97-39 creates a separate classification and gives a preferred status to one conclusively presumed to be wholly dependent. *Wilson v. Construction Co.,* 243 N.C. 96, 89 S.E. 2d 864, is cited in support of this proposition. In that case employee immediately prior to his death was living with a common law wife and supporting three of her illegitimate children of undetermined paternity. Another illegitimate child was born to her shortly after employee's death, but this child was not an "acknowledged" illegitimate child of employee. The inquiry was whether these children, or any of them, were entitled to share compensation with deceased's widow and children from whom he was separated. Applying the law to this factual situation, the Court said: ". . . (t)he widow and children 'shall be conclusively presumed

to be wholly dependent for support upon the deceased employee.' G.S. 97-39. And they *shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons.* G.S. 97-38(1)." Reference to the pertinent portion of the statute cited, G.S. 97-38(1), indicates that the Court did not intend the meaning that appellant attributes to the statement. That portion of the statute reads: "Persons wholly dependent . . . shall be entitled to receive the entire compensation . . ." The rationale of the opinion is that the arrangement between employee and his common law wife "was illicit, and his act in maintaining the children was purely voluntary. He was not under any legal obligation so to do." And they were "in no sense dependents within the meaning of the Workmen's Compensation Act." They were strangers and did not fall in any classification of beneficiaries within the purview of the Workmen's Compensation Act. This case does not support the theory propounded by appellant.

The phrase "in all other cases" is construed and explained in *Fields v. Hollowell,* 238 N.C. 614, 618, 78 S.E. 2d 740. There it is said: "The term 'in all other cases' in the connection in which it appears in the statute G.S. 97-39, means in all cases other than those of widows, widowers, and children, claiming to be dependents of the deceased employee, — dependency shall be determined in accordance with the facts as the facts may be at the time of the accident."

We find nothing in G.S. 97-39 which bestows a preferred classification upon those conclusively presumed to be wholly dependent so as to exclude from compensation those wholly dependent in fact within the meaning of the Workmen's Compensation Act. Had the Legislature so intended, it would have so stated in express terms. It did give priority to those wholly dependent over those only partially dependent. Had it intended another classification and priority, it is unreasonable to suppose that it would have left so important a matter to inference.

"The courts must give the Workmen's Compensation Act liberal construction 'to the end that the benefits thereof shall not be denied upon technical, narrow and restricted interpretation.'" *Kellams v. Metal Products,* 248 N.C. 199, 203, 102 S.E. 2d 841. Indeed, it is the tendency of the courts throughout the nation to give such Acts liberal construction so as to effectuate the purposes of such legislation in providing a measure of relief for those dependent upon employees who have unfortunately been injured or killed by accident in industry. *Produce Co. v. Industrial Commission* (Colo. 1951), 228 P. 2d 808, 810.

In our Court this is a case of first impression. But the North Carolina Industrial Commission has heretofore held that though the widow and children are conclusively presumed to be wholly dependent, this

does not exclude the right of other persons to compensation who are wholly dependent in fact. *Mills v. City of Salisbury,* 1 N.C. I. C. 230, The constructions placed on provisions of the Workmen's Compensation Act by our Industrial Commission are strongly persuasive with us.

The exact point involved here has been decided by the Supreme Court of our sister State, South Carolina. On the matters of dependency and compensation the South Carolina Workmen's Compensation Act is substantially identical with our own. Indeed, the two Acts are almost verbatim enactments. S. C. Code of Laws, sections 71-161, 162, 163 and 180. In *Bush v. Gingrey Brothers* (S.C. 1957) 100 S.E. 2d 821, deceased employee was survived by his widow and mother. He and his wife lived in the home of his mother. His mother was totally dependent upon him for support. Quoting with approval from *Produce Co. v. Industrial Commission, supra,* the Court said: "We find no provision in the statute, nor has any decision of this court been called to our attention, which gives a prior and exclusive right to persons who are presumed wholly dependent, under the terms of the statute itself, as against those who are shown to be in fact wholly dependent without regard to any presumption." The Court then continues, "We are of the opinion that the Legislature in enacting the . . . statute did not intend that those persons (conclusively presumed to be wholly dependent) shall take the entire benefits to the exclusion of others wholly dependent upon deceased but that they shall share equally the benefits with those wholly dependent upon the earnings of the deceased at the time of the accident." (Parentheses ours) See also *Produce Co. v. Industrial Commission, supra.*

The only case which has come to our attention wherein the Court takes a directly opposite view is *Whalen v. Pulp & Board Co.,* (Conn. 1940), 17 A. 2d 145. Other cases appearing to be contrary are based on strict statutory provisions differing widely from our Act. Where statutes specifically provide for priorities between classes of claimants, they are strictly adhered to. *Mays v. Indemnity Co.* (Ga. 1948), 48 S.E. 2d 550; *Steel & Iron Co. v. Alexander* (Ala. 1941), 3 S. 2d 46; *Flanigan v. Construction Co.* (Okla. 1955), 288 P. 2d 1112. Some compensation statutes provide for priorities among those wholly dependent. *Marcum v. Hickle* (Tenn. 1921), 234 S.W. 321; *Duffy v. Walsh-Kaiser Co.* (R.I. 1949), 64 A. 2d 863; *Locke v. Ice and Coal Co.* (Ala. 1926), 108 S. 46. On the other hand many of the Acts give discretion to Industrial Commissions to permit those wholly and partially dependent to share in the compensation. *Gas & Electric Co. v. Industrial Accident Commission* (Col. 1932), 12 P. 2d 649; *Hardymon v. Kaze* (Ky. 1931), 43 S.W. 2d 678; *Penn v. Penn* (Ky. 1919), 209 S.W. 53;

Krueger v. Industrial Commission (Wis. 1940), 295 N.W. 33; *Royster & Haardt v. Morgan* (Ala. 1944), 17 S. 2d 582.

In the instant case the Commission found as a fact that the mother of the deceased employee was wholly dependent on the employee for support. This finding is supported by competent evidence and appellant takes no exception thereto. The mother had been wholly dependent for more than three months, actually for several years. Her relationship is not too remote and comes within the general purview of the Act. Furthermore, on the facts in this case employee had the legal duty to support her. G.S. 14-326.1.

The judgment below is

Affirmed.

IN THE MATTER OF THE PETITION OF THE VANDERBILT UNIVERSITY FOR JUDICIAL REVIEW OF THE ADMINISTRATIVE DECISION OF THE TAX REVIEW BOARD RELATING TO NORTH CAROLINA INCOME AND FRANCHISE TAX ASSESSMENTS.

(Filed 10 June, 1960)

1. Taxation § 20—

In determining whether property is exempt from *ad valorem* taxes, the use to which the property is devoted rather than the character of the owner is controlling, while in determining exemption from franchise taxes, G.S. 105-125, the character of the owner is controlling, and in determining exemption from income taxes, G.S. 105-138(3), the character of the recipient of the income and the use the recipient makes of such income is controlling.

2. Same: Taxation § 27—

An educational institution of another state which engages in the business of renting real estate in this State is exempt from franchise taxes under G.S. 105-125 when no part of its net earnings inures to the benefit of any individual or private stockholder and its business here is carried on solely in its capacity of a nonprofit educational institution.

3. Taxation §§ 20, 29—

The income realized by an educational institution of another state from the rental of real estate owned by it in this State is exempt from income taxes under G.S. 105-138(3), when such income is placed in the general fund of such educational institution and is used exclusively for educational purposes.

4. Taxation § 23½—

The interpretation given tax statutes by the Commissioner of Revenue will be given due and careful consideration, but such interpretation is

not controlling and cannot be followed when it is in conflict with the clear intent and purpose of the statute under consideration.

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

APPEAL by petitioner, Vanderbilt University, from *Sharp, Special Judge,* at 23 March 1959 assigned Civil Term, of WAKE, argued as No. 452 at Fall Term 1959 of the Supreme Court, and now appearing on docket as No. 450 at Spring Term, 1960, of WAKE.

Civil proceeding for administrative and judicial review of North Carolina franchise and income tax assessments for the years 1951-1955 made by the Commissioner of Revenue in accordance with the procedure outlined by the tax statutes.

On 25 February 1957, Vanderbilt University filed application for a hearing before the Commissioner of Revenue and the original hearing was held on 17 June 1957.

On 23 August 1957, the Commissioner rendered his decision and held that the petitioner is doing business in North Carolina within the meaning of the applicable provisions of law and is required to pay franchise and income taxes. G.S. 105-122 and G.S. 105-134 respectively.

The Commissioner further held: "That said corporation is not exempt from taxation by this State with respect to franchise taxes as provided by G.S. 105-125 or income taxes as provided by G.S. 105-138; that although it is an educational institution said provisions have no application to it under the law as so interpreted."

It has been stipulated that the franchise and income taxes assessed and claimed by the State will not be contested as to amount if it is ultimately determined upon appeal that the petitioner, Vanderbilt University, is subject to the North Carolina franchise and income taxes.

The petitioner appealed from the decision of the Commissioner of Revenue to the Tax Review Board, and the Board entered its administrative decision on 3 November 1958, in pertinent part as follows:

"1. * * * that the Vanderbilt University, a corporation organized under the laws of the State of Tennessee, is an educational institution operated solely for educational purposes and that no part of its net earnings inures to the benefit of any private stockholder or individual.

"2. * * * that on or about June 29, 1951, the University acquired certain real estate and improvements thereon located in Charlotte, North Carolina, and subsequently leased said property to Textron

Southern, Inc., for a period of eleven years for a net annual rental of $330,000. * * * that the lease agreement between the University and Textron Southern, Inc., contained certain renewal options.

"3. * * * that the annual rental income is placed in the general fund of the University along with its income from endowments, contributions, tuition fees and other items of income and is used exclusively for educational purposes.

"4. * * * that, although the University maintains no office in this State and has no office or other employees in this State and acquisition of the property within this State and the collection of rental income therefrom constitutes a steady, continuous and regular course of income producing business activity within this State.

"5. * * * that the exemption provisions of the statutes relied upon by the University are applicable only to educational institutions within this State. * * * that on the basis of the competitive business activities of the University within this State the University is not exempt from income and franchise taxes under said exemption provisions.

"6. * * * that there should be no reduction of the tax liability asserted by the Commissioner of Revenue * * *."

The petitioner appealed from the Tax Review Board to the Superior Court of Wake County and the court overruled each and every one of the petitioner's exceptions to the adverse findings, conclusions and decision of the Tax Review Board and affirmed the decision of said Board. The petitioner excepted to the ruling in the Superior Court and appeals, assigning error.

Smith, Moore, Smith, Schell & Hunter for petitioner.

Attorney General Seawell, Asst. Attorney General Pullen for Commissioner of Revenue.

DENNY, J. If it be conceded that the petitioner, Vanderbilt University, is doing business in North Carolina within the meaning of our franchise and income tax laws, it does not follow as a matter of course that the petitioner is liable to the State of North Carolina for such taxes in light of the exemptive provisions in our Revenue Act.

The determinative question on this appeal is whether or not Vanderbilt University is liable for franchise taxes pursuant to the provisions of G.S. 105-122, and income taxes pursuant to the provisions of G.S. 105-134. In this connection, we must determine whether or not the exemptive provisions of G.S. 105-125 with respect to fran-

chise taxes, and the exemptive provisions in G.S. 105-138, subsection (3), with respect to income taxes, apply to Vanderbilt University.

Article V, section 5, of our State Constitution declares in pertinent part that: "Property belonging to the State or to municipal corporations, shall be exempt from taxation," and that "the General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes * * *."

This Court has interpreted our statutes pertaining to *ad valorem* taxes to mean that it is the use to which the property is devoted rather than the character of the owner that determines whether the property is exemptible thereunder. *Odd Fellows v. Swain,* 217 N.C. 632, 9 S.E. 2d 365; *Rockingham County v. Elon College,* 219 N.C. 342, 13 S.E. 2d 618; *Guilford College v. Guilford County,* 219 N.C. 347, 13 S.E. 2d 622; *Sparrow v. Beaufort County,* 221 N.C. 222, 19 S.E. 2d 861; *Seminary, Inc. v. Wake County,* 251 N.C. 775, 112 S.E. 2d 528.

In determining whether or not the exemptive provisions of G.S. 105-125 apply to Vanderbilt University with respect to franchise taxes, and whether the exemptions provided for in G.S. 105-138, subsection (3), with respect to income taxes, apply to Vanderbilt University, we must apply an entirely different rule from that applied in determining whether property owned by an educational institution is subject to *ad valorem* taxes. As pointed out hereinabove, we determine the liability for an *ad valorem* tax based on the use of the property and not on the character of the owner. Here, we must determine the exemption from liability for franchise taxes based on the character of the owner as set out in G.S. 105-125; and with respect to the exemption of payment of income taxes we must base our decision (1) on the character of the recipient of the income and (2) on the use the recipient makes of such income, G.S. 105-138.

G.S. 105-125 provides: "None of the taxes levied in § 105-122 (franchise or privilege tax on domestic and foreign corporations) * * * shall apply to religious, fraternal, benevolent, scientific or educational corporations, not operating for a profit * * *."

G.S. 105-138 provides: "The following organizations shall be exempt from taxation (income) under this article: * * * (3) * * * corporations organized or trusts created for religious, charitable, scientific, or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private stockholder or individual."

As to liability for franchise taxes, we interpret G.S. 105-125 to expressly exempt a foreign corporation from franchise taxes if such corporation is an educational institution not operated for profit.

Likewise, with respect to income taxes levied pursuant to G.S. 105-134, G.S. 105-138 exempts corporations organized for educational purposes, "no part of the net earnings of which inures to the benefit of any private stockholder or individual."

We can find nothing in our franchise or income tax laws that limits the exemption of educational institutions to those located within North Carolina. The exemption provided in G.S. 105-296 (4) deals only with exemption from *ad valorem* taxes and has nothing whatever to do with franchise or income taxes.

Ordinarily, the interpretation given to the provisions of our tax statutes by the Commissioner of Revenue will be held to be *prima facie* correct and such interpretation will be given due and careful consideration by this Court, though such interpretation is not controlling.

Moreover, this Court will not follow an administrative interpretation which, in its opinion, is in conflict with the clear intent and purpose of the statute under consideration. *Cannon v. Maxwell, Com'r. of Revenue,* 205 N.C. 420, 171 S.E. 624; *Powell v. Maxwell, Com'r. of Revenue,* 210 N.C. 211, 186 S.E. 326; *Knitting Mills v. Gill, Com'r. of Revenue,* 228 N.C. 764, 47 S.E. 2d 240; *Watson Industries, Inc. v. Shaw, Com'r. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505; *Rubber Co. v. Shaw, Com'r. of Revenue,* 244 N.C. 170, 92 S.E. 2d 799; *Campbell v. Currie, Com'r. of Revenue,* 251 N.C. 329, 111 S.E. 2d 319.

The only way we could uphold the ruling of the court below would be to ignore the clear and unequivocal exemptive provisions of our revenue statutes on the subject and adopt the view expressed in 51 Am. Jur., Taxation, section 556, page 549, where it is said: "Right of Foreign Institutions to Benefit of Tax Exemption. — The courts generally construe the constitutional and statutory provisions granting such institutions exemptions from taxation to refer and apply only to the institutions of the state, and not to those of foreign states, particularly when they do not dispense their charity or benevolence in the state, or devote their property therein to such purposes in the state. Exemption to charitable, educational, and religious organizations is predicated upon the fact that they render service to the state, for which reason they are relieved of certain burdens of taxation. The effect of an exemption is equivalent to an appropriation. It cannot be said to be the intent of the legislature to make appropriation for the benefit or maintenance of foreign charities which, at best, have a remote chance only of benefiting the citizens of the state granting the exemption * * *."

In *Rubber Co. v. Shaw, Com'r. of Revenue, supra,* in considering the loss carry-over provisions contained in G.S. 105-147 (6) (d) of our Revenue Act, which carry-over provisions were made applicable to foreign and domestic corporations alike as well as to resident individuals, we said: "Our Legislature was under no constitutional or other legal compulsion to allow any carry-over to be deducted from taxable income in a future year. It enacted the carry-over provisions purely as a matter of grace * * *." This is exactly what the General Assembly has done with respect to educational corporations not operated for profit, without limiting such grace to domestic corporations only.

The General Assembly could have limited the loss carry-over provisions of our Revenue Act to domestic corporation and to resident individuals, but it did not see fit to do so; it elected to treat domestic and foreign corporations alike with respect to such loss carry-over provisions.

Since the statutory provisions with respect to exemptions contained in G.S. 105-125 and G.S. 105-138 are clear and unambiguous, we do not think this Court should read into the language of the General Assembly a meaning that in our opinion the language used by the General Assembly does not support. Therefore, we do not concur in the purported finding of fact No. 5, hereinabove set out, which is in reality a conclusion of law.

The Tax Review Board has found that Vanderbilt University is an educational institution operating solely for educational purposes and that no part of its net earnings inures to the benefit of any private stockholder or individual. The Board has also found that the annual rental income from the petitioner's Charlotte property is placed in the general fund of the University along with its income from endowments, contributions, tuition fees, and other items of income, and is used exclusively for educational purposes.

These findings bring the petitioner squarely within the exemptive provisions of G.S. 105-125 and G.S. 105-138 with respect to franchise and income taxes.

Therefore, the judgment of the court below is

Reversed.

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

THE NORTH ASHEBORO-CENTRAL FALLS SANITARY DISTRICT PETITIONER, v. R. L. CANOY AND WIFE, MYRTLE CANOY, DEFENDANTS.

(Filed 10 June, 1960.)

Eminent Domain §§ 5, 9— Owners are not entitled to value of fee when only easement which does not preclude use of land by owners is condemned.

Where a sanitary district condemns an easement for sewer lines together with the perpetual right to enter upon the land for the purpose of inspecting its lines and making necessary repairs, replacements, additions and alterations thereon, with right of the land owners to use the land for all lawful purposes not inconsistent with the rights acquired by the district, the measure of compensation is the difference in the market value of the land free of the easement and the market value of the land subject to the easement, and an instruction to the effect that the owners retain the bare fee, with only a permissive right to use the surface, and that the value of the perpetual easements acquired by the district is virtually the same as the value of the land itself, is error.

APPEAL by petitioner from *Armstrong, J.*, at November 1959 Term, of Randolph.

Special proceeding instituted by petitioner The North Asheboro-Central Falls Sanitary District to acquire by condemnation an easement over and through the lands of defendant, described in the complaint, for the installation and operation of a sanitary sewer system.

Defendants by answer admit right of petitioner to acquire the easement and right of way as sought by it, raising only question of damages or compensation due by petitioner for same.

Commissioners, duly appointed, appraised the property and easements taken and reported to the court. Defendants excepted thereto, and appealed to Superior Court. And upon pre-trial hearing in Superior Court, all parties being represented, the following pre-trial order was entered.

"It is judicially stipulated by all the parties to this action as follows: 1. That the petitioning North Asheboro-Central Falls Sanitary District is a sanitary district created under the provisions of Chapter 130, Article 6 of the General Statutes of North Carolina, under the supervision of the North Carolina State Board of Health and with authority to construct, maintain and operate a sanitary sewer system; that under the provisions of G.S. 130-130, the petitioning Sanitary District has the right, power and authority of eminent domain with power of condemnation as provided in Chapter 40 of the General Statutes.

"2. That the petitioning Sanitary District has the right and author-

ity to acquire an easement for a sanitary sewer line or lines in, along, through and over the lands of the respondents, subject to the payment of reasonable compensation to the respondents for damages, if any, by the taking of easement and of any damages to adjoining lands.

"3. That the respondents, R. L. Canoy and wife, Myrtle Canoy, are the owners in fee simple of approximately 62 acres of land located in Asheboro and Randleman Townships, Randolph County, the boundaries of which appear on a map, Respondents' Exhibit 'A'," reference being made to the record of certain deeds in the office of Register of Deeds of Randolph County.

"4. That the petitioner stipulates the right of way and easement over and through the lands of defendants as set forth in paragraph 5 of the Petition is 30 feet in width and 5,228 feet in length, and is shown on defendants' Exhibit 'A' in red lines, consisting of 3.53 acres.

"5. That all of the property as described in the easements lies within the North Asheboro-Central Falls Sanitary District, and that by virtue thereof, the responding landowners will have the privilege of tapping on to said line and receiving service from said line or lines.

"6. That the time of the taking of said right of way and easement was June 26, 1959. * * *"

Upon trial in Superior Court petitioner offered these stipulations in evidence and rested its case.

Thereupon defendants offered evidence pertaining in the main to matter of just compensation and rested their case. Petitioner then offered evidence in rebuttal,— and again rested.

The case was submitted to the jury upon this issue which was answered as here indicated:

"What amount of damages, if any, are the respondents R. L. Canoy and wife, Myrtle Canoy, entitled to recover of the petitioner, North Asheboro-Central Falls Sanitary District, for the easements and rights of way taken by the petitioner across their lands as described in this Petition? Answer: $5,000.00."

Judgment in accordance therewith was entered in pertinent part as follows:

" * * * and it appearing from the stipulation of the parties that the petitioner is a sanitary district created under the provisions of Chapter 130, Article 6 of the General Statutes of North Carolina and with authority to construct, maintain and operate a sanitary sewer system, and that under the provisions of General Statutes 130-130, the petitioning sanitary district has the right, power and authority of eminent domain with the power of condemnation as provided in Chapter 40 of the General Statutes; that the respondents, R. L. Canoy and

wife, Myrtle Canoy, are the owners of the lands across which the petitioner, by virtue of this proceeding, acquired the right of way and easement hereinafter described; and that the petitioning sanitary district has the right and authority to acquire an easement for a sanitary sewer line, or lines, in, along, through and over the lands of the respondents, subject to the payment of a reasonable compensation to the respondents for damages, if any, by the taking of the easement and of any damages to adjoining lands.

"It is therefore ordered, adjudged and decreed:

"1. That the petitioner, the North Asheboro-Central Falls Sanitary District, and its successors, be, and it is hereby granted the perpetual right of way and easement, and for the purposes herein set out, over, along, through, under and upon the lands of the respondents described in the Petition and Amended Petition, the same being a strip of land thirty feet wide, lying 15 feet on each side of a center line, which said center line is described as follows: Easement No. 1 (specifically described); Easement No. 2 (specifically described); Easement No. 3 (specifically described); Easement No. 4 (specifically described).

"2. That the petitioner is hereby granted the easement, right of way and privilege to construct and maintain in and upon and over and through the easements as described in a proper manner and with such apparatus and equipment as shall be necessary, sanitary sewer lines as a part of the sanitary sewer system of the petitioner, together with the perpetual and permanent right at all times to enter upon said easement for the purpose of inspecting said sanitary sewer lines and making the necessary repairs, replacements, additions and alterations thereon, and that except for said purposes, the petitioner shall not interfere with the rights of the respondents, and the respondents shall have the full power and right to use the lands over which said rights of way and easements have been condemned and secured and located, for all lawful purposes, so long as such purposes are not inconsistent with the rights to be acquired therein, and do not interfere with the use and maintenance of the rights of way and easements granted and acquired by the petitioner * * *."

Petitioner excepts thereto and appeals therefrom to Supreme Court, and assigns error.

H. Wade Yates for petitioner, appellant.
Ottway Burton for defendants, appellees.

WINBORNE, C. J. When the North Asheboro-Central Falls Sani-

tary District, in the exercise of its power of eminent domain, took the easements and rights of way over the lands of defendants hereinabove described, it became obligated by the North Carolina Constitution and by the statute under which it acted to pay to defendants just compensation for the damage done.

In this connection the petition sought and the judgment granted it the easements, rights of way and privilege as hereinabove set forth to construct and maintain in and upon and over and through the easements, as described, in a proper manner and with such apparatus and equipment as shall be necessary, sanitary sewer lines as a part of the sanitary sewer system of the petitioner, together with the perpetual and permanent right at all times to enter upon said easement for the purpose of inspecting said sanitary sewer lines and making the necessary repairs, replacements, additions and alterations thereon, and that except for said purposes, the petitioner shall not interfere with the rights of the respondents, and the respondents shall have the full power and right to use the lands over which said right of way and easements have been condemned and secured and located, for all lawful purposes, so long as such purposes are not inconsistent with the rights to be acquired therein, and do not interfere with the use and maintenance of the rights of way and easements granted and acquired by the petitioner.

Thus it appears by express language that the respondents retained the fee and have a right to use the property so long as such use does not interfere with the proper use by petitioner for the maintenance and operation of its sewer lines. Petitioner does not seek and did not acquire an absolute fee simple. It acquired merely an easement. And the court was under duty to lay down the correct rule to guide the jury as to what was just compensation for the damage done. In the performance of his duty the presiding judge told the jury: "(It is necessary for you to know what the rule is for measuring damages in such a case as this and the court charges you that the rule is that a petitioner such as the one in this case, a sanitary district, takes by condemnation a perpetual easement or right of way entitling it to occupy and use the entire surface of a part of a tract of land or to erect sewer lines, through and under said lands, such as is sought in this case, the landowners are entitled to recover just compensation from said petitioner for the easements taken, and just compensation in such case includes the reasonable market value of the part of the tract covered by the easement and damages, if any, done to the remainder of the tract by the taking of the easements and rights of way)." Petitioner excepts to the foregoing portion in parenthesis. Exception 25.

And continuing in this respect "(the court further charges you that since the condemnor, that is, the petitioner in this case, acquires the complete right to occupy and use the entire surface of the part of the land covered by the perpetual easements and rights of way for all time to the exclusion of the landowner, subject to his right to use it as I read in paragraph 6 of the petition where the petitioner sets forth the rights it desires to acquire, the bare fee then remains in the landowner, that is, Canoys, and for all practical purposes is of no particular value, and the value of the perpetual easements and rights of way acquired by the petitioner is virtually the same as the value of the land embraced in it; and the court further instructs you that any use which the landowner may make of any part of the land embraced in the perpetual easement is necessarily permissive and limited in character, and what, if anything, that may be worth in diminution of the compensation to which the respondents are entitled, if any, is to be determined by you under the evidence and the law as I give it to you in this case)." Petitioner excepts to the foregoing portion of charge in parenthesis. Exception 26. Compare with opinion in *Light Co. v. Clark,* 243 N.C. 577, 91 S.E. 2d 569.

In this respect petitioner appellant concedes in its brief that the law as thus charged is correct in the acquisition of certain easements, but that it is not a correct charge in connection with the easements and rights of way sought in this proceeding and by the petitioner in consideration of the express rights described in petition. Petitioner could use the property taken for only a limited purpose, and any other use by it or anyone else would require additional compensation. See *Grimes v. Power Co.,* 245 N.C. 583, 96 S.E. 2d 713; *Light Co. v. Clark, supra; Hildebrand v. Telegraph Co.,* 219 N.C. 402, 14 S.E. 2d 252; *Crisp v. Light Co.,* 201 N.C. 46, 158 S.E. 845; *Hodges v. Telegraph Co.,* 133 N.C. 225, 45 S.E. 572; and *R. R. v. Bunting,* 168 N.C. 579, 84 S.E. 1009.

Indeed, if the Sanitary District should arbitrarily or capriciously interfere with respondents' use of the surface, interference could be enjoined and the damage resulting from such interference would constitute a cause of action.

The landowner is entitled to the right to surface use. He is not required to seek permission for such use from the Sanitary District. To say in effect that such right or use has no value seems to be contrary to law and an expression of opinion prohibited by statute, G.S. 1-180.

The jury should have been instructed as to the respective rights of the petitioner and respondents. Petitioner should be required to pay

the difference in the market value of respondents' property free of the easement and subject to the easement. Such difference is a fair compensation.

For error pointed out there must be a

New trial.

WILLIAM E. DELOATCH, JOHN T. FLYNN, I. HOLT, JR., L. H. SUTTON, CURTIS P. PENDERGRAPH AND J. L. ANDERSON, ON BEHALF OF THEMSELVES AND ALL OTHER PROPERTY OWNERS AND TAXPAYERS OF ALAMANCE COUNTY, v. W. L. BEAMON, CHAIRMAN, J. B. LONG, C. C. BAYLIFF, GARLAND M. NEWLIN AND BUEL MOSER, COUNTY COMMISSIONERS OF THE COUNTY OF ALAMANCE, STATE OF NORTH CAROLINA.

(Filed 10 June, 1960.)

1. Injunctions § 13—

Where the pleadings in an action for a permanent injunction raise no issue of fact but present only a question of law, the court may determine the question of law upon the hearing of the order to show cause, and dismiss the action.

2. Taxation § 4—

What is a necessary expense within the meaning of Art. VII, Sec. 7 of the State Constitution is for the determination of the Supreme Court.

3. Same—

An expenditure by a governmental agency for the maintenance of public peace, the administration of justice, the discharge of a governmental function, or in the exercise of a portion of the State's delegated sovereignty, is a necessary expense within the meaning of the Constitution.

4. Constitutional Law § 6—

The power to levy taxes is vested exclusively in the General Assembly, and it has the exclusive power to provide the method and prescribe the procedure for the discovery, listing and assessing of property for taxation.

5. Counties § 1—

Counties are agencies of the State government for the convenient administration of governmental functions in their respective territories, and in the exercise of such functions they are subject to unlimited legislative control within constitutional limitations.

6. Same—

Since Art. VII, Sec. 2, may be modified or changed by statute, Art. VII, Sec. 13, the General Assembly has full power, unless restricted by some other constitutional provision, to prescribe the power and duty of county commissioners in respect of the levying of taxes and the manner in which property shall be valued for tax purposes.

7. Same: Taxation § 4—

The County Commissioners of Alamance County are directed to provide a county-wide revaluation of all real property in the County and are authorized to employ expert appraisers to assist county officials in the discharge of this duty, and therefore sums paid by the County to an appraising company as compensation for the performance of this duty pursuant to contract are for a necessary expense and need not be authorized by a vote. G.S. 153-64.1, G.S. 105-278, G.S. 105-295, G.S. 105-291, Constitution of North Carolina, Art. VII, Sec. 7.

8. Taxation § 4—

The courts determine whether a given project is a necessary expense of a county, but the board of commissioners of the county determines in its discretion whether such project is necessary or needed in the designated locality.

APPEAL by plaintiffs from *Carr, J.*, November Civil Term, 1959, of ALAMANCE.

Civil action by certain resident property owners and taxpayers of Alamance County for a permanent injunction to restrain the County Commissioners of Alamance County from paying $158,400.00 to Cole-Layer-Trumble Appraising Company of Dayton, Ohio, hereafter called Appraising Company, pursuant to the terms of an allegedly void agreement entered into by defendants with Appraising Company.

On October 29, 1959, when the action was commenced, Judge Crissman, upon plaintiffs' application, issued a temporary restraining order and an order directing defendants to appear before Judge Carr, at designated time and place, to show cause why a permanent injunction should not be granted. Prior to hearing by Judge Carr, defendants answered the complaint.

Plaintiffs, in substance, alleged: Defendants, notwithstanding protests from property owners and taxpayers of Alamance County, entered into an agreement to pay Appraising Company $158,400.00 for appraising farm land and homesteads and rural tenements in Alamance County. This expenditure is not for a necessary expense within the meaning of Article VII, Section 7, Constitution of North Carolina. It is not necessary to employ experts "to appraise farm land and ordinary homes, houses and lots in Alamance County." Burlington Mills and Western Electric, large taxpayers in Alamance County, have already had their machinery appraised by experts and further appraisal is unnecessary. Western Electric pays no real estate tax, its plant being on property exempt from taxation because owned by the United States Government. Unless defendants are restrained, plaintiffs will be irreparably damaged in that additional taxes will be levied upon them contrary to law.

The answer of defendants, in substance, contains these allegations: Property owners and taxpayers in large numbers have stated they agree with the action of defendants in employing expert appraisers to assist the county officials in the appraisal of all property in Alamance County incident to a complete county-wide revaluation. While certain of the real estate occupied by Western Electric Company is exempt from *ad valorem* taxes, such real estate must be appraised for the reason the federal government, pursuant to Congressional action, makes a contribution (in lieu of taxes) based on the taxable value of such property. As to machinery, a recurring annual reappraisal is necessary. Their agreement provides for the payment of not more than $65,400.00 to Appraising Company prior to July 1, 1960, for specified work; and the additional sum of $93,000.00 is to be paid to Appraising Company for additional specified work after July 1, 1960, in the event defendants exercise their option to have Appraising Company perform such work.

Subject to the aforesaid explanations, defendants do not deny the factual allegations of the complaint. However, they deny all allegations in which plaintiffs assert as a matter of law the invalidity of defendants' agreement with Appraising Company and cite the statutes referred to in the opinion as authority for their actions.

Upon hearing, Judge Carr entered judgment denying plaintiffs' application for a permanent injunction, dissolving the restraining order, dismissing the action and taxing plaintiffs with the costs. Plaintiffs excepted and appealed.

H. F. Seawell, Jr., for plaintiffs, appellants.
Young, Young & Gordon for defendants, appellees.

BOBBITT, J. Judge Carr, in entering final judgment, treated defendants' prayer that the action be dismissed as a motion for judgment on the pleadings. The rules applicable upon consideration of such motion are fully stated in *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384. Suffice to say, we are in agreement with Judge Carr's ruling that the pleadings do not raise an issue of fact as to any material matter. The question arising thereon is a question of law, namely, whether the proposed expenditures are "necessary expenses" within the terms of Article VII, Section 7, of the Constitution of North Carolina, which provides:

> "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of

those who shall vote thereon in any election held for such purpose."

It is noted: The complaint contains no allegation that the challenged expenditures were not authorized by a majority of the voters of Alamance County in an election held for such purpose. However, since defendants do not contend such election was held, we consider the complaint *as if* it contained such allegation.

It is well settled, as plaintiffs contend, that it is the function and duty of this Court, not the General Assembly, to determine what are "necessary expenses" within the terms of Article VII, Section 7. *Wilson v. High Point,* 238 N.C. 14, 20, 76 S.E. 2d 546, and cases cited.

Where the purpose of the proposed expenditure "is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty, the expense is a necessary expense within the Constitution, and may be incurred without a vote of the people." *Ervin, J.,* in *Green v. Kitchin,* 229 N.C. 450, 457, 50 S.E. 2d 545, quoted with approval in *Wilson v. High Point, supra.*

"A tax is an enforced contribution of money assessed by authority of a sovereign State. It is a source of revenue, necessary to the maintenance of government, and collectible in the way and within the period provided by law." *Orange County v. Wilson,* 202 N.C. 424, 428, 163 S.E. 113; *Lumber Co. v. Graham County,* 214 N.C. 167, 170, 198 S.E. 843.

Under Article V of the Constitution of North Carolina, the power to levy taxes vests exclusively in the legislative branch of the government; and it is within the exclusive power of the General Assembly to provide the method and prescribe the procedure for discovery, listing and assessing property for taxation. *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136, and cases cited; *Freeman v. Comrs. of Madison,* 217 N.C. 209, 216, 7 S.E. 2d 354.

Counties are creatures and constituent parts of the State government. *Dare County v. Currituck County,* 95 N.C. 189; *Trustees v. Webb,* 155 N.C. 379, 71 S.E. 520; *R. R. v. Mecklenburg County,* 231 N.C. 148, 150, 56 S.E. 2d 438. "In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control, except where this power is restricted by constitutional provision." *Jones v. Commissioners,* 137 N.C. 579, 50 S.E. 291; *Trustees v. Webb, supra; Freeman v. Comrs. of Madison, supra.*

Article VII, Section 2, of the Constitution of North Carolina, in

part, provides: "It shall be the duty of the commissioners to exercise a general supervision and control of the . . . levying of taxes, and finances of the county, *as may be prescribed by law.*" (Our italics) However, by Article VII, Section 13, Constitution of North Carolina, the General Assembly has full power "by statute to modify, change, or abrogate any and all of the provisions" of Article VII, Section 2. *Freeman v. Comrs. of Madison, supra.* Thus, unless restricted by another constitutional provision, the General Assembly has full power to prescribe the power and duty of county commissioners in respect of the levying of taxes and the manner in which property in the county shall be valued for tax purposes.

G.S. 105-278, as rewritten by C. 704, s. 1, Session Laws of 1959, provides that *all* real property in Alamance County (1) "shall be listed and assessed for *ad valorem* tax purposes" as of January 1, 1961, and as of January 1st on every eighth year thereafter, (2) "shall be appraised . . . by actual appraisal as provided in G.S. 105-295," and (3) "assessed in accordance with the provisions of G.S. 105-294." (Note: G.S. 105-294 was amended by C. 682, Session Laws of 1959, and G.S. 105-295 was amended by C. 704, s. 4, Session Laws of 1959.)

G.S. 105-295, as amended, in part, provides: "In appraising real property for tax purposes as required by G.S. 105-278, G.S. 105-279, and G.S. 105-294, it shall be the duty of the county tax supervisor to see that every lot, parcel, tract, building, structure, and other improvement being appraised actually be visited and observed by a competent appraiser, either one appointed under the provisions of G.S. 105-287 or one employed under the provisions of G.S. 105-291." In addition, G.S. 105-295 prescribes in detail the factors to be considered in the appraisal of each lot, parcel or tract.

G.S. 105-287, as amended by C. 704, s. 3, Session Laws of 1959, provides that the county tax supervisor, subject to the approval of the county commissioners, shall appoint list takers and assessors, with special provisions applicable in "revaluation years."

G.S. 105-291 provides: "The board of county commissioners in each county, at the request of the county supervisor of taxation, may in their discretion employ one or more persons having expert knowledge of the value of specific kinds or classes of property within the county, such as mines, factories, mills and other similar property, to aid and assist the county supervisor of taxation and the list takers and assessors in the respective townships, or to advise with, aid and assist the board of equalization and review in arriving at the true value in money of the property in the county. Such expert, or experts, so employed by the board of county commissioners shall receive for their

services such compensation as the board of county commissioners shall designate."

The cited statutes impose upon the county commissioners of Alamance County the positive duty to provide a county-wide revaluation of all real property as of January 1, 1961, and authorized them, in their discretion, to employ expert appraisers to assist the county officials "in arriving at the true value in money of the property in the county." In performing such duties, the county commissioners exercise "a portion of the State's delegated sovereignty" and expenditures for such purpose are "necessary expenses" within the terms of Article VII, Section 7. Indeed, the purpose of said expenditure is to provide, in accordance with legislative authority, an equitable basis for the levy and collection of the *ad valorem* taxes required to maintain the county government and to pay the "necessary expenses" thereof.

It is noted that C. 704, s. 6, Session Laws of 1959, codified as G.S. 153-64.1 in the 1959 Supplement, declares the levy of taxes therein authorized "to be for a necessary expense and for a special purpose." Plaintiffs contend, and rightly so, that the General Assembly is without power to determine what are "necessary expenses" within the terms of Article VII, Section 7. However, this Court, apart from the legislative declaration, now holds that the proposed expenditures are for "necessary expenses" within the terms of Article VII, Section 7. The fact that the legislative declaration is in accord with this Court's decision affords no ground for complaint.

It is noted: "The courts determine whether a given project is a necessary expense of a county, but the board of commissioners for the county determine in their discretion whether such project is necessary or needed in the designated locality." *Insurance Company v. Guilford County,* 225 N.C. 293, 301, 34 S.E. 2d 430, and cases cited; also, *Brodnax v. Groom,* 64 N.C. 244; *Vaughn v. Commissioners,* 117 N.C. 429, 23 S.E. 354; *Fawcett v. Mount Airy,* 134 N.C. 125, 45 S.E. 1029; *Starmount Co. v. Hamilton Lakes,* 205 N.C. 514, 520, 171 S.E. 909; *Green v. Kitchin, supra.*

Having reached the conclusion that the sole ground on which the plaintiffs attack the proposed expenditure is untenable, the judgment of Judge Carr is affirmed.

Affirmed.

KEITH TRACTOR AND IMPLEMENT CO., INC., v.

W. B. MCLAMB AND MRS. W. B. MCLAMB.

(Filed 10 June, 1960.)

1. Appeal and Error § 21—

A sole assignment of error to the signing and entering of the order appealed from raises only the questions of whether the facts found support the judgment and whether fatal error of law appears upon the face of the record.

2. Claim and Delivery § 4—

Where judgment in claim and delivery directs that the property be sold and the proceeds of sale be applied to the judgment on the note secured by a mortgage on the personalty, an order setting aside the judgment "in so far as it pertains to the value of the property" is irrelevant and a nullity.

3. Same— Record held insufficient to show equities entitling defendants to attack price brought at public sale on ground of inadequacy.

In this action on a note secured by mortgage on personalty, claim and delivery for the personalty was issued, and default judgment was entered for the amount of the note, which judgment directed the sale of the mortgaged property by the mortgagee and the application of the proceeds of sale to the judgment. Sometime thereafter the plaintiff sold the property at public auction and reported the sale to the court. Upon defendants' motion in the cause, based upon the asserted inadequacy of the price at the sale, the court, upon consideration of the judgment roll, ordered that the cause be transferred to the civil issue docket in order that the value of the property at time of its seizure might be determined. The judgment roll failed to disclose either the specific property seized or the time of its seizure, irregularity in the sale, or equities in favor of defendant. *Held:* Order transferring the cause to the civil issue docket for the determination of the value of the property at the time of its seizure is not supported by the record and cannot be sustained.

4. Appeal and Error §§ 2, 7—

Whether the Supreme Court will consider a demurrer *ore tenus* upon a fragmentary appeal rests in its sound discretion.

5. Claim and Delivery § 4—

While the value of personalty seized in claim and delivery by the mortgagee is to be determined as of the time of seizure, when judgment by default is promptly taken by the mortgagee and foreclosure sale is made within a reasonable time thereafter, the price obtained at such sale is conclusive as to value at the time of the seizure in the absence of fraud, intervening damage to the property, failure to comply with the requisites for a valid sale, or other equitable considerations affecting value.

6. Same—

In the instant case, whether the mortgagors are entitled to any credit on the judgment note over and above the sale price must be determined

by the lower court upon consideration of the equities upon definite findings as to the date of seizure and the date of sale, the promptness with which defendants moved for relief, etc.

APPEAL by plaintiff from *Williams, J.*, October 1959 Civil Term, of HARNETT.

On 21 August 1956 defendants executed and delivered to plaintiff a promissory note for $1659.30 and a chattel mortgage conveying a tractor and equipment for security. Plaintiff filed suit on 5 November 1956 for the face amount of the note and caused claim and delivery proceedings to issue for the tractor and equipment. Summons was served 17 November 1956.

The complaint sets out the note verbatim and alleges demand and default. The affidavit in claim and delivery complies with the requirements of G.S. 1-473, and alleges that the value of the tractor and equipment is $800.00. Defendants filed no answer or other pleadings.

On 11 February 1957 the Clerk of Superior Court entered judgment by default. It recites, among other things, that claim and delivery proceedings were served on 17 November 1956, and "notwithstanding . . . the seizure of said personal property, or so much thereof as (sheriff) was able to find, defendants failed and neglected to replevy . . . , which said personal property is now held by the sheriff . . . to be . . . delivered to the plaintiff as by law provided." It adjudged: (1) that plaintiff recover the amount of the note; and (2) that plaintiff is entitled to the immediate possession of the mortgaged property for sale and application of proceeds to the money judgment.

On 16 December 1957 the clerk issued execution and directed the sheriff to satisfy the judgment out of the personal and real property of defendants and, if such property proved insufficient, to "search for and find . . . the personal property" (described in the chattel mortgage) and "deliver the same to the plaintiff." The sheriff's return on the execution states that on 30 December 1957 he took from defendants and delivered to plaintiff the mortgaged property.

On 10 February 1958 plaintiff sold the tractor and equipment at public auction at the price of $330.00 and reported the sale to the court.

Defendants on 28 August 1959 filed a motion in the cause and alleged that the tractor and equipment were seized by the sheriff under claim and delivery on 17 November 1956 and with the consent of plaintiff were retained by the sheriff until 17 February 1958, and that this property at the time of seizure was well worth $1700.00. Defendants ask that the judgment of the clerk, dated 11 February 1957, be vacat-

ed and set aside "in order that the value of the property may be determined as of the date of seizure."

The motion was heard and an order entered in Superior Court at the term above indicated. ". . . (a)fter hearing argument of counsel for defendants and likewise for the plaintiff and the introduction of Judgment Roll by the defendants" the court found as a fact, among other things, that "the sheriff . . . failed and neglected to turn over the possession of said personal property so seized by him (on 17 November 1956), if any, to the plaintiff and it was retained by the sheriff." It was adjudged: (1) that the judgment of the clerk, dated 11 February 1957, "is set aside and vacated in so far as it pertains to the value of the property," and (2) the cause is transferred to the Civil Issue Docket "in order that the value of the property seized may be determined on a proper issue submitted to the jury as of November 17, 1956, the date of its seizure."

From this order plaintiff appealed and assigned error.

Dupree & Strickland and Dupree & Weaver for plaintiff, appellant.
Neill McK. Ross for defendants, appellees.

MOORE, J. Plaintiff's sole assignment of error is to "the signing and entering the order." It raises only two questions: "(1) Do the facts found support the judgment and (2) does any fatal error of law appear upon the face of the record?" *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E. 2d 592.

The order vacates and sets aside the judgment of the clerk "in so far as it pertains to the value of the property." The clerk's judgment makes no finding with respect to the value of the property in question, and no adjudication of value. Therefore this provision of the order is wholly irrelevant and a nullity. It is here observed that the judgment entered by the clerk was within his authority and jurisdiction, and on this record no cause for disturbing it has been asserted. G.S. 1-209 (c), (d) and (e). G.S. 1-211 (1) and (5).

The order transfers the cause to the civil issue docket "that the value of the property seized may be determined on a proper issue submitted to the jury as of November 17, 1956, the date of its seizure." This provision of the order is based on the assumption that the mortgaged property was seized and taken from the possession of defendants on 17 November 1956. There is no finding of fact to support this premise and the order predicated thereon. There is a finding that the sheriff "failed and neglected to turn over the possession of said personal property so seized by him, *if any*, to the plaintiff." (Empha-

sis ours) The words "if any" leave the matter in doubt and negate the proposition that there is a positive finding sufficient to support the order. Furthermore, the recitals in the order clearly indicate that the court heard no evidence but based the adjudication entirely upon arguments of counsel and the judgment roll. The judgment roll is inconclusive as to when the property was taken from the defendants by the sheriff.

There is a finding in the clerk's judgment that claim and delivery papers were served on 17 November 1956 and "notwithstanding . . . the seizure of said personal property, or so much thereof as (sheriff) was able to find, the defendants failed and neglected to replevy." How much was the sheriff able to find? Did he find all of the property, a single piece of equipment, or a wheel from the tractor? As to this the judgment roll is silent.

The sheriff's return of the claim and delivery proceedings is not helpful. It indicates that the papers were received 5 November 1956 and executed 17 November 1956 "by delivering a copy of the . . . summons, a copy of the complaint, a copy of the . . . affidavit and undertaking, and the order thereon endorsed" to defendants "and by taking from the defendants *the following* personal property described in the annexed affidavit:" (Emphasis ours) In the space following the colon there is nothing. It is entirely blank.

The sheriff's return of the execution dated 16 December 1957 is as follows: "Received December 18, 1957. Taken from defendant and delivered to the plaintiff (here is listed all of the personal property described in the chattel mortgage). This 30 day of Dec. 1957. C. R. Moore, Sheriff. . ." This return seems to indicate that the property was taken from defendants on or about 30 December 1957.

The challenged order is not supported by a finding of fact or the judgment roll. It cannot be sustained.

In the Supreme Court, for the first time, plaintiff interposed a demurrer *ore tenus* to defendants' motion in the cause on the ground that the motion does not state sufficient facts to constitute a valid claim for further relief in this action, in that all issues which might have been raised by defendants were determined against them when they failed to file answer, and the judgment of the clerk was by default final and concludes defendants.

This Court may, in its discretion, on a fragmentary appeal, express an opinion on the merits. Or it may refuse to do so. *G. M. C. Trucks v. Smith,* 249 N.C. 764, 768, 107 S.E. 2d 746. We think it proper in this instance to remand the cause to Superior Court for determination of the unresolved questions, if they are there properly presented.

Proof of the amount seized property brings at foreclosure a considerable time after seizure may not be treated as conclusive on the issue of value at the time of seizure. *Credit Corp. v. Saunders,* 235 N.C. 369, 373, 70 S.E. 2d 176. The value of the property taken is to be determined as of the time of its taking, and proof of its value within a reasonable time before or after the taking is competent as bearing upon its value at the time of seizure. *Newsom v. Cothrane,* 185 N.C. 161, 162, 116 S.E. 415. The price obtained at an auction sale made within a reasonable time after seizure of the property is competent evidence of the value at the time of the taking. 20 Am. Jur., Evidence, sec. 373, p. 340. Where mortgaged property has been taken by claim and delivery, and defendant fails to replevy and files no answer or other pleading and judgment is promptly taken by default and foreclosure sale is made within a reasonable time thereafter, the price which the property brings at foreclosure sale is, by virtue of the mortgage provisions, conclusive of its value at the time of seizure in the absence of fraud, damage to the property after seizure and before the sale, failure to comply with the legal and contractual requirements for a valid sale, or other equitable considerations affecting value.

In the instant case, if the property was taken from defendants by execution on or about 30 December 1957 and duly sold at foreclosure sale on 10 February 1958, are the circumstances and equities such that defendants will be permitted to raise the issue of value by motion in the cause more than eighteen months after sale? On the other hand, if the property was seized on 17 November 1956 and not sold until 10 February 1958, will defendants be permitted to reopen the case by motion in the cause, made two years and nine months after seizure of the property, for the purpose of submitting an issue of value to a jury, or will both plaintiff and defendants be limited and concluded by the allegations of the complaint and the affidavit in claim and delivery — defendants having failed to answer? Plaintiff alleged in its affidavit that the value of the property at the time of issuance of claim and delivery was $800.00. Defendants filed no answer to the complaint and no exceptions to plaintiff's undertaking. *Credit Corp. v. Saunders, Supra.*

The matters involved are for determination of the Superior Court. The inquiry is whether defendants are entitled to any credit on the clerk's judgment and the execution issued pursuant thereto over and above the sale price of $330.00.

The order below is vacated and the cause is remanded for further proceedings.

Error and remanded.

IN RE CONDEMNATION BY THE CITY OF GREENSBORO OF CERTAIN LAND OWNED BY T. L. ALLEY AND WIFE, INELL V. ALLEY.

1. Eminent Domain § 5—

Just compensation which must be paid when an entire tract of land is taken is the fair market value of the land; when only a portion of a tract is taken, just compensation is, in the absence of statutory provision for the deduction of general and special benefits, the difference between the fair market value of the entire property before the taking and the fair market value of the remainder following the taking.

2. Same—

The reason for the rule for the admeasurement of damages when only a part of a tract of land is taken is to afford the owner compensation for the damage, if any, to the land remaining to him after the taking, and the owner may elect to seek compensation only for the value of the land taken even though it be a part of a single tract.

3. Same:—Eminent Domain § 9—

Where there is no evidence that the land taken under eminent domain had any special value to the owner except its sentimental value as his home, such value is special or peculiar to the owner and adds nothing to the market value of the land and is not compensable, and therefore an instruction upon such evidence that if the land possessed special value to the owner which could be measured in money, the owner is entitled to have that value considered in fixing the compensation, must be held for prejudicial error.

APPEAL by City of Greensboro from *Crissman, J.*, 28 October 1959 Civil Term, of GUILFORD (Greensboro Division).

This is an appeal from a judgment based on a verdict fixing the amount of compensation to be paid for land taken to enlarge the city's water supply.

H. J. Elam, III and J. L. Warren for petitioner, appellant.

John R. Hughes and Shuping & Shuping for respondent appellees.

RODMAN, J. On 21 July 1958 City of Greensboro, acting pursuant to provisions of its charter (c. 37, Private Laws 1923, as amended by c. 91, Private Laws 1929) initiated condemnation proceedings to acquire 19.65 acres, part of a tract of 37.4 acres owned and occupied by T. L. Alley and wife, Inell V. Alley as a home. The commissioners appointed pursuant to the provisions of the city charter fixed the compensation to be paid at $5,403.75. Dissatisfied with the amount awarded, the property owners excepted and appealed to the Superior Court as permitted by the statute under which the proceeding was begun.

As determinative of the controversy, the court submitted an issue answered by the jury as follows:

"What compensation are the respondents T. L. Alley and wife, Inell V. Alley, entitled to recover of the City of Greensboro for the taking by condemnation of the lands described in this proceeding.?

"ANSWER: $16,510.00 plus interest at 6% from July 21, 1958."

When the city, in the exercise of sovereign power, took Alley's property, it became obligated by our Constitution and by the statute under which it acted to pay just compensation for the damage inflicted.

When an entire tract is taken, just compensation is the fair market value of the land taken. When only a portion of a tract is taken and the statute which authorizes the taking directs the deduction of general and special benefits as does the statute under which Greensboro acted, just compensation is the difference between the fair market value of the entire property before the taking and the fair market value of the remainder following the taking. *Robinson v. Highway Com.*, 249 N.C. 120, 105 S.E. 2d 287; *Statesville v. Anderson*, 245 N.C. 208, 95 S.E. 2d 591; *Gallimore v. Highway Com.*, 241 N.C. 350, 85 S.E. 2d 392; *Proctor v. Highway Com.*, 230 N.C. 687, 55 S.E. 2d 479.

The reason for the rule as stated above with respect to a partial taking is to enable the property owner to obtain compensation for the damage, if any, to the remainder. Here the property owners offered no evidence of value of the entire tract or of the remainder but elected to measure the amount of compensation to which they were entitled by establishing the fair market value of the property taken. For that purpose T. L. Alley and his witnesses described the type and character of the land. Its location with respect to highways and the railroad was shown. The area taken has only a limited road frontage, but has all of the railroad frontage. This railroad frontage made it valuable for industrial sites; but according to Alley and the other witnesses, its chief value was for agricultural purposes. It was rich bottom land, well protected and sodded to pasture producing great quantities of grass, clover, and lespedeza. Its fertility was sufficient to provide the entire annual food requirements, except during brief periods in the winter, for a herd of fifteen cows and their annual offspring. A spring on the land provided a natural source of water for the cattle or to irrigate any other crops which might be raised. It was not only capable of producing large quantities of grass and legumes, but could produce large crops of tobacco, corn, and other grains. These qualities, so the witnesses testified, gave the area taken a fair market value

ranging from $1250 to $1500 per acre. To the contrary, the city's witnesses put a value on the land ranging from $150 to $300 per acre.

Except for the fact that the land taken was a part of the home place and the farming operation of the owner, there was no evidence suggesting special value to the owner.

The court in its charge reviewed the evidence and the contentions of the parties with respect to the purposes for which the land could be used and their contentions as to fair value. He instructed the jury to determine the answer to the issue submitted to them by ascertaining the fair market value of the property taken.

He correctly told the jury: ". . . the fair market value immediately before the taking must not be based upon speculation or an imaginary use of the property. The market value of property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell and is bought by one who is under no necessity of having it."

Having correctly instructed the jury, based on the theory of damage adopted by the owners, the court further charged: "If a tract is taken for public use and it possesses a special value to the owner which can be measured by money, he's entitled to have that value considered in the estimate of compensation and damages."

The city excepted and assigned as error the last quoted portion of the charge.

This challengd portion is for practical purposes a direct quotation from *Brown v. Power Co.*, 140 N.C. 333. A careful reading of the opinion in that case leads us to the conclusion that the quotation was not material to the decision in that case. That opinion correctly enunciates the rule to measure compensation as fair market value.

Based on the facts of this case we think the law as announced in *U. S. v. Petty Motor Co.*, 327 U.S. 372, 90 L. Ed. 729, quoted by *Parker, J.*, in *Williams v. Highway Com., ante,* 141, is applicable. It is there said: "The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.' It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and

other such consequential losses are refused in federal condemnation proceedings."

In *Light Co. v. Clark,* 243 N.C. 577, 91 S.E. 2d 569, we said: "In fixing values on property in condemnation proceedings for any and all uses or purposes to which the property is reasonably adapted and might, with reasonable probability, be applied, but has never been applied, its availability for future uses must be such as enters into and affects its market value, and regard must be had to the existing business or wants of the community, or such as may be reasonably expected in the immediate future to affect present market value. The test is what is the fair value of the property in the market. The uses to be considered must be so reasonably probable as to have an effect on the present market value. Purely imaginative or speculative value should not be considered." Values which are peculiar to the owner and add nothing to the market value are not compensable. *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258; *S. v. Lumber Co.,* 199 N. C. 199, 154 S.E. 72; *U. S. v. Miller,* 317 U.S. 369, 87 L. Ed. 336; 147 A.L.R. 55.

We find nothing in the evidence indicating any special value to the owner as distinguished from those factors relating to market value unless perhaps it is the fact that the property taken is a part of a home which Alley had been cultivating for fourteen years and had perhaps for that reason a sentimental attachment. Such a value would be special or peculiar to the owner, but it is not such a value as will support a monetary compensation. Nowhere in the charge did the court attempt to elucidate with respect to the special values which the owner might attribute to the property taken nor did it indicate which, if any, of these values could or should be compensated by a monetary payment.

It is not necessary for us to determine now the factual situation, if any, under which the challenged rule would be applicable. Perhaps it might be applicable to those cases where because of special conditions the property could not be said to have a market value in the accepted sense of that term. 29 C.J.S. 970-971; 18 Am. Jur. 885.

Here the challenged portion of the charge is a mere abstract statement of law not supported by the evidence, reasonably calculated to cause the jury to award more than just compensation and hence erroneous. *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560; *Worley v. Champion Motor Co.,* 246 N.C. 677, 100 S.E. 2d 70; *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558; *Collingwood v. R. R.,* 232 N.C. 724, 62 S.E. 2d 87.

New trial.

RULAX ROWE v. NOEL BETTS FUQUAY.

(Filed 10 June, 1960.)

1. Automobiles § 41l—

Plaintiff's evidence to the effect that he was walking entirely off the hard surface on the shoulder of the road on his right side of the highway when he was struck from the rear, without warning, by defendant's car, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Trial § 31b—

The court is required to declare and explain the law arising on the evidence as to all substantial features of the case, and a mere declaration of the law in general terms and a statement of the contentions of the parties are insufficient. G.S. 1-180.

3. Automobiles § 46—

Where defendant pleads contributory negligence of plaintiff pedestrian and introduces supporting evidence on the issue, it is error for the court to fail to charge as to the facts necessary to be found by the jury to constitute negligence on the part of plaintiff, but the court should charge, in addition to stating the contentions of the parties, as to the circumstances arising on the evidence upon which the issue should be answered in the affirmative and the circumstances upon which it should be answered in the negative.

APPEAL by defendant from *Burgwyn, E. J.*, at September Assigned Civil Term, 1959, of WAKE.

Civil action to recover damage for personal injury resulting from actionable negligence as alleged in the complaint. Defendant, answering, denies allegations of complaint, and pleads in defense contributory negligence of plaintiff.

The injury involved here occurred at about 10:15 P. M., on 20 December, 1957, on the old Garner Road a short distance from the city limits of Raleigh when the automobile operated by defendant struck plaintiff, a pedestrian. At the point where the accident occurred the asphalt road is twenty feet wide. There are no sidewalks. The shoulders on each side are approximately level with the road, which is straight and practically level, except for a gradual slope, for a distance of about one mile in each direction from the point of the accident. Some rain had been falling and the weather was misty and foggy at the time of the accident.

The evidence tends to show that plaintiff was walking in an easterly direction, away from the city of Raleigh. Defendant was proceeding in the same direction along the road in his automobile. Plaintiff testified that he was walking alongside his right-hand side of the

road, that there were several commercial establishments on that side; that some light was provided on that side; that the area between these establishments and the road was paved in some places; and that the shoulder on the other side was grown up in high grass and weeds. He further testified that when he had walked past the last establishment, and had left the paved area provided by that establishment, and was walking along the dirt shoulder about two and one-half feet off the paved surface of the road, he was struck from behind and without warning by what he later learned was the automobile being operated by defendant. Plaintiff suffered personal injuries.

Defendant's evidence tended to show that he was operating his automobile at a reasonable rate of speed and under proper control; that he was maintaining a proper lookout; that another automobile was following him a few car lengths back; that he had met a few automobiles but was not meeting one at the time of the accident; that he was driving on his right-hand side of the road; that his automobile was on the hard surface of the road at all times; that his lights were shining 100 or 125 feet ahead; that "something" suddenly appeared on the road in front of him; that he swerved to the left in an attempt to miss the object, but struck it with the right front part of his automobile; and that after traveling 75 or 100 feet and stopping his car he returned and found the plaintiff lying on the shoulder of the road.

The issues of negligence and contributory negligence were answered in favor of the plaintiff and damages were assessed. From the judgment entered on the verdict, defendant appeals to Supreme Court, and assigns error.

Teague, Johnson & Patterson for plaintiff, appellee.
Smith, Leach, Anderson & Dorsett, for defendant, appellant.

WINBORNE, C. J. I. The evidence considered in the light most favorable to plaintiff was sufficient to go to the jury and defendant's motion for judgment of nonsuit was properly overruled. See *Williams v. Henderson*, 230 N.C. 707, 55 S.E. 2d 462, and *Hatcher v. Clayton*, 242 N.C. 450, 88 S.E. 2d 104.

II. There are several assignments of error based on exceptions duly taken by defendant to the court's charge on the second issue. Among these No. 24 based on exception number 24, is that the court erred in that it "failed to instruct the jury what facts it was necessary for them to find to constitute negligence on the part of the plaintiff or as to the circumstances under which the second issue should be

answered in the affirmative, and under what circumstances it should be answered in the negative, but left the jury unaided to determine what facts constituted negligence on the part of the plaintiff, and thereby failed to declare, explain, and apply the law to the facts arising upon the evidence given in this case as required by G.S. 1-180." The exception is well taken.

Parker, J., speaking for the Court in *Glenn v. Raleigh*, 246 N.C. 469, 98 S.E. 2d 913, said: "The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that G.S. 1-180 imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties, as here, is not sufficient to meet the statutory requirement. *Hawkins v. Simpson*, 237 N.C. 155, 74 S.E. 2d 331, where 14 of our cases are cited." In the case in hand the court defined contributory negligence in general terms and stated the allegations and contentions of the defendant relating thereto. However, nowhere in the charge did the trial judge instruct the jury as to the facts necessary to be found by them to constitute negligence on the part of the plaintiff. Nor did he in the charge instruct them as to the circumstances under which the second issue should be answered in the affirmative, and under what circumstances it should be answered in the negative. *Glenn v. Raleigh, supra.* Indeed there is failure to explain the law of contributory negligence applicable to the evidence upon which the defendant's contentions were based, should the jury find the facts from the evidence to be as contended for by him. *Brooks v. Honeycutt*, 250 N.C. 179, 108 S.E. 2d 457.

Other assignments of error are not expressly considered. They may not recur upon another trial.

For the error pointed out, the defendant is entitled to a

New trial.

R. SAUNDERS WILLIAMS, W. WALTER HORNIG, AND JOHN F. TROXLER, JR., v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 10 June, 1960.)

1. Highways § 1: State § 3a—

The State Highway Commission is an agency of the State and is subject to suit only in the manner expressly authorized by statute.

2. Easements § 1—

The right of access to a public highway is a property right regardless of whether the right is an easement appurtenant arising out of the ownership of land adjacent to a highway, or whether it is an easement arising out of contract giving the owner of land the right of access to a highway at a particular point.

3. Eminent Domain § 7a—

The State Highway Commission may take property and appropriate it to public use without instituting condemnation proceedings. In such event the owner must pursue the prescribed remedy to recover compensation for the taking of his land.

4. Same: Eminent Domain § 2: State § 3a—

Where the agreement between the owner and the State Highway Commission for the taking of land for a limited access highway stipulates that the owner should have access to the highway at a stipulated place, the right of access in accordance with the agreement is a property right, and the refusal of the Commission to allow access at the stipulated place in accordance with the agreement constitutes a "taking" entitling the owner to institute a special proceeding for compensation, and this remedy being available, the owner may not maintain a civil action for damages.

APPEAL by plaintiffs from *Preyer, J.*, at November 16, 1959 Civil Term of GUILFORD— Greensboro Division.

Civil action to recover damages for alleged breach of contract heard upon demurrer to complaint— for that this Court does not have jurisdiction of the action as to this defendant and for that said complaint does not allege facts sufficient to constitute a cause of action against the defendant as expressly set forth in the demurrer.

The following summarized facts are alleged in plaintiffs' complaint. On November 19, 1953, John F. Clark, J. S. Clark and Hattie Clark Lee, owners of a tract of land in Guilford County containing approximately 71 ½ acres, executed an agreement granting to the defendant a right-of-way across said tract. The agreement contained the following language: "* * * the undersigned owners of that certain property known as * * * on State Highway Project 5404, recognizing the benefits to said property by reason of the construction of the proposed highway development in accordance with the survey

and plans proposed for the same, and in consideration of the construction of said project, hereby grants to the State Highway and Public Works Commission the right-of-way for said highway project as hereinafter described and releases the Commission from all claims for damages by reason of said right-of-way across the lands of the undersigned, and of the past and future use thereof by the Commission, its successors and assigns, for all purposes for which the Commission is authorized by law to subject such right-of-way; * * * (description of right-of-way) * * *, and in accordance with plans for said project in the office of the State Highway and Public Works Commission in Raleigh, N. C., subject to the following provisions only: * * * (description of additional right-of-way) * * * The property owners are to be paid a cash consideration of $2,500.

"It is further understood and agreed that the undersigned and their heirs and assigns shall have no right of access to the highway constructed on said right-of-way except at the following survey stations: 761 + 00 right * * *."

The project referred to in the agreement was in connection with the construction of U. S. Highway 29-70.

On 28 July, 1956, John F. Clark, J. S. Clark, and Hattie Clark Lee conveyed the aforesaid tract of land to plaintiffs.

The defendant has refused and still refuses to allow plaintiffs to enter upon U.S. Highway 29-70 at survey station 761 + 00 right. This refusal has resulted in damages to plaintiffs since the tract would be more valuable with access to the highway at the said point.

Defendant demurred to the complaint for that the Superior Court "does not have jurisdiction of this action as to this defendant and for that said complaint does not allege facts sufficient to constitute a cause of action against this defendant." After hearing the cause, upon the demurrer, the presiding judge entered an order sustaining the demurrer and dismissing the action. To the signing of the order and order as signed, the plaintiffs except and appeal therefrom to the Supreme Court, and assign error.

Fred M. Upchurch, Booth & Osteen for plaintiffs, appellants.

Attorney General T. Wade Bruton, Assistant Attorney General Kenneth Wooten, Jr., Harrison Lewis, Trial Attorney, and Adams, Kleemeier & Hagan for the State Highway Commission.

WINBORNE, C. J. The defendant North Carolina State Highway Commission, an unincorporated governmental agency of the State, is not subject to suit except in the manner expressly authorized by sta-

tute. *Latham v. Highway Comm.*, 191 N.C. 141, 131 S.E. 385; *McKinney v. Highway Comm.*, 192 N.C. 670, 135 S.E. 772; *Schloss v. Highway Comm.*, 230 N.C. 489, 53 S.E. 2d 517; *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182; *Cannon v. Wilmington*, 242 N.C. 711, 89 S.E. 2d 595.

The authorized manner of suit against the Highway Commission to recover compensation for the taking of property is by a special proceeding in condemnation under G.S. 136-19, and G.S. 40-12 *et seq.* There is an exception to the above rule where "private property is taken under circumstances such that no procedure provided by statute affords an applicable or adequate remedy." Under these circumstances, "the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor." *Cannon v. Wilmington, supra; Sale v. Highway Comm.*, 242 N.C. 612, 89 S.E. 2d 290. However the exception has no application here.

This Court said in *Sanders v. Smithfield*, 221 N.C. 166, 19 S.E. 2d 630, that the owner of abutting property has the right of egress from and ingress to his property, that this right is in the nature of an easement appurtenant to the property, that the easement itself is property, and that interference with the easement by vacating or closing a street under circumstances resulting in depreciation of the value of the abutting property is considered *pro tanto* a taking of the property (easement) for which compensation must be allowed.

An abutting landowner's right of access to a public highway adjacent to his property is in the nature of an easement appurtenant to his property. *Hedrick v. Graham*, 245 N.C. 249, 96 S.E. 2d 129. In the *Hedrick* case this Court held that the State Highway Commission has statutory authority "to exercise the power of eminent domain to condemn or severely curtail an abutting landowner's right of access to a State public highway adjacent to his property for the construction or reconstruction, maintenance and repair, of a limited-access highway upon the payment of just compensation."

The Highway Commission is not required to bring a special proceeding against the owner for the condemnation of private property prior to taking it, but may actually take the property and appropriate it to public use. *Moore v. Clark, supra; Gallimore v. Highway Com.*, 241 N.C. 350, 85 S.E. 2d 392. When this is done the property owner is entitled to just compensation but he must pursue the prescribed remedy.

Plaintiffs in their brief concede that the remedy for the taking of an easement is a special proceeding in condemnation. However they argue that they had no property right which could be taken here,

but that they had a contractual right which was not subject to condemnation. A similar point was argued in *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 41 L. Ed. 1165, where plaintiff had a twenty-five year contract with the city to supply it water and the city acquired plaintiff's water supply system by condemnation. In response to the argument that the taking was improper because it interfered with a contract right the court said "it (the argument) ignores the fact that the contract is a mere incident to the tangible property; that it is the latter which, being fitted for public use, is condemned * * * it still is true that the contract is not the thing which is sought to be condemned, and its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property." The fact that plaintiffs' right of access arose out of an agreement and a deed does not prevent its being a property right. Indeed, defendant's right-of-way was created by agreement, but it is nonetheless a property right.

The defendant has authority by virtue of G.S. 136-19 to acquire rights-of-way by purchase. *Sale v. Highway Comm.*, 238 N.C. 599, 78 S.E. 2d 724. The right-of-way agreement involved here embodies a purchase which vests in the State Highway and Public Works Commission a right-of-way over certain specifically described land, the abutting owners' right of access except at one specific point, and other incidental rights not pertinent to this appeal. The agreement provided the owners $2500 cash, a highway constructed across their land, and a right of access at survey station 761 + 00 right. This right of access was an easement, a property right, and as such was subject to condemnation. Defendant's refusal to allow plaintiffs to enter upon the highway at the point of the easement constituted a taking or appropriation of private property. For such taking or appropriation, an adequate statutory remedy in the nature of a special proceeding is provided. Plaintiff's complaint having stated a civil action, the demurrer thereto was properly sustained.

Affirmed.

STATE OF NORTH CAROLINA, ON THE RELATION OF THE UTILITIES COMMISSION v. MAYBELLE TRANSPORT COMPANY AND RYDER TANK LINE, INC.

(Filed 10 June, 1960.)

1. Appeal and Error § 4—

Only a party aggrieved may appeal from the Superior Court to the Supreme Court. G.S. 1-271.

2. Appeal and Error § 3—

An interlocutory order of the Superior Court is not appealable unless it deprives appellant of a substantial right which he may lose if the order is not reviewed before final judgment. G.S. 1-277.

3. Appeal and Error § 2—

The Supreme Court, in the exercise of its supervisory jurisdiction, may vacate an interlocutory order and remand the cause in the interest of expediting the administration of justice.

4. Utilities Commission § 5—

If the Superior Court remands a cause to the Utilities Commission under G.S. 62-26.10, it should specify the ground upon which its order is based, and where upon an appeal from the Utilities Commission upon exceptions to the findings of fact and to other portions of the order, the Superior Court remands the cause to the Utilities Commission without passing upon the exceptions and without reference to G.S. 62-26.9 or G.S. 62-26.10, the Supreme Court may vacate the order and remand the cause to the Superior Court for further proceedings in accordance with law.

APPEAL by Central Transport, Inc., from *Crissman, J.*, November 19, 1959, Civil Term, of GUILFORD (High Point Division).

On March 13, 1959, Central Transport, Inc., hereafter called applicant, filed with the North Carolina Utilities Commission, hereafter called Commission, an application for enlargement of its existing rights under its (intrastate common carrier) Certificate No. C-543. Applicant, as authorized by said certificate, was engaged in the transportation of petroleum products in bulk in tank trucks, as an irregular route common carrier, in certain prescribed territory in North Carolina. Its application was for *additional* authority, namely, authority to transport liquid commodities in bulk in tank trucks throughout the State of North Carolina.

Maybelle Transport Company and Ryder Tank Line, Inc., intervened and filed protests. The matter was heard May 14, 1959, by Commissioner Worthington. (G.S. 62-26.1) Evidence was offered by applicant and by protestants.

The recommended order of Commissioner Worthington (G.S. 62-

26.2), entered May 29, 1959, contains these findings of fact: "(1) Public convenience and necessity exists for the common carrier transportation authority sought by the applicant in this application in addition to presently authorized and existing transportation service. (2) The applicant is fit, able and willing to render the proposed service on a continuing basis." It amended applicant's Certificate No. C-543 so as to confer upon applicant, effective July 1, 1959, the additional authority for which it had applied. Protestants filed exceptions to said findings of fact and to other provisions of said recommended order. (G.S. 62-26.3)

The Commission, by order of July 23, 1959, overruled all of protestants' exceptions and affirmed in all respects Commissioner Worthington's order of May 29, 1959. (G.S. 62-26.3) On September 1, 1959, the Commission, upon reconsideration (G.S. 62-26.6), affirmed its order of July 23, 1959, and also denied protestants' request that its effective date be postponed pending judicial review. Protestants then appealed to the superior court, bringing forward the exceptions they had theretofore directed to Commissioner Worthington's order of May 29, 1959.

After hearing in superior court, Judge Crissman entered an order which, in pertinent part, provides:

> "The Court having reviewed the whole record, the exceptions filed by the protestants and the briefs filed by both the petitioner and protestants, and being of the opinion that the case should be remanded for further proceedings by the Commission as to whether a necessity presently exists for common carrier authority in addition to presently authorized and existing transportation service.
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter be, and the same is hereby ORDERED remanded to the North Carolina Utilities Commission for further proceedings thereon in accordance with this order."

Applicant excepted and appealed.

Fletcher & Lake and Martin & Whitley for applicant Central Transport, Inc., appellant.

J. Archie Cannon, Jr., for protestant Ryder Tank Line, Inc., and Allen & Hipp for protestant Maybelle Transport Company, appellees.

BOBBITT, J. The cause was for hearing in the superior court upon protestants' exceptions to the Commission's findings and order. The court made no ruling on any of these exceptions. Instead, the order

of Judge Crissman remands the cause to the Commission for a determination, after further proceedings, of the precise question it had theretofore considered and decided. Notwithstanding, the arguments in this Court relate largely to questions raised by protestants' exceptions to the Commission's findings and order, not to the exception of applicant (appellant here) to Judge Crissman's order.

Judge Crissman's order does not purport to reverse, vacate or in any way modify the Commission's order. Presumably, applicant is now exercising the franchise rights granted by the Commission.

"Only a 'party aggrieved' may appeal from the superior court to the Supreme Court. G.S. 1-271"; *Buick Co. v. General Motors Corp.*, 251 N.C. 201, 205, 110 S.E. 2d 870. Moreover, G.S. 1-277, defining the right of appeal, "prescribes, in substance, that an appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. G.S. 1-277; *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377; *Emry v. Parker*, 111 N.C. 261, 16 S.E. 236." *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669, and cases cited.

Absent circumstances affording a basis for remanding the cause to the Commission, the only legal right of applicant adversely affected by Judge Crissman's order was the right to have the superior court consider and decide the questions presented by protestants' exceptions to the Commission's findings and order.

G.S. 62-26.9 prescribes the conditions under which, upon motion by any party, the court, in its discretion, may remand the proceeding in order that newly discovered evidence may be presented at a further hearing by the Commission. Nothing in the record indicates any party made such motion, or that any party desired to offer further evidence, or that newly discovered evidence was available. Hence, there was no basis for the court, in its discretion, to remand the cause under circumstances contemplated by G.S. 62-26.9.

G.S. 62-26.10, in pertinent part, provides: "The court may affirm or reverse the decision of the Commission, declare the same null and void, *or remand the case for further proceedings;* or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (a) in violation of constitutional provisions, or (b) in excess of statutory authority or jurisdiction of the Commission, or (c) made upon unlawful proceedings, or (d) affected by other errors of law, or (e) unsupported by competent, material and

substantial evidence in view of the entire record as submitted, or (f) arbitrary or capricious." (Our italics)

If a cause is remanded under G.S. 62-26.10, the order should specify the ground on which it is based and thereby indicate to the Commission the nature of its further proceedings. Judge Crissman's order does not do so. If Judge Crissman were of the opinion that the Commission's findings and order were "(e) unsupported by competent, material and substantial evidence in view of the entire record as submitted, or (f) arbitrary or capricious," a proper order would have reversed the Commission's order. There is nothing in Judge Crissman's order to indicate that such ground was the basis therefor. Indeed, the failure to disturb the Commission's order indicates it was not based on such ground.

This Court, under the circumstances, in the exercise of its power "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts (N.C. Const., Art. IV, sec. 8)," *Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273, deems it appropriate to vacate Judge Crissman's order and remand the cause to the superior court for consideration and decision of the questions raised by protestants' exceptions to the Commission's findings and order. It is so ordered.

For the reasons stated, the cause is remanded to the superior court for further proceedings in accordance with the law as stated herein.

Error and remanded.

STATE v. JESSIE GRAVES.

(Filed 10 June, 1960.)

Criminal Law § 97—

Argument of the Solicitor to the effect that the jury should not recommend life imprisonment because crime of the type with which defendant was charged tempted people to take the law in their own hands, that they might have done so in this case except for their reliance upon the jury to uphold the law, and that if defendant were given life imprisonment rather than death the Solicitor did not know what might happen in later cases, *is held* grossly improper, and defendant's assignment of error based upon an exception taken during the trial is sustained.

APPEAL by defendant from *Carr, J.,* at October 1959 Criminal Term, of ALAMANCE.

STATE *v.* GRAVES.

Criminal prosecution upon a bill of indictment charging defendant Jessie Graves with the capital felony of rape.

Plea: Not guilty to the indictment.

Verdict: That defendant is guilty of rape.

Judgment: Sentenced to death by inhalation of lethal gas.

Defendant excepts thereto, and appeals therefrom to Supreme Court and assigns error.

Attorney General T. Wade Bruton for the State.

B. F. Wood, M. Hugh Thompson for defendant appellant.

WINBORNE, C. J.: Of the many assignments of error based upon exceptions taken to matters occurring in the course of the selection of jury, to the taking of evidence, to the argument of Solicitor, and to the charge of the court, appearing in the record of case on appeal, defendant appellant assigns as error in particular No. 9: "In that His Honor, over defendant's objection allowed the Solicitor to argue to the jury as follows, and denied defendant's motion for a mistrial: 'This is the type of crime, I argue to you, that tempts people to take the law into their own hands. It is the type of crime that people get worked up about and forget that they are law abiding citizens and they take the law into their own hands and do things that they may or may not regret later. I argue to you that could easily have happened in this case but they didn't, the people were relying upon you, that is the jurors and the people of this County to uphold the laws of this State in which rape is a capital crime, and I argue to you it is your duty as jurors to uphold that law although it is in your unbridled discretion to recommend life imprisonment. I argue to you that you shouldn't exercise that discretion in this case. If you did, I don't know what would happen so far as the next case is concerned. I don't know and I'm not going to argue to you. This type of crime could be committed a thousand times and maybe there would not be a person taking the law in their own hands, but I argue to you this, if this defendant is given life imprisonment rather than death, I don't know what might happen,'" on which exceptions 16 and 17 are based.

Furthermore, in reference thereto the Attorney General, in brief filed on this appeal, after quoting the above remarks of the Solicitor, had this to say: "Similar arguments have been held for error by this Court as not supported by evidence," citing cases, including *S. v. Little,* 228 N.C. 417, 45 S.E. 2d, 542.

In the *Little* case, *supra,* the second headnote epitomizes the de-

cision of the Court in this manner: "Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so, it is the right and duty of the court to correct the argument at the time or in the charge to the jury." G.S. 84-14.

To like effect are: *Cuthrell v. Greene,* 229 N.C. 475, 50 S.E. 2d 525; *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466; *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *S. v. Phillips,* 240 N.C. 516, 82 S.E. 2d, 762; *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656; *S. v. Willard,* 241 N.C. 259, 84 S.E. 2d 899; *S. v. Roberts,* 243 N.C. 619, 91 S.E. 2d 589; *S. v. Roach,* 248 N.C. 63, 102 S.E. 2d 413; *S. v. Walker,* 251 N.C. 465, 112 S.E. 2d 61.

Since there must be a new trial for error pointed out, the merit or demerit of other assignments of error will not be treated as they may not recur upon another trial. For error indicated, there must be a

New trial.

STATE v. EARL GILBERT KIRKMAN, WILLIAM LEON CAMPBELL, GEORGE CLIFTON MOORE AND JAMES C. PENNINGTON.

(Filed 10 June, 1960.)

1. Criminal Law § 86—

A motion for a continuance is addressed to the sound discretion of the trial court and the denial of the motion will not be disturbed in the absence of a showing of abuse of discretion or that defendant has been deprived of a fair trial.

2. Criminal Law § 92—

After the State has rested its case, but before defendant has moved for nonsuit, the trial judge has the discretionary power to allow the State to reopen its case and introduce further testimony.

3. Conspiracy § 5—

When a person enters into an unlawful conspiracy, the acts and declarations of his co-conspirators in furtherance of the common design are competent against him.

APPEAL by defendant James C. Pennington from *McKinnon, J.,* November 1959 Criminal Term, of ROBESON.

Criminal prosecution upon an indictment charging Earl Gilbert

Kirkman, William Leon Campbell, George Clifton Moore and James C. Pennington with a conspiracy to break and enter the store-building of the Ward Company, wherein goods, chattels and money were stored, with a felonious intent to take, steal and carry away such goods, chattels and money.

Defendants Kirkman, Campbell and Moore pleaded guilty, and defendant Pennington pleaded Not Guilty. The jury said for its verdict, defendant Pennington is guilty as charged.

From a judgment of imprisonment defendant Pennington appeals.

T. W. Bruton, Attorney General and H. Horton Rountree, Assistant Attorney General for the State.

George A. Younce for defendant, appellant.

PER CURIAM. Defendant Pennington assigns as error the denial of his motion for a continuance of his trial for the term. The granting or denial of this motion rested in the sound discretion of the trial judge, and his ruling will not be disturbed on appeal, except for abuse of discretion or a showing defendant has been deprived of a fair trial. *S. v. Ipock,* 242 N.C. 119, 86 S.E. 2d 798; *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520. This assignment of error is overruled, for the reason that defendant has not shown an abuse of discretion on the part of the trial judge, or that he has been deprived of a fair trial.

Defendants Campbell and Kirkman testified as witnesses for the State. After the State had rested its case, and before defendant Pennington made a motion for judgment of nonsuit, the solicitor for the State moved to reopen the State's case on the ground that a State's witness desired to make an additional statement. The court in its discretion allowed the motion. Whereupon, the solicitor recalled the defendant Campbell who gave further testimony. Defendant Pennington assigns this as error. The motion was addressed to the sound discretion of the trial judge, and there is nothing in the record to suggest any abuse of discretion in this respect. *S. v. Satterfield,* 207 N.C. 118, 176 S.E. 466; *S. v. Hobbs,* 216 N.C. 14, 3 S.E. 2d 431. This assignment of error is overruled.

There is no merit in defendant's assignment of error to the court's denial of his motion for judgment of nonsuit made at the close of the State's case: defendant Pennington offered no evidence. The State's evidence was sufficient to carry the case to the jury.

We have carefully considered defendant's numerous assignments of error in respect to the evidence and the charge of the court, and

defendant has not shown that any one of them is sufficiently prejudicial to warrant a new trial. All are overruled.

When defendant Pennington engaged in the criminal conspiracy with defendants Kirkman, Campbell and Moore, he forfeited his independence and jeopardized his liberty, for, by agreeing with them to engage in an unlawful enterprise, he placed his safety and freedom in the hands of each and every member of the conspiracy, and must abide the consequences of his acts. *S. v. Ritter,* 197 N.C. 113, 147 S.E. 733; *S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291.

In the trial below, we find

No error.

STATE v. BILL BILLER, VERNON JACKSON LLOYD AND LARRY BROOKS HOLT.

(Filed 10 June, 1960.)

1. Larceny § 4—

A warrant for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property, is fatally defective.

2. Criminal Law § 121

The legal effect of arrest of judgment for fatal defect of the warrant is to vacate the verdict and judgment, but it does not preclude the State from thereafter proceeding upon a sufficient warrant or indictment if it so desires.

APPEAL by defendants from *Carr, J.,* at December Term, 1959 of ORANGE.

Criminal prosecution upon two warrants issued out of Recorder's Court, Chapel Hill, Orange County, North Carolina, one charging that on 23rd day of November, 1959, Bill Biller "did unlawfully and wilfully enter the premises of U-Wash-It, in Chapel Hill, and did break from its fastenings, steal, take, and remove one change-making machine and monies contained therein, with intent to deprive the owners of the said machine and monies and to appropriate same to his own use, knowing them to be stolen in violation of the ordinances of the City of Chapel Hill, and contrary to the form of the statute and against the peace and dignity of the State"; and the other, charging Larry Brooks Holt and Vernon Jackson Lloyd with aiding and abetting Bill Biller in the commission of the offense substantially as described in the first warrant, etc. The record reveals plea of

not guilty by defendants; motion to quash warrants; trial in Superior Court; and verdict of guilty of larceny as charged as to each defendant, and judgment pronounced and their appeal to Supreme Court — and assignment of error.

Attorney General Bruton, Assistant Attorney General Glenn L. Hooper, Jr., for the State.

Dalton H. Loftin for defendants appellants.

PER CURIAM: Defendants move in Supreme Court in arrest of judgment on the ground that the warrants under which they were tried, convicted and sentenced, are fatally defective in that they did not sufficiently allege that the owner of the property allegedly stolen was either a natural person or a legal entity capable of owning property, citing as authority therefor the case of *S. v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901.

The Attorney General in response thereto states that before pleading to the warrants the defendants moved to quash the same, and their motion was denied, and they except; and that he is unable to distinguish the instant case from the Thornton case wherein judgment was arrested.

The legal effect of arresting the judgment is to vacate verdict of guilty of larceny as charged and judgment of imprisonment imposed below, and the State, if it so desire, may proceed against defendants upon a sufficient indictment. *S. v. Thornton, supra,* and cases cited. See also *S. v. Rorie, ante.*

Judgment arrested.

STATE v. JOE TODD.

(Filed 10 June, 1960.)

Criminal Law § 161—

Where the evidence is not in the record, assignments of error to the charge cannot be sustained unless the instructions are inherently or patently erroneous irrespective of any evidence.

APPEAL by defendant from *Carr, J.,* February Criminal Term, 1960 of ROBESON.

The defendant was tried on a bill of indictment charging him with manslaughter. From a verdict of guilty of involuntary manslaughter

and the sentence imposed thereon, the defendant appeals, assigning error.

Attorney General Bruton for the State.
Hackett & Weinstein for defendant.

PER CURIAM: All that appears in this case is the record proper, the Judge's charge and the defendant's assignments of error, all of which are addressed to portions of the charge. The case on appeal contains none of the evidence offered in the trial below.

In the case of *S. v. Ray,* 232 N.C. 496, 61 S.E. 2d 254, *Stacy, C. J.,* speaking for the Court, said: "Even if some of the instructions, standing alone, should be regarded as erroneous, they could not be declared prejudicial or hurtful, unless inherently and patently so, in the absence of the evidence upon which they were based or to which they speak. 24 C.J.S., Criminal Law, § 1857, page 733; *Pickett v. Pickett,* 14 N.C. 6; *State v. Wilson,* 121 N.C. 650, 28 S.E. 416."

An examination of the assignments of error challenging the correctness of certain portions of the charge in the trial below, reveals no error and they are, therefore, without merit.

The verdict and judgment will be upheld.

No error.

MEARLE JARRETT v. W. H. COVINGTON AND CHARLES USHER STROUD.

(Filed 10 June, 1960.)

APPEAL by defendants from *Huskins, J.,* January Civil Term, 1960, of CATAWBA.

Personal injury action growing out of a collision in Catawba County on May 28, 1956, about 9:50 a.m., between a 1955 Ford Truck operated by Johnny Lester Cook, in which plaintiff was a guest passenger, and a 1942 Chevrolet truck owned by defendant Covington and operated by defendant Stroud.

It was stipulated that, on the occasion of the collision, Stroud was Covington's agent and was operating the truck within the scope of such agency.

The collision occurred on (new) N. C. Highway #10, an east-west highway, a short distance east of where a section of old N. C. Highway #10 joins #10 to form a "T" intersection, #10 being the top of

the "T." This section of old #10 extends south from #10. A short distance east of this "T" intersection, another section of old #10 joins #10 to form another "T" intersection, #10 being the top of the "T." This section of old #10 extends north from #10.

The Ford truck was proceeding east on #10, the dominant highway.

The facts on which plaintiff bases her allegations of negligence are these: Stroud, traveling north on old #10, approached and entered #10 at the "T" intersection first described. An embankment on the southwest corner (to his left) partially blocked his view of east-bound traffic on #10. He failed to stop in obedience to the stop sign. He drove into #10, heading east thereon, directly in the path of the oncoming Ford truck.

Defendants alleged the collision and plaintiff's injuries were caused solely by the negligence of Cook, the operator of the Ford truck. The facts upon which defendants based their allegations are these: Stroud had not operated the Chevrolet truck on old #10. On the contrary, he had been traveling east on #10 for a considerable distance before reaching and passing the first "T" intersection. The Ford truck, also proceeding east on #10, overtook and struck the Chevrolet truck with great force and violence. When this occurred, Stroud had signaled his intention to turn left and enter old #10 at the second "T" intersection and proceed north thereon.

Plaintiff and defendants offered evidence tending to support their conflicting allegations as to the circumstances of the collision.

The jury found that plaintiff was injured by the negligence of defendants, as alleged in the complaint, and awarded damages in the amount of $17,500.00.

Judgment for plaintiff in accordance with the verdict was entered. Defendants excepted and appealed.

William H. Chamblee and Marvin R. Wooten for plaintiff, appellee.

Falls, Falls & Hamrick for defendants, appellants.

PER CURIAM. Defendants' assignments of error are based on exceptions directed to designated portions of the charge. Many, if not all, fall short of compliance with the mandatory rules of this Court. See *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405, and *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294. The assignments directed to the court's failure to charge in designated respects are not supported by exceptions in the case on appeal. "It is elemental that an exception to an excerpt from the charge ordinarily does not

challenge the omission of the court to charge further on the same or another aspect of the case." *Peek v. Trust Company*, 242 N.C. 1, 16, 86 S.E. 2d 745.

Notwithstanding the foregoing, we have considered each of the assignments of error. Consideration thereof fails to disclose prejudicial error. Indeed, a careful reading of the charge leaves the impression that the court explained the law and applied it to the facts in evidence with clarity and accuracy. Upon sharply conflicting evidence, the case was one for jury determination, and the verdict will not be disturbed.

No error.

BARBARA WATTERS, BY AND THROUGH HER NEXT FRIEND, V. GREGG WATTERS, v. HOMER LLOYD PARRISH, MATTIE LEE PARRISH, HARRY W. LAWRENCE AND HARRY E. LAWRENCE, AND HARRY E. LAWRENCE, GUARDIAN AD LITEM FOR HARRY W. LAWRENCE.

(Filed 30 June, 1960.)

1. Trial § 4—

A motion for a continuance is addressed to the sound discretion of the trial judge, and his denial of the motion will not be disturbed in the absence of a showing of manifest abuse of discretion.

2. Trial § 2—

A court has inherent power to control the call of cases on its docket so as to dispose of them with economy of time and effort for itself, for counsel and for litigants.

3. Same—

Where a passenger in one car institutes action against the drivers of both cars involved in the collision and thereafter one of the drivers institutes suit against the other, the denial of the motion of such driver that his action be first called for trial will not be disturbed in the absence of a showing of any unusual or extraordinary circumstances or any clear inequity, since plaintiff passenger cannot be compelled to stand aside while another action is litigated except in a clear case of hardship to the other parties, the matter being addressed to the sound discretion of the trial court.

4. Trial § 22a—

On motion to nonsuit, plaintiff is entitled to have the evidence considered in the light most favorable to her, and contradictions and discrepancies, even in plaintiff's evidence, do not justify nonsuit.

5. Trial § 22b—

Upon motions to nonsuit, entered by the several defendants after all the evidence of plaintiff and all the defendants is in, the court may consider so much of both defendants' evidence, or the evidence of either of them, as is favorable to plaintiff or tends to clarify or explain evidence offered by plaintiff, but will disregard defendants' evidence which tends to contradict or impeach plaintiff's evidence.

6. Automobiles §§ 6, 15—

It is negligence *per se* for a person to operate a motor vehicle while under the influence of intoxicating liquor, G.S. 20-138, or to fail to keep his vehicle on his right side of the highway and give to a vehicle approaching from the opposite direction one half of the main traveled portion of the highway. G.S. 20-146, G.S. 20-148.

7. Automobiles § 41c—

Plaintiff's evidence, together with the evidence of the driver of the car in which she was riding, tending to show that the driver of an automobile approaching from the opposite direction was under the influence of intoxicating liquor and drove his car to the left of the center line of the highway, resulting in a collision of the vehicles, *is held* sufficient to overrule such driver's motion to nonsuit in plaintiff's action against both drivers.

8. Same—

Where one aspect of plaintiff passenger's evidence, together with the evidence of one of defendant drivers, tends to show that the defendant in whose car plaintiff was riding failed to keep his vehicle on his right half of the highway as he was meeting the other car, and failed to give the approaching car one half of the main traveled part of the highway, resulting in a collision of the vehicles, *is held* sufficient to overrule his motion to nonsuit in plaintiff's action against both drivers.

9. Same: Automobiles § 43— Evidence held insufficient to warrant nonsuit on the ground of insulating negligence.

Evidence tending to show that two vehicles approaching each other on the highway were each on its left side of the highway, that the driver of the car in which plaintiff was riding turned to his right when the vehicles were some 200 feet apart, that when the cars were some 100 feet away he turned to his left to avoid a collision, that the other driver at about the same time turned to his right, resulting in a collision about the center of the highway, *is held* insufficient to warrant, on the ground of insulating negligence, nonsuit in favor of the driver of the car in which plaintiff was riding, since such driver, under the circumstances, could have reasonably foreseen that his negligence in driving to his left of the center of the highway would cause each driver to cut back and forth on the road to avoid a collision, and therefore his negligence in initially being on the wrong side of the road continued to constitute a proximate cause of the accident.

10. Negligence § 8—

The primary negligence of one party cannot be insulated by the negligence of the other so long as the primary negligence continues to constitute a proximate cause of the injury, or so long as the intervening negligence could have been reasonably forseen under the circumstances.

11. Automobiles § 19—

The doctrine of sudden emergency is not available to one whose own negligence brings about or contributes to the emergency.

12. Automobiles §§ 41c, 43—

The driver of a car colliding with a vehicle approaching from the opposite direction is not entitled to nonsuit on the ground that he was confronted with an emergency in that the approaching car was on its left side of the highway and that he cut to his left to avoid a collision, when there is evidence that he, initially, was also driving to his left of the center of the highway, and thus brought about the emergency.

13. Automobiles § 37: Evidence § 56—

The testimony on cross-examination of one defendant by the other that such defendant had been convicted of driving while under the influence of intoxicating liquor in a prosecution growing out of the same accident is properly excluded even for the purpose of impeaching such defendant as a witness, since under the circumstances the testimony might be given undue weight by the jury, there being no testimony offered as to any conviction of such defendant theretofore or thereafter.

14. Appeal and Error § 19—

An assignment of error not supported by an exception in the record may be disregarded.

15. Appeal and Error § 41—

The exclusion of testimony cannot be held prejudicial when the same witness thereafter is permitted to testify to the same import.

16. Automobiles § 49—

A passenger in an automobile is not required by the law to maintain constant attention to the road, and evidence that a passenger was sitting sideways with her knees on the seat, talking to the driver, is insufficient to raise the issue of her contributory negligence in failing to keep a lookout and warn the driver when the evidence further establishes that the vehicle was traveling on a straight highway on a clear day at a lawful speed, and there is no evidence of any occurrence which did or should have made the passenger apprehensive as to the manner in which the vehicle was being operated.

17. Appeal and Error § 42—

Exceptions to the charge will not be sustained where the charge is without prejudicial error when construed contextually.

APPEAL by defendants from *Phillips, J.,* 12 October 1959 Term, of RICHMOND.

Civil action to recover damages for personal injuries sustained in a collision between a 1956 Chevrolet sedan owned by Harry E. Lawrence and operated by his son, Harry W. Lawrence, in which plaintiff was a guest, and a 1948 Ford pickup truck owned by Mattie Lee Parrish and operated by her husband, Homer Lloyd Parrish.

Defendants Parrish and defendants Lawrence filed separate answers. Defendants Parrish in their answer deny that Homer Lloyd Parrish was negligent in the operation of the pickup truck, allege that the sole, proximate cause of the collision was due to the negligence of Harry W. Lawrence in the operation of the Chevrolet sedan, and plead the contributory negligence of plaintiff as a bar to recovery. Defendants Lawrence in their answer deny that Harry W. Lawrence was negligent, aver that the sole, proximate cause of the collision was the gross negligence of Homer Lloyd Parrish, and plead the contributory negligence of plaintiff as a bar to recovery.

All the parties offered evidence.

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

"1. Was the plaintiff injured by the negligence of Homer Lloyd Parrish as alleged in the complaint?

ANSWER: Yes.

"2. Was the plaintiff injured by the negligence of Harry W. Lawrence as alleged in the complaint?

ANSWER: Yes.

"3. What amount of damages, if any, is the plaintiff entitled to recover?

ANSWER: $30,000.00."

The following stipulation appears in the record before the charge of the court to the jury: "It was stipulated by counsel representing all the defendants, that if the jury answered the first issue submitted 'Yes,' that the negligence of Homer Lloyd Parrish would be attributed to the defendant, Mattie Lee Parrish, and each would be equally liable for any injuries as the result of such negligence, and that if the jury answered the second issue 'Yes,' that the negligence of Harry W. Lawrence would be attributed to the defendant, Harry E. Lawrence, and each would be equally liable for any injuries as a result of such negligence."

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

Webb & Lee and W. G. Pittman for plaintiff, appellee, on the appeal of the defendants Lawrence and defendants Parrish.

Leath & Blount for Homer Lloyd Parrish and Mattie Lee Parrish defendants, appellants.

Smith, Moore, Smith, Schell & Hunter, McNeill Smith, David McK. Clark and Z. V. Morgan for Harry W. Lawrence and Harry E. Lawrence, defendants, appellants.

PARKER, J. The instant case was commenced by the issuance of summons on 28 May 1959, which was served on all the defendants, except Harry E. Lawrence as guardian *ad litem* of his son, Harry W. Lawrence, on 1 June 1959. Summons was issued against Harry E. Lawrence as guardian *ad litem* of his son, Harry W. Lawrence, on 17 July 1959 and served on him the same day. Harry W. Lawrence, by his next friend, Harry E. Lawrence, instituted an action by the issuance of summons on 15 June 1959 in Richmond County Superior Court to recover damages for personal injuries in the collision here against defendants Parrish, and which was served on defendants Parrish the next day. Frank Williams, a passenger in the pickup truck driven by Homer Lloyd Parrish, instituted by the issuance of summons on 26 March 1959 in the same county a similar action against defendants Parrish, and which was served on defendants Parrish the next day. None of these summons were in the record. We had them certified here by the lower court.

Immediately prior to the trial of the instant case Harry W. Lawrence made a motion that the court place his case against defendants Parrish on the civil issue docket for trial before the trial of the instant case and of the *Frank Williams* case, and that plaintiff here and Frank Williams be restrained from bringing their cases to trial, until his case against defendants Parrish is finally determined. The trial court, in its discretion, denied the motion. Harry W. Lawrence assigns this as error, and contends in his brief that any judgment here against both defendants would be *res judicata* in his action against the Parrishes, and no prejudice could come to the plaintiff here if his case is tried first, since she is not a party to it, and that "the trial judge abused his discretion in refusing the continuance."

A motion for a continuance is addressed to the sound discretion of the trial judge, and, in the absence of manifest abuse, his ruling thereon is not reviewable. *Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123; *Sykes v. Blakey,* 215 N.C. 61, 200 S.E. 910; *Piedmont Wagon Co. v. Bostic,* 118 N.C. 758, 24 S.E. 525.

A trial court is vested with wide discretion in setting for trial and calling for trial cases pending before it. *Jones v. Jones,* 94 N.C. 111; *Abernethy v. Burns,* 206 N.C. 370, 173 S.E. 899; 88 C.J.S., Trial, § 31.

Whether one lawsuit will be held in abeyance to abide the outcome of another rests in the sound discretion of the trial judge, and his action will not be disturbed on appeal, unless the discretion has been abused, for there is power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants. 53 Am. Jur., Trial, §14, §15 and

§16. "The suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. North American Co.*, 299 U.S. 248, 81 L. Ed. 153.

Plaintiff in the instant case commenced her action before Harry W. Lawrence did his, and alleged in her complaint that she was grievously injured by his negligence and the negligence of Homer Lloyd Parrish. Our study of the record fails to disclose any unusual or extraordinary circumstances or any clear case of hardship or inequity to Harry W. Lawrence that would have justified the trial judge in continuing plaintiff's case here, and requiring her to sit by with folded arms until Harry W. Lawrence had reached a final determination of his action against Homer Lloyd Parrish and wife. Harry W. Lawrence has not shown that Judge Phillips manifestly abused his discretion in denying his motion. His assignment of error in that respect is overruled. See 88 C.J.S., Trial §33(a), Advancement or Preference of Cases.

During the trial all the defendants offered evidence. All the defendants assign as error the denial of their motions for judgments of nonsuit renewed at the close of all the evidence. Defendants Parrish and defendants Lawrence filed separate briefs.

About 3:45 p. m. on Sunday, 4 January 1959, plaintiff a 20-year-old girl, was a passenger in a Chevrolet automobile driven by her friend, Harry W. Lawrence, and travelling in a westerly direction on the County Home Road near the town of Hamlet. This is a hard surfaced road about 18 feet wide with a marked center line, which has 6 to 8 feet sand and gravel shoulders. At the same time and place Homer Lloyd Parrish, with a passenger, Frank Williams, was driving a pickup truck in an easterly direction on this road. It was a pretty day, and the road was dry. The road at the scene of the collision was fairly level and straight. No other automobile was near the scene of the collision when it occurred, except an automobile some 150 or 200 feet behind Parrish's pickup truck.

Plaintiff's evidence, including the testimony of defendant Harry W. Lawrence called by plaintiff as a witness for herself against the defendants Parrish, and the testimony of John A. Cartwright, a witness for the defendants Lawrence who was travelling some 150 or 200 feet behind the Parrish truck, shows the following facts as to Homer Lloyd Parrish's operation of his pickup truck: At the place where

the Hospital Road and the County Home Road intersect, there is a traffic light with a traffic island. When Parrish turned his truck to enter the County Home Road, he drove over the traffic island, and in turning right into the County Home Road went over to the asphalt, not really an island, more of an abutment, before proceeding down the County Home Road. In going down the road he drove several times over the center line, and just before the collision his truck made a wide sweep over on the left side of the road and went off on the shoulder. When Parrish's truck approached the Lawrence automobile, the Parrish truck was on its left side of the road half off on the left shoulder coming directly toward the Lawrence automobile. The Parrish truck continued to approach the Lawrence automobile in this manner, until the Lawrence automobile was 75 to 100 feet away. This is the testimony of Harry W. Lawrence: "He was coming down my side of the road and was on my right coming directly toward me. I was back down the highway traveling from east going west. This truck was coming at me on my side of the road and half off on my shoulder and was coming at me on my side of the road halfway off my side of the road, and if I had cut this way, it appeared to me at the time that he would have run directly into the side of me; and if I had gone straight, he would have run head-on. The only choice that I had at the time was to go over there to try to get out of his way because he had my side of the highway. I could not say how far he was away when I first saw him, but I do know that I was on my right side of the road. If we did not turn to the side of the road on which the accident happened simultaneously, then I turned first; I do not know exactly which of us turned first. I know that when I turned over there, he was still on my side of the road. At that time I turned, I'd say he was 75 to 80 feet down the road. It could not have been as much as 150 feet." The two automobiles collided in about the middle of the road, according to John A. Cartwright, on Parrish's side of the road, according to plaintiff's own testimony, and the testimony of Frank Williams.

Patrolman J. B. Pierce, a witness for defendants Lawrence, immediately after the collision and at the scene saw Homer Lloyd Parrish, who had a strong odor of alcohol on his breath. In Pierce's written report of his investigation of the collision he stated that Parrish's ability was impaired by reason of the fact he had been drinking.

In the collision Homer Lloyd Parrish suffered, *inter alia,* one broken knee and a badly gashed knee. Some 45 minutes or an hour and 15 minutes after the wreck, Rex Howell, Captain on the Hamlet Police Force and a witness for defendants Lawrence, saw Parrish in

the Hamlet Hospital. When Howell got to the hallway next to the operating room, he heard loud, boisterous and profane language. When Howell went in the operating room, Dr. James asked him to hold Parrish on the operating table as he was trying to sew up his knees and he couldn't keep him still long enough to do it. He smelled the odor of alcohol on Parrish's breath. When Howell came in, Parrish quieted down.

Plaintiff's testimony in respect to the collision is as follows in substance: She and Harry W. Lawrence had been dating each other for three years. It was the last day of her Christmas vacation, for she was to return to college that afternoon. They were riding around this Sunday afternoon and talking. She was sitting about six or seven inches from the door with her knees on the seat facing Harry, who was driving. When Harry yelled "look out," she turned and saw the old Parrish truck about 200 feet away coming down the road cutting to its left. She put her hand over her face, and threw her head down on Harry's chest. She felt Harry's automobile go to the other side of the road. Harry was slowing down, and about that time there was a crash. The crash was on Harry's left side of the road, and Parrish's right side.

Frank Williams, a passenger in the Parrish truck and a witness for plaintiff, testified in substance: When the Parrish truck and the Lawrence automobile meeting each other were about 200 feet apart, the Lawrence automobile was on its left side of the road, and the Parrish truck on its left side of the road. Parrish went back to his side, and Lawrence went back to his side. Then Lawrence came down his lane, and collided right into Parrish, and Parrish pulled his truck to the right. The automobiles collided on Parrish's side of the road.

Homer Lloyd Parrish, called as a witness by plaintiff testified as follows: "At the time I first observed it, the vehicle that was meeting me was on its left hand side, or the south side of the dotted white line. When I first saw the car, I was on the right hand side of the dotted white lines traveling east. When I first saw him, I didn't do anything; and I proceeded on down the road for a short distance. It seemed he didn't see me, and so I went to the left. We were still a short distance away, and he came back to his side so there wasn't room over there for both of us; and I went back to mine. When I went back to my right, he came back over there; and we hit and we wrecked. I saw him when he cut back across to the left side. When he cut back to his left, I was back on my right side of the road. When I saw him, he was coming back to my right. I cut off the road, but there wasn't time to avoid the collision. Part of both vehicles was on the

south side of the shoulder of the highway when the collision occurred. One wheel of each vehicle was on the dirt, the right wheel of mine and the left of his." Homer Lloyd Parrish, after plaintiff rested her case, testified in his own behalf. His testimony then was substantially similar to his testimony as a witness for plaintiff in respect to the operation of the two automobiles immediately prior to the collision.

Harry W. Lawrence offered evidence in his behalf, but did not go back on the stand as a witness for himself.

When defendants made their motions at the close of all the evidence for judgments of involuntary nonsuit, plaintiff is entitled to have her evidence considered in the light most favorable to her. *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492. "Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court," *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, and do not justify a nonsuit. *Keaton v. Taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93.

The law is well established in this jurisdiction that in ruling upon a motion for an involuntary judgment of nonsuit, after all the evidence of plaintiff and both defendants is in, the court may consider so much of both defendants' evidence, or the evidence of either of them, as is favorable to plaintiff or tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541; *King v. Powell,* 252 N.C. 506, 114 S.E. 2d 265. Otherwise, consideration would not be in the light most favorable to plaintiff. *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209.

Plaintiff's evidence, and the evidence of the defendants Lawrence favorable to her, considered in the light most favorable to her, tends to show, *inter alia,* that Homer Lloyd Parrish was guilty of negligence *per se,* in operating his pickup truck while under the influence of intoxicating liquor in violation of G.S. 20-138, in failing to drive his automobile on the right half of the highway in violation of G.S. 20-146, and of failing to give to the approaching Lawrence automobile one-half of the main travelled part of the road in violation of G.S. 20-148, and that such negligence caused a collision of his truck and the Lawrence automobile in about the middle of the road, and contributed proximately to plaintiff's injuries, as alleged in her complaint. *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598; *Hoke v. Grey-*

hound Corp., 226 N.C. 692, 40 S.E. 2d 345. The trial court properly denied Homer Lloyd Parrish's motion for judgment of nonsuit made at the close of all the evidence, and also a similar motion of his wife, Mattie Lee Parrish, by reason of the stipulation they made above set forth, and their assignment of error thereto is overruled.

Plaintiff's evidence and the evidence of defendants Parrish and of defendants Lawrence favorable to her, considered in the light most favorable to her, tends to show, *inter alia*, that Harry W. Lawrence was guilty of negligence *per se* in failing to drive his automobile on the right half of the highway as he was meeting an approaching automobile proceeding in the opposite direction in violation of G.S. 20-146, and of failing to give to the approaching Parrish truck one-half of the main travelled part of the road in violation of G.S. 20-148, and of negligence in failing to keep a proper lookout, *Clark v. Emerson*, 245 N.C. 387, 95 S.E. 2d 880, as alleged in the complaint.

Defendants Lawrence contend in their brief that conceding that the Lawrence automobile was initially on the wrong side of the road, such negligence was insulated by the intervening negligence of the defendant Homer Lloyd Parrish. Such a contention is not tenable. Harry W. Lawrence, according to his own testimony, was travelling 45 miles an hour, and according to the testimony of Frank Williams, a witness for plaintiff, when the two automobiles were about 200 feet apart, the Lawrence automobile was on its left side of the road. Parrish, according to Williams' testimony, was travelling 35 miles an hour. This evidence would warrant a finding by a jury that Harry W. Lawrence, by driving his automobile on his left side of the road under the circumstances above set out, in the exercise of ordinary care, might have reasonably foreseen that he and the approaching Parrish truck would cut back and forth on the road to avoid a collision, and the resulting collision in the middle of the road (testimony of John A. Cartwright, a witness for the Lawrences) followed so quickly and is so connected with Harry W. Lawrence's negligence, that it constituted a direct chain of events resulting from the negligence of Harry W. Lawrence in driving on his left side of the road, and that such negligence on the part of Harry W. Lawrence was a proximate cause of plaintiff's injuries. "No negligence is 'insulated' so long as it plays a substantial and proximate part in the injury." *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876. A judgment of involuntary nonsuit of plaintiff's case against the defendants Lawrence on the ground that Harry W. Lawrence's negligence was insulated by the intervening negligence of Homer Lloyd Parrish would be improper, because "the test by which the negligent conduct of one is to

be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Butner v. Spease and Spease v. Butner,* 217 N.C. 82, 6 S.E. 2d 808.

Defendants further contend that Harry W. Lawrence was confronted with a sudden emergency, that he acted with due care, and they are entitled to a nonsuit. Such contention is without merit. This principle is not available to defendants Lawrence on their motions for judgment of nonsuit upon the facts here, for the reason that taking plaintiff's evidence as true, as we are compelled to do in considering such a motion (*Polansky v. Insurance Ass'n.,* 238 N.C. 427, 78 S.E. 2d 213), and considering it in the light most favorable to her, Harry W. Lawrence by his own negligence in driving his automobile on the left side of the road under the circumstances above set forth brought about or contributed to the emergency. *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593.

The trial court properly denied Harry W. Lawrence's motion for judgment of involuntary nonsuit made at the close of all the evidence, and also a similar motion by his father, Harry E. Lawrence, by reason of the stipulation above set forth, and their assignment of error thereto is overruled.

During the cross-examination of Homer Lloyd Parrish, when he was on the stand as an adverse witness for plaintiff, this occurred: Homer Lloyd Parrish admitted he had no North Carolina driver's license. He was then asked by counsel for the Lawrences: "You've been convicted of drunk driving, haven't you?" The trial judge sustained an objection by Parrish's counsel stating it is not competent, he would let him put it in later. To this ruling the defendants Lawrence did not except. After some colloquy between Lawrence's counsel and and the judge, the judge stated in effect that if Parrish had been convicted of drunken driving prior to this occasion or subsequent to it, that would be competent, but a conviction of drunk driving by Parrish on this particular occasion would be incompetent. To this ruling the defendants Lawrence excepted. At this point the jury was sent to its room, and in the jury's absence counsel for the Lawrences asked Parrish: "You have been convicted of driving drunk, haven't you?" He replied: "Yes, sir, in Recorder's Court in Richmond County as a result of this accident, but I have never been convicted before that accident of any traffic laws." Defendants Lawrence assign as error the exclusion of this evidence, contending it was competent for the purpose of impeaching Parrish's credibility as a witness, and they state further in their brief they "do not contend

that the evidence of Parrish's previous unappealed conviction for drunken driving arising out of the occurrence here in controversy should be received as substantive evidence against him." They further assign as error the ruling of the court to the effect that they could not ask the general question if Parrish had been convicted of drunken driving.

In *Swinson v. Nance,* 219 N.C. 772, 15 S.E. 2d 284, on cross-examination, the defense attorney attempted to ask one of the plaintiffs in an action for negligence growing out of an automobile collision if he had not been convicted of reckless driving as a result of the accident. The plaintiff would have answered in the affirmative. Exclusion of the evidence of conviction was held proper, though counsel for defendant stated that he asked the question solely for the purpose of impeaching the witness. This Court said: "Passing the fact that the question was not renewed when the jury returned, we think its exclusion was proper anyway. If the sole purpose was to impeach the witness by showing that he had been convicted of a criminal offense, the question might have been formulated differently. The question tied the testimony to the transaction then under civil investigation and the effect, if the evidence should be admitted, was to bring before the jury on the question of contributory negligence the fact that the plaintiff had been convicted of careless driving by another jury because of the same act of negligence. The situation is novel as far as we can discover, but we are convinced that the exclusion of the evidence was proper, on this principle *ut res magis valeat quam pereat.*" In reference to this point in the *Swinson* case, this comment appears in 34 N. C. Law Review, p. 291, note 52: "While the evidence was offered for the purposes of impeachment, it would seem that the exclusion of the evidence, had it been offered on the issue of the plaintiff's negligence, should follow *a fortiori. Cf. Warren v. Pilot Life Insurance Co.*, 215 N.C. 402, 2 S.E. 2d 17 (1939)."

Moseley v. Ewing, (Supreme Court of Florida, 1955), 79 So. 2d 776, was an action to recover damages for personal injuries sustained by plaintiff, when the automobile he was driving was hit from the rear by an automobile driven by defendant. On cross-examination of defendant by plaintiff's counsel, defendant, over his objection, was compelled to answer that he had been convicted of reckless driving and fined as the result of such conviction. The Supreme Court of Florida held that the admission of this evidence over the defendant's objection constituted reversible error, and ordered a new trial. See also *Eggers v. Phillips Hardware Co.,* (Supreme Court of Florida, 1956), 88 So. 2d 507.

Sherwood v. Murray, (Civil Appeals of Texas, 1950), 233 S.W. 2d 879, was an action for damages growing out of a collision between two automobiles. Plaintiff was a guest in an automobile being driven by one Al Hoffman. Hoffman testified he did not stop at the stop sign on Blacker Street before entering Stanton Street. On cross-examination counsel asked him: "As a matter of fact, you forfeited a bond you put up in the police station, didn't you?" The court sustained an objection to the question. It was a fact that Hoffman did put up a sum of money as a bond and forfeited it by failure to appear. The Court in its opinion said: "Evidence that Hoffman had forfeited a bond he had put up at the police station was inadmissible for any purpose. . . . By the great weight of authority even evidence of a conviction in a criminal prosecution for the very acts which constitute the negligence sought to be established in a civil suit as the basis of liability is not admissible unless such conviction is based on a plea of guilty. See Annotations, 31 A.L.R. 262; 57 A.L.R. 504; 80 A.L.R. 1145. There are a few authorities holding such evidence admissible to substantiate evidence as to the defendant's action. See 9 Blashfield Cyc. of Automobile Law and Procedure, p. 641, Sec. 6196. *However, we have found no authority holding evidence of such conviction admissible for the purpose of impeaching the witness.*" (Emphasis ours).

Johnson v. Empire Machinery Co., 256 F. 2d 479, and *Dunham v. Pannell,* (1959), 263 F. 2d 725, are distinguishable. In the *Johnson* case, Cooper, the defendant's driver, several days after the accident paid a fine without insisting on a trial for following too closely. In the *Dunham* case, the truck driver signed a statement, admitting guilt to charge of a traffic offense. In *McMullen v. Cannon,* (Appellate Court of Indiana, 1958), 150 N.E. 2d 765, relied on by defendants Lawrence, plaintiff, on cross-examination, was asked whether he had been convicted of drunk driving for the purpose of impeachment. The court sustained an objection to the question. Plaintiff was then asked: "On this particular date were you operating your motor vehicle under the influence of liquor?" To which he replied "I was not." The Court ordered a new trial holding the question asked, to which an objection was sustained, was proper. That was a different situation from what we have here. In the instant case Parrish replied that he had been convicted of driving drunk on the occasion when the collision occurred which formed the basis of the instant case, but that he had never been convicted before that accident of any traffic laws. There is no evidence so far as the record discloses that he has been convicted of the violation of any traffic laws since the collision here. Cer-

tainly, driving drunk is a violation of the traffic laws. See Annotation, 20 A.L.R. 2d 1217: "Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses."

Following our own decision of *Swinson v. Nance, supra,* with which *Moseley v. Ewing, supra,* seems to be in accord, we hold that the court properly excluded the evidence that Parrish had been convicted of driving his truck while drunk on the occasion when the collision here occurred. To have admitted it in evidence for the purpose of impeaching Parrish might, and probably would have caused the jury to give such conviction undue weight in this action, wherein plaintiff was seriously injured and asking for large damages. The judge told counsel for defendants Lawrence in effect he could ask Parrish if he had been convicted of drunk driving before or subsequent to the collision here. He declined to ask questions to that effect. If he had asked such questions, there is nothing in the record to show that he would have received any benefit thereby, and the burden is upon defendants Lawrence to show prejudicial error. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657. The assignments of error by defendants Lawrence in respect to these matters are overruled.

Defendants Lawrence assign as error number 3 that the judge just before court recessed in the afternoon sustained upon objection of Parrish's counsel this question asked by their counsel on cross-examination of plaintiff: "If you didn't tell your father it was not Harry's fault?" This assignment of error will be disregarded, because it is not supported by an exception in the record, but only by an exception appearing in the assignment of error. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. In addition it is without merit because upon the reconvening of court the following morning the judge reversed himself, and the prosecutrix answered the question as follows: "I have told my father that I don't blame Harry."

The other assignments of error by the defendants Lawrence as to the evidence, brought forward and discussed in their brief, are not meritorious and all are overruled.

Defendants Parrish have no assignment of error and no exception as to the evidence.

At the close of all the evidence and before the charge defendants Lawrence tendered issues, as did defendants Parrish. The court submitted to the jury the issues tendered by defendants Lawrence. The issues tendered by defendants Parrish included an issue as to whether or not plaintiff by her own negligence contributed to her injuries. Defendants Parrish assign as error the failure of the court to submit an issue of contributory negligence.

The evidence upon which defendants Parrish rely in respect to this assignment of error is contained primarily in the testimony of plaintiff, and is to this effect: She was sitting with her knees on the seat talking to Harry W. Lawrence, and he was talking to her. She was looking at Harry, and paying no attention to the road ahead or his operation of the automobile. She was paying attention to what Harry was saying, and she assumes Harry was paying attention to what she was saying. She did not tell him to look at the road. Defendants Parrish contend if she had been watching the road, she would have seen that Harry W. Lawrence was driving on his left side of the road, and could have warned him, and her failure to do so was contributory negligence.

Plaintiff's testimony is further to this effect: It was a pretty day and the road was dry. The speed of the Lawrence automobile was about 40 miles per hour: Harry W. Lawrence testified his speed was 45 miles an hour. She did not observe anything that caused her to have any complaint about the way Harry was driving at the time the collision occurred.

In *Gardiner v. Travelers Indemnity Co.*, (Court of Appeals of Louisiana), 11 So. 2d 61, the Court said: "Ordinarily, a guest may rely on the driver to keep a proper lookout, unless the danger is obvious, or is known to the guest, and is apparently not known to the driver. The guest cannot be expected to keep the same careful lookout at all times as the driver is required to keep, and the guest is necessarily required to intrust a great part of his safety to the driver. Blashfield, Cyclopedia of Automobile Law and Practice, Perm. Ed., Vol. 4, p. 202, §2411 *et seq.;* 5 Am. Jur., Automobiles, §476, p. 770." In our Perm. Ed. of Blashfield the page is 541.

Granting that it is the duty of a guest passenger in an automobile to exercise ordinary care for his own safety, and as one item thereof to maintain some sort of lookout (*Samuels v. Bowers*, 232 N.C. 149, 59 S.E. 2d 787), what constitutes the exercise of ordinary care on the part of the guest depends on circumstances. The place occupied by the guest is important in determining whether he exercised reasonable care, for one on the front seat may have a far better opportunity of discovering danger ahead than one on the back seat. 5A Am. Jur., Automobiles and Highway Traffic, § 795.

In *Darling v. Browning*, 120 W. Va. 666, 200 S.E. 737, plaintiff was a guest passenger riding on the front seat. The Court said: "In the course of the ordinary operation of an automobile under circumstances and conditions which may be considered usual for the street or road being traveled by it, guests in the automobile are not required to be con-

stantly at the height of attention and alertness in order to raise an instant alarm if danger should arise. Such strictness of requirement would impose an exaction, destructive of the reasonable use and enjoyment of automobiles. A guest must not be oblivious to danger but, on the other hand, the law does not require that he be annoyingly active in vigilance and in proclaiming notice of danger. Such conduct may readily result in more harm than good." To the same effect see 5A Am. Jur., Automobiles and Highway Traffic, §794. See also 60 C.J.S., Motor Vehicles, p. 545, wherein it is said: "A guest. . . is not bound . . . to pay constant attention to the management of the car." In *Lindley v. Sink*, 218 Ind. 1, 30 N.E. 2d 456, 2 A.L.R. 2d 772, the Court said: "Ordinarily a passenger in an automobile, having no control over the management of the automobile, may rely upon the assumption that the driver will exercise proper care and caution, and, therefore, under the facts and circumstances of the particular case the passenger may be exercising reasonable care for his safety although not keeping a lookout for other cars approaching." See also *White v. State Farm Mut. Auto Ins. Co.*, 222 La. 994, 64 So. 2d 245, 42 A.L.R. 2d 338 — headnote 4 in A.L.R. See also 5A Am. Jur., Automobiles and Highway Traffic, § 795.

If Harry W. Lawrence's automobile was on the left side of the road, there is nothing in the record to show for what distance it had been on that side, and nothing to show plaintiff could have seen that unless she had been constantly alert. The road was dry, the time was 3:45 p. m., there was nothing to obscure the vision of the driver, Harry W. Lawrence, and he was driving from 40 to 45 miles an hour on a road that at and near the scene of collision was fairly level and straight. Harry W. Lawrence testified he had just come out of a curve, he could see the highway for several hundred yards, and he had both hands on the wheel looking straight ahead. Homer Lloyd Parrish testified he came out of a curve at the scene of the collision. It is true she testified she was facing Harry W. Lawrence talking to him, paying no attention to the road ahead or his operation of the automobile, but she also testified that he was driving 40 miles an hour, and that she observed nothing that caused her to complain about the way Harry was driving at the time the collision occurred. As she was aware of these facts, this is not a case where she surrendered herself completely to the care of the driver. In our opinion, there is no evidence tending to show that plaintiff failed to exercise ordinary care for her safety which proximately contributed to her injury. The court properly refused to submit the issue of contributory negligence tendered by defendants Parrish. The case of *Hunt v. Wooten*, 238 N.C. 42, 76 S.E.

2d 326, contains many similar facts, and no issue of contributory negligence was submitted. For other cases where no issue of contributory negligence was submitted see, *Norfleet v. Hall*, 204 N.C. 573, 169 S.E. 143; *York v. York*, 212 N.C. 695, 194 S.E. 486.

All assignments of error to the charge by defendants Parrish and defendants Lawrence are to the first two issues, none by any of the defendants to the damage issue. All these assignments of error brought forward and discussed in the briefs of the respective parties have been examined, and all are untenable and all are overruled. The court gave to the jury the prayers for instructions prayed by defendants Lawrence, which take up according to quotation marks in the charge seven pages of the charge. There is nothing in the record to indicate that the court refused any such prayer of defendants Lawrence, or changed a word of these prayers for instructions. It would seem that such long prayers for instructions covered every aspect of the law and facts, as contended by defendants Lawrence during the trial.

Defendants Lawrence assign as errors certain parts of the charge which they contend contain improper comments by the judge on the weight and sufficiency of the evidence, and show bias on the part of the judge which deprived them of a fair trial. Defendants Parrish make no such contentions. We find nothing in the record and charge to support such contentions as to the conduct and language of the able and learned jurist who presided at the trial.

All assignments of error brought forward and discussed in the briefs of defendants Parrish and of defendants Lawrence are overruled. In the trial below we find as to defendants Parrish and as to defendants Lawrence

No error.

ARTHUR L. PHARR v. LINN D. GARIBALDI, CHAIRMAN, AND EDGAR GURGANUS, JAMES M. PARROTT, JR., DR. HARLEY SHANDS, DR. M. B. DAVIS, W. W. SHOPE, MRS. J. MELVILLE BROUGHTON, MEMBERS OF THE NORTH CAROLINA STATE PRISON COMMISSION, AND WILLIAM F. BAILEY, DIRECTOR OF PRISONS.

(Filed 30 June, 1960.)

1. Prisons § 1: State § 3a—

A suit against the members of the State Prison Commission and the Director of Prisons to enjoin the maintenance and operation of a prison and the enlargement thereof, without allegation of any unlawful conduct on the part of the individual defendants, is a suit against the

State and may not be maintained, there being no constitutional or legislative waiver of the State's immunity to suit in such instance.

2. Prisons § 1—

The Director of Prisons, subject to the rules and regulations adopted by the State Prison Commission, is expressly authorized to designate where prisoners committed to his custody shall serve their sentences, and the Commission has the discretionary authority to determine whether the operation of a particular prison should be continued or enlarged, and whether such prison should be operated as a "minimum security prison". Constitution of North Carolina, Art. XI, Sections 1, 4, 5, G.S. 148-1(b), G.S. 148-1(c), G.S. 148-4, G.S. 148-6, G.S. 148-26, G.S. 148-33.1.

3. Same: Nuisance § 1—

The maintenance and operation of a prison, even though it be a "minimum security prison" is not a nuisance *per se*, but is a necessary governmental function and may not be enjoined in an action against the prison officials in the absence of allegation of abuse of discretion or want of good faith in the discharge of their statutory duties, or any unlawful or unauthorized conduct on their part, and in the absence of such elements, any depreciation in the market value of real estate in the vicinity of a prison is *damnum absque injuria*.

4. Administrative Law § 3—

The courts have no authority to interfere with the exercise of a discretionary power by a state agency or commission except in cases of manifest abuse of discretion or some unauthorized or unlawful conduct on the part of the officials in charge.

5. Prisons § 1: Evidence § 3—

It is a matter of common knowledge that, notwithstanding all efforts of prison authorities, prisoners do escape from maximum security prisons as well as minimum security prisons, and that escaped prisoners, as well as persons who are not prisoners, have committed crimes both in the neighborhood of prisons and elsewhere.

6. Prisons § 1: Nuisance § 7— Maintenance of prison may not be enjoined in absence of allegation of any unauthorized or unlawful conduct on part of officials.

Allegations to the effect that prisoners at a minimum security prison are not closely confined or guarded and actually go on the property and into the homes of residents of the area, without allegation that the prison authorities promulgated any policy or any rule permitting prisoners to roam the neighborhood at will or invade private property, or that the authorities had failed to punish such violations of its rules as did occur, or had failed to discharge or discipline subordinate employees who may have granted liberties to prisoners in violation of its policy, are insufficient basis for the abatement of the maintenance of the prison as a nuisance, and it is error for the court upon such allegations to enter an interlocutory order restraining the maintenance of the prison as a minimum security prison.

7. Pleadings § 2—

Plaintiff must plead a municipal ordinance relied upon by him.

8. Municipal Corporations § 34: Injunctions § 4—

An individual may not seek to restrain the violation of a municipal zoning ordinance upon mere allegation of the conclusions that defendant's use was a violation of the ordinance and would result in irreparable injury to plaintiff, but plaintiff is required to allege the facts supporting the conclusions of defendant's violation of the ordinance and irreparable injury to plaintiff.

APPEAL by defendants from *Thompson, Special Judge,* December Special Term, 1959, of WAKE.

Civil action to enjoin (1) the maintenance and operation of Camp Polk Prison, (2) the construction of buildings for enlargement thereof, and (3) the removal of buildings heretofore constructed in violation of zoning ordinances of the City of Raleigh.

The allegations of the (amended) complaint, summarized or quoted, are as follows:

Plaintiff resides on Lake Boone Trail on property located (1) within one mile of the corporate limits of Raleigh, (2) within an area zoned for residential use, and (3) "in close proximity" to Camp Polk Prison.

Defendants, except William F. Bailey, are members of the State Prison Commission. Defendant Bailey is Director of Prisons. Their respective official duties are defined in G.S. 148-1. They maintain and operate, "in their official capacities," a prison in Wake County identified as Camp Polk Prison.

Camp Polk Prison is located northwest of Raleigh in a thickly inhabited area. There are approximately five hundred residences within a radius of one mile of said prison. Part of the Camp Polk Prison property is located within one mile of the corporate limits of Raleigh and within an area (over which the City of Raleigh has zoning authority) zoned for residential use only. A public school, LeRoy Martin Junior High School, attended by approximately 473 school children, and Meredith College, attended by approximately 750 young ladies, are "located nearby."

Camp Polk Prison "is presently inhabited by approximately 400 prisoners, and is now being expanded to provide for an additional 300 prisoners."

". . . plaintiff is informed and believes the said Camp Polk Prison is maintained and operated by the defendants as a 'minimum security prison,' that as such its inhabitants are not closely confined and are not closely guarded, that said inhabitants are given considerable freedom and that as a result thereof the prisoners roam the neighbor-

hood at will and that the said prisoners actually go onto property and to the homes of residents of the area, putting said residents in fear of their persons and even of their lives and constituting a threat to the safety of the persons and property of said residents; that escapes from the prison are numerous and frequent and that escapees and discharged inhabitants of the prison have committed serious crimes, including rape and murder, in the area; that the operation of the said prison in such a manner has created an intolerable condition, which seriously affects the residents of said area and constitutes a continuing nuisance, and unless said nuisance is abated the residents of the said area will continue to be subjected to the said intolerable conditions and will thereby be denied the use and enjoyment of their property."

The City of Raleigh, pursuant to G.S., Chapter 160, Article 14, and Section 100 of its charter (Chapter 1184, Session Laws of 1949, as amended), adopted comprehensive zoning ordinances. Section 24-12(f) of the Raleigh City Code prohibits the erection or enlargement of a prison within a residential district.

". . . on or about 1 June 1959, after the adoption and effective date of said zoning ordinances, the defendants commenced enlargement of the Camp Polk Prison by erecting additional buildings of a nonresidential character within the said residential district, and that said buildings are now under construction, which such action is in violation of Section 24-12(f) of the City Code of Raleigh."

"Plaintiff has no plain, speedy or adequate remedy at law to prevent the acts and conduct aforesaid and such conduct renders plaintiff's premises and property undesirable, uninhabitable in peace and security, and is resulting in its diminished value, and unless the same is abated, plaintiff will suffer and is now suffering irreparable damage and loss."

Upon the foregoing allegations, plaintiff prays that defendants be "perpetually and permanently" enjoined and restrained as set forth above.

Defendants demurred, asserting as grounds therefor, in substance, the following: The complaint does not state facts sufficient to constitute a cause of action against them in that (1) the court has no jurisdiction to control the discretion of an agency of the State engaged in the performance of a governmental function, (2) the State is the real party whose action would be controlled by the injunctive relief sought, and (3) defendants are not subject to suit for the cause alleged.

The cause came on before Judge Thompson for hearing (1) on

defendants' demurrer and (2) on return of an order that defendants "show cause, if any there be, why the injunction as prayed for by the plaintiff should not be granted until the final determination of this action."

On December 15, 1959, Judge Thompson, after hearing, entered an order overruling defendants' demurrer. Defendants excepted. Thereafter, plaintiff and defendants presented affidavits relevant to the issuance of a restraining order pending final determination of the action.

On December 16, 1959, Judge Thompson entered a "Temporary Restraining Order," which, after recitals, contains these provisions:

> ". . . it appears to the court that there is probable proof of the maintenance of the nuisance alleged in the complaint, in that it appears, *prima facie* from the affidavits offered by the plaintiff that prisoners at the Camp Polk Prison have from time to time been allowed and permitted to be away from custodial supervision of the prison and to wander about the neighborhood in the vicinity of the prison unguarded.
>
> "IT IS ORDERED, ADJUDGED AND DECREED, that the defendants be and each of them hereby is, until further order of the Court, enjoined and restrained from establishing and maintaining a prison policy for Camp Polk Prison allowing prisoners to be away from guarded supervision in the vicinity of the camp and to roam at will about the surrounding neighborhood; and it is further ordered and adjudged that this order and injunction remain in effect during the pendency of this action and until further order of the court."

Defendants excepted to the signing and entry of said order, specifically to the quoted portions thereof, and appealed.

On December 17, 1959, upon application of the Attorney General, counsel for defendants, the Chief Justice ordered that the execution of Judge Thompson's judgment of December 16, 1959, "be and the same is hereby stayed pending final determination of an appeal to be filed by the defendants with the Supreme Court of North Carolina."

On January 14, 1960, this Court, upon defendants' application, issued its writ of *certiorari* for review of the order of December 15, 1959, overruling defendants' demurrer to the complaint.

In this Court, defendants filed a demurrer *ore tenus* in which they set forth, summarily stated, these additional grounds of objection: (1) The facts alleged in the complaint are insufficient to show plaintiff has suffered or will suffer irreparable or special damage. (2) No

facts are alleged in the complaint that defendants have acted unlawfully or in palpable abuse of their discretion.

Jordan, Dawkins & Toms for plaintiff, appellee.

Attorney General Bruton, Assistant Attorney General Moody and Giles R. Clark and Carl C. Churchill, Members of Staff, for defendants, appellants.

BOBBITT, J. Analysis of the complaint discloses:

1. The action is solely for injunctive relief, specifically to require defendants, in their official capacities, to discontinue operation of Camp Polk Prison on the site where it has been and is now maintained.

2. Plaintiff's property is on Lake Boone Trail, within one mile of the corporate limits of Raleigh and "in close proximity" to Camp Polk Prison. A part of Camp Polk Prison is also located within one mile of the limits of Raleigh.

3. There are approximately five hundred residences within a radius of one mile of Camp Polk Prison, but there is no allegation that plaintiff's property is within this area.

4. Escapees and other prisoners, including discharged prisoners, have committed serious crimes "in the area" surrounding Camp Polk Prison, or have trespassed upon the property of residents "of the area" in such manner as to constitute a threat to the safety of such persons and their property, but it is not alleged that any such incident has occurred on plaintiff's property or in the immediate vicinity thereof or that plaintiff or any member of his household has been directly affected thereby.

5. The alleged ground for injunctive relief is the apprehension that plaintiff's safety and property is endangered by acts of escapees and other prisoners, including discharged prisoners, on property beyond the limits of Camp Polk Prison; but there is no allegation that any condition exists *within the limits of Camp Polk Prison* that constitutes an annoyance to plaintiff or adversely affects his property.

It is here noted that the decisions upon which plaintiff relies, cited below, relate to factual situations where the plaintiff owned property contiguous, in whole or in part, to the prison property, or so close as to be directly affected by conditions within the jail or prison. All, except the *Totten* case, deal with annoyances such as alleged unsanitary conditions, obscene, boisterous and disorderly conduct, invasion of privacy by exposure of the plaintiff's premises to the view, remarks and gesticulations of prisoners, *etc.*

The State Prison Department was created by G.S. 148-1(a) as

the State's agency for the performance of an essential governmental function. A suit against the State Prison Department *eo nomine* is essentially a suit against the State. Hence, absent constitutional or legislative authority therefor, plaintiff could not maintain such suit. *Moody v. State Prison,* 128 N.C. 12, 38 S.E. 131; *Schloss v. Highway Commission,* 230 N.C. 489, 53 S.E. 2d 517, and cases cited.

While a suit against State officials is not necessarily a suit against the State, "where the state, although not a party to the record, is the real party against which relief is sought, and where a judgment for the plaintiff, although nominally against the officer as an individual, could operate to control the action of the state or subject it to liability," such suit "is to be deemed a suit against the state, and is not maintainable unless the state has consented to be sued." 49 Am. Jur., States, Territories, and Dependencies § 92; *Vinson v. O'Berry,* 209 N.C. 287, 183 S.E. 423. Whether a suit against State officials is a suit against the State "is to be determined by the essential nature and effect of the proceeding." *Ford Motor Co. v. Treasury Department,* 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347, and cases cited.

In *Schloss v. Highway Commission, supra, Barnhill, J. (later C. J.),* said: "When public officers whose duty it is to supervise and direct a State agency attempt to enforce an invalid ordinance or regulation, or invade or threaten to invade the personal or property rights of a citizen *in disregard of law,* they are not relieved from responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State." (Our italics) A statement to like effect was made by *Devin, J. (later C. J.),* in *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359.

The official status of defendants, standing alone, does not immunize them from suit. Whether plaintiff can maintain this action depends upon the essential nature and effect of the proceeding, specifically whether the facts alleged, if true, are sufficient to show plaintiff's rights have been invaded or threatened *by unlawful conduct* on the part of defendants.

It is noted that, while the time, place and circumstances of such incidents are not alleged, the complaint contains general allegations as to crimes and trespasses heretofore committed "in the area." It is noted further there is no allegation as to what incidents, if any, occurred while defendants have held their alleged respective official positions. Even so, plaintiff does allege, upon information and belief, that Camp Polk Prison is maintained and operated by defendants, "in their official capacities," as a "minimum security prison" and that "its inhabitants are not closely confined and are not closely guarded" and are given "considerable freedom."

Under the provisions of Article XI of the Constitution of North Carolina, the General Assembly has plenary authority to provide for a State Prison System. It is noted that Section 1 thereof expressly authorizes "the employment of such convict labor on public works or highways, or other labor for public benefit, and the farming out thereof, where and in such manner as may be provided by law; but no convict shall be farmed out who has been sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson." Sections 4 and 5 of Article XI expressly recognize that rehabilitation of a prisoner as well as punishment for past criminal conduct is a proper function of prison administration.

The State's prison policy, as defined by the General Assembly, contemplates that able-bodied prisoners shall engage in useful labor, either on the prison premises or elsewhere, G.S. 148-6, and so "reduce the cost of their keep while enabling them to acquire and retain skills and work habits needed to secure honest employment after their release," G.S. 148-26. Also, see G.S. 148-33.1 relating to prisoners granted the option of serving sentences under the "work release plan" therein authorized. The cited provisions, as well as provisions with reference to paroles, G.S. Chapter 148, Article 4, are predicated upon the idea that the ability as well as the disposition *of released prisoners* to engage in honest employment and become law-abiding members of society is calculated to serve the best interests of the State and of its citizens.

The statutory responsibility of the State Prison Commission, to be exercised at meetings held as provided, is "to formulate general prison policies, to adopt prison rules and regulations, to approve budgetary proposals of the State Prison Department, and to advise with the Director of Prisons on matters pertaining to prison administration." G.S. 148-1(b). The statutory duty of the Director of Prisons, as executive head of the Department, is to "administer the affairs of the State Prison Department subject to the duly adopted policies and rules and regulations of the Commission." G.S. 148-1(c). The Director of Prisons, subject to the rules and regulations of the Commission, is expressly authorized to designate the places of confinement within the State Prison System where prisoners committed to his custody shall serve their sentences. G.S. 148-4, as amended by Chapter 109, Session Laws of 1959.

"The erection and operation of prisons and jails, whether by the state, a county, or a municipality, is a purely governmental function, being an indispensable part of the administration of the criminal law, . . . They are a part of the police system for the preservation of order

and the security of society, and are established by the state in the exercise of its sovereign powers, in performance of its duty to provide for the custody, employment, and maintenance of convicts. They are a public necessity." 41 Am. Jur., Prisons and Prisoners § 3; *Burwell v. Comrs. of Vance County,* 93 N.C. 73; *Moody v. State Prison, supra.*

"It is true that nobody would be pleased at the erection of a jail in the vicinity of his residence, but it must be built somewhere. It is a public necessity. It is authorized by law. In no sense, or rather in no legal sense, is it a nuisance. Nothing that is legal in its erection can be a nuisance *per se;* much less can that which public necessity demands be one." *Bacon v. Walker,* 77 Ga. 336.

A prison is not a nuisance *per se.* Hence, *the construction* of a prison on a site selected by public officials pursuant to statutory authority will not be enjoined. *Burwell v. Comrs. of Vance County, supra; Bacon v. Walker, supra; Hughes v. McVay,* 113 Wash. 333, 194 P. 565, 14 A.L.R. 681; *Baptist Church of Madisonville v. Webb* (Texas), 178 S.W. 689. *Smith, C. J.,* speaking for this Court in *Burwell v. Comrs. of Vance County, supra,* said: "For if they could thus have the aid of the Court, so could residents of any other part of the town, for the same and perhaps stronger reasons, because more thickly settled, as well as contiguous proprietors could prevent the erection elsewhere. The special damage in such case is incidental to what the general interest of the community requires and becomes *damnum absque injuria.* Otherwise no jail could be built within the town if parties interested as these plaintiffs choose to object."

Whether the maintenance and operation of *a* prison on the Camp Polk site shall be conducted, either as at present or as enlarged by the construction of additional buildings and facilities, is a matter for determination by the State Prison Commission in the exercise of its discretion. G.S. 148-3; G.S. 148-5. Moreover, a minimum security prison is not a nuisance *per se;* and, absent allegations that defendants are acting otherwise than in good faith in the discharge of their statutory duties, whether Camp Polk Prison shall be operated as a "minimum security prison" is likewise a matter for determination by the Commission in the exercise of its judgment and discretion.

As succinctly stated by *Devin, C. J.,* in *Williamston v. R. R.,* 236 N.C. 271, 72 S.E. 2d 609: "Courts will not undertake to control the exercise of discretion and judgment on the part of the members of a commission in performing the functions of a State agency." When discretionary authority is vested in such commission, the court has no power to substitute its discretion for that of the commission; and, in the absence of fraud, manifest abuse of discretion or conduct in ex-

cess of lawful authority, the court has no power to intervene. *Sanders v. Smithfield,* 221 N.C. 166, 19 S.E. 2d 630; *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484, and cases cited. For a full exposition of this well established principle of law, see opinion of *Barnhill, C. J.,* in *Burton v. Reidsville,* 243 N.C. 405, 407, 90 S.E. 2d 700.

The complaint contains no allegation that defendants have acted fraudulently or in such arbitrary manner as to constitute a manifest abuse of discretion. There is no allegation that the Commission has adopted any policy, rule or regulation permitting prisoners to roam the neighborhood at will or to go onto the property or to the homes of residents in the area. Nor is there any allegation that defendants have failed in any way to use all means at their disposal to punish such violations of its rules and regulations as occur and to prevent recurrence of such violations in the future. Nor is there any allegation that defendants have failed to discipline or discharge subordinate employees who may have granted liberties to prisoners in violation of the Department's policy, rules or regulations, or who may have been negligent in the enforcement of the Department's policy, rules and regulations. It is common knowledge that, notwithstanding all efforts of the State Prison Commission and of the Director of Prisons, prisoners do escape from maximum security prisons as well as from minimum security prisons; and that escaped prisoners, as well as persons who are not prisoners, have committed crimes both in the neighborhood of prisons and elsewhere.

Since plaintiff does not allege that defendants have established and maintained or that they threaten to establish and maintain "a prison policy for Camp Polk Prison allowing prisoners to be away from guarded supervision in the vicinity of the camp and to roam at will about the surrounding neighborhood," the interlocutory order restraining defendants from establishing and maintaining such prison policy was improvidently entered and is vacated.

Plaintiff directs our attention to this statement from 41 Am. Jur., Prisons and Prisoners § 8: "Authority to erect and maintain such an institution does not carry with it authority so to manage and conduct it as to create a nuisance, and if a penal institution is maintained in such a manner as unreasonably to interfere with the comfort, use, and enjoyment of property in the neighborhood, the maintenance thereof may be restrained as a nuisance or may warrant the recovery of damages." Also, see 66 C.J.S., Nuisances § 53. All cases cited in support of these general statements are referred to herein. Indeed, the opinion in *Burwell v. Comrs. of Vance County supra,* states, by way of *dictum,* that a directly affected property owner may reasonably

require that a jail be so managed "as to occasion as little inconvenience and discomfort to those living near as is consistent with the public purposes to be subserved."

Pritchett v. Board of Com'rs., 42 Ind. App. 3, 85 N.E. 32, is the only decision that has come to our attention in which it was held that plaintiff was entitled to injunctive relief. It was held that the plaintiff was entitled to relief from the nuisance of invasion of his privacy by prisoners looking into his house through open jail windows, specifically, that plaintiff was entitled to have the windows of the jail next to his residence kept closed.

In *Pritchett*, it was also held that the County Commissioners were not liable for damages on account of the way a jail was conducted, but the sheriff, who had control of the prisoners, and the jailor, who had control of the jail, may be liable. In the latter respect, *Wehn v. Commissioners of Gage County*, 5 Neb. 494, 25 Am. Rep. 497, and *City of Bowling Green v. Rogers*, 142 Ky. 558, 134 S.W. 921, 34 L.R.A. (N.S.) 461, are in accord. In this connection, see *Threadgill v. Commissioners*, 99 N.C. 352, 6 S.E. 189.

In *Dunkin v. Blust*, 83 Neb. 80, 119 N.W. 8, the court, at the instance of a taxpayer, enjoined the construction of a village jail solely on the ground the trustees of the village had not complied with statutory provisions requiring (1) publication of notice of the estimated expense and (2) appropriation of funds to defray such expense. The relevancy of this decision is not apparent.

In *Long v. Elberton*, 109 Ga. 28, 34 S.E. 333, 46 L.R.A. 428, 77 Am. St. Rep. 363, plaintiff instituted the action against City of Elberton for the recovery of damages. He alleged defendant had selected and built a "City Prison" within one hundred feet of his property, which included a hotel in which he and his family resided. He alleged defendant maintained this prison in such manner as to constitute a nuisance, alleging with particularity the offensive conditions at said prison which rendered his property less desirable and impaired its market value. A judgment, sustaining demurrer to amended complaint, was affirmed.

Plaintiff cites *District of Columbia v. Totten*, 5 F. 2d 374, 40 A.L.R. 1461, as directly in point and quotes extensively from the opinion. In substance, Totten alleged, and offered evidence tending to establish, these facts: Totten owned a tract of land in Fairfax County, Virginia. The District of Columbia, referred to in the opinion as a municipal corporation, acquired "a neighboring and partly contiguous tract of land" in Fairfax County, Virginia, and commenced con-

struction of permanent structures and buildings thereon for use as a workhouse and prison. This construction work was done by prison labor. Prisoners so engaged and other prisoners were insufficiently guarded, frequently escaped and as escapees or prisoners overran the community, specifically the premises of Totten, terrorizing the residents to such extent that Totten and his family were compelled to abandon their home and live elsewhere. A judgment in favor of Totten against the District of Columbia, in accordance with verdict, was affirmed by the District of Columbia Court of Appeals (a three-judge court), Chief Justice Martin dissenting.

It appears that Totten's recovery was for damages he sustained *"on account of his being deprived of the enjoyment of the use of his premises,* on account of a nuisance maintained by the defendant in the manner in which it attempted to perform the function of keeping prisoners and using prison labor to build the prison in which to keep them." (Our italics) Whether Totten was entitled to injunctive relief was not involved or discussed. As to the right to recover damages, the *Totten* case appears to be in conflict with decisions heretofore cited unless a distinction is drawn from the fact that the District of Columbia had constructed and operated a prison outside of its own territorial limits.

Plaintiff does not attempt to allege a cause of action for damages against the defendants as individuals. In this connection, see *Smith v. Hefner,* 235 N.C. 1, 7, 68 S.E. 2d 783, and cases cited. Nor does he attempt to allege a cause of action for damages against the State. Rather, he asks the court to require the defendants to do what must be done, if at all, in the exercise of their discretionary authority as public officials. Obviously, defendants, as individuals, have no authority with reference to the maintenance of the State Prison System.

The Commission, in the exercise of its official duties, is the State agency empowered by the General Assembly to perform an essential governmental function. If it cannot maintain Camp Polk Prison at its present location, the State itself cannot do so. Hence, plaintiff's action, in its essential nature and effect, is an action against the State. The facts alleged are insufficient to entitle plaintiff to maintain such action.

We have not overlooked plaintiff's allegations that the present site of Camp Polk Prison is in an area restricted to residential use by zoning ordinances of the City of Raleigh. Too, we are advertent to the fact that the demurrers do not specifically assert a failure of plaintiff to allege a cause of action in this respect. Obviously, this was

considered a secondary phase of the case. Indeed, plaintiff submitted no argument bearing thereon.

Plaintiff pleaded, by general reference, the charter of the City of Raleigh, and Chapter 160, Article 14, of the General Statutes. In respect of zoning, these are enabling acts. Also, plaintiff pleads, by specific reference, "Section 24-12(f) of the City Code of Raleigh," ostensibly a provision of a zoning ordinance; but plaintiff does not plead, by reference or otherwise, any ordinance provision purporting to restrict to residential use the area in which Camp Polk Prison is located. Where a plaintiff bases his right of action on the provisions of a city ordinance, such ordinance must be pleaded. G.S. 160-272; *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 343, 88 S.E. 2d 333.

Moreover, the facts alleged as to the location of plaintiff's property are insufficient to show he is entitled to relief on the ground that the operation and maintenance of Camp Polk Prison is *a nonconforming use* in violation of a city ordinance. *Shelby v. Lackey,* 236 N.C. 369, 72 S.E. 2d 757; *Harrington & Co. v. Renner,* 236 N.C. 321, 327, 72 S.E. 2d 838; *Goldsboro v. Supply Co.,* 200 N.C. 405, 157 S.E. 58. "It is not enough for the plaintiff to allege simply that the commission or continuance of the act will cause him injury, or serious injury, or irreparable injury; but he should allege the facts, from which the court may determine whether or not such injury will result." McIntosh, North Carolina Practice and Procedure, § 853(2); *Bogey v. Shute,* 54 N.C. 180; *Lewis v. Lumber Co.,* 99 N.C. 11, 5 S.E. 19; *Porter v. Armstrong,* 132 N.C. 66, 43 S.E. 542.

We are constrained to hold that plaintiff's allegations as to alleged violations of zoning ordinances and as to alleged irreparable injury are legal conclusions and that plaintiff's factual allegations are insufficient to state a cause of action on this ground.

Under the circumstances set forth, this Court sustains defendants' demurrers. Hence, the order of December 15, 1959, overruling defendants' original demurrer, is reversed and vacated.

Reversed.

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. v. THE CITY OF SHELBY.

(Filed 30 June, 1960.)

1. Injunctions § 13—

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the final hearing, the ultimate issues are not before the court, but the court is required to ascertain only if there is probable cause that plaintiff will be able to prevail on the merits and whether there is reasonable apprehension of irreparable loss to plaintiff if the temporary order is not continued to the hearing.

2. Same—

Upon the hearing of an order to show cause, it is the duty of the court to consider the inconvenience and damage which would result to defendant upon the continuance of the order, as well as the benefit that will accrue to plaintiff.

3. Injunctions § 9—

While the invasion of the franchise right of a corporation is subject to injunction, as a general rule a preliminary order will not be issued or continued unless a reasonably clear showing of irreparable injury is made out.

4. Same: Injunctions § 13— Injunction should not be continued to the hearing when dissolution would not result in irreparable injury.

In an action to restrain a municipality from constructing facilities to furnish gas to a customer outside its corporate limits under a contract between the city and such customer, instituted by a utility having no contract to serve such customer, on the ground that the city's service to such customer would invade its franchise rights, there can be no irreparable injury sufficient to support the continuance of a temporary order, since, if the city should establish its right upon the final hearing to serve such customer, the injury would be *damnum absque injuria*, and if the city should not prevail upon the final hearing, the invasion of the franchise right would be remedied by the final judgment and the possible loss of profits to plaintiff would be ascertainable and recoverable.

5. Appeal and Error § 1—

The Supreme Court will not ordinarily review matters not ruled on or adjudicated in the lower court.

6. Injunctions §§ 9, 13—

Where, in an action by a public utility to enjoin a municipality from constructing facilities for furnishing gas to a customer outside its corporate limits, plaintiff fails to show irreparable injury and the court finds that the city is authorized by law to furnish such service, G.S. 160-255, the dissolution of the temporary restraining order will not be disturbed, the ultimate questions relating to the invasion of plain-

tiffs franchise rights, whether the city was precluded from furnishing such service by a consent judgment theretofore entered, and whether the furnishing of such service was *ultra vires* the city, being for determination upon the final hearing.

7. Municipal Corporations § 4: Utilities Commission § 2—

The authority of a municipality to extend its public utilities to customers residing outside its corporate limits, G.S. 160-255, and to do so without a certificate of public convenience and necessity when no revenue bond issue is involved, is subject to reasonable limits, not only in regard to the territorial extent of the venture, but also in regard to the public benefit, not only as to residents of the city, but also in regard to the rate structure in the area and the possible result of discrimination in rates, the increase in rates to customers of utilities operating within the territory, and damage to the capital structure of such utilities.

APPEAL by plaintiff from *Froneberger, J.*, in Chambers 24 December 1959, CLEVELAND.

Action was instituted 10 December 1959.

The complaint as amended alleges in substance:

Plaintiff is a quasi-public domestic corporation and defendant a municipal corporation. Plaintiff is engaged in the transmission, distribution and sale of natural gas for compensation, subject to regulation by the North Carolina Utilities Commission under Chapter 62 of the General Statutes of North Carolina. In 1951 the Commission issued to plaintiff a certificate of convenience and necessity for specified areas wholly within the State including the entire county of Cleveland. The City of Shelby refused plaintiff a franchise for the area within its corporate limits. Plaintiff has constructed its main transmission pipe line across and through the southern section of Cleveland County and carries on business and sells gas at rates fixed by the Commission for various types and classes of natural gas services, including industrial and manufacturing establishments of all kinds. Its service is of high quality and adequate to meet the needs of all customers; its rates are reasonable, lawful and proper, as fixed and approved by the Commission. Plaintiff is ready, able and willing to adequately serve all in Cleveland County accessible to its facilities or any reasonable and proper extension thereof.

Plaintiff has constructed and laid an extension from its main line to the plant of Fiber Industries, Inc. (hereinafter called "Fiber"), situate near the village of Earl in Cleveland County. Earl is about six miles from Shelby. This extension is adequate to serve Fiber and all other users of natural gas in that vicinity.

In 1954 defendant, City of Shelby, applied to the Commission for a certificate of convenience and necessity to construct a transmission line from a line of Transcontinental Gas Pipe Line Corporation to the City of Shelby and to distribute and sell natural gas within and beyond its corporate limits, the proposed line and system to be constructed with the proceeds of revenue bonds to be issued by defendant pursuant to the Revenue Act of 1938 (G.S. 160-421). On 19 January 1954 the Commission granted to defendant a certificate authorizing service within the corporate limits of the City but not otherwise. Defendant appealed from the provisions of this order restricting service to the area within the corporate limits. At this time Pittsburgh Plate Glass Company was planning to construct a plant near Shelby; defendant desired to serve gas to this plant and feared it would locate elsewhere unless this was permitted. Plaintiff had entered a protest in defendant's proceeding before the Commission and thereby opposed the granting of extra-territorial rights to defendant. Plaintiff and defendant reached an agreement pursuant to which the cause was remanded to the Commission and an amended order entered, by consent of plaintiff and defendant, whereby defendant was permitted to furnish gas through its system to the Glass Company and it was provided in the amended order that "the City of Shelby agrees and consents that it will not again make a similar request for permission to serve natural gas to any other person, firm or corporation outside its corporate limits." This consent judgment was entered pursuant to a resolution of the Board of Aldermen of the City of Shelby. Defendant issued bonds, constructed its line and system and served the Glass Company.

Defendant now proposes, unless restrained, to lay and construct a pipe line, leading from its intake line at a point about four miles from the City and crossing plaintiff's right of way and main line and running thence to Fiber plant, for the purpose of furnishing and selling natural gas to Fiber. Defendant has entered, or is about to enter, into a contract for construction of this line.

Plaintiff has advised Fiber it is ready, able and willing to furnish adequate gas at the price fixed by the Commission. Defendant proposes to furnish gas to Fiber at a lower rate, which if charged would be discriminatory as to industrial users from plaintiff. Defendant's proposed rate is less than plaintiff's cost. Defendant pays no franchise or income taxes.

Defendant's proposed line will be a wholly new line, not an extension of its present system and not necessary for nor incidental to service of the City and its residents. It will put defendant in the

business of transmitting and selling gas outside the City in competition with plaintiff. Defendant has no legal right to construct, maintain and use this line; the scheme is *ultra vires* of defendant, contrary to law, an unlawful invasion of plaintiff's territory, will cause it irreparable damage, deprive it of profits and hamper it in attracting capital. Defendant proposes to construct other such lines; it has no obligation to serve any except those it chooses. This would leave others for plaintiff to serve at unreasonable rates. Plaintiff has no adequate remedy at law.

Plaintiff prays: (1) temporary injunction pending the termination of the action; (2) specific performance of the contract embraced in the consent judgment; and (3) permanent injunction.

On 10 December 1959 the court issued a temporary injunction restraining defendant "from proceeding further with the construction" and use of the pipe line, and directing defendant to appear on 18 December 1959 and show cause why the injunction should not be continued to the final hearing.

The defendant appeared and moved to dissolve the temporary injunction. Plaintiff offered as affidavits the complaint as amended and the exhibits attached. Defendant offered its verified motion and certain affidavits. Among other things, defendant's evidence tends to show: The City's project is not to be financed by the proceeds of a bond issue. The contractor will suffer damages in case of work stoppage due to injunction. Fiber has contracted to purchase gas from defendant and has no contract with plaintiff. The cost of the proposed pipe line will be approximately $45,000.00.

Findings of fact by the court are summarized as follows:

Plaintiff is not a resident or tax payer of the City of Shelby. Plaintiff is authorized to distribute and sell natural gas for compensation in an area including Cleveland County, is engaged in this business, has a natural gas pipe line through and across the southern section of the county, has constructed a line to the Fiber plant but has no contract with Fiber to furnish gas. Defendant has in use a gas line and system in which it invested $1,300,000.00, the proceeds from long term bonds which are to be retired from revenues of the system. Defendant has contracted to expend approximately $45,000 for right of way, materials and construction in establishing a pipe line to serve Fiber. If the restraining order is continued the contractor, now in the process of laying the line, will sustain substantial damages and has notified defendant it will seek to recover these damages.

The court also found the following additional facts:

"(k) That the plaintiff has failed to show that there is any danger

of irreparable or substantial injury or damage to it or that its rights will be lost or materially impaired pending the trial if the temporary restraining order is dissolved;

"(1) That the defendant has shown that the injury and damages to the defendant, the City of Shelby, and to the contractor, C. N. Flagg & Company, would be heavy if the temporary restraining order were continued to the hearing;

"(m) That the cost of the said pipe line by the City of Shelby is not being financed by and is not to be financed by bonds, either revenue or otherwise, issued or to be issued by the City of Shelby;

"(n) That the defendant, the City of Shelby, is not making any request to the North Carolina Public Utilities Commission in connection with the construction of said pipe line."

The court made the following conclusions of law and adjudications:

"(a) That under the General Statutes of North Carolina, including Section 160-255, a municipality, including the defendant, is expressly authorized to furnish gas services to any person, firm or corporation desiring the same outside the corporate limits where the service can be made available by the municipality;

"(b) That under the General Statutes of North Carolina, including Section 160-255, a municipality, including the defendant, is not required to obtain permission from the North Carolina Utilities Commission to construct a pipe line for the purpose of rendering gas service to any person, firm or corporation desiring the same outside the corporate limits where the service can be made available by the municipality, unless the cost of such pipe line and service is to be financed through bonds issued by such municipality;

"(c) That if the temporary restraining order herein were continued to the hearing, it would cause heavy injury and damage to the defendant, and confer little benefit in comparison upon the plaintiff.

"Upon the foregoing findings of facts and conclusions of law, IT IS ORDERED, ADJUDGED AND DECREED, that the Temporary Restraining Order heretofore entered in this cause on the 10th day of December 1959, and of record in this cause be, and the same hereby is, vacated and dissolved."

From the foregoing order plaintiff appealed and assigned errors.

Fletcher and Lake for plaintiff, appellant.

A. A. Powell and Robinson, Jones & Hewson for defendant, appellee.

MOORE, J. The parties in their briefs discuss the ultimate issues involved in the action. But these questions have not been adjudicated

by the court below and do not properly arise on this appeal. From a careful consideration of the record and the order appealed from it is determined that the sole question now before us is whether or not the court erred in dismissing and vacating the temporary restraining order.

". . . (i)n order to justify continuing the writ until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined." *Edmonds v. Hall,* 236 N.C. 153, 156, 72 S.E. 2d 221.

When these rules are applied to the situation here presented, we find no error in the dismissal of the temporary order of injunction. We do not think that plaintiff has alleged facts that tend to show, or has otherwise shown, that there is reasonable apprehension of irreparable loss pending the determinination of the action or that a temporary restraining order is reasonably necessary to protect plaintiff's rights during litigation. Besides, it ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be dissolved on hearing pleadings and affidavits only. It is the duty of the court to consider the inconvenience and damage to the defendant as well as the benefit that will accrue to the plaintiff in continuing the writ. *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319. The rights asserted by the plaintiff are controverted by the defendant.

"Injunction is a proper remedy in cases in which a franchise of a corporation or rights thereunder are being invaded. . . . and, even though complainant's franchise is not exclusive, equity may. . . . enjoin the illegal acts of others. . . . As a general rule a preliminary injunction should not be granted unless a reasonably clear case of necessity and threatened irreparable damage is made out." 43 C.J.S., Injunctions, s. 97, pp. 601-603.

In the main the injury, damage and impairment of rights of which plaintiff complains are such as will be completely remedied and restored by a favorable final judgment. Such damage by an unfavorable final judgment will be rendered *damnum absque injuria.* We refer to such damages as are occasioned by invasion of territorial franchise, fixing of discriminatory rates, possible increase of rates for rural users of plaintiff's services, further invasions by defendant and other municipal corporations, duty to serve less desirable customers while the more profitable users are served by defendant and other

municipal corporations, and possible loss of attractiveness for investors of capital. These are matters more naturally to be considered on the final hearing.

The only immediate damage that will result to plaintiff by dissolution of the temporary restraining order is possible loss of profits. If profits are lost pending final termination of the action, the amount thereof will be ascertainable and recoverable and therefore such damages are not irreparable. Furthermore, it appears from the record that Fiber has made no contract with plaintiff for service, and plaintiff does not allege otherwise. It does not affirmatively appear that Fiber would use plaintiff's services even if denied the right to purchase natural gas from defendant. It might decide to make use of artificial gas, electricity or other fuel or energy. So it does not clearly appear that there would be a loss of profits to plaintiff during litigation.

We cannot say that the court below abused its discretion in dissolving the temporary restraining order. The order appealed from should be affirmed.

Plaintiff bases its action for relief on two grounds: (1) that defendant entered into a contract (consent judgment) with plaintiff not to serve natural gas to users, save Pittsburgh Plate Glass Company, outside its corporate boundaries in competition with plaintiff, and defendant proposes to serve natural gas to Fiber in breach of this agreement; and (2) that the construction and use of the proposed pipe line by defendant to deliver and sell natural gas to Fiber are not authorized by law and are *ultra vires* of defendant.

The court below made no finding of fact or conclusion of law with respect to the alleged contract, did not rule upon its validity, did not undertake to construe it, and gave it no consideration. This Court will not ordinarily review matters not ruled on or adjudicated in Superior Court. *Collier v. Mills,* 245 N.C. 200, 204, 95 S.E. 2d 529; *Realty Co. v. Planning Board,* 243 N.C. 648, 655, 92 S.E. 2d 82. The alleged contract and its effect will be for determination upon the final hearing of this cause in Superior Court.

As to the legality of defendant's proposed project, the court concluded as a matter of law that under G.S. 160-255 defendant is authorized "to furnish gas services to any person, firm or corporation desiring same outside the corporate limits where the service can be made available by the municipality" and, since the project is not to be financed through a revenue bond issue, defendant is not required to obtain permission therefor from the North Carolina Utilities Commission. This is tantamount to a ruling that there is no probable cause shown that defendant's proposed undertaking is il-

legal. In as much as the order dismissing the temporary injunction must be affirmed on the ground already discussed, we refrain from expressing an opinion as to the correctness of the court's conclusion on the legality of the project. A final determination of this question of legality must await the final hearing in Superior Court when all facts and circumstances are presented.

We deem it expedient to point out that the authority granted by G.S. 160-255 is not unlimited. It authorizes a municipality "to construct and operate (utilities) . . . for the *benefit of the public* beyond its corporate boundaries *within reasonable limitation.*" (Emphasis added). *Grimesland v. Washington,* 234 N.C. 117, 122, 66 S.E. 2d 794. If the authority was not thus limited the Act would contravene fundamental law. *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90. The 1957 amendment did not affect these limitations. In considering the matter of public benefit, reference is not merely to the residents of the municipality. Consideration must be given to the users of gas from the City outside its boundaries, the possible effect on rural users of gas from plaintiff and like corporations, and the effect on the public generally. The term, "within reasonable limitations," does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which affect the reasonableness of the venture.

While the source of the necessary funds for construction of defendant's project is not disclosed, it does appear without contradiction that the funds are not to be derived from a bond issue. Therefore, assuming that the funds are such as may be lawfully used for the proposed purpose and the project is otherwise in compliance with legal authority, a certificate of convenience and necessity from the Utilities Commission is not required. *Grimesland v. Washington, supra,* at page 126. However, the court is not disqualified to inquire into the source of the funds allocated for the project in so far as such inquiry might bear upon the legality of the venture.

Nothing herein shall be construed as the expression of an opinion as to the validity or effect of the alleged contract or as to the legality of defendant's proposed pipe line. These are matters for the Superior Court on the final hearing.

The order appealed from is

Affirmed.

FRANK J. YEAGER v. BEULAH L. DOBBINS, EXECUTRIX UNDER THE WILL OF C. N. DOBBINS, DECEASED.

(Filed 30 June, 1960.)

1. Contracts § 25—

Where the specific contract constituting the sole basis of the cause of action is made a part of the complaint, the sufficiency of the instrument to constitute a valid agreement must be determined in accordance with its provisions rather than the more broadly stated allegations of the complaint, or the conclusions of the pleader as to its character and meaning.

2. Contracts § 2—

In order to constitute a valid contract, there must be an offer which is definite and complete and an acceptance of the offer in its exact terms and sense, and a mere proposal intended to open negotiations which may ultimately result in a contract and which contains no definite terms but refers to contingencies to be worked out, is not binding even though accepted.

3. Vendor and Purchaser § 2: Wills § 4— Letter held insufficient to constitute contract to convey or devise.

A letter written by the owner of a farm to his son-in-law expressing the owner's desire to divide the farm among his son-in-law and his two sons, or those of them who would like to keep the farm and work it, requesting the son-in-law to come to the farm as soon as possible, expressing the desire to turn the farm over to the son-in-law to make what he could from it, and then, when the two sons had finished school, the three could carry on from there, and suggesting that the son-in-law might not like it after a trial and that it was impossible to tell whether the sons, or either of them, would like farming, *is held* insufficient to constitute a contract or offer to convey the farm or devise it to the son-in-law.

PARKER AND HIGGINS, J.J., dissenting.

APPEAL by plaintiff from *Gambill, J.*, November Civil Term, of YADKIN.

Plaintiff's complaint is summarized as follows: Defendant is the widow of C. N. Dobbins who died 15 June 1958. She is sole devisee and legatee and executrix under the will of deceased. She is sued in her representative capacity. On and prior to 21 October 1948 plaintiff was a resident of Lansdowne, Pennsylvania, where he owned his home and was employed in the insurance business. At this time C. N. Dobbins owned a 210-acre farm in Yadkin County, North Carolina and, "in writing, contracted with and promised" plaintiff if he would give up his residence and employment in Pennsylvania, bring his family to North Carolina and take over, operate and work the farm,

Dobbins would convey or devise it to plaintiff. The contract was subject to the condition that if Dobbins' sons, Charles and James, or either of them, should join plaintiff in operating and working the farm, it would be conveyed or devised to plaintiff and such son or sons in equal shares, otherwise to plaintiff solely. In reliance upon the contract, plaintiff sold his home, gave up his employment, moved his family to the farm, lived thereon and operated and worked it until the death of C. N. Dobbins. Neither of the sons joined with plaintiff in operating and working the farm. The land was not conveyed to plaintiff, and in breach of the contract Dobbins willed it to his wife, the defendant. The farm, at the death of Dobbins, was worth $105,000.00, including $50,000.00 in improvements placed thereon by plaintiff at his own expense. Plaintiff filed claim with defendant for the sum of $105,000.00 but payment was refused.

In consequence of a motion by defendant that the complaint be made more definite and certain and that the writing relied on by plaintiff be fully set out, plaintiff filed an amendment and alleged that the writing is a letter from C. N. Dobbins to plaintiff. It was made a part of the complaint and attached thereto as an exhibit.

The letter is dated 21 October 1948, addressed to "Dear Frank" and signed, "Your dad, C. N. Dobbins." Omitting nonessentials, it is as follows:

"I wanted that you should make the decision yourself so that . . . I wouldn't feel that I had over persuaded you . . . I've been getting the corn out of the field and sowing grain, which is mighty close akin to work . . . the payoff comes next summer with the harvest.

"Now to answer more specifically your questions. I had hoped that you, Charles and James could and would take the farm over and operate it as a jointly owned piece of property. There is sufficient land and sufficient work for all of you to have a full time job. However I realize that partnerships are rather hard to make operate and it would probably be just as well or better to divide the place 3 ways even though it should be operated as an entity. Who knows for sure what James or Charles will want to do when older? They may not want to farm. You might not like it after a trial. I would like for any of you boys to have the farm only if you would keep it and work it . . .

"I would like to turn the whole thing over to you to make as much as you can until Charles gets through school and comes home; then the two of you to do likewise until James can join you and then the three of you carry on from there. It appears that I am about through except in an advisory capacity and possibly that too. I

naturally would like to have you and Grace nearby and even more especially Kathy and Christine.

"The decision is yours to make, Frank. I'd love to have you come on down as soon as possible . . .

"As for a house for you to live in, we might at odd times build one. I selected one out of the October Country Gentleman as being about what would be needed for you boys to live in. You have better ideas probably. . . .

"One thing is certain you would never be out of a job. . . .

"For my part will try to make it interesting from every angle.

"I am not sure this covers everything you wanted to know. If not I would be glad to explain further on request."

Defendant demurred to the complaint as amended on the ground that it does not state facts sufficient to constitute a cause of action, in that the action, sounding in contract, is based solely and entirely upon the above letter, which upon its face is wholly insufficient in law to constitute an offer to contract, a contract, "or any other thing upon which plaintiff can as a matter of law maintain the action."

The court sustained the demurrer. Plaintiff appealed and assigned error.

Fletcher & Lake for plaintiff, appellant.
Sanford, Phillips, McCoy & Weaver for defendant, appellee.

MOORE, J. The complaint alleges that the agreement or contract on the part of C. N. Dobbins is in writing. Plaintiff amended the complaint and alleged that the writing relied on is the letter of C. N. Dobbins dated 21 October 1948. It is not alleged that Dobbins agreed or offered to do anything more than appears in the letter.

The question for decision is whether the letter constitutes a contract or offer to contract sufficient to support an action for damages for breach of its terms.

Where the alleged contract is made a part of the complaint and is relied on as the sole basis of recovery, the court will look to its particular provisions rather than the more broadly stated allegations in the complaint or the conclusions of the pleader as to its character and meaning. *Williamson v. Miller,* 231 N.C. 722, 726, 58 S.E. 2d 743.

The inquiry here does not involve the statute of frauds, G.S. 22-2. Plaintiff alleges that the agreement on the part of C. N. Dobbins is in writing. Furthermore, the statute of frauds is an affirmative defense and must be pleaded. *Weant v. McCanless,* 235 N.C. 384, 386, 70 S.E. 2d 196. This defense may not be raised by demurrer. *Mc-*

Campbell v. Building and Loan Ass'n., 231 N.C. 647, 651, 58 S.E. 2d 617.

Upon proper construction of the letter in question depends the propriety of the judgment sustaining the demurrer. The letter is not a complete contract within itself. This is obvious and requires no discussion. The real question is whether it contains a valid offer in express terms or by necessary implication, the acceptance of which and the performance of conditions therein contained give rise to a binding contract, the breach of which will support an action for damages.

In the analysis and construction of the contents of the letter, certain facts and conclusions inevitably emerge. The letter is in answer to an inquiry by plaintiff, the writer's son-in-law. As to whether he will come to North Carolina is for decision of plaintiff. Farming is hard work, the writer likes it but is about through except in an advisory capacity. He would like to have his daughter and granddaughters near him. He has two sons, Charles and James, who have not finished school.

The writer comes to the main purpose of the letter in this wise: "Now to answer more specifically your questions." Here he discusses some ideas he has concerning the farm. He *had hoped* that plaintiff, Charles and James could and would take the farm over and operate it as a *jointly owned* piece of property. There is work enough for all. However he realizes that partnerships are "hard to make operate." It would probably be as well or better to divide the place three ways but it should be operated as a unit. He doesn't know whether James or Charles will want to farm when they are older. Plaintiff might not like it if he tried it. Writer would like for any of the three boys to have the farm *"only"* if they "would keep it and work it."

It is our opinion that the foregoing portion of the letter does not comprise an offer to convey or devise the farm or any part thereof. The writer is merely discussing ideas and possibilities. He is giving background information for possible future disposition of the farm. He has reached no definite decision. He wants plaintiff and writer's sons to have the farm *only* if they should like farming, that is, "would keep it and work it." It would appear that the writer does not wish to convey the land to plaintiff, Charles or James until he is convinced they like farming and want to farm. There is no positive offer of the land on any definite conditions. The writer is reserving his decision as to the disposition of the farm until future developments disclose

the attitudes of plaintiff and the sons toward farming. This is borne out by his summary or conclusion of the matter.

The writer concludes by making the following proposal: "I would like to turn the whole thing over to you to make as much as you can until Charles gets through school and comes home; then the two of you do likewise until James can join you and then the three of you carry on from there." It is clear that writer offers an interim arrangement. Plaintiff may come to North Carolina, take over the farm and *make as much as he can* until Charles and James finish school. Then the three are to "carry on from there." There is still no offer to convey or devise. Again final decision and disposition must await developments.

"When an offer and acceptance are relied on to make a contract, 'The offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer intended merely to open negotiations which will ultimately result in a contract, or intended to call forth an offer in legal form from the party to whom it is addressed.' 1 Page on Contracts, sec. 26." *Elks v. Insurance Company*, 159 N.C. 619, 625, 75 S.E. 808. "If a proposal is one merely to open negotiations which may or may not ultimately result in a contract, it is not binding though accepted . . . Care should be taken not to construe as offers letters which are intended merely as preliminary negotiations." 12 Am. Jur., Contracts, sec. 28, p. 526; Restatement of the Law of Contracts, sec. 25, p. 31.

"In the formation of a contract an offer and acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. (Citing authority). Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms." *Dodds v. Trust Co.*, 205 N.C. 153, 156, 170 S.E. 652.

We are of the opinion, and we so hold, that C. N. Dobbins did not make an offer to convey or devise the farm that will support plaintiff's contention and theory of the case. The court below properly sustained the demurrer.

It is observed that the demurrer was sustained but the action was not dismissed. G.S. 1-131. As to whether the allegations are sufficient to support a recovery for betterments or for *quantum meruit*, such inquiry does not arise on the demurrer or on this appeal. *Pamlico County v. Davis*, 249 N.C. 648, 652, 107 S.E. 2d 306; *Stewart v. Wyrick*, 228 N.C. 429, 433, 45 S.E. 2d 764.

The judgment below is

Affirmed.

PARKER AND HIGGINS, JJ., dissenting.

The original complaint alleged that C. N. Dobbins owned a farm in Yadkin County containing 210 acres. "On or about October 21, 1948, C. N. Dobbins, in writing, contracted with and promised the plaintiff that if the plaintiff would give up his employment in the insurance business and his residence in Landsdowne, Pennsylvania, would remove himself and his family to the farm described in paragraph four, . . . and would take over and operate the farm, keep it and work it, C. N. Dobbins, in consideration of the plaintiff's doing so, would convey the farm to the plaintiff prior to the death of C. N. Dobbins, or, if such conveyance was not made prior to his death, he would devise the farm to the plaintiff by his will. The contract and promise so made by C. N. Dobbins to the plaintiff were subject to the condition that if Charles N. Dobbins, Jr., and James Dobbins, the sons of C. N. Dobbins, or either of them, desired to join with the plaintiff in taking over and operating . . . the farm . . . and if they, or either of them, did so join with the plaintiff . . . C. N. Dobbins would so convey or devise the farm, in equal shares, to the plaintiff and such of his said sons as did so join with the plaintiff, . . . but if neither of his said sons so joined . . . then C. N. Dobbins would so convey or devise the entire farm to the plaintiff alone."

"On or about January 5, 1949, the plaintiff, in consideration of and in reliance upon the contract and promise of C. N. Dobbins, . . . resigned his position of employment in the insurance business . . . sold his home . . . removed . . . to Yadkin County . . . took over the operation of the farm and placed improvements thereon . . . of the value of $50,000." Neither of the sons joined the plaintiff in taking over and operating the farm. C. N. Dobbins died suddenly on June 15, 1958. "Notwithstanding his contract and promise as set forth in paragraph five, . . . and notwithstanding the full performance and fulfillment by the plaintiff of each and every condition . . . in the promise of C. N. Dobbins, . . . C. N. Dobbins did not convey or devise the farm, . . . but in breach of his contract and promise . . . devised the said farm together with all other real and personal property . . . to his wife, Beulah L. Dobbins, and appointed her the executrix of his will."

The plaintiff filed a claim against the estate for damages resulting to him from the breach of the contract on the part of C. N. Dobbins. The administrator denied the claim and the plaintiff brought this action for a breach of contract. Upon motion of defendant and order of the court the plaintiff amended the complaint by attaching the

Dobbins letter — which letter shows that it was written as a reply to the plaintiff's letter to Mr. Dobbins. The plaintiff's letter, therefore, may be competent as evidence to explain and to throw light on the Dobbins letter.

The plaintiff has alleged a contract, performance on his part, breach on the part of Mr. Dobbins, and damages. For the purpose of testing the sufficiency of the complaint, the demurrer admits all facts well pleaded. The ultimate factual allegations in a complaint must be controverted — not by demurrer, but by answer. The complaint, liberally construed, states a cause of action. When the answer and evidence are in, the court will then be in a position to determine with safety and accuracy the sufficiency of the evidence to support the plaintiff's allegation. We think the demurrer should have been overruled.

GEORGE W. FERRELL AND WIFE, CATHERINE H. FERRELL v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 30 June, 1960.)

1. State § 3a—

The State may not be sued unless by statute it has consented to be sued or has otherwise waived its immunity from suit. Art. IV, Sec. 9, Constitution of North Carolina.

2. Same: Eminent Domain § 11—

The State Highway Commission, as an agency of the State, may be sued only in the manner specifically authorized by statute, and the sole remedy against it for the taking of land for a public purpose is a special proceeding pursuant to G.S. 136-19 and G.S. 40-12 *et seq*, with the sole exception that where the circumstances are such that no statutory procedure is applicable or adequate, the owner, in the exercise of his constitutional rights, may maintain a common law action for compensation.

3. Contracts § 25: Judgments § 10—

Since a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, where the consent judgment sued on is set out in the complaint the effect and construction of the agreement must be determined upon demurrer on the basis of the specific provisions of the judgment rather than the more broadly stated allegations in the complaint or the conclusions of the pleader as to its character and meaning.

4. Judgments § 10—

A consent judgment, being the contract of the parties, must be construed as a whole to ascertain its meaning and effect.

5. Eminent Domain § 11—

A consent judgment between the Highway Commission and the owner of land which provides for the payment of a stipulated sum as compensation for a right of way and also the limitation of access to the highway, with further provision that the right of access should be limited to service roads constructed and to be constructed with access to the highway only at points selected and provided by the Commission in its discretion, does not obligate the Commission to construct service roads, and no cause of action arises upon the failure of the Commission to do so.

6. Contracts § 12—

Where a contract deals with the subject matter in detailed, clear and specific language, it will be presumed that the parties inserted therein every provision regarded as material, and additional provisions will not ordinarily be implied in the face of the detailed treatment of the matter in the agreement.

APPEAL by plaintiffs from *Mallard, J.*, January 1960 Civil Term, of DURHAM.

This is a civil action instituted 8 December 1959 in the Superior Court of Durham County.

Complaint alleges: Prior to 2 August 1956 W. L. King and wife owned approximately 17 acres of land. Defendant Highway Commission in exercise of its right of eminent domain took an easement of right of way through and across said land for construction of a hard-surfaced thoroughfare known as U. S. Highway 15 By-pass. King and wife instituted a proceeding before the Clerk of Superior Court to recover of defendant compensation for the taking of easement. The parties reached an agreement and entered into a consent judgment before the Clerk on 13 May 1955 by the terms of which King and wife were paid the sum of $2,500.00 and defendant agreed to "furnish the Kings access to the main paved lanes of the highway by means of service roads to be constructed by the Highway Commission on each side of the main paved lanes at its own expense." Copy of the consent judgment is attached to and made a part of the complaint. On 2 August 1956 King and wife for a consideration of $7,000.00 conveyed to plaintiffs by warranty deed 12.13 acres, the portion of the tract situate on the northwest side of the right of way and abutting thereon. Plaintiffs purchased with knowledge of the contents of the consent judgment. On 23 November 1959, by separate instrument in writing, the Kings assigned to plaintiffs "all their interest and rights arising out of the said (consent judgment) . . . pertaining to the tract of land . . . conveyed to (plaintiffs)." Plaintiffs have demanded that defendant construct service roads to provide access to the highway from plaintiffs' land but defendant has refused. Plain-

tiffs do not have an adequate remedy at law. A reasonable time for construction of the service roads has expired. Plaintiffs pray specific performance of the contract, that is, that defendant be ordered to construct the service roads, or in the alternative for recovery of $7,000.00 damage to the land by reason of the breach of the contract.

The pertinent portions of the consent judgment are:

". . . (T)he estate or interest acquired by the . . . Commission for the public use in said lands is an easement of right of way across same, including the limitation of access to the main or paved lanes of said project as set out in the pleadings herein and more particularly hereinafter described."

"It is ordered, adjudged and decreed:

"1. (The judgment declares the acquisition and purposes of the right of way, gives the description, and states that it is 260 feet wide and distance across petitioners' land is 640 feet. Then is given the provision relating to limitation of access which follows). ". . . that the right of access to the main paved lanes of said project will be limited to service roads constructed or to be constructed on each side of the main paved lanes with no right of access to the said main paved lanes except as provided by the respondent herein and with the right of selection to be solely in the discretion of the respondent."

"2. That the sum of TWENTY-FIVE HUNDRED DOLLARS ($2500.00) is the full, fair and adequate value of and represents just compensation for the easement of right of way in, over, upon and across the lands of the Petitioners and the past and future use thereof by the . . . Commission, its successors and assigns, for all purposes for which the said Commission is authorized by law to subject the same, including the limitation of access as above set forth."

Defendant demurred to the complaint "for that (Superior Court) does not have jurisdiction of this action as to this defendant and . . . complaint does not allege facts sufficient to constitute a cause of action against this defendant . . ." In support of the demurrer it is stated: (1) defendant may be sued only for such causes and in such manner as are specifically authorized by statute; (2) there is no statute granting the Superior Court original jurisdiction of any suit against defendant, and (3) that an action for breach of contract will not lie against this defendant.

The court sustained the demurrer and dismissed the action. Plaintiffs appealed and assigned error.

Robert I. Lipton, F. Gordon Battle; Bryant, Lipton, Strayhorn & Bryant for plaintiffs, appellants.

Attorney General Bruton, Assistant Attorney General Wooten, Charles W. Barbee, Jr., and Reade, Fuller, Newsom & Graham for defendant, appellee.

MOORE, J. The demurrer challenges the jurisdiction of the Superior Court to adjudicate the matters alleged in the complaint.

The action sounds in contract. Plaintiffs seek specific performance of the alleged contract and to that end a mandatory injunction, or in the alternative damages for alleged breach of contract.

The State may not be sued unless by statute it has consented to be sued or has otherwise waived its immunity from suit. Article IV, section 9, Constitution of North Carolina; *Smith v. Hefner,* 235 N.C. 1, 6, 68 S.E. 2d 783. The North Carolina State Highway Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute, and against it an action in contract will not lie. *Dalton v. Highway Com.,* 223 N.C. 406, 407, 27 S.E. 2d 1. It may not be sued in tort. *Schloss v. Highway Com.,* 230 N.C. 489, 492, 53 S.E. 2d 517. Where private property has been taken for highway purposes, the only remedy available to the owner is a special proceeding pursuant to G.S. 136-19 and G.S. 40-12 *et seq. Moore v. Clark,* 235 N.C. 364, 367, 70 S.E. 2d 182.

Our Court recognizes an exception to the foregoing general rules. "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. ". . . (W)hen private property is *taken* under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in exercise of his constitutional rights, may maintain an action to obtain just compensation therefor." *Cannon v. Wilmington,* 242 N.C. 711, 713, 89 S.E. 2d 595.

To maintain the present cause of action it is incumbent upon the plaintiffs to allege facts which tend to show, or from which may be inferred: (1) that defendant obligated and agreed to construct service roads on each side of the main paved lane of the project as a part of the consideration for the right of way; (2) that defendant has failed to perform the agreement; and (3) that there is no procedure by statute affording an applicable or adequate remedy.

The complaint utterly fails to allege such cause of action or any cause of action against defendant. The complaint fails to allege a contract on the part of defendant to construct service roads.

The instrument, alleged to be a contract, is the consent judgment in the condemnation proceedings by the Kings against defendant. It is made a part of the complaint by reference. It is true that a consent judgment is the contract of parties to litigation entered upon the records with the approval and sanction of a court of competent jurisdiction. *Armstrong v. Insurance Co.*, 249 N.C. 352, 356, 106 S.E. 2d 515. Plaintiffs claim benefits under the consent judgment as assignees of the Kings.

"Since the contract is made a part of the complaint, and is alleged as the sole basis of recovery, the Court will look to its particular provisions rather than the more broadly stated allegations in the complaint, or the conclusions of the pleader as to its character and meaning." *Williamson v. Miller*, 231 N.C. 722, 726, 58 S.E. 2d 743.

The following statement appears in the preamble to the consent judgment proper: ". . . the estate or interest acquired by the . . . Commission for the public use in said lands is an easement of right of way across the same, including the limitation of access to the main or paved lanes of said project as set out in the pleadings herein and more particularly hereinafter described . . ." It must be assumed that the pleadings referred to do not enlarge or supplement the terms of the consent judgment since the above quoted excerpt states that the limitation of access as set out in the pleadings is *more particularly* described in the consent judgment.

Plaintiffs rely upon the following provision of the consent judgment to show a contract: ". . . the right of access to the main paved lanes of the project will be limited to service roads constructed or to be constructed on each side of the main paved lanes with no right of access to the said main paved lanes except as provided by the respondent herein and with the right of selection to be solely in the discretion of the respondent." Plaintiffs' main emphasis is upon the phrase, "service roads constructed or to be constructed on each side of the main paved lanes." Plaintiffs contend that this constitutes a contract to construct service roads on each side of the main paved lanes immediately or within a reasonable time. We do not agree.

Of course the consent judgment as a whole is a contract. It is therefore necessary to construe this contract to ascertain whether or not the portion relied on by plaintiffs has the meaning and effect attributed to it by them. It is the purpose of the contract to convey to defendant herein the easement of right of way in, over, through and across the land of the Kings "*including* the limitation of access." This is repeated over and over again in the consent judgment. Defendant is to pay the Kings $2500.00 as "the full, fair and adequate value

of" and "just compensation for the easement of right of way . . . *including* the limitation of access." This is likewise repeatedly stated.

So it is clear that it is not the purpose of the contract to provide and assure access. On the contrary, it is the purpose of the agreement to limit access. The instrument undertakes to define and describe that limitation. This description is the portion of the instrument upon which plaintiffs rely to make out their case. But it is a negative, not a positive, provision. It purports to take from and not to add to the rights of the Kings, grantors. "The right of access will be *limited* to service roads constructed and to be constructed." This means simply that the grantors shall have right of access only by service roads already constructed or such as may be constructed in the future. The definition or description of the "limitation of access" further provides that such service roads shall have access to the main paved lanes only at points selected and provided by the Commission in its discretion.

Certainly there is no clear, definite, specific and unqualified agreement to build service roads. But it will be observed that as to all other matters the contract is detailed, clear and specific. If there had been an intent on the part of the contracting parties to obligate the Commission to construct service roads, it is reasonable to assume that the contract would have definitely stated the specific location, materials, specifications and time for construction of such service roads. "The parties undertook to reduce their agreement to writing, and presumably inserted every provision regarded material, and it is a well recognized principle that there can be no implied contract where there is an express contract between the parties in reference to the same subject-matter." *Manufacturing Co. v. Andrews*, 165 N.C. 285, 290, 81 S.E. 418. The contract is not ambiguous. Plaintiffs, assignees, read into the contract provisions that are not there.

The consent judgment repeatedly states that the sum of $2500.00 is the full, fair and adequate value of and just compensation for the right of way and also the limitation of access. It nowhere mentions or suggests that any other consideration is to be given. There is no contention that the $2500.00 has not been paid as agreed.

The judgment below is

Affirmed.

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

(Filed 30 June, 1960.)

1. Abatement and Revival § 8—

An action by a subcontractor against the main contractor and the owner for breach of the subcontract is ground for abatement as to the subcontractor in a subsequent action by the main contractor against the subcontractor and the surety on the subcontractor's bond, based upon breach of the same contract.

2. Same—

An action by the subcontractor against the main contractor and the owner for breach of the construction contract is not ground for abatement as to the surety on the subcontractor's bond in the subsequent action instituted by the main contractor against the subcontractor and the surety, in which the surety and the subcontractor set up, respectively, a counterclaim for breach of the same contract, and the surety also alleges that it was induced to sign the surety bond by the false and fraudulent representations of the main contractor and the subcontractor, since the surety is not a party to the prior action.

3. Principal and Surety § 2—

Where the performance bond of a subcontractor provides that the principal and surety should be jointly and severally bound, the obligee of the bond may sue the subcontractor and the surety jointly or separately.

APPEALS by defendants from *Frizzelle, J.*, September Civil Term, 1959, of WAYNE.

This action was instituted April 21, 1958, and is referred to hereafter as the Wayne action.

A prior action entitled, "*Harris & Harris Construction Company Inc., PLAINTIFF, v. Crain & Denbo, Inc., and Town of Mount Olive, DEFENDANTS,*" which was instituted April 17, 1957, and is now pending in the Superior Court of Durham County, is referred to hereafter as the Durham action.

Crain & Denbo, plaintiff in the Wayne action, is *a* defendant in the Durham action. Harris & Harris, *a* defendant in the Wayne action, is the plaintiff in the Durham action. Aetna, a defendant in the Wayne action, is *not* a party in the Durham action. The town of Mount Olive, a defendant in the Durham action, is not a party in the Wayne action.

In the Wayne action, Crain & Denbo alleged that on July 6, 1956, it entered into a contract (Exhibit A) with the Town of Mount Olive for the construction and installation of water and sewer improvements, and on the same date entered into a subcontract (Ex-

hibit B) with Harris & Harris under which Harris & Harris agreed, upon stated terms and conditions, to perform all obligations imposed upon Crain & Denbo under its said contract with the Town of Mount Olive.

Under date of July 20, 1956, Harris and Harris, as principal, and Aetna, as surety, executed and delivered to Crain & Denbo a bond (Exhibit C) in the sum of $453,115.68 conditioned on the performance of said subcontract, including the payment of all claims for labor and materials entering into the work.

In the Wayne action, Crain & Denbo alleged it is entitled to recover from Harris & Harris and Aetna, jointly and severally, the sum of $300,672.07, plus interest, as damages caused by the breach by Harris & Harris of said subcontract and of the conditions of said performance bond.

In the Wayne action, separate answers were filed by Harris & Harris and Aetna. Each interposed a plea in abatement and motion to dismiss, assigning as ground therefor the pendency of the prior Durham action. Apart from said pleas in abatement and motions to dismiss, the answers, respectively, contained, briefly stated, these allegations: Harris & Harris, denying it had breached said subcontract, alleged, by way of counterclaim, it was entitled to recover compensatory damages in the aggregate amount of $345,612.42 and punitive damages in the amount of $150,000.00 from Crain & Denbo on account of its breach of said subcontract. Aetna, after denying all material allegations of the complaint, interposed further defenses in which it alleged, *inter alia,* that it was induced to execute said performance bond by false and fraudulent representations of Crain & Denbo and of Harris & Harris.

In the Durham action, Harris & Harris alleged it was entitled to recover from the defendants therein (Crain & Denbo and the Town of Mount Olive), "jointly and/or severally," compensatory damages in the aggregate amount of $345,612.42 and punitive damages in the amount of $150,000.00. It alleged, *inter alia,* that, after it had entered upon performance of said subcontract, Crain & Denbo and the Town of Mount Olive, pursuant to an unlawful, wilful and wanton conspiracy, forced it to leave the job, and thereafter Crain & Denbo tortiously converted to its own use all materials and facilities Harris & Harris had procured for its use in the prosecution of the work under said subcontract. Apart from allegations as to the alleged conspiracy and conduct of engineers, police officers and officials of the Town of Mount Olive, Harris & Harris alleged substantially the same

facts as it alleged subsequently as the basis for its counterclaim in the Wayne action.

In the Durham action, separate answers were filed by Crain & Denbo and by the Town of Mount Olive. Each defendant denied the material allegations of the complaint and alleged facts in explanation and justification of its conduct. Neither defendant asserted a counterclaim.

The hearing related solely to the pleas in abatement interposed in this (Wayne) action. By consent, it was submitted on the pleadings (referred to above) in the two actions.

The order entered by Judge Frizzelle provides "that the pleas in abatement filed herein by the defendants, and each of them, be and the same are hereby overruled and dismissed." Each defendant excepted to this order and appealed.

Brooks & Brooks and Taylor, Allen & Warren for plaintiff, appellee.

Williams & Zimmerman for defendant Harris & Harris Construction Company, appellant.

Fletcher & Lake for defendant Aetna Insurance Company, appellant.

BOBBITT, J. The rules applicable when considering a plea in abatement on the ground that "(t)here is another action pending between the same parties for the same cause" (G.S. 1-127(3)) are stated, with full citation of authority, by *Ervin, J.*, in *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E. 2d 860, and by *Winborne, J. (now C.J.)*, in *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892.

The plea in abatement by Harris & Harris is good only if (1) Crain & Denbo could obtain the same relief against Harris & Harris by counterclaim in the Durham action, *and* (2) a judgment in favor of Harris & Harris in the Durham action would operate as a bar to the prosecution by Crain & Denbo of this (Wayne) action. *Hill v. Spinning Co.*, 244 N.C. 554, 94 S.E. 2d 677, and cases cited.

In *Construction Co. v. Ice Co.*, 190 N.C. 580, 130 S.E. 165, the action was to recover the balance alleged to be due on account of plaintiff's performance of a building contract. The defendant's plea in abatement was sustained and the prior action dismissed. In the prior action, the Ice Company had sued the Construction Company *and its surety* to recover damages for alleged breach of said building contract. The basis of decision is indicated by this excerpt from the opinion of *Stacy, C. J.*: "It will be observed that the parties bottom their respective causes of action on the same contract, each alleging

a breach by the other. The two causes of action, therefore, arise out of the same subject-matter; and a recovery by one would necessarily be a bar or offset, *pro tanto* at least, to a recovery by the other." This statement is applicable here. The determinative issues, in both cases, as between Harris & Harris and Crain & Denbo, relate to a single contract, each alleging a breach thereof by the other.

Under the decisions cited, if Crain & Denbo desires to assert a cause of action against Harris & Harris for alleged breach of said subcontract, it must do so by way of counterclaim in the Durham action. Thus, the plea in abatement interposed by Harris & Harris should be sustained and the (Wayne) action dismissed as to it. The fact that Crain & Denbo has joined Aetna as a party defendant does not impair this legal right of Harris & Harris.

As to Aetna, the Durham action is not a prior action *between the same parties* for the same cause. Aetna, which is not a party to the Durham action, grounds its plea in abatement on these propositions: (1) For reasons stated above, the plea in abatement of Harris & Harris must be sustained and the (Wayne) action dismissed as to it. (2) The basis of Crain & Denbo's alleged cause of action against Aetna, the alleged breach by Harris & Harris of said subcontract, is the basis of the cause of action Crain & Denbo must assert, if at all, as a counterclaim in the Durham action.

It may be conceded that a judgment in favor of Harris & Harris in the Durham action would bar further prosecution by Crain & Denbo of this (Wayne) action against Aetna. However, if the verdict in the Durham action should be in its favor, Crain & Denbo could not obtain judgment against Aetna. Nor could it do so even if it alleged such counterclaim in the Durham action unless Aetna were joined as a party in the Durham action.

Whether Crain & Denbo, *if* it filed such counterclaim in the Durham action *may* join Aetna as a party in respect thereof, is not presented. As to permissible joinder, see *Rubber Co. v. Distributors, Inc.*, 251 N.C. 406, 111 S.E. 2d 614; *Burns v. Oil Corporation*, 246 N.C. 266, 98 S.E. 2d 339; *Hill v. Spinning Co., supra.* Nor do we now consider the effect upon the further prosecution of this (Wayne) action by Crain & Denbo against Aetna if the Durham action proceeds to judgment without the assertion therein by Crain & Denbo of such counterclaim.

It is noted that Harris & Harris and Aetna are bound "jointly and severally" by the terms of the performance bond. "In the case of a joint and several obligation, under both the common law and the modern practice statutes, the plaintiff at his option or election may

sue each obligor separately or all of them jointly." 39 Am. Jur., Parties § 39; 72 C.J.S., Principal and Surety § 264(b).

We pass solely upon the legal significance of the Durham action as presently constituted. Crain & Denbo has not asserted therein a cause of action against either Harris & Harris or Aetna. While there is a prior pending action between Crain & Denbo and Harris & Harris for the same cause, there is no prior pending action as between Crain & Denbo and Aetna for *any* cause. Hence, Aetna's plea in abatement was properly overruled.

The portion of the order overruling the plea in abatement of Harris & Harris is erroneous and should be stricken. The plea in abatement of Harris & Harris should have been sustained and the action dismissed as to it. It is so ordered. The portion of the order wherein Aetna's plea in abatement was overruled is affirmed.

As to Harris & Harris: Reversed.

As to Aetna: Affirmed.

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL

§ 8. Identity of Actions.

An action between the drivers of vehicles in which each alleges that the collision was the result of the negligence of the other precludes a cross-action by one of the drivers against the other for damages to his vehicle attempted to be asserted in a subsequent action instituted by a passenger in one of the cars against the other driver. *Demoret v. Lowery*, 187.

An action by a subcontractor against the main contractor and the owner for breach of the subcontract is ground for abatement as to the subcontractor in a subsequent action by the main contractor against the subcontractor and the surety on the subcontractor's bond, based upon breach of the same contract. *Crain & Denbo, Inc. v. Construction Co.* 836.

An action by the subcontractor against the main contractor and the owner for breach of the construction contract is not ground for abatement as to the surety on the subcontractor's bond in the subsequent action instituted by the main contractor against the subcontractor and the surety, in which the surety and the subcontractor set up, respectively, a counterclaim for breach of the same contract, and the surety also alleges that it was induced to sign the surety bond by the false and fraudulent representations of the main contractor and the subcontractor, since the surety is not a party to the prior action. *Ibid.*

ABORTION

§ 1. Nature and Elements of the Offenses and Distinctions.

G.S. 14-44 and G.S. 14-45 create separate and distinct offenses, the first, designed to protect the life of a child *in ventre sa mere*, making it unlawful to employ an instrument upon a woman quick with child with intent to destroy the child unless necessary to preserve the life of the mother, and the second, designed to protect the health or life of a pregnant woman, making it unlawful to administer any drugs or use any instrument upon a pregnant woman with intent thereby to produce the miscarriage of such woman. *S. v. Hoover*, 133.

In a prosecution upon an indictment charging violation of G.S. 14-44 and the violation of G.S. 14-45, the State may not be nonsuited if there is sufficient evidence of defendant's guilt of either of the offenses. *Ibid.*

§ 2. Offense of Destroying Unborn Child.

A defendant cannot be convicted under G.S. 14-44 if there is no evidence that at the time the offense was committed the child was quick. *S. v. Hoover*, 133.

§ 3. Offense of Causing Miscarriage of, Injury to, or Destruction of, Pregnant Woman.

In a prosecution for abortion it is competent for the femme to testify as to her belief on the day of the alleged operation that she was pregnant. *S. v. Hoover*, 133.

In a prosecution under G.S. 14-45 it is required that the State prove the fact of pregnancy but it is not required that it prove an actual miscarriage. *Ibid.*

ABORTION—*Continued.*

In a prosecution under G.S. 14-45 it is not required that the child be quick, but the offense may be committed during any stage of pregnancy. *Ibid.*

Testimony of the femme in a prosecution under G.S. 14-45 that at the time of the operation she believed she was a month and half or two months pregnant, together with testimony of two physicians, who examined her the day after the operation, to the effect that from the size of her uterus it was their opinion that the femme was about two months pregnant, is sufficient to be submitted to the jury on this element of the offense. *Ibid.*

ACCORD AND SATISFACTION

§ 1. Nature and Essentials.

A compromise and settlement must be based upon a disputed claim; an accord and satisfaction may be based on an undisputed or liquidated claim. *Products Corp. v. Chestnutt*, 269.

ADMINISTRATIVE LAW

§ 4. Appeal, Certiorari and Review.

The determination of questions of fact by an administrative board will not be disturbed when its findings are supported by evidence and are made in good faith. *In re Appeal of Hasting*, 327.

The courts have no authority to interfere with the exercise of a discretionary power by a state agency or commission except in cases of manifest abuse of discretion or some unauthorized or unlawful conduct on the part of the officials in charge. *Pharr v. Garibaldi*, 803.

ADMIRALTY

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Evidence held sufficient to be submitted to the jury in action to recover under the Federal Merchant Marine Act. *Ibid.*

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

Correct ruling will not be disturbed merely because lower court assigns wrong reason therefor. *Hall, In re Will of*, 70.

Where a question is not presented to or ruled upon in the lower court, it is not presented for decision on appeal. *Robinson v. Hospital Authority*, 189.

An appeal will be determined in accordance with the theory of Trial in the lower court. *Bowling v. Bowling*, 527; *Hill v. Casualty Co.*, 649.

APPEAL AND ERROR—*Continued.*

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court, in the exercise of its supervisory jurisdiction, may decide questions on the merits even though the procedure prescribed by the Rules of Practice as necessary to present such questions has not been followed. *Products Corp. v. Chestnutt*, 269.

The failure of the complaint to state a cause of action in favor of plaintiff is a defect appearing on the face of the record of which the Supreme Court will take notice *ex mero motu*. *Skinner v. Transformadora, S. A.*, 320.

The Supreme Court in the exercise of its discretionary jurisdiction may decide a question of pressing public interest on the merits and disregard whether the question is presented by the proper procedure. *Shue v. Scheidt*, 561.

The Supreme Court, in the exercise of its supervisory jurisdiction, may vacate an interlocutory order and remand the cause in the interest of expediting the administration of justice. *Utilities Com. v. Transport Co.*, 776.

§ 3. Judgments Appealable.

Where the court sets aside the verdict in its discretion there is no judgment from which an appeal can lie. *House v. Ins. Asso.*, 189.

Whether the Supreme Court will consider a demurrer *ore tenus* upon a fragmentary appeal rests in its sound discretion. *Implement Co. v. McLamb*, 760.

An interlocutory order of the superior court is not appealable unless it deprives appellant of a substantial right which he may lose if the order is not reviewed before final judgment. *Utilities Com. v. Transport Co.*, 776.

§ 4. Parties Who May Appeal — "Party Aggrieved."

Only a party aggrieved may appeal from the superior court to the Supreme Court. *Utilities Com. v. Transport Co.*, 776.

§ 7. Demurrers and Motions in the Supreme Court.

A defendant may file a demurrer *ore tenus* in the Supreme Court on the ground that the complaint, together with any amendment thereto, fails to state facts sufficient to constitute a cause of action. *Jones v. Loan Co.*, 626.

Whether the Supreme Court will consider a demurrer *ore tenus* upon a fragmentary appeal rests in its sound discretion. *Implement Co. v. McLamb*, 760.

§ 12. Jurisdiction and Powers of Lower Court after Appeal.

Where appellant has filed specific and definite exceptions to the court's findings of fact and the court signs the entry of appeal and the case on appeal is settled, the jurisdiction of the Superior Court is at an end, and the Superior Court has no power thereafter to compel appellant to furnish additional assignments of error nor authority to compel him to group the assignments of error to comply with the rules of the Supreme Court. *Conrad v. Conrad*, 412.

§ 16. Certiorari or Method of Review.

The granting of *certiorari* to review an order denying motion to strike certain paragraphs from a pleading in effect grants the right of immediate appeal, which is governed by the Rules of Practice in the Supreme Court, and the failure of the record to contain assignments of error is ground for dismissal. Rule 19 (3). *Products Corp. v. Chestnutt*, 269.

APPEAL AND ERROR—*Continued.*

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

Error can be asserted only by exception taken at an appropriate time and in an appropriate manner. *Conrad v. Conrad*, 412.

Exceptions to rulings made during the trial must ordinarily be based on an objection taken when the ruling is made. *Ibid.*

In grouping the exceptions assigned as error, appellant should bring together all of the exceptions which present a single question of law, and the exceptions so grouped must set out in detail and must refer to the page of the record where each exception is to be found, and appellant may reduce the number of the exceptions by failing to thus assign them as error. Rules of Practice in the Supreme Court, 19(3). *Ibid.*

An assignment of error not supported by an exception in the record may be disregarded. *Watters v. Parrish*, 787.

Appeal dismissed on authority of *Hunt v. Davis*, 248 N.C. 69 for failure properly to group the exceptions. *Wood v. Scaward*, 484.

§ 20. Parties Entitled to Object and Take Exception.

A party may not complain of an error in the charge which is favorable to him. *Ray v. Membership Corp.*, 380; *Dinkins v. Booe*, 731.

§ 21. Exceptions and Assignments of Error to Judgment or to beginning of Judgment.

An exception to the judgment presents whether the facts found support the judgment and whether error of law appears on the face of the record, but it does not challenge the sufficiency of the evidence to support the findings, and the findings of fact are thus binding on appeal. *Utilities Com. v. Wilson*, 640; *Implement Co. v. McLamb*, 760.

§ 22. Objections, Exceptions and Assignments of Error to Findings of Fact.

Where, upon the rendition of an order upon findings of fact made by the Court, appellant takes exceptions, each one directed to a specific factual conclusion, and thereafter lists the exceptions on which he relies and asserts the single legal error that the evidence was sufficient to support the findings excepted to, there is a sufficient compliance with the requirements of Rule of Practice in the Supreme Court No. 19(3). *Conrad v. Conrad*, 412.

§ 23. Objections and Exceptions to Evidence and Motions to Strike.

Where the record fails to show any objection or exception to the admission of certain testimony a contention of error in the admission of such testimony is not presented. *Abbitt v. Bartlett*, 40.

§ 24. Exceptions and Assignments of Error to Charge.

An assignment of error to the charge will not be considered when it is not based upon an exception duly noted in the record. *Benton v. Willis, Inc.*, 166.

An assignment of error to the court's failure to charge the law and explain the evidence as required by statute is a broadside exception and will not be considered. *Creed v. Whitlock*, 336.

Exceptions to the charge can be taken within the time allowed for the preparation of the case on appeal. *Conrad v. Conrad*, 412.

An exception to an excerpt from the charge, without exception to any omission or failure of the court to give further instructions, ordinarily does

not challenge the omission of the court to charge further on the same or any other aspect of the case. *King v. Powell*, 506.

§ 25. Objections, Exceptions and Assignments of Error to the Issues.

Where plaintiff does not object or except to the issue submitted and tenders no issue, plaintiff may not object to the form of the issue submitted by the court. *Wesley v. Lea*, 540.

§ 31. Settlement of Case on Appeal.

Upon settlement of case on appeal by the trial judge upon disagreement of counsel, the judge has the power and duty to exercise supervision to see that the record accurately presents the questions on which the Supreme Court is expected to rule. *Conrad v. Conrad*, 412.

§ 34. Form and Requisites of Transcript.

The case on appeal need not contain all the exceptions taken at the trial but only those upon which appellant then intends to rely. *Conrad v. Conrad*, 412.

§ 35. Presumptions in Regard to Matters not Appearing of Record.

Where the charge of the court is not in the record, it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts. *Byrd v. Freeman*, 724.

§ 38. Form and Contents of Brief; Abandonment of Exceptions.

Appellant may reduce the number of assignments of error by failing to discuss them in his brief. Rules of Practice in the Supreme Court No. 28. *Conrad v. Conrad*, 412.

Exceptions not set out in the brief are deemed abandoned. *Williams v. Highway Com.*, 514; *Dinkins v. Booe*, 731.

§ 39. Presumptions and Burden of Showing Error.

The burden is on appellant to show prejudicial error amounting to the denial of some substantial right. *Kennedy v. James*, 434; *Barefoot v. Rulnick*, 483.

§ 40. Harmless and Prejudicial Error in General.

A new trial will not be awarded for mere technical error, and when upon all the evidence and the stipulations of the parties an issue may be answered only in the affirmative, a directed verdict thereon in favor of plaintiff will not be held for prejudicial error. *In re Will of Harrington*, 105.

The burden is on appellant not only to show error but to show that the alleged error was prejudicial to him. *Ray v. Membership Corp.*, 380.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where the testimony which a witness would have given if he had been permitted to answer is not in the record it cannot be ascertained on appeal that the exclusion of the evidence was prejudicial. *Abbitt v. Bartlett*, 40.

Where a witness had theretofore been permitted to testify in regard to the matter, the exclusion of subsequent testimony of the same witness of the same import is not ordinarily prejudicial, and certainly its exclusion will not be held for erorr when the subsequent question is objectionable as a leading question. *Ibid.*

APPEAL AND ERROR—*Continued.*

The exclusion of testimony cannot be held prejudicial when the same witness thereafter is permitted to testify to the same import. *Watters v. Parrish*, 787.

The exclusion of cumulative evidence will not be deemed prejudicial unless there is some reasonable liklihood that its admission would have changed the result of the trial. *In re Will of Hall*, 70.

The admission of testimony over defendants' objection as to a particular fact cannot be prejudicial when plaintiff's own testimony thereafter establishes the identical matter. *Ray v. Membership Corp.*, 380.

The admission of testimony over defendants' objection as to a particular fact cannot be prejudicial when defendants' allege the identical matter in their separate answers. *Ibid.*

Toy models of vehicles, while they may be competent for the purpose of permitting a witness to explain his testimony, are not competent as substantive evidence and, therefore, the exclusion of the testimony of a witness in respect to the use of such toy models cannot be held for error when the record fails to disclose on what ground the use of the models was excluded. *McCombs v. Trucking Co.*, 699.

§ 42. Harmless and Prejudicial Error in Instructions.

The charge of the court will be construed contextually, and an exception thereto will not be sustained when upon such construction the jury could not have been misled. *Abbitt v. Bartlett*, 40; *Creed v. Whitlock*, 336; *Kennedy v. James*, 434; *Dinkins v. Booe*, 732; *Watters v. Parrish*, 787.

While it is error for the court to charge law which is inapplicable to the facts in evidence, the charge of the court in this case, involving voluminous pleadings and evidence, *is held* not to contain prejudicial error in this respect. *McCombs v. Trucking Co.*, 699.

§ 45. Error Cured by Verdict.

Where the answer of the jury to an issue precludes recovery, error relating to a subsequent issue cannot be prejudicial to plaintiff. *Abbitt v. Bartlett*, 40.

Where the verdict on one issue establishes plaintiff's right to recover, the submission of another issue cannot be prejudicial to defendant. *Dinkins v. Booe*, 731.

§ 46. Review of Discretionary Matters.

In the absence of an indication to the contrary in the record, it will be presumed that the trial court determined a discretionary matter in the exercise of its discretion, and such ruling is not reviewable in the absence of a showing of abuse of discretion, the burden being upon the appellant to so show. *Phelps v. McCotter*, 66.

The discretion to determine the competency of a witness on the basis of age or mentality, in the same manner as the power to determine the qualification of experts or the voluntariness of confessions, is the power to determine a factual question in accordance with established rules of law and is not an arbituary power, and therefore when the court hears evidence to determine the question of competency its factual conclusions are binding if supported by any evidence, but if the court applies to the facts found by it an incorrect legal principle, the conclusion is reviewable and will be corrected on appeal. *Artesani v. Gritton*, 463.

APPEAL AND ERROR—*Continued.*

§ 49. Review of Findings or Judgments on Findings.

Where a jury trial is waived, the findings of fact of the court are as conclusive and binding as a jury verdict if the findings are supported by any evidence. *Eakley v. Raleigh*, 683.

Where there are no exceptions to the court's findings of fact, it will be presumed that the findings are supported by competent evidence and the findings are binding on appeal. *Redevelopment Com. v. Bank*, 595.

A judgment on findings will not be disturbed because one of the findings is not supported by evidence when such finding is not necessary to support the judgment and does not affect the conclusion reached. *Lennon v. Lennon*, 659.

§ 50. Review of Injunctive Proceedings.

While the Supreme Court has the power to make findings at variance with those of the trial court upon an appeal in injunction proceedings, the Court will not disturb an order granting injunction to the hearing on the merits, when it is made to appear that the questions presented are grave and that the injury to movant will be certain and irreparable if the application for the interlocutory injunction should be denied, and that the injury to the opposing party from the granting of the order would be inconsiderable or subject to adequate indemnity by bond. *Restaurant, Inc. v. Charlotte*, 324.

§ 51. Review of Judgments on Motions to Nonsuit.

Incompetent evidence admitted without objection must be considered in passing upon motion to nonsuit. *Bishop v. DuBose*, 158.

Upon appeal from denial of motions for judgment of involuntary nonsuit only the motion made at the close of all the evidence is to be considered. *Drum v. Bisaner*, 305.

The correctness of a judgment of nonsuit entered in favor of one dedendant at the close of plaintiff's evidence must be determined without reference to the evidence offered thereafter by the other defendant. *Jones v. Schaffer*, 367.

On appeal from judgment of involuntary nonsuit, plaintiff's evidence erroneously excluded will be considered together with the evidence admitted. *Artesani v. Gritton*, 463.

In an action against two joint tort-feasors in which both defendants introduced evidence, the evidence offered by plaintiff and both defendants must be considered in the light most favorable to plaintiff in passing upon the exception of one of the defendants to the refusal of his motion to nonsuit, and only such defendant's motion made at the close of all of the evidence will be considered on his appeal. *King v. Powell*, 506.

§ 53. Petition to Rehear.

Petition to hehear the prior decision of the court sustaining judgment of nonsuit allowed in this case for error of law, it appearing that the physical facts and the oral testimony were sufficient to permit an inference of negligence and to take the issue to the jury. *Lane v. Dorney*, 90.

§ 55. Remand.

When a case has been tried under a misapprehension of the pertinent principles of law and of the facts, the verdict and judgment will be vacated and a new trial ordered. *Jones v. Loan Asso.*, 626.

APPEAL AND ERROR—*Continued.*

Where judgment is predicated upon a misapprehension of the pertinent law, the cause must be remanded for appropriate proceedings. *Utilities Com. v. Wilson*, 640.

APPEARANCE

§ 2. Effect of General Appearance.

Under the provisions of G.S. 1-134.1 the fact that a motion to dismiss for want of jurisdiction of the person of defendant contains matter relating to other defenses does not waive the objection as to the lack of jurisdiction. *Finch v. Small Business Administration*, 50.

ASSAULT AND BATTERY

§ 17. Verdict and Punishment.

A common law indictment for murder will not support a verdict of guilty of assault with a deadly weapon. *S. v. Rorie*, 579.

§ 8. Self-Defense and Defense of Home.

Upon evidence tending to show that the proprietor of an establishment had twice warned drunken patrons to be quiet or leave, and that on the third occassion an assault ensued in which the proprietor shot one of the patrons, it is error for the court to charge the jury that generally a person cannot repel an unarmed assailant with a pistol, since the correct rule of law is that a person on his own premises, who is free from fault in bringing on a difficulty, is under no duty to retreat in the face of a threatened assault, regardless of its character. *S. v. Francis*, 57.

In the exercise of the right of self-defense a person may use such force to repel an assault as is reasonably necessary or apparently necessary to protect himself from death or great bodily harm, the reasonableness of the apprehension to be determined by the jury in accordance with the facts and circumstances as they appear to defendant at the time of the assault, and an instruction omitting the element of apparent necessity must be held for error. *Ibid.*

AUTOMOBILES

§ 1. Authority to License Drivers or to Suspend or Revoke Licenses

The General Assembly, in the exercise of the State's police power to enact such rules as are reasonable and necessary to promote safety upon the highways, has authority to require a showing of financial responsibility as a prerequisite to the issuance of license or operating permit to those using the public highways. *Justice v. Scheidt*, 361.

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute. *Ibid.*

Construing Section 11(a) of Chapter 1006, S.L. 1947, with Section 15(c) of Chapter 1067, enacted the same day, the authority of the Department of Motor Vehicles or the Commissioner to suspend license or permit of an operator for failure to pay a judgment is limited to one year. *Ibid.*

Section 14, Chapter 1300, S.L. 1953, by its express terms does not apply to any accident, or judgment arising therefrom, occurring prior to the effective date of the statute. G.S. 20-279.14. *Ibid.*

AUTOMOBILES—*Continued.*

A petition showing that the Commissioner of Motor Vehicles had refused petitioner's request for a driver's license solely because of an unsatisfied judgment against the petitioner, that more than a year had elapsed since the revocation of petitioner's license for failure to pay the judgment, that petitioner is now able to show financial responsibility and is qualified for the renewal of his license, states a cause of action for the issuance or renewal of the license and demurrer thereto was improperly sustained. *Ibid.*

A conviction of driving an automobile 75 m.p.h. in a zone designated by the State Highway Commission as a 45 m.p.h. speed zone, G.S. 20-141(d), requires a mandatory thirty-day suspension of the driver's license under the provisions of G.S. 20-16.1, since even though the latter statute does not refer to G.S. 20-141(d) it does refer to G.S. 20-141(b) 4, and a speed of 75 m.p.h. is more than 15 m.p.h. in excess of the general maximum speed of 55 m.p.h. *Shue v. Scheidt*, 561.

The operation of a motor vehicle on a public highway in this State is not a natural right but is a conditional privilege which the State may regulate in the exercise of its police power in the interest of public safety. *Ibid.*

§ 5. Negligence in Manufacture or Sale of Defective Vehicles.

The manufacturer of a truck is under duty to the ultimate purchaser, irrespective of contract, to use reasonable care in the manufacture of the article and to make reasonable inspection so as not to subject the purchaser to injury from a hidden or latent defect. *Gwyn v. Motors, Inc.*, 123.

Malfunctioning of brakes held not to contribute notice to purchaser of latent defect, and failure of repairman to remedy the defect held not to insulate negligence of manufacturer. *Ibid.*

§ 6. Safety Statutes and Ordinances in General.

G.S. 20-141 relating to reckless driving, G.S. 20-141 (b)(3), relating to speed limit of vehicles other than passenger cars, G.S. 20-141(c), relating to reduction of speed when special hazards exist, and G.S. 20-146 and G.S. 20-148, relating to driving on the right side of the highway prescribe legislative standards of care, which are absolute. *Bondurant v. Mastin*, 190.

It is negligence *per se* for a person to drive a motor vehicle while under the influence of intoxicating liquor or to fail to give approaching vehicles one-half the main traveled portion of the highway. *Watters v. Parrish*, 787.

§ 7. Attention to Road, Look-out and Due Care in General.

It is the duty of a motorist not merely to look but to keep a lookout in the direction of travel, and he is charged with the duty of seeing what he ought to see. *Jones v. Schaffer*, 368.

§ 9. Stopping, Parking, Signals and Lights.

To "park" means something more than a temporary or momentary stoppage on the highway for a necessary purpose, and neither G.S. 20-161 nor G.S. 20-129 are applicable to a mere temporary stop for a necessary purpose when there is no intent to break the continuity of travel. *Meece v. Dickson*, 300.

The parking of a vehicle on a grade without properly setting the brake and turning the wheels toward the curb of the street, in violation of G.S. 20-163 and G.S. 20-124 (b), is negligence *per se*, and is actionable if the proximate cause of injury. *Watts v. Watts*, 352.

The fact that an automobile runs down the street for a considerable distance immediately after it was parked permits the inference that the driver did not turn its front wheels to the curb as required by statute. *Ibid.*

AUTOMOBILES—*Continued.*

§ 11. Lights.

The operation of an automobile on the public highway at night without lights is negligence *per se*. *Williamson v. Varner*, 446.

§ 15. Right side of Road and Passing Vehicles Traveling in Opposite Direction.

Under the laws of the State of Virginia, governing these actions, the drivers of vehicles proceeding in opposite directions are required to keep to the right side of the highway, each giving the other, as nearly as possible, one-half of the main traveled portion of the highway, and each driver has the right to assume that the other will obey the law, and it is only when he apprehends that the other is going to fail to do so that he should take other action in an attempt to avoid collision. *McCombs v. Trucking Co.*, 699; *Watters v. Parrish*, 787.

In this action involving a collision of vehicles traveling in opposite directions, defendant contended that he was confronted with plaintiff's vehicle on its left side of the highway, and, in the emergency, drove to his left in an effort to avoid collision. An instruction of the court as to the law of the road in passing a vehicle traveling in the opposite direction, as to sudden emergencies, and applying the law to the facts in evidence, with further instructions that if defendant's conduct was that of an ordinarily prudent person under similar circumstances he would not be guilty of negligence even though he pulled his vehicle to the left of the road, *is held* without error. *Dinkins v. Booe*, 731.

§ 17. Right of Way at Intersection.

Where one highway, running north and south, is intersected by another highway from the east, forming a "T" intersection, and ninety feet further north the intersecting highway leads off again to the west, forming another "T" intersection, each entrance of the intersecting highway is a separate intersection. *Pruett v. Inman*, 520.

A vehicle first reaching an intersection which has no stop sign or traffic control signal in operation has the right of way over a vehicle subsequently reaching the intersection, regardless of whether the first vehicle is going straight through the intersection or turning thereat. *Carr v. Stewart*, 118.

G.S. 20-155(a) has no application to an intersection governed by automatic traffic control signals. *Jones v. Schaffer*, 368.

The failure of a motorist to stop in obedience to the red light of a traffic control signal in violation of a municipal ordinance is negligence *per se*. *Ibid.*

If at the time of starting forward into an intersection in response to a green traffic signal no other vehicle is then within the intersection or approaching the intersection within the range of the motorist's vision, the motorist's primary obligation thereafter is to keep a proper lookout in his direction of travel, and in such event he has the right to assume that a motorist approaching the intersection from his left will stop in obedience to the traffic signal unless and until something occurs that is reasonably calculated to put him on notice that such other motorist will unlawfully enter the intersection. *Ibid.*

While a motorist approaching an intersection along a dominant highway may assume that a motorist traveling on the servient highway will stop as required by statute, and may rely on such assumption even to the last moment in the absence of anything which gives or should give him notice to the contrary, the motorist along the dominant highway is nevertheless

required not to exceed a speed which is reasonable and prudent under the circumstances, to keep his vehicle under control, to keep a reasonably careful lookout, and to take such action as an ordinarily prudent person would take to avoid a collision when danger of collision is discovered or should have been discovered in the exercise of due care. *King v. Powell*, 506.

If a motorist along the dominant highway sees or should see, in the exercise of due care, that a motorist along the servient highway has entered the intersection without stopping as required by statute, and obtains such knowledge, actual or imputed, in time to have avoided a collision by the exercise of due care, his failure to do so is negligence regardless of whether such failure is due to his excessive speed or to his miscalculation that the other car would clear the intersection before contact. *Ibid.*

§ 18. Passing at Intersections.

G.S. 20-50(c) prohibits a motorist from overtaking and passing another motorist traveling in the same direction not only at an intersection of highways designated and marked by the State Highway Commission but also at any street intersection in a city or town, without regard to whether such street intersection is marked or unmarked, and an instruction permitting a motorist to ignore an unmarked intersection of streets in a municipality must be held for prejudicial error. *Adams v. Godwin*, 471.

G.S. 20-150(c) prohibits a motorist from passing another at an intersection only if the intersection is designated and marked by the State Highway Commission by appropriate signs, or is a street intersection in a city or town. *Pruett v. Inman*, 520.

§ 19. Sudden Emergencies.

A motorist confronted with an emergency created by the negligence of another is not held to the wisest choice of conduct but only to such choice as a person of ordinary prudence similarly situated would have made. *Bondurant v. Mastin*, 190.

A party is not entitled to the benefit of the doctrine of sudden emergency if he himself brings about the emergency or contributes to its creation. *Watts v. Watts*, 352; *Watters v. Parrish*, 787.

Whether defendant driver was justified in turning left across the highway in effort to avoid colliding with vehicle approaching on his side of highway held for jury. *McCombs v. Trucking Co.*, 699; *Dinkins v. Booe*, 731.

§ 21. Brakes and Defects in Vehicles.

Liability of manufacturer to purchaser for injuries resulting from latent defect in brakes. *Gwyn v. Motors, Inc.*, 123.

A person who lends his car to another with knowledge express or implied of defective brakes may be liable for accident resulting from brake failure. *Austin v. Austin*, 283.

Evidence *held* insufficient to show that emergency brake was defective at the time the owner permitted intestate to use the car. *Watts v. Watts*, 352.

The owner of a car cannot be held liable for injuries resulting from worn or defective latch on door when there is no evidence that the owner had any knowledge that the latch was defective or that the door had theretofore come open in a like manner. *Hoover v. Odom*, 459.

§ 25. Speed in General.

The operation of an automobile at a speed in excess of that lawfully prescribed is a negligent act. *Krider v. Martello*, 474.

AUTOMOBILES—*Continued.*

The general maximum speed limit of motor vehicles in North Carolina is 55 m.p.h., the provisions of G.S. 20-141(b) 5, authorizing the State Highway Commission to designate a maximum speed limit of 60 m.p.h. for certain vehicles on certain highways, being in the nature of an exception. *Shue v. Scheidt*, 561.

§ 33. Pedestrians.

It is not unlawful for a pedestrian to cross a public highway, but in crossing a highway at a point other than a marked crosswalk or an unmarked crosswalk at an intersection, a pedestrian is required to yield the right of way to vehicular traffic, although the failure to do so is not negligence *per se*, but only evidence of negligence to be considered by the jury with other facts and circumstances. *Gamble v. Sears*, 706.

A motorist, even in those instances in which he has the right of way over a pedestrian, is under the common law duty to exercise due care to avoid colliding with the pedestrian and is under statutory duty to give warning by sounding his horn when necessary and the duty to exercise proper precaution upon observing any child or confused person upon the highway. *Ibid.*

Where a motorist having the right of way observes a pedestrian, apparently in possession of his faculties, standing in a place of safety, the motorist has the right to assume and act upon the assumption that the pedestrian will recognize her right of way in the absence of anything which should give notice to the contrary. *Ibid.*

§ 35. Pleadings in Auto Accident Cases.

Where plaintiff alleges negligence on the part of the defendant driver and that the driver was the agent of defendant owner, there is no necessity, upon the filing of a counterclaim by defendant owner to recover for damages to his vehicle, for plaintiff to repeat the allegation of negligence and the imputation of such negligence to defendant owner, and the filing of a reply to the counterclaim is not required. *Williamson v. Varner*, 446.

In this action against the drivers of the two cars involved in a collision at an intersection to recover for the death of a passenger in one of the cars, the complaint, liberally construed, *is held* not to allege negligence on the part of one of the drivers as the sole proximate cause of the collision, and the demurrer of the other driver is overruled, the complaint being sufficient to allege concurring negligence. *King v. Powell*, 506.

§ 36. Presumptions and Burden of Proof.

The doctrine of *res ipsa loquitur* is not applicable upon a mere showing of the wreck of an automobile on the highway, but evidence that the driver ran off the road to the right while attempting to negotiate a long curve to the left, with further evidence, physical or direct, tending to show that this was the result of the failure of the driver to exercise due care to maintain a proper lookout and to keep his car under control, may raise an inference of negligence sufficient to take the issue to the jury. *Lane v. Dorney*, 90.

§ 38. Opinion Evidence as to Speed.

An officer standing at an intersection and observing a car approaching is competent to give his opinion of the speed of such car notwithstanding his prior statement that he couldn't determine the speed but had an opinion in regard thereto, the weight to be given his testimony being for the determination of the jury. *Ray v. Membership Corp.*, 380.

AUTOMOBILES—*Continued.*

§ 39. Physical Facts at Scene.

Physical facts at the scene of the accident may be sufficiently strong within themselves, or in combination with other evidence, to permit the legitimate inference of negligence on the part of the driver. *Lane v. Dorney*, 90.

Where evidence of physical facts introduced by plaintiff makes it inherently impossible for facts to be as testified by plaintiff, and there is no contradiction in the evidence as to the physical facts, plaintiff's testimony in conflict with the physical facts must be disregarded. *Jones v. Schaffer*, 368.

In this case, the physical facts at the scene of the collision at the intersection, including evidence as to the course, and position of, and damage to the respective cars after the collision, skid marks extending 50 feet from the point of impact along the dominant highway and evidence as to the violence of the impact, *is held* sufficient to support a finding that the driver traveling dominant highway was operating his car at an unlawful and excessive speed. *King v. Powell*, 506.

§ 39a. Use of Toy Models to Illustrate Testimony.

While the use of toy models may be competent to explain the testimony of a witness, such models are incompetent as substantive proof, and when the testimony is excluded and the record fails to show the ground of exclusion it will be presumed that the evidence was offered and excluded as substantive evidence. *McCombs v. Trucking Co.*, 699.

§ 40. Relevancy and Competency of Declarations and Admissions, and of Convictions.

In a suit by the personal representative of a passenger against both drivers, it is competent for counsel for one defendant to ask the other defendant, for the purpose of impeachment, whether he had not entered a plea of guilty to a manslaughter arising out by the same accident. *King v. Powell*, 506.

The testimony on cross-examination of one defendant by the other that such defendant had been convicted of driving while under the influence of intoxicating liquor in a prosecution growing out of the same accident is properly excluded even for the purpose of impeaching such defendant as a witness, since under the circumstances the testimony might be given undue weight by the jury, there being no testimony offered as to any conviction of such defendant theretofore or thereafter. *Watters v. Parrish*, 787.

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

Physical facts at the scene of the accident may be sufficiently strong within themselves, or in combination with other evidence to permit the legitimate inference of negligence on the part of the driver. *Lane v. Dorney*, 90.

While discrepancies, even in plaintiff's evidence, are ordinarily for the jury to resolve in the exercise of its function in determining the weight to be given the testimony, this rule does not apply when the only testimony favorable to plaintiff on a material point is in direct conflict with the physical facts established by plaintiff's uncontradicted evidence, and when such aspect of the evidence favorable to plaintiff is inherently impossible upon the undisputed physical facts, nonsuit is proper. *Jones v. Schaffer*, 368.

If the evidence supports any one of defendant's negligent acts enumerated in the complaint, nonsuit may not be entered. *Krider v. Martello*, 474.

§ 41b. Sufficiency of Evidence of Negligence in Failing to Use Due Care and in Traveling at Excessive Speed.

Evidence held sufficient to support inference that driver failed to exer-

AUTOMOBILES—*Continued.*

cise due care to maintain a proper lookout and keep his car under control. *Lane v. Dorney*, 90.

Evidence that the operator of a motor vehicle was traveling in excess of 80 m.p.h. *is held* sufficient to be submitted to the jury on the question of whether such negligence was a proximate cause of a collision with another vehicle, since it cannot be said as a matter of law the driver could not have reasonably foreseen that some accident or injury was likely to occur as the result of such excessive speed. *Bryant v. Woodlief*, 488.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Highway in Passing Vehicles Traveling in Opposite Direction.

Whether defendant was justified in turning left across highway in effort to avoid colliding with vehicle approaching on his side of the highway *held* for jury. *McCombs v. Trucking Co.*, 699.

§ 41d. Sufficiency of Evidence of Negligence in Overtaking and Passing Vehicles Traveling in Same Direction.

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of the negligence of defendant, while attempting to pass a car preceding him in the same direction, in driving over the center line and colliding with the car in which plaintiff was riding, which was traveling in the opposite direction. *McGinnis v. Robinson*, 574.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Highway in Passing Vehicles Traveling in Opposite Direction.

Evidence held sufficient on question of whether negligence of one driver, in creating emergency, was proximate cause of collision between two other vehicles. *Bondurant v. Mastin*, 190.

Plaintiff's evidence, together with the evidence of the driver of the car in which she was riding, tending to show that the driver of an automobile approaching from the opposite direction was under the influence of intoxicating liquor and drove his car to the left of the center line of the highway, resulting in a collision of the vehicles, *is held* sufficient to overrule such driver's motion to nonsuit in plaintiff's action against both drivers. *Watters v. Parrish*, 787.

Where one aspect of plaintiff passenger's evidence, together with the evidence of one of defendant drivers, tends to show that the defendant in whose car plaintiff was riding failed to keep his vehicle on his right half of the highway as he was meeting the other car, and failed to give the approaching car one half of the main traveled part of the highway, resulting in a collision of the vehicles, *is held* sufficient to overrule his motion to nonsuit in plaintiff's action against both drivers. *Ibid.*

§ 41e. Sufficiency of Evidence of Negligence in Stopping or Parking without Lights.

Where plaintiff's own evidence discloses that defendant's vehicle was stopped on a paved highway in its proper lane of travel because it had become disabled, and had been there for only a few minutes before plaintiff ran into its rear, and that the section of the highway was straight for more than four-tenths of a mile, nonsuit is proper for failure of evidence of negligence on the part of defendant in so stopping on the highway. *Meece v. Dickson*, 300.

AUTOMOBILES—*Continued.*

§ 41g. Sufficiency of Evidence of Negligence in Failing to Yield Right of Way at Intersection or in Entering Intersection at Excessive Speed.

Plaintiff's testimony to the effect that, in approaching an intersection, he looked both ways, saw no traffic approaching, and entered the intersection at 10 miles per hour, and that after his front wheels had cleared the intersection, defendant's vehicle, approaching the intersection from plaintiff's right, struck plaintiff's vehicle with such force as to render it "a total loss," together with testimony of a witness that plaintiff's car entered the intersection first, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence, and not to justify nonsuit as a matter of law for contributory negligence. *Carr v. Stewart*, 118.

Evidence held insufficient to show negligence on part of driver entering intersection with green light. *Jones v. Schaffer*, 368.

Conflicting evidence of each driver that he entered the intersection while faced with the green light raises the issue of negligence for the determination of the jury. *Ray v. Membership Corp.*, 380.

Evidence that plaintiff, traveling at a lawful speed, entered an intersection before defendant's vehicle reached the intersection, is sufficient to take the issue of defendant's negligence to the jury, notwithstanding defendant entered the intersection from plaintiff's right. *Kennedy v. James*, 434.

Evidence that a driver entered an intersection controlled by traffic signals at a speed of 35 m.p.h. in a 20 m.p.h. speed zone, resulting in a collision with a car entering the intersection from his right, takes the issue of such driver's negligence to the jury notwithstanding that other allegations in respect to such driver's entering the intersection while facing the red light are not supported by evidence. *Krider v. Martello*, 474.

Evidence held sufficient for jury on question of negligence of driver approaching intersection on dominant highway. *King v. Powell*, 506.

§ 41b. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Turning.

Evidence tending to show that the operator of defendant's car, traveling north, gave the signal for a left turn at an intersection, waited until a car with headlights burning traveling south, passed, and then proceeded to turn left, and was struck by plaintiff's car which was traveling south at an excessive rate of speed without headlights, raises, on defendant's counterclaim, the issue of plaintiff's negligence for the determination of the jury, and plaintiff's evidence in conflict therewith cannot entitle plaintiff to nonsuit on the counterclaim. *Williamson v. Varner*, 446.

Testimony of the driver of a car that he saw a car approaching from the opposite direction at a speed which he estimated at 100 m.p.h., together with evidence that he turned left to enter a driveway in the path of such other car when it was between 200 to 600 feet away, *is held* sufficient to be submitted to the jury on the questions of such driver's negligence and proximate cause in a suit for the death of a passenger in his vehicle resulting from the collision of the cars. *Bryant v. Woodlief*, 488.

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrian.

Evidence tending to show that two pedestrians were walking in sand on the edge of a highway on their right side thereof, that one of the pedestrians slipped and accidentally struck the other with his hand and that immediately thereafter the other pedestrian was struck by a vehicle, without evidence

that the vehicle ever left the hard surface, but with evidence to the contrary tending to show that it was travelling at a lawful speed in its lane of travel with its lights burning, and was stopped some 75 feet after the impact, *is held* insufficient to be submitted to the jury on the question of the driver's negligence. *Rogers v. Green*, 214.

Evidence held insufficient to show negligence of nonsuit of motorist striking pedestrian. *Gamble v. Sears*, 706.

Plaintiff's evidence to the effect that he was walking entirely off the hard surface on the shoulder of the road of his right side of the highway when he was struck from the rear, without warning, by defendant's car, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Rowe v. Fuquay*, 769.

§ 41m. Sufficiency of Evidence of Negligence in Striking Child on Highway.

The evidence adduced in this case, together with evidence erroneously excluded, *is held* sufficient to be submitted to the jury on the question of whether defendant motorist by the exercise of reasonable care could or should have seen the child on the highway in time to have avoided striking him. *Artesani v. Gritton*, 463.

§ 41p. Sufficiency of Evidence of Identity of Driver of Car.

The circumstantial evidence in this case *is held* sufficient to be submitted to the jury on the question of the identity of the defendant as the driver of the car involved in the collision. *McGinnis v. Robinson*, 574.

§ 41r. Sufficiency of Evidence of Negligence in Operating or Lending Defective Car.

Evidence held for jury on question of whether owner had knowledge, express or implied that vehicle had defective brakes when he lent it to plaintiff's intestate to operate. *Austin v. Austin*, 283.

Evidence held insufficient to show that emergency brake was defective at the time owner permitted intestate to use the car. *Watts v. Watts*, 352.

Evidence held insufficient to show that driver had actual or constructive knowledge that exhaust pipe was stopped up by side of ditch into which he had backed car. *Ashford v. Fox*, 477.

Evidence held insufficient to show that driver had express or implied knowledge of defective latch on door. *Hoover v. Odom*, 459.

§ 42a. Nonsuit on Ground of Contributory Negligence in General.

Evidence tending to show that a vehicle approached from the opposite direction on its left of the center of the highway, and that plaintiff, to avoid colliding with it, ran off the road to his right, lost control, and, in attempting to get back on the highway, collided with a following vehicle, *is held* not to disclose contributory negligence on the part of the plaintiff as a matter of law, plaintiff being confronted with a sudden emergency. *Bondurant v. Mastin*, 190.

§ 42e. Contributory Negligence in Passing Vehicles Traveling in Same Direction.

Plaintiff's evidence held not to show that he attempted to pass at intersection, and nonsuit for contributory negligence was erroneous. *Pruett v. Inman*, 520.

AUTOMOBILES—*Continued.*

§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersection.

Plaintiff's evidence, considered in the light most favorable to him, tending to show that before entering an intersection with a dominant street, he stopped at a point from which he could see along the dominant highway, and did not move into the intersection until he saw no traffic approaching, and that upon entering the intersection he saw defendant's vehicle some 150 feet away, approaching from his left at a high rate of speed along the dominant highway, that he then stopped his car and was hit by defendant's car, *is held* not to disclose contributory negligence as a matter of law. *Mavrolas v. Gregory*, 220.

Conflicting evidence of each driver that he entered the intersection while faced with the green light raises the issue of contributory negligence for the jury. *Ray v. Membership Corp.*, 380.

Evidence held not to establish contributory negligence as matter of law on part of plaintiff in entering intersection. *Kennedy v. James*, 434.

§ 42k. Nonsuit for Contributory Negligence of Pedestrian.

Evidence held to show contributory negligence as a matter of law on part of pedestrian walking into side of car. *Gamble v. Sears*, 706.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Evidence tending to show that the driver of one vehicle was traveling in excess of 80 m.p.h. along a straight section of highway, and that the driver of the vehicle in which plaintiff's testate was riding as a passenger, traveling in the opposite direction and intending to enter a driveway on his left, turned left across the path of the first vehicle when it was some 200 to 600 feet away, *is held* sufficient to be submitted to the jury on the question of the concurring negligence of both drivers in proximately causing the collision. *Bryant v. Woodlief*, 488.

To like effect. *Watters v. Parrish*, 787.

§ 46. Instructions in Automobile Accident Cases.

Where the trial court charges the law in regard to the statutory duties of a motorist to keep a proper lookout and the statutory provisions in regard to the right of way at an intersection, and applies the law to the evidence in the case, G.S. 20-141(*c*) ; G.S. 20-155(a), objection on the ground that the court failed to charge on the statutes is without merit, it not being required that the court read the applicable statutes to the jury. *Kennedy v. James*, 434.

Charge held for error in instructing the jury on inapplicable statute. *McGinnis v. Robinson*, 574.

An instruction to answer the issue of negligence in the affirmative if the jury should find that defendant's negligence was the proximate, rather than a proximate cause, of the accident, is favorable to defendant, and defendant, not being prejudiced thereby, will not be heard to complain. *Dinkins v. Booe*, 731.

Instructions on rights of defendant when confronted with an emergency resulting from plaintiff's approach on his side of the road, held without error. *Ibid.*

Where defendant pleads contributory negligence of plaintiff pedestrian and introduces supporting evidence on the issue, it is error for the court to

AUTOMOBILES—*Continued.*

fail to charge as to the facts necessary to be found by the jury to constitute negligence on the part of plaintiff, but the court should charge, in addition to stating the contentions of the parties, as to the circumstances arising on the evidence upon which the issue should be answered in the affirmative and the circumstances upon which it should be answered in the negative. *Rowe v. Fuquay*, 769.

§ 47. Liabilities of Driver to Guests or Passengers in General.

Nonsuit is properly entered in an action by the guest in a car to recover of the driver thereof for injuries sustained when the door of the car, because of a worn latch, flew open while the driver was making a left turn, throwing or causing the guest to fall therefrom, when there is no evidence tending to show that the driver had any knowledge that the latch was defective or that the door had theretofore come open in a like manner. *Hoover v. Odom*, 459.

Evidence to the effect that defendant backed the car into a ditch in attempting to turn around, that he left his passenger in the car with the motor running to keep her warm and went off to obtain aid in getting the car out of the ditch, and that upon his return the passenger was dead as a result of carbon-monoxide poisoning from the fumes of the moter entering the car because the exhaust pipe was buried in the bank of the ditch, without any evidence that the driver could or should have known of the condition of the exhaust pipe, *is held* insufficient to be submitted to the jury on the issue of negligence of the driver in an action for the wrongful death of the passenger. *Ashford v. Fox*, 477.

§ 49. Contributory Negligence of Guest or Passenger.

A passenger in an automobile is not required by the law to maintain constant attention to the road, and evidence that a passenger was sitting sideways with her knees on the seat, talking to the driver, is insufficient to raise the issue of her contributory negligence in failing to keep a lookout and warn the driver when the evidence further establishes that the vehicle was traveling on a straight highway on a clear day at a lawful speed, and there is no evidence of any occurrence which did or should have made the passenger apprehensive as to the manner in which the vehicle was being operated. *Watters v. Parrish*, 787.

§ 53. Negligence of Owner in Permitting Incompetent or Reckless Person to Drive.

An owner of an automobile who entrusts its operation to a person he knows, or should know in the exercise of due care, to be an incompetent or reckless driver, may be held liable for his own negligence in so doing in an action instituted by a person injured as a result of the negligence of such driver. *Dinkins v. Booe*, 731.

Testimony of an owner of a motor vehicle that he knew that a certain person had been convicted of driving without an operator's license, and that such person had thereafter been involved in two separate automobile accidents, but that he had no knowledge of the fact that such person had been convicted of other violations of the traffic laws, *is held* sufficient to be submitted to the jury on the issue of the owner's negligence in entrusting the operation of his vehicle to such person. *Ibid.*

AUTOMOBILES—*Continued.*

§ 54d. Pleadings in Actions to Recover under Doctrine of Respondeat Superior.

Alegations to the effect that the car involved in the accident was owned by the mother of the driver is insufficient to charge the mother with liability under G.S. 20-71.1, since the effect of the statute is solely to provide a ready means of proving agency and does not dispense with the necessity of allegations that the driver was the agent of the owner. *Lynn v. Clark*, 289.

§ 54f. Sufficiency of Evidence on Issue of Respondeat Superior.

Where plaintiff alleges that defendant driver was the agent of defendant owner and was acting in the course of the employment at the time of the collision, and that defendant owner admitted the ownership of the vehicle, plaintiff is entitled to the benefit of G.S. 20-71.1, and upon defendant owner's denial of the agency and the introduction of evidence that the driver was a bailee, an issue of fact is raised for the determination of a jury. *Williamson v. Varner*, 446.

§ 54h. Liability of Owner for Driver's Negligence — Issues and Verdict.

An affirmative answer to the jury on the issue of the negligence of the owner of a motor vehicle in entrusting its operation to a person whom he knew or should have known to be a reckless driver, is sufficient to charge the owner with liability for injuries resulting from the negligence of such driver irrespective of agency, and therefore the submission of an issue of agency cannot be prejudicial to such owner. *Dinkins v. Booe*, 731.

§ 55. Family Purpose Doctrine.

Alegations that the car involved in the accident was a family purpose car owned by the driver's mother and driven by him with her consent, knowledge, and permission, are alone insufficient predicate for recovery under the family purpose doctrine. *Lynn v. Clark*, 289.

Evidence that the car involved in the accident was owned by the mother of the driver, that she had permitted him to drive the car on occasions when accompanied by her, and had permitted him to drive on a private road, and that she had permitted him and a friend to use the car with the understanding that the friend alone was to drive, but that she had never permitted him to drive on the public highways, is insufficient evidence to invoke the family purpose doctrine. *Ibid.*

§ 59. Homicide — Sufficiency of Evidence and Nonsuit.

The evidence in this case, in any view, *is held* to show a violation of highway safety statutes and a heedless indifference to the safety and rights of others, proximately resulting in death, and was sufficient to be submitted to the jury and sustained a verdict of guilty of manslaughter. *S. v. Macon*, 333.

Evidence *held* insufficient to show that deceased was killed as a result of negligent operation of automobile or that she was pushed or shoved therefrom by defendant. *S. v. Pope*, 356.

§ 75. Punishment for Violation of G.S. 20-138.

Where, in a prosecution for operating a vehicle on a public highway while under the influence of intoxicating liquor, defendant admits in his testimony that he had theretofore been convicted of a similar offense, the court may assume the truth of the admission and instruct the jury peremptorily that if it should find the defendant guilty the verdict should show that it was for a second offense. *S. v. Mumford*, 227.

BANKS AND BANKING

§ 1. Creation of Banking Corporations, Control and Regulation in General.

Incorporators of prospective banking corporation are not entitled to mandamus to require Commissioner of Banks to approve certificate when they have not followed statutory remedy of appeal to State Banking Commission. *Young v. Roberts*, 9.

Neither the Commissioner of Banks nor the State Banking Commission is authorized to require, as a prerequisite for the issuance of a certificate of approval, that a proposed banking corporation should obtain insurance of its deposits with the Federal Deposit Insurance Corporation, although its inability to obtain such insurance may be considered with other relevant facts and circumstances in determining whether a proposed banking corporation meets the statutory standards. *Ibid.*

The authority of the Commissioner of Banks to refuse to issue his certificate of approval of a certificate of incorporation of a banking institution, which is in all respects regular and in compliance with statute, is a limited, discretionary authority and must be based on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in G.S. 53-4. *Ibid.*

BILLS AND NOTES

§ 7. Makers and Persons Primarily Liable.

Persons who execute an instrument in writing to secure the payee of a series of notes for loans made or any advances which the payee might make to the maker, recognizing "this indebtedness as if it were our own" become jointly liable with the maker and are sureties and not guarantors, but the instrument cannot change the obligation of the maker from liability on the series of notes to liability on a single debt in the aggregate amount of the notes, and the statute of limitations runs in favor of the maker and such sureties on each note separately. *Pickett v. Rigsbee*, 200.

§ 15. Limitations of Actions on Notes.

Where notes are not under seal the fact that a subsequent instrument, constituting strangers to the notes sureties of payment, is executed under seal does not make the ten-year statute applicable, G.S. 1-47, since by the express terms of that statute it is applicable only to principals, and the three-year statute, G.S. 1-52, applies to the sureties. *Pickett v. Rigsbee*, 200.

Payments made on a note prior to the effective date of Chapter 1076, S.L. 1953 by one person primarily liable has the same legal effect as a written promise and starts the statute of limitations running anew as to all persons primarily liable thereon as of the date of such payment, action on the note not being barred at the time of the payment. *Ibid.*

Where the evidence discloses that more than three years elapsed subsequent to the last payment by the maker, allocated by the law to each of a series of notes executed by the maker, a peremptory instruction that the payee's action against the sureties was barred cannot be held for error. *Ibid.*

Under 1953 statute, payment by maker without knowledge or ratification of sureties does not bind sureties. *Ibid.*

BOUNDARIES

§ 3. Reversing Calls.

Where a corner is known and fixed, but the markers of the preceeding corners have been destroyed, such preceeding corners may be established by reversing the calls. *Andrews v. Andrews*, 97.

§ 4. Contemporaneous Surveys.

While corners marked and agreed upon by parties contemporaneously with the execution of the deeds may prevail over the descriptions contained in the instruments, where the corners can be definately located from the descriptions in the deeds by extrinsic evidence, the location of such corners may not be changed by later parol agreement of the respective owners of the contiguous tracts. *Andrews v. Andrews*, 97.

§ 7. Nature and Jurisdiction of Processioning Proceedings.

Where a proceeding to establish the true dividing line between contiguous tracts of land is removed from the Clerk to the Superior Court, the Superior Court acquires jurisdiction and may dispose of the proceeding notwithstanding that the Clerk did not hear the proceeding and render a decision therein, the statutory direction that the proceeding be heard first by the Clerk not being jurisdictional. *Andrews v. Andrews*, 97.

§ 8. Questions of Law and of Fact in Processioning Proceedings.

In a proceeding to establish the true boundary line between adjoining tracts of land, what constitutes the line is a matter of law for the court, where the line is actually located on the ground is a question of fact for the jury. *Andrews v. Andrews*, 97.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 2. Cancellation and Rescission for Fraud or Mistake Induced by Fraud.

Defendants' allegations to the effect that they were induced to sign a novation because of false and fraudulent representations by plaintiff in regard to an item which item defendants disputed prior to and at the time of the execution of the agreement, is insufficient to state a cause of action to rescind the novation contract, since in such instance defendants could not have been deceived by and could not have relied upon such representations. *Products Corp. v. Chestnutt*, 269.

CARRIERS

§ 1. State and Federal Regulation and Control.

Rule of Utilities Commission prohibiting carrier from selling interstate tickets at its office maintained outside of union bus station is unconstitutional. *Utilities Com. v. Greyhound Corp.*, 18.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 9. Lien and Registration of Instruments Executed in Another State.

The general common law rule of comity protecting the lien of a chattel mortgage or conditional sale contract duly executed and registered in another state upon the removal of the property to this State is subject to statutory modification by the laws of this State. *Bank v. Ramsey*, 339.

Where a conditional sale contract is not registered in the state in which

CHATEL MORTGAGES AND CONDITIONAL SALES—*Continued.*

the conditional sale was made until after the vehicle had been brought into this State, a *bona fide* purchaser without notice from the conditional sale vendee acquires title free from the lien of the conditional sale contract, irrespective of whether the vehicle acquired a *situs* here. G.S. 44-38.1(a), (b), (c). *Ibid.*

Where a vehicle subject to a conditional sale contract executed in another state is brought into this State prior to the registration of the conditional sale contract in such other state, the fact that the conditional sale contract is thereafter registered in such other state within the time permitted by its laws, which provide that upon such registration the lien should relate back to the date of sale, cannot have the effect of rendering the lien of such conditional sale binding in this State contrary to the provisions of G.S. 44-38.1. *Ibid.*

CLAIM AND DELIVERY

§ 4. Judgment for Sale of Property and Application of Proceeds.

Where judgment in claim and delivery directs that the property be sold and the proceeds of sale be applied to the judgment on the note secured by a mortgage on the personalty, an order setting aside the judgment "in so far as it pertains to the value of the property" is irrelevant and a nullity. *Implement Co. v. McLamb*, 760.

Record held insufficient to show equities entitling defendants to attack on ground of inadequacy price brought at public sale. *Ibid.*

While the value of personalty seized in claim and delivery by the mortgagee is to be determined as of the time of seizure, when judgment by default is promptly taken by the mortgagee and foreclosure sale is made within a reasonable time thereafter, the price obtained at such sale is conclusive as to value at the time of the seizure in the absence of fraud, intervening damage to the property, failure to comply with the requisites for a valid sale, or other equitable considerations affecting value. *Implement Co. v. McLamb*, 760.

In the instant case, whether the mortgagors are entitled to any credit on the judgment note over and above the sale price must be determined by the lower court upon consideration of the equities upon definite findings as to the date of seizure and the date of sale, the promptness with which defendants moved for relief, etc. *Ibid.*

COMPROMISE AND SETTLEMENT

A compromise and settlement must be based upon a disputed claim; an accord and satisfaction may be based on an undisputed or liquidated claim. *Products Corp. v. Chestnutt*, 269.

The execution of a compromise and settlement by payment in accordance with a valid judgment entered in an *ex parte* proceeding, G.S. 1-400, G.S. 1-402, of the sum stipulated for the benefit of a minor, represented in the proceeding by a duly appointed next friend, is valid and binding, and precludes the minor from thereafter maintaining an action based upon the same cause of action. *Gillikin v. Gillikin*, 1.

CONSPIRACY

§ 5. Relevancy and Competency of Evidence.

Testimony of declarations made by one conspirator in the absence of the

CONSPIRACY—*Continued.*

other, which declarations are not made in furtherance of the conspiracy but contain a mere narration of past facts implicating the absent conspirator, is incompetent as against the absent conspirator. *S. v. Potter*, 312.

Error in the admission of such testimony is not cured by the fact that part of such testimony later becomes competent for purpose of corroboration. *Ibid.*

When a person enters into an unlawful conspiracy, the acts and declarations of his co-conspirators in furtherance of the common design are competent against him. *S. v. Kirkman*, 781.

§ 8. Nature and Elements of Criminal Conspiracy.

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, and it is not necessary that the agreement be accomplished. The agreement itself being the offense. *S. v. Potter*, 312.

CONSTITUTIONAL LAW

§ 1. Supremacy of Federal Constitution.

The National Labor Relations Act does not deprive our courts of jurisdiction to hear and determine an action by union members against the union upon allegations that in negotiating the collective bargaining agreement with the employer the union acted arbitrarily and unjustly in depriving plaintiff members of their proper seniority rights. *Gainey v. Brotherhood*, 256.

§ 6. Legislative Powers in General.

If a statute is not proscribed by any section of our State Constitution, the wisdom of its enactment is a legislative and not a judicial question, since the General Assembly has the right to experiment with any modes of dealing with old evils unless prevented by the Constitution. *Redevelopment Com. v. Bank*, 595.

The expediency of legislation within constitutional limitations is within the sole province of the General Assembly; whether an act controvenes some constitutional proscription is a matter for the courts. *S. v. Warren*, 690.

The power to levy taxes is vested exclusively in the General Assembly, and it has the exclusive power to provide the method and prescribe the procedure for the discovery, listing and assessing property for taxation. *DeLoatch v. Beamon*, 754.

§ 7. Delegation of Power by the General Assembly.

While the General Assembly may not delegate the power to make law except as authorized by the Constitution, it may delegate to a state agency the power to find facts or to determine the existence or non-existence of a factual situation or condition upon which the operation of a law is made to depend, provided adequate standards are set forth to guide the agency in so doing. Constitution of North Carolina, Art. II, Sec. 1. *Redevelopment Com. v. Bank*, 595

The Urban Redevelopment Act is a constitutional delegation of power. *Ibid.*

§ 10. Judicial Powers.

Whether an Act of the General Assembly contravenes some constitutional proscription is a question for the courts. *S. v. Warren*, 690.

CONSTITUTIONAL LAW—*Continued.*

§ 11. The Police Power in General.

The police power is inherent in sovereighty and may be exercised by the General Assembly within constitutional limits to protect or promote the health, morals, order, safety and general walfare of society and within the constitutional limitations the expediency of an enactment is within the exclusive province of the Legislature. *S. v. Warren*, 690.

§ 12. Regulation of Trades and Professions under the Police Power.

A rule of the Utilities Commission proscribing an interstate carrier from maintaining an office for the sale of interstate tickets separate and apart from the ticket office at the union station, at which such carrier's tickets, as well as all other carriers using the station, are sold, is void as imposing an undue burden upon interstate commerce and also as violating the constitutional right guaranteed to every person to contract and utilize his properties to the fullest extent in a lawful manner to earn a living. *Utilities Com. v. Greyhound Corp.*, 18.

The right to engage in the ordinary trades and occupations is a property right which may not be circumscribed by the General Assembly. *S. v. Warren*, 690.

A business or occupation may not be regulated solely to protect the public against fraud and dishonesty, but resort in such instances must be had under the criminal laws. *Ibid.*

The regulation of an occupation in the exercise of the police power may be sustained only if it affirmatively appears that the occupation is clothed with a substantial public interest and the regulatory act has a rational, real or substantial relation to one or more of the purposes for which the police power may be exercised and is reasonably necessary to accomplish its purposes. *Ibid.*

G.S. 93A regulating real estate brokers and salesmen is a constitutional exercise of the police power in the interest of the public welfare, since the relation of real estate broker and client involves a measure of trust and the business affords peculiar opportunities to such agents to extract illicit gains by concealment and collusion, and such business affects a substantial public interest in that it relates to a basic element of the economy. *Ibid.*

§ 15. Police Power — Public Convenience and Welfare.

The State in the exercise of its police power may require common carriers to provide services reasonably necessary for public convenience provided its regulations do not unduly burden interstate commerce. *Utilities Com. v. Greyhound Corp.*, 18.

§ 19. Monopolies and Exclusive Emoluments.

The provision of the Urban Redevelopment Act that the condemned property may be sold to a private person or corporation does not result in exclusive emoluments, since the Act provides that the property be sold at public auction. *Redevelopment Com. v. Bank*, 595.

The Act regulating the licensing of real estate brokers does not confer exclusive emoluments or tend to create a monopoly. *S. v. Warren*, 690.

§ 24. What Constitutes Due Process.

The condemnation of property under the Urban Redevelopment Law is not a taking of private property in violation of the Constitution. *Redevelopment Com. v. Bank*, 595.

CONSTITUTIONAL LAW—*Continued.*

§ 27. Burdens on Interstate Commerce.

A State regulation which prohibits the free exercise of a carrier's franchise to engage in interstate commerce is void. *Utilities Com. v. Greyhound Corp.*, 18.

§ 26. Full Faith and Credit to Foreign Judgments.

The full faith and credit clause of the Federal Constitution does not entitle a judgment *in personam* to extra-territorial effect when such judgment is rendered without jurisdiction over the person sought to be bound. *Lennon v. Lennon*, 659.

CONTRACTS

§ 2. Offer and Acceptance and Mutuality.

In order to constitute a valid contract, there must be an offer which is definite and complete and an acceptance of the offer in its exact terms and sense, and a mere proposal intended to open negotiations which may ultimately result in a contract and which contains no definite terms but refers to contingencies to be worked out, is not binding even though accepted. *Yeager v. Dobbins*, 824.

§ 4. Consideration.

A contract executed under seal imports consideration, *nudum pactum* being applicable only to simple contracts. *Honey Properties v. Gastonia*, 567.

§ 5. Form and Requisites of Agreements and Parol Provisions.

Unless forbidden by the statute of frauds, a contract may be partly written and partly oral, in which event the unwritten part of the agreement may be shown by parol, provided that the parol evidence does not contradict the written terms but merely supplements them. *Bishop v. DuBose*, 158.

§ 12. Construction and Operation of Contracts in General.

Where the language of a contract is plain and unambiguous it is for the court and not the jury to declare its meaning and effect. *Bishop v. DuBose*, 158.

Where a contract deals with the subject matter in detailed, clear and specific language, it will be presumed that the parties inserted therein every provision regarded as material, and additional provisions will not ordinarily be implied in the face of the detailed treatment of the matter in the agreement. *Ferrell v. Highway Com.* 830.

§ 16. Conditions Precedent and Subsequent.

Where a contract is written and signed by one party and delivered to the other party without any conditions or reservations, and the contract is accepted by such other party, the agreement is complete, and the first party may not, in the absence of assent by the other party, thereafter attach conditions and reservations thereto, and a letter setting forth such conditions, even though the letter is written on the same day as the contract, cannot modify the contract when the letter is not received by the other party until after the contract had been accepted. *Honey Properties v. Gastonia*, 567.

§ 19. Novation and Substitution.

Where, after differences between the parties to a contract, they execute

CONTRACTS—*Continued.*

a new agreement prescribing the rights and liabilities of the parties in regard to the entire subject matter of the original agreement, the new agreement amounts to a novation and precludes the assertion of any rights under the original agreement so long as the novation stands. *Products Corp. v. Chestnutt*, 269.

§ 24. Actions on Contracts — Parties.

In an action on a contract instituted by an individual, allegations that, although the contract was made in the name of plaintiff, the negotiations leading to the contract were carried on by a named corporation, that the contract was for the benefit of the corporation, and that plaintiff had assigned his interest in the contract to the corporation, without allegation that plaintiff was bringing the action as trustee for the corporation nor facts from which a trusteeship may be inferred, disclose that plaintiff is not the real property in interest and that he is without any right to maintain the action. *Skinner v. Transformandora, S. A.*, 320.

§ 25. Pleadings in Actions.

Where the specific contract constituting the sole basis of the cause of action is made a part of the complaint, the sufficiency of the instrument to constitute a valid agreement must be determined in accordance with its provisions rather than the more broadly stated allegations of the complaint, or the conclusions of the pleader as to its character and meaning. *Yeager v. Dobbins*, 824.

See, also, *Ferrell v. Highway Comm.*, 830.

COSTS

§ 2. Recovery of Costs by Successful Party.

Costs follow the final judgment. *Whaley v. Taxi Co.*, 586.

§ 3. Taxing of Costs in Discretion of Court and Appointment of Costs.

Where the court requires each side to deposit a designated sum with the referee to cover the cost of the reference, and in confirming the referee's report fixes the compensation of the referee and makes an allowance for the court reporter and surveyor, taxing these items as a part of the cost against plaintiff less the sum theretofore advanced by defendant, the order in effect is an apportionment of the cost and is within the discretionary power given the court by G.S. 6-21 (6). *Tyser v. Sears*, 65.

Where discretion is vested in the trustees in determining what items should be considered income and what items *corpus* of the estate, the exercise of such discretion will not be disturbed unless in contravention of the intent of testator as expressed in the instrument or unless the discretion is manifestly abused. *Little v. Trust Co.*, 229.

§ 4. Items of Costs.

Attorneys fees may be taxed as item of costs in action to construe will. *Little v. Trust Co.*, 229.

COUNTIES

§ 1. Nature and Functions; Legislative Supervision and Control.

Counties are agencies of the State government for the convenient adminis-

tration of governmental functions in their respective territories, and in the exercise of such functions they are subject to unlimited legislative control within constitutional limitations. *DeLoatch v. Beamon*, 754.

Since Art. VII, Sec. 2, may be modified or changed by statute, Art. VII, Sec. 13, the General Assembly has full power, unless restricted by some other constitutional provision, to prescribe the power and duty of county commissioners in respect of the levying of taxes and the manner in which property shall be valued for tax purposes. *Ibid.*

§ 7. Business and Contracts.

A county may contract with a private corporation to appraise county property for taxation and pay the company the contract price as a necessary county expense. *DeLoatch v. Beamon*, 754.

COURTS

§ 2. Jurisdiction of Courts in General.

If a court is without jurisdiction of a proceeding it must dismiss the case. *Gainey v. Brotherhood*, 256.

Where the court has not acquired jurisdiction over the persons of the next of kin of a decedent it may not adjudicate that such next of kin are not entitled to inherit because the decedent had been adopted (Chapter 813, S.L. 1955) and that therefore notice and service as to them was not required, since the next of kin have a right to be heard before the court decrees that they are precluded from sharing in the estate of their kinsmen who died intestate. *Bank v. Jordan*, 419.

§ 6. Jurisdiction of Superior Court on Appeal from Clerk.

The Superior Court acquires jurisdiction upon the removal of a proceeding to it from the Clerk, even though the clerk did not enter a judgment or order therein. *Andrews v. Andrews*, 97.

Where proceedings before the clerk are brought before the Superior Court in any manner the Superior Court aquires jurisdiction to hear and determine all matters in controversy. *Blades v. Spitzer*, 207.

§ 18. What Law Controls — State and Federal Courts.

The National Labor Relations Act does not deprive our courts of jurisdiction to hear an action by a union member against the union for discrimination in the labor contract in regard to the member's seniority rights. *Gainey v. Brotherhood*, 256.

See also, *Haynes v. R. R.*, 391.

§ 19. Enforcement of Federal Statutes in State Court.

In an action instituted in a State court to enforce rights arising under the Federal Merchant Marine Act of 1920, the Federal substantive law controls. *Benton v. Willis, Inc.*, 166.

§ 20. What Law Controls — Laws of this and Other States.

Comity will not be applied in this State when contrary to unambiguous provisions of our statutes. *Bank v. Ramsey*, 339.

In action based on a collision in another state, the law of the road of such other state governs the substantive rights, while matters of procedure, including the rules of evidence and the sufficiency of the evidence to take the case to the jury, are to be determined by the laws of this State. *McCombs v. Trucking Co.*, 699.

CRIMINAL LAW

§ 25. Plea of Nolo Contendere.

An assignment of error to the refusal of the court to dismiss the prosecution as of nonsuit is inapposite where the defendant has entered a plea of *nolo contendere*, since the law does not sanction a conditional plea of *nolo contendere*, and, upon acceptance of the plea, the court is clothed with the same authority to impose judgment as if defendant had been convicted by a jury or had entered a plea of guilty, and the introduction of evidence is ordinarily for the sole purpose of determining what punishment should be imposed. *S. v. Stevens*, 331.

§ 33. Facts in Issue and Relevant to Issues in General.

Evidence which merely discloses the possibility of the existence of a collateral incriminating circumstance should be excluded, since the attention of the jury should not be distracted from the material matters by evidence raising only a conjecture or suspicion in regard to incriminating circumstances. *S. v. Gaskins*, 46.

The admission of irrelevant evidence having the sole effect of exciting the prejudice or sympathy of the jury may be held prejudicial. *Ibid.*

§ 34. Evidence of Defendant's Guilt of Other Offenses.

In a prosecution for carnal knowledge of a female under 12 years of age, her testimony to the effect that defendant had repeatedly had intercourse with her during the prior several years is competent in corroboration of the offense charged, and the first such occasions will not be held too remote when the evidense discloses that such acts were repeated with regularity up to the date specified in the indictment. *S. v. Browder*, 35.

§ 42. Articles and Clothing Found Near Scene of Crime.

The admission into evidence of certain articles of clothing and other articles of personal property found at the scene *held* not error. *S. v. Rhodes*, 438.

§ 49. Attempt by Defendant to Procure False Testimony.

State may not prejudice defendant by cross-examination of witness inferring that defendant had attempted to bribe another witness, there being no direct evidence that defendant attempted bribery. *S. v. Gaskins*, 46.

§ 51. Qualification of Experts.

Where the court finds upon supporting evidence that the witness is a medical expert, he having performed many autopsies in the course of his work, the testimony of such witness as to the cause of death based upon his autopsy on the body of the deceased is competent notwithstanding the failure of the State to show that the witness was authorized to make the autopsy. In the absence of evidence to the contrary it will be assumed that the autopsy was lawfully performed. *S. v. Rhodes*, 438.

§ 71. Confessions.

Where the court hears evidence and determines that the incriminating statements of defendant were voluntarily made, the admission of testimony thereof will not be disturbed when the record fails to show that the statements were not voluntary. *S. v. Rhodes*, 438.

§ 79. Evidence Obtained by Unlawful Means.

Ordinarily the courts look to the competency of the evidence and not to the manner in which it was acquired. *S. v. Rhodes*, 438.

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§ 83. Cross-Examination.

State may not prejudice defendant by cross-examination of witness inferring that defendant had attempted to bribe another witness, there being no direct evidence that defendant attempted bribery. *S. v. Gaskins*, 46.

§ 84. Credibility of Witnesses, Corroboration and Impeachment.

Testimony of statements made by prosecutrix which corroborate her incriminating testimony upon the trial is properly admitted for the restricted purpose of corroboration. *S. v. Browder*, 35.

The admission in evidence of a written statement made by a witness for the State for the sole purpose of corroborating her testimony upon the trial *held* not to justify a new trial. *S. v. Hoover*, 133.

§ 85. Rule that Party May Not Discredit Own Witness.

The introduction by the State of exculpating declarations of a defendant does not preclude the State from showing that the facts are otherwise. *S. v. Rogers*, 499.

§ 86. Time of Trial and Continuance.

A motion for a continuance is addressed to the sound discretion of the trial court and the denial of the motion will not be disturbed in the absence of a showing of abuse of discretion or that defendant has been deprived of a fair trial. *S. v. Kirkman*, 781.

§ 90. Admission of Evidence Competent for Restricted Purpose.

Error in the admission of incompetent testimony is not cured by reason of the fact that part of such testimony later becomes competent for purpose of corroboration. *S. v. Potter*, 312.

§ 91. Withdrawal of Evidence.

Where the court sustains defendant's objection to testimony and strikes it and then sustains the objection to the following question, an assignment of error to the asking of the second question will not be held prejudicial. *S. v. Hoover*, 133.

§ 92. Introduction of Additional Evidence.

After the State has rested its case, but before defendant has moved for nonsuit, the trial judge has the discretionary power to allow the State to reopen its case and introduce further testimony. *S. v. Kirkman*, 781.

§ 94. Expression of Opinion by Court on Evidence During Trial.

The remark of the court during the examination of a witness for the State that the court found the witness a reluctant witness and that therefore the court would allow a certain line of questioning, *held* not prejudicial to defendant, since the remark, when considered in the light of all the facts and circumstances, had the effect of lessening the strength or minimizing the weight of the testimony of the State's witness, *S. v. Hoover*, 133.

Not every remark of the court or question propounded by it to a witness is of such harmful effect as to constitute reversible error, and a new trial will not be granted therefor unless it is apparent that such action might reasonably have prejudiced defendant. *Ibid.*

The statement of the court upon objection by defandant's counsel to

CRIMINAL LAW—*Continued.*

the solicitor's smiling and laughing while cross-examining defendant's witness, "Look sour, Mr. Solicitor" cannot be held prejudicial when the record fails to show what occasioned the mirth and pleasantry complained of, since in the absence of such showing it cannot be ascertained that the occurrence had the effect of discrediting the witness. *S. v. Mumford*, 227.

§ 97. Argument and Conduct of Counsel and Solicitor.

The control of the agrument of the solicitor and counsel must be left largely to the discretion of the trial court, and in this case the remarks of the solicitor, apparently invited by remarks of the attorney for defendant in addressing the jury, *held* not to warrant a new trial. *S. v. Seipel*, 335.

Argument of the Solicitor to the effect that the jury should not recommend life imprisonment because crime of the type with which defendant was charged tempted people to take the law in their own hands, that they might have done so in this case except for their reliance upon the jury to uphold the law, and that if defendant were given life imprisonment rather than death the Solicitor did not know what might happen in later cases, *is held* grossly improper, and defendant's assignment of error based upon an exception taken during the trial is sustained. *S. v. Graves*, 779.

§ 98. Function of Court and Jury in General.

The probative weight of the evidence is for the jury; the legal sufficiency of the evidence is for the court. *S. v. Rhodes*, 438; *S. v. Rogers*, 499.

§ 99. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence must be considered in the aspect most favorable to the State. *S. v. Pope*, 356; *S. v. Rogers*, 499.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

Evidence which merely shows the possibility of defendant's guilt of the offense charged but raises no more than a conjecture or speculation of such guilt is insufficient to be submitted to the jury. *S. v. Guffey*, 60.

Circumstantial evidence is sufficient to overrule nonsuit if it tends to prove the fact of guilt, or reasonably conduces to such conclusion as a fairly logical and legitimate deduction. It is insufficient if it merely raises a suspicion or conjecture in regard thereto. *S. v. Pope*, 356; *S. v. Rhodes*, 438; *S. v. Rogers*, 499.

The contention that the testimony of the presecutrix is contrary to reason and experience and therefore should be rejected as unworthy of belief cannot justify nonsuit, since the probative value of the testimony is solely for the determination of the jury and discrepancies and contradictions in the State's evidence are for the jury to resolve. *S. v. Burell*, 115.

Where the indictment contains separate counts charging separate offenses the State may not be nonsuited if there is sufficient evidence of defendant's guilt on either count. *S. v. Hoover*, 133.

Contradiction in the State's evidence do not justify nonsuit. *S. v. Rogers*, 499.

§ 106. Instructions on Burden of Proof and Presumptions.

Where the court correctly places the burden upon the State to prove defendant's guilt beyond a reasonable doubt and charges upon the presumption of innocence, the failure of the court to define the term "reasonable doubt" will not be held for error in the absence of a request for special instructions. *S. v. Browder*, 35.

CRIMINAL LAW—*Continued.*

An instruction to the effect that when the State relies on circumstantial evidence the jury should accept the hypothesis of innocence as much so as the hypothesis of guilt, is prejudicial error, since it is the duty of the jury to accept the hypothesis of innocence even though that of guilt is the more probable. *S. v. Potter*, 312.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

The court has the affirmative duty of instructing the jury as to the law applicable to the facts in the case, and this duty is not discharged by a mere statement of the State's contentions. *S. v. DeWitt*, 457.

§ 110. Change on Character Evidence and Credibility of Witnesses.

Defendant's character evidence is a subordinate feature of the case and the failure of the court to give any instructions in regard thereto will not be held prejudicial in the absence of a request for special instructions. *S. v. Burell*, 115.

§ 112. Change on Contentions of Parties.

The order of stating the respective contentions of the State and the defendant rests largely in the discretion of the trial court, and an objection to the statement of the contention must ordinarily be brought to the trial court's attention in apt time. *S. v. Rhodes*, 438.

§ 118. Sufficiency and Effect of Verdict.

A verdict of guilty as charged rendered in a prosecution on an indictment containing two separate counts is a verdict of guilty as to both counts. *S. v. Hoover*, 133.

§ 121. Arrest of Judgment.

The legal effect of arrest of judgment for fatal defect of the warrant is to vacate the verdict and judgment, but it does not preclude the State from thereafter proceeding upon a sufficient warrant or indictment if it so desires. *S. v. Biller*, 783.

§ 132. Sentence to Maximum and Minimum Terms.

Under a judgment of imprisonment for not less than one year defendant cannot be lawfully imprisoned for more than one year. *S. v. Hoover*, 133.

§ 134. Sentence for Repeated Offenses.

Where, in a prosecution for operating a vehicle on a public highway while under the influence of intoxicating liquor, defendant admits in his testimony that he had theretofore been convicted of a similar offense, the court may assume the truth of the admission and instruct the jury peremptorily that if it should find the defendant guilty the verdict should show that it was for a second offense. *S. v. Munford*, 227.

§ 135. Suspended Judgments and Executions.

Where the judgment below recites that sentence was suspended by the consent of the defendant and there is no specific exception to this portion of the judgment, the recital of defendant's consent will be accepted as true in the absence of anything to indicate a withdrawal of his consent, G.S. 15-180.1, and the defendant may not upon appeal contend that he did not consent to the suspension of the sentence. *S. v. Warren*, 690.

CRIMINAL LAW—*Continued.*

§ 136. Revocation of Suspension of Sentence.

Where sentence for wilful failure to provide adequate support for defendant's wife and children is suspended on condition that defendant pay a stipulated sum per week for their support, and the sum is later increased for change of condition, the wilful failure of defendant thereafter to pay any amount warrants the revocation of suspension regardless of whether the wilful failure to pay the increased amount was made a condition of suspension, since upon the facts defendant has breached the original condition as well as the later one. *S. v. Morton*, 482.

Upon a hearing of whether defendant wilfully breached a condition of suspension of sentence, the court is not bound by strict rules of evidence. *Ibid.*

On an appeal from an order of an inferior court revoking a suspension of sentence, the Superior Court properly hears the matter *de novo* for the purpose of determining the sole question whether defendant had violated the conditions of suspension without lawful excuse, and the Superior Court determines this question in its sound discretion and its order of revocation will not be disturbed when the evidence is sufficient to support it. *Ibid.*

§ 154. Necessity for, Form and Sufficiency of Exceptions and Assignments of Error in General.

An assignment of error should present only a single question of law for consideration. *S. v. Rhodes*, 438.

§ 156. Exceptions and Assignments of Error to Charge.

An inadvertence of the court in stating the contentions of defendant must be brought to the court's attention in time for correction in order to be considered on appeal. *S. v. Holder*, 121.

An assignment of error based on eight exceptions to the charge *held to constitute a broadside assignment of error. S. v. Rhodes*, 438.

§ 160. Presumptions, Burden of Showing Error, and Harmless and Prejudicial Error in General.

The burden is on appellant to show that the error complained of was prejudicial and amounted to a denial of a substantial right. *S. v. Munford*, 227.

Defendant may not object to an infraction of the rule prohibiting the court from expressing an opinion on the credibility of a witness when such occurrence is prejudicial to the State rather than to defendant. *S. v. Hoover*, 133.

§ 161. Harmless and Prejudicial Error in the Charge.

Where the charge of the court is not in the record it will be presumed that the court correctly charged the law arising upon the evidence. *S. v. Hoover*, 133.

Where the evidence is not in the record, assignments of error to the charge cannot be sustained unless the instructions are inherently or patently erroneous irrespective of any evidence. *S. v. Todd*, 784.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of irrelevant evidence having a tendency to prejudice defendant in the eyes of the jury cannot be held harmless even though there is ample competent evidence to sustain a conviction, since it cannot be de-

CRIMINAL LAW—*Continued.*

termined on appeal whether or not the verdict was influenced by the incompetent evidence. *S. v. Gaskins*, 46.

Error in the admission against one conspirator of testimony of declarations made by the other conspirator in his absence, is not cured when only a part of such testimony later becomes competent for the purpose of corroborating the subsequent testimony of the declarant upon the trial, and it would seem that the admission of testimony of such declarations was prejudicial under the facts of this case. *S. v. Potter*, 312.

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have said if permitted to testify. *S. v. Rhodes*, 438.

§ 164. Whether Error Relating to One Court Alone is Prejudicial.

Where the trial of the defendant upon an indictment containing two counts is free from prejudicial error and but a single judgment of imprisonment is imposed, which is less than the maximum which might be imposed on either one of the counts, the fact that the evidence is insufficient to support a conviction of one of the counts does not warrant a new trial, there being sufficient evidence to support the verdict and judgment on the other count. *S. v. Hoover*, 133.

DAMAGES

§ 9. Credit on Damages for Sums Paid for Plaintiff's Benefit.

Where the court instructs the jury that it should, in ascertaining the amount of damages, take into account wages paid the injured plaintiff subsequent to the injury, defendant may not contend that the amount of wages so paid should further be deducted from the award of the jury. *Benton v. Willis, Inc.*, 166.

§ 12. Competency and Relevancy of Evidence on Issue of Compensatory Damages.

A medical expert witness who has examined the injured party and given his opinon as to the permanent partial disability to her neck may testify as to the injured person's physical ability to perform a particular kind of work. *Jones v. Schaffer*, 368.

§ 15. Instructions on Measure of Damages.

The determination of the issue of damages lies in the exclusive province of the jury, and the court may not in its charge give an opinion of whether any damages must be awarded or the amount thereof. *Williams v. Highway Com.*, 514.

Where the court reviews in detail the evidence of plaintiff's injuries, the failure of the court to repeat such evidence in stating the rule for the admeasurement of damages for personal injury will not be held for error. *Dinkins v. Booe*, 731.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death.

In an action for wrongful death, plaintiff must show both a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff's intestate under the circum-

stances in which they were placed, and that such negligent breach of duty, acting in continuous sequence, produced the injury resulting in death, and without which it would not have occurred, under circumstances from which any man of ordinary prudence could have foreseen that such result was probable. *Rogers v. Green*, 214.

§ 6. Expectancy of Life and Damages.

In an action for wrongful death the measure of damages is the present worth of the pecuniary loss resulting to the family of the deceased by reason of his untimely death, which loss is to be ascertained by deducting his personal expenditures from the amount which deceased would probably have earned, based upon his life expectancy. *Bryant v. Woodlief*, 488.

The retirement income which a deceased was receiving at the time of his death is properly shown in evidence on the question of damages in an action for wrongful death, since such retirement income is earned by an employee as the result of his previous labors, and evidence that the deceased was earning such income is alone sufficient basis for the admeasurement of damages. *Ibid.*

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy.

If the complaint alleges facts constituting a cause of action cognizable under the Declaratory Judgment Act, the action will be so determined, notwithstanding the failure of the complaint to make specific reference to the statute, since the facts alleged determine the nature of the relief to be granted. G.S. 1-153, *et seq. Little v. Trust Co.*, 231.

A person claiming under the will of a beneficiary of a testamentary trust may maintain an action under the Declaratory Judgment Act to determine the estate taken by his testator under the trust. *Ibid.*

The Declaratory Judgment Act enables courts to take cognizance of disputes at an earlier stage than permitted by ordinary legal procedure, and while the Act does not confer jurisdiction on the courts to determine purely speculative matters and does not authorize anticipatory judgments or advisory opinions, a party claiming a vested and presently determinable interest under a will, controverted in good faith by other interested parties, so that it appears that adjudication thereof will prevent future litigation, the courts have jurisdiction to determine the matter even though the enjoyment of the estate claimed must be postponed until the termination of a prior trust. *Ibid.*

DEEDS

§ 11. Construction and Operation in General.

In construing a deed, the intent of grantor as ascertained from the language used, giving force and effect to all parts if possible by any reasonable construction, will prevail unless in conflict with some settled rule of law or public policy. *Cannon v. Baker*, 111.

§ 12. Estates Created by Construction of Trustment in General.

Where the granting clause of a deed, evidently filled in by typewriter upon a deed form, conveys an unqualified fee and the *habendum* and warranty clauses are in harmony with the granting clause, a provision in-

serted immediately before the description in that part of the form intended for the description, that the conveyance was of "A life estate in and to the following described tract of land, to wit:", and a provision immediately following the description that it was understood between the parties that the grantee was to have a life estate, will be rejected as repugnant to the fee simple estate granted. *Oxendine v. Lewis*, 699.

§ 15. Estates upon Special Limitation and Defeasible Fees.

A conveyance to grantors' son during his natural life and at his death to the son's "living issue or children," with further provision that if the son had no living issue or children at his death the land should go to the heirs at law of grantors, *is held* to create a defeasible fee in the children of the life tenant, since the word "issue" construed in context, means "lineal descendants" and is a word of purchase, so that upon the death of one or more of the children of the life tenant leaving issue surviving, such issue would take as purchases under the deed and not by descent. *Cannon v. Baker*, 111.

§ 19. Restrictive Covenants.

A restriction that not more than one dwelling should be constructed on any lot in a subdivision is not a restriction limiting the use of the property to residential purposes or prohibiting the building of a structure on more than one lot, and therefore the building of a church on three lots is not a violation of the restriction. *Scott v. Board of Missions*, 443.

Covenants restricting the use of property impose servitudes in derogation of the usual right to the free unfettered use of land by the owner, and such covenants are to be strictly construed and may not be enlarged by inference, implication or strained construction. *Ibid.*

A covenant restricting the placing of a structure nearer than fifteen feet from the sidelines of a lot relates, in an instance where several lots are owned by one person, to the outside lines, and does not prohibit such owner from placing a single structure on several lots when the structure is not nearer than fifteen feet from the outside lines. *Ibid.*

§ 26. Requisites and Validity of Timber Deeds.

Standing timber is realty and can be conveyed only by an instrument sufficient to convey realty. *Bishop v. DuBose*, 158.

§ 27. Construction and Operation of Timber Deeds.

An instrument sufficient to convey standing timber is an executed contract and passes title to the timber as of the time of its execution, with reversion, to the vendor, where there is a time limitation, of the timber not cut within the time specified. *Bishop v. DuBose*, 158.

The term "logs" does not include growing trees, and a contract under which the vendor agrees to sell and the vendee agrees to buy "logs on the stump" at a specified price per thousand feet, to be paid before removal of the logs from the land, is an executory contract for sale of "logs," and title does not pass until after the logs are severed, measured and paid for. *Ibid.*

While under certain circumstances there may be a lease of standing timber and timber rights, it is essential to the validity of such lease that it be for a specified period of time. *Ibid.*

DEEDS—*Continued.*

§ 28. Contracts for Sale of Logs.

A contract for the sale of logs to be cut by the purchaser within specified boundaries, the purchaser to pay for same before removal, together with evidence that the vendor orally stipulated the point at which the cutting was to be begun and the direction in which the purchaser was to cut, does not amount to a designation of all merchantable timber on the vendor's land and is insufficient to specify any particular area to be cut, or constitute a contract for the sale of any specific logs, and therefore the vendor's termination of the purchaser's license to go upon the land does not give the purchaser a right of action for damages for breach of the contract for the sale of logs then uncut. *Bishop v. DuBose*, 158.

A contract for the sale of unspecified logs to be cut by the purchaser and to be paid for before removal from the land gives the purchaser a license to go upon the land for the purpose of cutting the timber but, there being no direct promise on the part of the purchaser to sever and pay for all the timber on the tract and no designation of any particular trees to be cut, the license may be revoked at any time as to uncut timber, the license not being coupled with an interest and there being no contention that the licensee had made expenditures in reliance upon the license. *Ibid.*

DESCENT AND DISTRIBUTION

§ 10. Suits for Distributive Share.

Where the court has not acquired jurisdiction over the persons of the next of kin of a decedent it may not adjudicate that such next of kin are not entitled to inherit because the decedent had been adopted (Chapter 813, S.L. 1955) and that therefore notice and service as to them was not required, since the next of kin have a right to be heard before the court decrees that they are precluded from sharing in the estate of their kinsmen who died intestate. *Bank v. Jordan*, 419.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce.

The plaintiff in an action for alimony without divorce on the ground of abandonment is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person of plaintiff as to render her condition intolerable and life burdensome. *Sguros v. Sguros*, 408.

Allegations and evidence to the effect that the husband separated himself from his wife and failed to provide her with necessary subsistence makes out a *prima facie* case for the recovery of alimony without divorce under G.S. 50-16. *Bowling v. Bowling*, 528.

The husband is under moral and legal duty to support the wife and, although the earnings and means of the wife are matters to be considered in determining the amount of alimony, the fact that the wife has property or means of her own does not relieve the husband of the duty to furnish her reasonable support according to his ability. *Ibid.*

An instruction in an action for alimony without divorce that if the jury answered the issue in the affirmative the amount of alimony which the court would allow would be terminated by a subsequent divorce, must be held for prejudicial error, since a subsequent divorce would terminate the

DIVORCE AND ALIMONY—*Continued.*

alimony only in certain instances, G.S. 50-11, and the instruction might leave the impression with the jury that a verdict for plaintiff would be less onerous for defendant than the law provides, and might influence them to return a verdict in plaintiff's favor on less evidence than they would have otherwise required. *Ibid.*

§ 18. Alimony and Subsistance Pendente Lite.

The allowance of alimony *pendente lite* rests in the discretion of the trial court and his order will not be disturbed in the absence of some error of law. *Wade v. Wade*, 330.

In this action for alimony without divorce on the ground of abandonment, G.S. 50-16, the court's findings are *held* sufficient to entitle plaintiff to an award of alimony *pendente lite* and to counsel fees. *Sguros v. Sguros*, 408.

In fixing the amount to be allocated as subsistence pending trial on the merits, the court should take into account the estate and earnings of the husband as well as the estate and earnings of the wife. *Ibid.*

Where the husband quits one employment and accepts another employment at a lower salary solely for the reason that the second employment offers greater opportunities for advancement in his specialized field, and there is no finding or evidence that the husband acted otherwise than in good faith, the allowance of alimony *pendente lite* should be based upon the lower salary, and he may make a motion in the cause to have the amount of alimony reconsidered for such change of condition. *Ibid.*

The law recognizes the responsibility of the father to support his children and the responsibility of the husband to provide subsistence for his wife, and therefore in an action for divorce, alimony and subsistence may be awarded her under G.S. 50-15, G.S. 50-16 if she is the plaintiff and under the common law if she is the defendant. *Ibid.*

In fixing the amount of subsistence to the wife *pendente lite* the court may properly award the wife in addition to monthly allowance, exclusive possession of the home, the furnishings and the family automobile, and require defendant to make payments on the mortgage on the home in order that the wife and children may have a place to live, but the award of alimony *pendente lite* is solely for the purpose of providing subsistence and counsel fees pending the litigation, and it is error for the court to go further and direct that she should have a lien on the home for the amounts paid by her on the mortgage out of the monthly allowance to her. *Ibid.*

While the provisions of G.S. 50-14 limiting the amount of alimony upon divorce from bed and board does not apply to G.S. 50-16, the limitations of G.S. 50-14 should not be completely ignored but should be used as a guide in fixing the amount of alimony without divorce or alimony and subsistence *pendente lite* in an action under G.S. 50-16. *Conrad v. Conrad*, 412.

The allowance of alimony *pendente lite* in an action under G.S. 50-16 should be based on the amount of the current earnings of the husband and not upon the earnings of the husband in a single preceding year unless there is a finding, based on evidence, that the husband was failing to exercise his capacity to earn because of a disregard of his marital obligations to provide his wife reasonable support. *Ibid.*

An allowance of alimony and subsistence *pendente lite* based on the findings of the court that the husband was capable of earning a stipulated amount, which the evidence discloses was made by him in only one preceding year, with further evidence that his current earnings were in a substantially smaller amount, and without a finding based on evidence

DIVORCE AND ALIMONY—*Continued.*

that the husband was failing to exercise his capacity to earn because of his disregard of his marital obligations, held erroneous. *Ibid.*

ELECTIONS

§ 1. Calling of Election and Time of Holding Election.

Where a statute provides for an election to determine whether an area should be incorporated as a municipality and further provides for the qualification and election of officers of the municipality, the fact that the provision for the election of the municipal officers is void and unconstitutional in prescribing qualification of office in conflict with the Constitution does not render void the provisions for the election to determine whether the area should be incorporated, the two parts of the statute being independent and separable. *Starbuck v. Havelock*, 176.

§ 4. Ballots.

Where there is no irregularity in the authorization of municipal bonds for its water and sewer systems, G.S. 160-379(b)(1), G.S. 160-379(d), G.S. 160-382, and in the city's notice of intent to annex certain areas it is stated that it intended to use certain of the proceeds of the bonds for the construction of water and sewer lines in areas intended to be annexed, the fact that neither the bond ordinance nor the ballots used in the election at which the issuance of the bonds was approved disclosed such intent does not affect the validity of the bonds, the city being authorized by its charter and G.S. 160-255 to extend its water and sewer facilities beyond its corporate limits and the Annexation Act specifically providing that it should not be necessary for the City to specify the location of any contemplated improvements. *Upchurch v. Raleigh*, 676; *Eakley v. Raleigh*, 683.

§ 7. Procedure to Contest Election.

Where a statute provides for an election to determine whether a specified area should be incorporated as a municipality, persons within the area may challenge the validity of an election under the statute without leave of the Attorney General, since a *de facto* corporation might arise from such election which would subject their property to obligations and liabilities of municipal government. *Starbuck v. Havelock*, 176.

An action challenging the corporate existence of a municipality on the ground of fatal irregularities in the election pursuant to statute at which the creation of the corporation was approved is not an action to determine a right to a public office nor one to prevent the exercise of a franchise by a *de facto* municipal corporation, and therefore it is not required that the question be presented by *quo warranto*. *Ibid.*

ELECTRICITY

§ 7. Connections, Disconnections and Fires on Premises.

The violation of the provisions of an electrical code in regard to the installation of electric wires, conduits, switches and terminal fittings, is negligence *per se*, the code having the force of law by virtue of statute. *Drum v. Bisaner*, 305.

Evidence held sufficient to support inference that fire resulted from negligent installation of electrical equipment. *Ibid.*

EMINENT DOMAIN

§ 1. Nature and Extent of Power.

The requirement of payment of just compensation for the taking of private property under the power of eminent domain is imposed on the Federal government by the Fifth Amendment to the U. S. Constitution and upon the State government and its agencies by the Fourteenth Amendment to the federal constitution and by Article I, Section 17, of the Constitution of North Carolina. *Williams v. Highway Comm.*, 141.

The power of eminent domain is the power of the sovereign to take private property for a public purpose upon payment of just compensation. *Ibid.*

Private property may be taken under the power of eminent domain only for a public use and then only upon the payment of just compensation. *Redevelopment Com. v. Bank*, 595.

§ 2. Acts Constituting a "Taking."

The right of access to a public highway is a property right regardless of whether the right is an easement appurtenant arising out of the ownership of land adjacent to a highway, or whether it is an easement arising out of contract giving the owner of land the right of access to a highway at a stipulated place, and the refusal of the Commission to grant access in accordance with its contract constitutes a "taking" of property. *Williams v. Highway Com.*, 772.

§ 3. What is a Public Purpose within Power of Eminent Domain.

When the facts are determined, what is a public use is a question of law for the court. *Redevelopment Co. v. Bank*, 595.

If the condemnation of land is for a public purpose, the General Assembly may select the agency to exercise the power of eminent domain and the method by which the public purpose is to be accomplished. *Ibid.*

The condemnation of land under the Urban Redevelopment Act is for a public purpose notwithstanding that the property may be conveyed to a private person or corporation, there being safeguards to prevent the land from reverting to a slum area. *Ibid.*

§ 5. Amount of Compensation.

The compensation for the taking of private property under the power of eminent domain is to be measured by the value of the property taken together with damages to the remaining property, but recovery may not be had for other injuries resulting from the taking which are merely incidental thereto and do not constitute the taking of property. *Williams v. Highway Comm.*, 141.

Where an entire leasehold estate is taken in the exercise of the power of eminent domain the lessee is not entitled to recover compensation for the incidental loss attributable to the costs of removing his stock of merchandise, fixtures and other personal property, the interruption or loss of business or loss of customers or goodwill incident to the necessity of moving to a new location, since such losses are not property and are noncompensable. *Ibid.*

Where the easement condemned does not preclude the use of the surface of the land by the owner, the owner is not entitled to recover the value of the land, but only the difference in the value of the land free of the easement and its value subject to the easement. *Sanitary District v. Canoy*, 749.

EMINENT DOMAIN—*Continued.*

Just compensation which must be paid when an entire tract of land is taken is the fair market value of the land; when only a portion of a tract is taken, just compensation is, in the absence of statutory provision for the deduction of general and special benefits, the difference between the fair market value of the entire property before the taking and the fair market value of the remainder following the taking. *In re Land of Alley*, 765.

The reason for the rule for the admeasurement of damages when only a part of a tract of land is taken is to afford the owner compensation for the damage, if any, to the land remaining to him after the taking, and the owner may elect to seek compensation only for the value of the land taken even though it be a part of a single tract. *Ibid.*

The owner is not entitled to recover any special value peculiar to himself which adds nothing to the market value of the property, such as his sentimental attachment to the place as his home. *Ibid.*

§ 6. Evidence of Value.

Where a witness has testified as to his opinion of the reasonable market value of the land immediately before and after the taking, it is competent for him to testify that in arriving at such opinion he took into consideration the highest and best use of which the land was susceptible, since such possible use is properly considered to the extent it affects the present market value of the property, and it being incumbent on the adverse party, if the witness had considered elements and followed methods that did not reflect the true market value of the property either before or after the taking, to show upon cross-examination of the witness. *Williams v. Highway Com.*, 514.

It is competent for a witness to testify as to his opinion of the highest and best use to which the land taken was susceptible. *Ibid.*

§ 7a. Proceedings to Take Land and Assess Compensation in General.

The State Highway Commission may take property and appropriate it to public use without instituting condemnation proceedings. In such event the owner must pursue the prescribed remedy to recover compensation for the taking of his land. *Williams v. Highway Com.*, 772.

Where the agreement between the owner and the State Highway Commission for the taking of land for a limited access highway stipulates that the owner should have access to the highway at a stipulated place, the right of access in accordance with the agreement is a property right, and the refusal of the Commission to allow access at the stipulated place in accordance with the agreement constitutes a "taking" entitling the owner to institute a special proceeding for compensation, and this remedy being available, the owner may not maintain a civil action for damages. *Ibid.*

A consent judgment between the Highway Commission and the owner of land which provides for the payment of a stipulated sum as compensation for a right of way and also the limitation of access to the highway, with further provision that the right of access should be limited to service roads constructed and to be constructed with access to the highway only at points selected and provided by the Commission in its discretion, does not obligate the Commission to construct service roads, and no cause of action arises upon the failure of the Commission to do so. *Ferrell v. Highway Com.*, 830.

EMINENT DOMAIN—*Continued.*

§ 9. Exceptions to Report and Trial upon Appeal.

In a proceeding to recover compensation for the taking of land under the power of eminent domain, the court properly submits the issue as to what amount, if any, the petitioners are entitled to recover and properly instructs the jury thereon, and such charge will not be held for error as permitting the jury to answer the issue "nothing" in the face of petitioner's evidence of damages, since the questions of the sufficiency of the evidence and the determination of the amount of damages lie in the exclusive province of the jury. *Williams v. Highway Com.*, 514.

An instruction that the measure of damages is the difference in the fair market value of the entire tract immediately before and the fair market value of the remaining land immediately after the taking, and that the items going to make up such difference embrace compensation for the land taken and compensation for injury to the remaining lands, to be offset by any special benefits resulting to the land, *is held* without error. *Ibid.*

Instruction as to the amount of compensation for an easement not interfering with the use of the surface of the land by the owner, *held* erroneous. *Sanitary District v. Canoy*, 749.

An instruction that if the land had special value to the owner which could be measured in money, the owner is entitled to recover such value must be held for error when based on evidence of sentimental value peculiar to the owner and not affecting its market value. *In re Land of Alley*, 765.

§ 11. Actions by Owner to Recover Compensation.

The State Highway Commission, as an agency of the State, may be sued only in the manner specifically authorized by statute, and the sole remedy against it for the taking of land for a public purpose is a special proceeding pursuant to G.S. 136-19 and G.S. 40-12 *et seq*, with the sole exception that where the circumstances are such that no statutory procedure is applicable or adequate, the owner, in the exercise of his constitutional rights, may maintain a common law action for compensation. *Williams v. Highway Com.*, 514; *Ferrell v. Highway Com.*, 830.

ESTATES

§ 7. Sale of Estates for Division or Reinvestment.

The provisions of the statute for sale of estates for reinvestment must be strictly complied with. *Blades v. Spitzer*, 207.

While the court may not order the sale of an estate for reinvestment unless the interest of all parties require or would be materially enhanced by such sale, findings that the price offered by a proposed purchaser is fair and adequate and that sale would be to the best interest of the trust estate, the life tenant and the contingent remainderman, together with other findings as to lack of income from the lands of the trust and recurring expenses, etc., are sufficient to show that the sale would materially enhance the interest of all parties even if not actually required to protest their interest. *Ibid.*

The fact that sale of a trust estate for reinvestment would vary the terms of the trust does not preclude the court from decreeing sale for reinvestment, since a court of equity has the power to grant relief against limitations of a trust which work an injury to the trust estate. *Ibid.*

ESTATES—*Continued.*

Even if the answer of a guardian *ad litem* in proceedings to sell lands of an estate for reinvestment raises issues of fact as to whether the price offered is adequate and whether sale is to the best interest of all parties, the statute requires the clerk to make inquiry and determine these very matters before ordering sale, and in any event, where the parties appeal to the Superior Court and agree that the judge should hear the evidence and find the facts, the court has power to determine the issues of fact without intervention of a jury. *Ibid.*

Where the court decrees a sale of trust property for reinvestment the trustee should be required to give bond or other legal provision should be made to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustee should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. *Ibid.*

ESTOPPEL

§ 4. Equitable Estoppel.

The trust imposed the duty upon the trustees to manage the estate and pay a stipulated sum monthly to the widow of trustor, with further provision empowering the trustees to advance money to the children of trustor, the ultimate beneficiaries, as their necessities might require. A child of trustor, who was also a trustee of the estate, collected rents from a parcel of land and placed the rents in the trust fund and induced his cotrustees to make advancements to him and his sister upon representations that adequate property would remain in the estate to provide the allowance to the widow, specifically calling to their attention that the realty was a part of the trust fund. *Held:* The trustee is estopped from denying that the realty is a part of the trust fund. *Miller v. McLean*, 171.

Estoppel may not be invoked in order that the person asserting the estoppel may gain a profit, but estoppel may be asserted only as a shield to save him harmless. *Herring v. Merchandise, Inc.*, 450.

Equitable estoppel is based on conduct or silence of the party to be estopped which amounts to a false representation or concealment of material facts, calculated to mislead or induce a reasonably prudent person to rely thereon, with knowledge, actual or constructive of the real facts; and the party asserting the estoppel must lack knowledge or the means of knowledge as to the truth, and must rely on the conduct or silence of the party sought to be estopped, to his prejudice. *In re Will of Covington*, 546.

Knowledge or reckless indifference to the truth is necessary to invoke the doctrine of estoppel. *Ibid.*

EVIDENCE

§ 2. Judicial Notice of Legislative Acts.

The courts will not take judicial notice of municipal ordinances. *Pharr v. Garibaldi*, 803.

§ 3. Judicial Notice of Matters within Common Knowledge.

It is a matter of common knowledge that, notwithstanding all efforts of prison authorities, prisoners do escape from maximum security prisons

EVIDENCE—*Continued.*

as well as minimum security prisons, and that escaped prisoners, as well as persons who are not prisoners, have committed crimes both in the neighborhood of prisons and elsewhere. *Pharr v. Garibaldi*, 803.

§ 4. Presumptions.

The law presumes that a man is capable of procreation so long as he lives. *Parker v. Parker*, 399.

The law presumes that the possibility of issue is not extinct until death. *Bank v. Hannah*, 556.

The presumption that disability ends when an employee returns to work is a presumption of fact and not of law and is rebuttable, and such presumption is without weight in the face of facts establishing that an employee had partial incapacity during the healing period after her return to work and partial permanent disability thereafter. *Pratt v. Upholstery Co.*, 716.

§ 16. Experimental Evidence; Similar Facts and Transactions.

Toy models of vehicles may be competent to explain the testimony of a witness, but are incompetent as substantive evidence. *McCombs v. Trucking Co.*, 699.

§ 18. Circumstantial Evidence.

The origin of a fire causing the damages in suit may be established by circumstantial evidence. *Patton v. Dail*, 425.

§ 19. Evidence at Former Trial or Proceedings.

It is competent in a civil suit for damages resulting from an automobile accident to ask defendant if he had not pleaded guilty to manslaughter arising out of the same accident. *King v. Powell*, 506. But see *Watters v. Parrish*, 787.

§ 20. Competency of Allegations in Evidence.

Where plaintiff offers in evidence allegations of the answer averring that the defendant's automobile was stopped in its proper lane of travel and had been in a disabled condition for several minutes prior to the time in question, plaintiff is bound by such everments which he himself has introduced in evidence. *Meece v. Dickson*, 300.

§ 26. Best and Secondary Evidence Relating to Writings.

While former inconsistent wills may be competent upon the issue of undue influence, where a prior will is not offered in evidence or its unavailability shown, the court correctly excludes testimony as to the provisions of such former will, since the paper writing itself is the best evidence of its contest. *In re Will of Hall*, 70.

§ 27. Parol and Extrensic Evidence Affecting Writings.

Whether the rule precluding parol evidence in contradiction of or at variance with a written agreement of the parties be regarded as a rule of evidence or a rule of substantive law, allegations in a pleading relating to matters which the pleader is precluded from establishing because of the rule should be stricken on motion. *Products Corp. v. Chestnutt*, 269.

§ 28. Hearsay Evidence.

Testimony that a person had stated that petitioners had been damaged

EVIDENCE—*Continued.*

in a specified sum is hearsay and incompetent unless it comes within an exception to the hearsay rule. *Williams v. Highway Com.*, 514.

§ 31. Admissions and Declarations of Agents.

In order for a statement of an agent to be competent against the principal it must be shown that the statement was made within the scope of the agent's authority, and the burden of so showing is upon the party offering such testimony in evidence. *Williams v. Highway Com.*, 514.

§ 44. Medical Expert Testimony.

A medical expert witness who has examined the injured party and given his opinion as to the permanent partial disability to her neck may testify as to the injured person's physical ability to perform a particular kind of work. *Jones v. Schaffer*, 368.

§ 45. Relevancy and Competency of Evidence in General.

Ordinarily, testimony of any fact or circumstance connected with the matter in issue, or from which any inference of the disputed fact can reasonably be drawn, ought not to be excluded from the consideration of the jury. *Abbitt v. Bartlett*, 40.

§ 56. Evidence Competent to Impeach or Discredit Witness.

In an action against two joint tort-feasors it is competent for counsel of one of defendants to ask the other defendant on cross-examination for the purpose of impeachment whether such other defendant had not entered a plea of guilty to a charge of manslaughter arising out of the same accident, it appearing that the charge of manslaughter was based on every element necessary to establish such other defendant's actionable negligence. *King v. Powell*, 506.

The testimony on cross-examination of one defendant by the other that such defendant had been convicted of driving while under the influence of intoxicating liquor in a prosecution growing out of the same accident is properly excluded even for the purpose of impeaching such defendant as a witness, since under the circumstances the testimony might be given undue weight by the jury, there being no testimony offered as to any conviction of such defendant theretofore or thereafter. *Watters v. Parrish*, 787.

EXECUTORS AND ADMINISTRATORS

§ 4. Appointment of Administrator c.t.a.

The clerk of the Superior Court has authority to grant letters of administration with the will annexed, and the person so appointed has the same rights, powers and duties as though he had been named executor in the will. *Mitchell v. Downs*, 430.

§ 5. Attack of Appointment and Revocation of Letters.

An executor is required to take an oath, G.S. 28-40, and acts in a fiduciary capacity as an officer of the court and a trustee for the beneficiaries of the estate, and when conditions arise which prevent him from faithfully and impartially executing the duties which he has assumed, he should not be expected or permitted to continue to serve. *In re Will of Covington*, 551.

G.S. 28-8 confers authority on the clerk to revoke letters testamentary not only for the specific causes enumerated therein but also, under its

provisions for the removal of a person legally incompetent to serve, the power to remove an executor who is not fit, qualified, or prepared to impartially discharge the duties of the office in the manner directed by the oath. *Ibid.*

The statutory provisions for notice and hearing of proceedings for the removal of an executor are for the benefit and protection of the person who may be removed, and he waives notice when he himself calls to the court's attention the matters which justify his removal. *Ibid.*

Where an executor who has qualified under a paper writing probated in common form thereafter discoveres an instrument later executed by the testator, in which later instrument he is named sole beneficiary, he is under duty to bring such later instrument to the attention of the court, and when he does so and offers it for probate, G.S. 31-12, G.S. 31-13, the clerk properly revokes the letters testamentary theretofore issued under the instrument first probated. *Ibid.*

§ 33. Final Account and Discharge of Personal Representative.

The authority of an executor or administrator to represent the estate continues so long as the estate is not fully settled, unless terminated by his death, resignation, or removal in some manner sanctioned by law. *Mitchell v. Downs*, 430.

Where it is made to appear that the administrator c.t.a. has funds in his hands belonging to the estate, a prior order of the clerk discharging the personal representative may be set aside by motion in the cause, and an action asserting a claim, which if established would constitute a debt of the estate, may be treated as such motion. *Ibid.*

§ 36. Actions against Personal Representative.

An action against an executor or administrator on a claim against the estate may be brought originally in the Superior Court at term time, and the Superior Court has authority in such action to order an account to be taken by such persons as the court may designate, and to adjudge the application and distribution of assets of the estate, or to grant such other relief as the nature of the case may require. *Mitchell v. Downs*, 430.

FIDUCIARIES

Trustees and other fiduciaries must act in good faith and can never paramount their personal interest over the interest of those for whom they have assumed to act. *Miller v. McLean*, 171.

FOOD

§ 1. Liability of Manufacturer to Consumer.

In an action to recover for injuries from a foreign and deleterious substance in a bottled drink, evidence tending to show that the drink was bottled under license from a particular company but failing to show that defendant bottler was responsible for bottling this particular drink, with evidence of only one other instance when a drink bought from the same retailer contained a foreign substance, is insufficient to make out a case. *Elledge v. Bottling Co.*, 337.

FRAUD

§ 5. Reliance on Misrepresentation and Deception.

An essential element of actionable fraud is that the party to whom the alleged false and fraudulent representation is made must reasonably rely thereon and be deceived thereby to his injury. *Products Corp. v. Chestnutt*, 269.

§ 8. Pleadings in Actions for Fraud.

It is not sufficient to allege the elements of fraud in general terms, but it is required that the pleader allege facts, which if true, would constitute fraud. *Products Corp. v. Chestnutt*, 269.

FRAUDS, STATUTE OF

§ 5. Contracts to Answer for Debt or Default of Another.

Evidence that plaintiffs agreed to do certain construction work, which agreement was made with an individual who was president of the development company and the owner of practically all its shares of stock, upon his representation to the effect that he would be personally liable for the contract price, *is held* sufficient to be submitted to the jury on the question of whether the individual contracted for the work in his individual capacity, as well as in behalf of the corporation, and his agreement is an original promise not coming within the statute of frauds. *May v. Haynes*, 583.

§ 6c. Contracts Affecting Realty — Leases.

Evidence that the agent of lessors advised the agent of lessee that lessors, effective the end of that month, would accept the lessee's prior offer to surrender the premises more than three years before the end of the term, and that the lessee assigned the lease during the same month and the assignee took possession of the property, *is held* insufficient to support a cause of action by lessors against the lessee's assignee, since the agreement to accept a surrender of the lease at a future date was executory and precluded by the statute of frauds. *Herring v. Merchandise, Inc.*, 450.

HABEAS CORPUS

§ 3. To Determine Right to Custody of Infants.

Decree of another state awarding custody of children to father in action in which mother was not personally served does not oust jurisdiction of our court to hear petition of mother for custody of children, the children then being in this State. *Lennon v. Lennon*, 659.

HOMICIDE

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence held insufficient to show that death of the deceased was the result of any act on the part of defendant. *S. v. Pope*, 356.

The direct and circumstantial evidence in this case *is held* sufficient to overrule motions for judgment as of nonsuit and to support the verdict of guilty of manslaughter. *S. v. Rhodes*, 438.

§ 26. Instructions on Manslaughter.

In a prosecution for involuntary manslaughter, a charge which fails to

HOMICIDE—*Continued.*

define culpable negligence and proximate cause must be held for error. *S. v. DeWitt*, 457.

§ 30. Verdict.

A common law indictment for murder will not support a verdict of guilty of assault with a deadly weapon. *S. v. Rorie*, 579.

HOSPITALS

§ 3. Liabilities of Hospital to Patient.

Whether a charitable hospital is immune from liability for negligence as a matter of law is not presented in the lower court by motion to nonsuit. *Robinson v. Hospital Authority*, 185.

HUSBAND AND WIFE

§ 5. Contracts and Conveyances between Husband and Wife.

Where land held by entireties is sold, husband and wife hold proceeds as tenants in common, and she may follow her share of funds under doctrine of trust persuit. *Bowling v. Bowling*, 527.

§ 10. Requisites and Validity of Deeds of Separation.

An unsigned deed of separation has no legal effect. *Wade v. Wade*, 330.

§ 14. Creation and Existence of Estates by Entirety.

Conveyance of land to husband and wife creates estate by entireties even though wife furnishes no part of consideration. *Bowling v. Bowling*, 527.

§ 17. Sale, Termination and Survivorship of Estates by Entirety.

Upon the sale of lands held by entireties the proceeds become personalty and belong to the husband and wife as tenants in common, and although they have the right to dispose of the proceeds by contract *inter se* if they so desire, in the absence of such contract the wife's share remains her sole and separate estate. *Bowling v. Bowling*, 527.

INDICTMENT AND WARRANT

§ 18. Sufficiency of Indictment to Support Conviction of Other Degrees of Crime.

A statutory indictment for manslaughter which contains no averment that the manslaughter was commited by an assault, and no independent charge of assault and battery or assault with a deadly weapon is insufficient to support a conviction of an assault with a deadly weapon, since the lesser offense is not necessarily included in the charge of the graver offense. *S. v. Rorie*, 579.

INFANTS

§ 5. Representation of Minor by Next Friend.

Judgment in *ex parte* proceeding, approved by judge, affirming compromise settlement, is binding on minor. *Gillikin v. Gillikin*, 1.

§ 6. Appointment, Duties and Authority of Guardian ad Litem.

A guardian *ad litem* and his attorney may waive jury trial and agree

INFANTS—*Continued.*

that the Superior Court may hear the evidence and find the facts in a proceeding affecting the estate. *Blades v. Spitzer*, 207.

§ 8. Jurisdiction to Avoid Custody of Infant.

Where husband and wife are domiciled in this State and the husband surreptitiously removes the children of a marriage from this State to another state for the purpose of depriving our courts of jurisdiction over the children, a decree of divorce obtained by the husband in such other state awarding the custody of the children to him, obtained without personal service on the wife and without her appearance either in person or by attorney, does not deprive the courts of this State of jurisdiction to determine the right of custody of the children in *habeas corpus* proceedings instituted by the wife after the children had been brought back into this State and are residing here with her. *Lennon v. Lennon*, 659.

§ 9. Decree Awarding Custody.

In this *habeas corpus* proceeding to determine the right to the custody of the children of the marriage as between their divorced parents, findings to the effect that the mother was providing a suitable and healthful domicile for them with her in the home of her parents, that the mother was a woman of excellent character and reputation, that the children in a private interview expressed their desire to remain with their mother, that the home of the husband, presided over by his second wife, would not provide a suitable or happy environment for them, is tantamount to a finding that the best interest of the children would be served by placing them in the custody of their mother in the home of her parents, and supports decree to this effect. *Lennon v. Lennon*, 659.

INJUNCTIONS

§ 2. Invasion of or Threat to Rights of Party being in General.

Injunction may not issue if there is no allegation that plaintiffs' rights were imminently threatened. *Starbuck v. Havelock*, 176.

§ 4. Injunction to Restrain Violation of Ordinance.

An individual may not seek to restrain the violation of a municipal zoning ordinance upon mere allegation of the conclusions that defendant's use was a violation of the ordinance and would result in irreparable injury to plaintiff, but plaintiff is required to allege the facts supporting the conclusions of defendant's violation of the ordinance and irreparable injury to plaintiff. *Pharr v. Garibaldi*, 803.

§ 5. Injunction to Restrain Enforcement of Ordinance.

While injunction will not ordinarily lie to restrain the enforcement of an ordinance, injunction will lie if an ordinance is arbitrary, discriminatory and based solely on aesthetic considerations, and compliance with the ordinance would necessitate the expenditure of a large sum of money by the property owners to make their buildings conform to its provisions, and thus result in irreparable injury. *Restaurant v. Charlotte*, 324.

§ 7. Injunction to Restrain Occupancy or Use of Land.

Findings *held* sufficient to support order enjoining enforcement of ordinance against maintenance of business signs over sidewalk. *Restaurant v. Charlotte*, 324.

Maintenance of prison may not be enjoined in absence of allegation of any unauthorized and unlawful conduct on part of officials in charge. *Pharr v. Garibaldi*, 803.

§ 9. Enjoining Invasion of Franchise Rights.

While the invasion of the franchise right of a corporation is subject to injunction, as a general rule a preliminary order will not be issued or continued unless a reasonably clear showing of irreparable injury is made out. *Service Co. v. Shelby*, 816.

§ 13. Continuance and Dissolution of Temporary Orders.

Findings to the effect that a municipal ordinance prohibiting the maintenance of business signs over sidewalks in a designated area of the city was based solely on aesthetic consideration, discriminated without basis as between the area subject to the ordinance and the territory outside the area, and that it would cost the property owners a very large sum to make their properties conform to the ordinance, are sufficient to support an order issued upon notice enjoining the enforcement of the ordinance until the final hearing. *Restaurant v. Charlotte*, 324.

Where defendant denies plaintiffs' basic equity, alleges that the continuance of the temporary restraining order to the hearing would result in irreparable injury to defendant, and alleges that plaintiffs have an adequate remedy at law without resort to the equitable powers of the court, the denial of plaintiffs' motion for continuance of the temporary order to the hearing on the merits will not be disturbed on appeal, plaintiffs' having failed to show that the denial of their motion for a continuance was contrary to some rule of equity or the result of an improper exercise of judicial discretion. *Whaley v. Taxi Co.*, 586.

Upon the hearing of an order to show cause why a temporary restraining order should not be continued until the final determination of the action on the merits, the merits of the action are not before the court, and it is error for the court, even though it has properly refused a motion for the continuance of the temporary restraining order, to dismiss the action and tax plaintiffs with the costs. *Ibid.*

Where the pleadings in an action for a permanent injunction raise no issue of fact but present only a question of law, the court may determine the question of law upon the hearing of the order to show cause, and dismiss the action. *DeLoatch v. Beamon*, 754.

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the final hearing, the ultimate issues are not before the court, but the court is required to ascertain only if there is probable cause that plaintiff will be able to prevail on the merits and whether there is reasonable apprehension of irreparable loss to plaintiff if the temporary order is not continued to the hearing. *Service Co. v. Shelby*, 816.

Upon the hearing of an order to show cause, it is the duty of the court to consider the inconvenience and damage which would result to defendant upon the continuance of the order, as well as the benefit that will accrue to plaintiff. *Ibid.*

In suit by utility to restrain city from serving customer outside of city limits with natural gas, dissolution of temporary restraining order was proper upon failure of plaintiff to show irreparable injury, the questions

of whether the matter was *ultra vires* the city and whether the proposed service was invasion of utility's franchise being for determination upon final hearing. *Ibid.*

INSANE PERSONS

§ 10. Actions against Insane Persons.

A guardian *ad litem* and his attorney may waive jury trial and agree that the Superior Court may hear the evidence and find the facts in a proceeding affecting the estate. *Blades v. Spitzer*, 207.

INSURANCE

§ 17. Avoidance of Policy for Misrepresentation or Fraud.

If insurer would not have issued the policy had it known the truth, a false statement in an application for insurance to the effect that insured had never had diabetes constitutes a material misrepresentation as a matter of law, entitling insurer to rescind the policy upon tender of the premiums paid, nothing else appearing. *Swartzberg v. Ins. Co.*, 150.

Where plaintiff asserts that insurer's right to rescind is barred by the statute of limitations, the burden is on insurer to prove that its right to rescind was asserted within the time allowed. *Ibid.*

The statute does not begin to run against insurer's right to rescind until insurer knows, or should know in the exercise of due care, the falsity of the representations. *Ibid.*

Representation that insured had not been treated by a physician in the prior two years may be understood as an approximate statement and evidence that insured's treatment by a physician had extended to a week or so less than two years prior to the application does not justify nonsuit on the affirmative defense. *Hill v. Casualty Co.*, 649.

Representation that applicant had not been refused other insurance is false when applicant had been refused rider on policy on son's life waiving premiums in event of applicant's death. *Ibid.*

§ 18. Knowledge of Local Agent and Waiver of Right to Declare Forfeiture.

Insurer is not estopped to declare a forfeiture of a policy for material misrepresentations in the application, nor does it waive its right to rescission on this ground, by paying claims or accepting premiums, unless at the time of doing so it had knowledge or notice of the falsity of the representations. *Swartzberg v. Ins. Co.*, 150.

§ 26. Actions on Life Policies.

In an action on an insurance policy the burden is upon plaintiff to establish facts sufficient to constitute waiver or estoppel of insurer to set up a particular defense. *Swartzberg v. Ins. Co.*, 150.

The burden is on insurer to prove that its right to rescend was not barred by the statute of limitations. *Ibid.*

The right to avoid a policy of life insurance on the ground of false representations in the application is an affirmative defense upon which the insurer has the burden of proof. *Hill v. Casualty Co.*, 649.

Evidence held not to establish misrepresentations as matter of law in

averments in policy as to health, but insurer was entitled to introduce evidence that applicant had been refused rider on son's policy waiving premiums in event of applicant's death in order to show falsity of averment that applicant had not been refused other insurance. *Ibid.*

Where insurer denies liability solely on the ground of false and fraudulent representations in the application for the insurance, defends the action solely on this ground and tenders no other issues, insurer may not contend on appeal that its motion to nonsuit should have been allowed for plaintiff's failure to offer evidence that she was the person entitled to the proceeds, even though insurer had made a formal denial of plaintiff's allegations in this respect, since in such instance insurer has waived such defense and its objections and exceptions must be considered in the light of the theory of trial below. *Ibid.*

INTOXICATING LIQUOR

§ 5. Possession and Possession for Sale.

The possession of nontaxpaid whiskey in any quantity anywhere in this State is, without exception, unlawful, G.S. 18-48, G.S. 18-50, and raises the presumption that the possession is for the purpose of sale notwithstanding that the quantity be less than one gallon. G.S. 18-11. *S. v. Guffey*, 60.

Possession of nontaxpaid whiskey within the meaning of G.S. 18-48 may be either actual or constructive. *Ibid.*

The possession by an individual of intoxicating liquor for the purpose of sale is unlawful in this State. *S. v. Rogers*, 499.

§ 6. Presumptions from Possession.

The possession of more than one gallon of intoxicating liquor at any one time, whether in one or more places, and whether actual or constructive, is *prima facie* evidence of possession for the purpose of sale. *S. v. Rogers*, 499.

§ 13c. Sufficiency of Evidence on Charge of Possession or Possession for Sale.

Evidence tending to show that when the sheriff entered defendant's home he saw a jar of nontaxpaid whiskey unconcealed in the kitchen, that there were then present in defendant's house five adults, including defendant's mother and daughter, that defendant was not then at home but returned while the officers were there and ran to the sheriff, but without evidence that the nontaxpaid liquor was in the kitchen at the time defendant left her home, is insufficient to be submitted to the jury on the question of defendant's possession of the liquor, either actual or constructive. *S. v. Guffey*, 60.

Evidence tending to show that defendants jointly occupied an apartment and that more than two and one-half gallons of taxpaid liquor was found in the apartment and in the car in which they were riding, together with other circumstantial evidence, *is held* sufficient to be submitted to the jury as to each defendant on the charges of unlawful possession of intoxicating liquor and possession of liquor for the purpose of sale. *S. v. Rogers*, 499.

JUDGMENTS

§ 8. Nature and Essentials of Judgment by Consent and Retraxit.

A judgment of nonsuit entered with the approval of the attorney for defendant upon plaintiffs' statement that all matters in controversy had been settled between the parties and that plaintiffs disclaim any further interest in the controversy, is a judgment in *retraxit* amounting to a decision on the merits. *Overton v. Boyce*, 63.

§ 10. Construction and Operation of Judgments by Consent.

Since a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, where the consent judgment sued on is set out in the complaint the effect and construction of the agreement must be determined upon demurrer on the basis of the specific provisions of the judgment rather than the more broadly stated allegations in the complaint or the conclusions of the pleader as to its character and meaning. *Ferrell v. Highway Com.*, 830.

A consent judgment, being the contract of the parties, must be construed as a whole to ascertain its meaning and effect. *Ibid.*

§ 13. Judgments by Default in General.

Where a defendant has a consent judgment against her set aside on the ground that she did not employ the attorney who filed answer and did not authorize him to consent to the judgment in her behalf, she may not rely upon the answer filed by the attorney, and the court, upon its finding that she has no meritorious defense, properly refuses to exercise its discretionary power to permit her to file answer after the expiration of the time allowed, and properly enters judgment by default. *Owens v. Voncannon*, 461.

§ 19. Void Judgments.

A judgment rendered against a party who is dead at the time of the institution of the action is void and may be collaterally attacked by his heirs or devisees. *Page v. Miller*, 24.

Laches cannot estop a party from attacking a void judgment. *Ibid.*

A judgment against a defendant who is not brought into court in some way sanctioned by law and who does not make a voluntary appearance is void. *Bank v. Jordan*, 419.

§ 21. Attack of Irregular Judgments.

A judgment entered in an *ex parte* proceeding authorizing the next friend of a minor to accept on behalf of the minor a sum offered by insurer in settlement of a claim, which judgment is approved by the resident judge, is not void for mere irregularities, and it being found that the interest of the minor was duly represented by the next friend of the minor and the attorney employed by him, and that the settlement constituted a good and substantial recovery on behalf of the minor, so that there is no *indicia* of fraud, the judgment is not subject to collateral attack, and precludes an action by the minor or his next friend to recover on the same cause of action. *Gillikin v. Gillikin*, 1.

§ 35. Judgments of Retraxit and Dismissal as Bar.

A judgment of *retraxit* is a bar to a subsequent action between the parties upon the identical subject matter. *Overton v. Boyce*, 63.

JUDGMENTS—*Continued.*

§ 46. Rights of Assignees and Priorities.

Where the insurer of one tort-feasor pays the judgment and has it transferred to a trustee for the benefit of insured, the insurer has no right of contribution under G.S. 1-240 against the other tort-feasors. *Squires v. Sorahan*, 589.

JUDICIAL SALES

§ 3. Bids, Advance Bids and Resales.

The last and highest bidder at a judicial sale is but a proposed purchaser and acquires no interest in the land prior to confirmation. *Page v. Miller*, 23.

§ 4. Confirmation.

Upon due confirmation the last and highest bidder becomes the equitable owner of the land, and his interest can be set aside only upon motion in the cause for mistake, fraud or collusion, and the more fact that the amount of the bid is not promptly paid does not destroy his equitable estate. *Page v. Miller*, 23.

Upon confirmation the title of the judgment debtor is divested and his heirs or devisees can acquire no estate in the land. *Ibid.*

Confirmation of a judicial sale more than twenty years after the entry of the judgment directing the sale, is a nullity and neither vests title in the highest bidder nor divests the title of the judgment debtor. *Ibid.*

§ 5. Validity and Attacks of Sale, and Title of Purchaser.

The fact that a corporation purchasing property at a judicial sale, duly confirmed, has its charter revoked under G.S. 105-230 prior to its assignment of its bid to the judgment creditor does not deprive the assignee of its rights in the land, since G.S. 105-231 does not have the effect of depriving the corporation of its properties or penalizing innocent parties. *Page v. Miller*, 23.

LANDLORD AND TENANT

§ 10½. Termination of Lease by Agreement of Parties.

Evidence that the agent of lessors advised the agent of lessee that lessors, effective the end of that month, would accept the lessee's prior offer to surrender the premises more than three years before the end of the term, and that the lessee assigned the lease during the same month and the assignee took possession of the property, *is held* insufficient to support a cause of action by lessors against the lessee's assignee, since the agreement to accept a surrender of the lease at a future date was executory and precluded by the statute of frauds. *Herring v. Merchandise, Inc.*, 450.

§ 11. Tenancies from Year to Year and Month to Month.

Where plaintiff's own evidence shows that at the end of each year he made a separate contract with defendant landlord for the ensuing year, and further discloses that no agreement for renting the land for the year in question was reached, plaintiff's own evidence discloses that he was not a tenant from year to year and nonsuit is properly entered in his action for breach of lease agreement. *Davis v. Ralph*, 67.

LARCENY

§ 4. Warrant and Indictment.

A warrant for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property, is fatally defective. *S. v. Biller*, 783.

§ 10. Judgment and Sentence.

Larceny from the person in any amount is punishable for as much as ten years in the State's prison. *S. v. Stevens*, 331.

LIMITATION OF ACTIONS

§ 7. Fraud, Mistake and Ignorance of Cause of Action.

G.S. 1-52(9) is applicable to the right of insurer to rescind a policy of insurance for material misrepresentations in the applications, and insurer's right to rescind is not barred until three years after insurer knew or, in the exercise of due care, should have known of the falsity of the representations. *Swartzberg v. Ins. Co.*, 150.

§ 13. Part Payment.

Payments made on a note prior to the effective date of Chapter 1076, S.L. 1953 by one person primarily liable has the same legal effect as a written promise and starts the statute of limitations running anew as to all persons primarily liable thereon as of the date of such payment, action on the note not being barred at the time of the payment. *Pickett v. Rigsbee*, 200.

Under 1953 statute, payment by maker without knowledge or ratification of sureties does not bind sureties. *Ibid.*

§ 17. Burden of Proof.

Where defendant sets up the right to rescind for fraud the contract sued on, defendant has the burden of showing that the right to rescind was asserted within the time allowed. *Swartzberg v. Ins. Co.*, 150.

MALICIOUS PROSECUTION

§ 1. Nature and Distinctions of Cause of Action in General.

If a prosecution is wrongfully, knowingly and intentionally maintained without just cause or excuse, there is legal malice which alone is sufficient to support an action for malicious prosecution, and plaintiff must show actual malice only if he seeks to recover punitive damages. *Abbitt v. Bartlett*, 40.

§ 10. Competency and Relevancy of Evidence.

The acquittal of defendant by a court of competent jurisdiction, while necessary to show a termination of the prosecution, is not evidence one way or the other as to want of probable cause, and an instruction to this effect is not error. *Abbitt v. Bartlett*, 40.

Where upon the hearing of a prosecution for maintaining a public nuisance, the court directs the prosecuting witness and the defendant and her attorney to go into an ante-room and discuss the matter in a subsequent action for malicious prosecution the prosecuting witness, as defendant in the civil action, may testify, as bearing upon the questions of probable

MALICIOUS PROSECUTION—*Continued.*

cause and malice, that during the conference the attorney told defendant in the criminal prosecution that she would have to abide by the court's direction and clean up her premises. *Ibid.*

§ 12. Instructions.

Charge *held* to have diferentiated between actual and legal malice and to have instructed the jury that actual malice was not necessary for recovery of compensory damages. *Abbitt v. Bartlett*, 40.

While ordinarily it is better practice for the court to submit the issue of probable cause before the issue of malice, the submission of the issues in inverse order will not be held prejudicial where the court has correctly instructed the jury that legal malice may be inferred from want of probable cause and has correctly expressed the rules of law in regard thereto. *Ibid.*

MANDAMUS

§ 1. Nature and Grounds of the Writ in General.

Mandamus may not be used as a substitute for an appeal but may be issued only in the exercise of an original jurisdiction. *Young v. Roberts*, 9.

Mandamus lies to enforce a clear legal right only when there is no other adequate remedy available. *Ibid.*

MASTER AND SERVANT

§ 1. Contract of Employment in General.

Where a resident contractor, obligated to employ union men from a local union in this State, has its foreman on a job in another state call on the union's manager for workers skilled in certain lines, and the manager calls a resident worker to the union office here and gives him a referral slip, which entitles the employee to travel and reporting time if the employer rejects him because work is not available, and the employee takes the referral slip to the foreman on the job outside the state, and enters upon the job there, *held* the act of the employee in reporting to the union office in this State, accepting the referral slip and starting upon the trip to the job, constitutes an acceptance of the offer of employment, so that the contract of employment is made and completed in this State. *Warren v. Dixon Co.*, 534.

§ 10. Duration of Employment and Wrongful Discharge.

Ordinarily an employer is entitled to discharge an employee when the employee becomes mentally incapacitated to perform the duties of his employment. *Haynes v. R. R.*, 391.

§ 14. Collective Bargaining; State and Federal Regulations.

The National Labor Relations Act does not deprive our courts of jurisdiction to hear and determine an action by union members against the union upon allegations that in negotiating the collective bargaining agreement with the employer the union acted arbitrarily and unjustly in depriving plaintiff members of their proper seniority rights. *Gainey v. Brotherhood*, 256.

Where an employee does not seek reinstatement and damages upon con-

tention that his discharge was invalid, but accepts his discharge and seeks to recover damages on the ground that his discharge was wrongful, the state court has jurisdiction, and his complaint in such action is not demurrable for its failure to allege the exhaustion of administrative procedure. *Haynes v. R. R.*, 391.

§ 15. Negotiation, Operation and Construction of Labor Contracts.

A union member is entitled to judicial relief from a union's attempting to deprive him, or depriving him, of seniority rights secured by contract with an employer, when such union action is arbitrary, fraudulent, illegal, or in excess of the union's powers. *Gainey v. Brotherhood*, 256.

Evidence held insufficient to show that plaintiffs' seniority rights were adversely affected by the labor contract attacked. *Ibid.*

A member of a union, as a third party beneficiary, may maintain an action against the employer for his discharge in breach of the contract between his union and the employer, but his rights under the agreement can be no greater than they would have been had he entered into the contract directly with the employer. *Haynes v. R. R.*, 391.

Where the labor contract between the employer and the union authorizes the employer to discharge an employee for insubordination, the right of the employer to discharge an employee for such reason obtains regardless of whether the employee at the time of his act of insubordination was sane or insane. *Ibid.*

Where the employee does not elect to pursue his remedies under the Railroad Labor Act but institutes an action for wrongful discharge against the employer, the employer may assert any cause or reason it may have in justification of the discharge of the employee, and it is not required that the employer show compliance with the provisions of the labor contract in regard to notice and hearing of a charge against the employee prior to dismissal. *Ibid.*

The complaint in this action for wrongful discharge of plaintiff railroad employee is held to affirmatively disclose that plaintiff committed an act of insubordination constituting a ground for discharge under the subsisting labor contract, and to disclose that the employee was discharged only after he became mentally incompetent, warranting the railroad employer to discharge him in the interest of safety regardless of the terms of the contract of employment with respect to hearing, and demurrer to the complaint should have been sustained. *Ibid.*

§ 32. Liability of Employer for Injuries to Third Persons in General.

An unsatisfied judgment against a servant or one partner does not bar the injured person from suing the master or the other partner, but such judgment may be properly pleaded by defendant in the subsequent action, since the liability of the employer or the other partner cannot exceed that of the actual tort-feasor. *Griffin v. McBrayer*, 54.

In the absence of any evidence of negligence on the part of the asserted employee, nonsuit in favor of the employer sought to be held under the doctrine of *respondeat superior* is properly allowed. *Robinson v. Hospital Authority*, 185.

§ 45. Compensation Act — Construction in General.

The Workmen's Compensation Act is to be liberally construed to effectu-

MASTER AND SERVANT—*Continued.*

ate its purposes to provide a measure of relief for those dependant upon employees who have unfortunately been injured or killed by accident in industry. *Shealy v. Associated Transport*, 738.

§ 49. "Employees" of the State or Political Subdivisions.

An injury sustained by a member of the North Carolina National Guard while on active duty is compensable under the Workmen's Compensation Act. *Wesley v. Lea*, 540.

§ 67. Amount of Compensation, Temporary and Permanent, and Partial and Total Disability.

The presumption that disability ends when an employee returns to work is a presumption of fact and not of law and is rebuttable, and such presumption is without weight in the face of facts establishing that an employee had partial incapacity during the healing period after her return to work and partial permanent disability thereafter. *Pratt v. Upholstery Co.*, 716.

§ 74. Review of Award for Change of Condition.

Where only an interlocutory award has been entered, the hearing on the employee's claim for permanent partial disability thereafter appearing is not a hearing for change of condition, and G.S. 97-47 has no application. *Pratt v. Upholstery Co.*, 716.

§ 76. Compensation Act — Persons Entitled to Payment.

The Industrial Commission has no jurisdiction to hear conflicting claims of persons to award that has been paid. *Hill v. Cahoon*, 295.

Where a widow has been properly awarded compensation as the sole dependent of her deceased husband, her remarriage does not forfeit her right to receive further installments. *Ibid.*

Where a widow properly awarded compensation as the sole dependent of her deceased husband dies before all the installments of compensation have been paid, the commuted value of such future installments is properly paid to her personal representative, and the next of kin of the deceased employee, who are not dependents, are not entitled thereto. G.S. 97-38(1). *Ibid.*

Those conclusively presumed to be wholly dependent under the Compensation Act are not given any priority over those wholly dependent in fact within the meaning of the Act, and therefore where an employee leaves a mother who has been wholly dependent upon the employee for a number of years and also leaves her husband surviving, the mother of the employee and the widower are entitled to share equally in the compensation for the death of the employee. *Shealy v. Associated Transport*, 738.

§ 82. Jurisdiction of Industrial Commission in General.

While the Industrial Commission has jurisdiction to amend its award in regard to persons entitled to receive compensation awarded by it, it has no jurisdiction to enter a judgment in favor of a party in an action to recover compensation theretofore paid to another, but the Superior Court has jurisdiction to determine conflicting claims of persons in regard to compensation which has already been paid. *Hill v. Cahoon*, 295.

MASTER AND SERVANT—*Continued.*

The approval of an interlocutory agreement for the payment of compensation does not deprive the Industrial Commission of jurisdiction to hear the employee's claim thereafter filed for compensation for partial, permanent disability, the employee not having signed a "closing receipt." *Pratt v. Upholstery Co.*, 716.

§ 83. Jurisdiction of Commission — Employment in This and Other States.

Where the evidence is sufficient to support findings of the Industrial Commission that the contract of employment was made in this State and that the contract was not expressly for services exclusively outside the State, the North Carolina Industrial Commission correctly exercises jurisdiction over a claim of the employee for injuries resulting in the performance of the work. *Warren v. Dixon Co.*, 534.

§ 84. Compensation Act — Exclusion of Common Law Action or Other Remedies.

The Industrial Commission has exclusive original jurisdiction of a claim by a National guardsman for injuries received while on active duty, resulting from the negligence of another guardsman while on active duty. *Wesley v. Lea*, 540.

A negligent injury inflicted by one employee upon another in the course of their employments is within the exclusive jurisdiction of the Industrial Commission, notwithstanding that the negligence of the one may have been reckless and wanton, it being required that the injury be intentionally inflicted in order for the injured employee to be entitled to maintain an action at common law against the other. *Ibid.*

Injury to guardsman held to have been inflicted during the course of duty and not while the parties were pursuing private purpose. *Ibid.*

The Compensation Act does not preclude proceedings under the State Tort Claims Act to recover for the death of a prisoner resulting from the negligence of a State employee while the prisoner was performing an assigned task. *Ivey v. Prison Department*, 615.

§ 85. Common Law Judgment or Settlement as Precluding Claim under Compensation Act.

Where an injured employee has made settlement with the third person tort-feasor in an amount in excess of the liability of the employer under the Compensation Act, he may not thereafter maintain a proceeding against the employer and the insurer under the Compensation Act for the purpose of recovering one-half his attorneys' fees incurred in the proceeding against the third person tort-feasor, since the statutory provisions for the proportionate charge of the attorney's fee between the employer and employee does not apply when there is no recovery under the Compensation Act and the attorney's fee is not approved by the Commission. G.S. 97-10 prior to the 1959 amendment. *Hefner v. Plumbing Co.*, 277.

§ 86. Common Law Right of Action against Third Person Tort Feasor.

Under G.S. 97-10 the insurance carrier which has paid the claim for an injury to an employee has the exclusive right for the period of six months from the date of the injury to maintain an action against the third person tort-feasor for negligence causing the injury, and when a counterclaim is set up by such injured employee the court properly al-

MASTER AND SERVANT—*Continued.*

lows an amendment to allege that the counterclaim was being prosecuted by the insurer in the name of the employee and correctly charges the jury in regard thereto. The repeal of G.S. 97-10 by the Act of 1959, by its express terms, does not apply to an injury occurring prior to its ratification. *Ray v. Membership Corp.*, 380.

§ 88. Filing of Claim in General.

An interlocutory award for compensation, entered without a medical report and entered before the employee returned to work, does not prevent the employee from thereafter filing a claim for permanent partial disability thereafter appearing. *Pratt v. Upholstery Co.*, 716.

§ 90. Presecution of Claim and Proceedings before The Commission.

The fact that an employee has accepted a check marked as final payment of temporary total disability does not estop the employee from prosecuting a claim for partial permanent disability when the employee has signed no "closing receipt." *Pratt v. Upholstery Co.*, 716.

§ 91. Findings and Award of Commission.

Approval by the Industrial Commission of an agreement of the parties for payment of compensation is a judicial act, and the approval agreement becomes an award of the Industrial Commission. *Pratt v. Upholstery Co.*, 716.

The appeal by the Commission of an agreement for compensation, entered prior to the time the employee returned to work and entered without a final medical report or the signing of a "closing receipt" is an interlocutory award, and does not preclude a hearing on the employee's claim for permanent partial disability thereafter appearing. *Ibid.*

§ 94. Compensation Act — Appeals to Supreme Court.

Where those findings of fact of the Industrial Commission which are suported by the evidence are sufficient predicate for its award, the award will not be disturbed even though another finding, immaterial to the decision, is not supported by any evidence. *Warren v. Dixon Co.*, 534.

Where there are no exceptions by any of the parties to the findings of fact by the hearing commissioner, the findings are final and conclusive. *Pratt v. Upholstery Co.*, 716.

Claimant's exception to the judgment of the Superior Court upon appeal from an award of the Industrial Commission presents the sole question whether the findings of fact support the judgment. *Ibid.*

MORTGAGES

§ 30. Upset Bids and Resales.

The fact that the trustee's sale upon foreclosure of a deed of trust was not reported within five days as directed by G.S. 45-21.26 does not deprive the clerk of jurisdiction to thereafter order a resale based on a raised bid, G.S. 45-21.29, and the purchaser at the resale acquires title upon the execution of deed to him, the foreclosure being regular in all other respects. *Gallos v. Lucas*, 480.

MUNICIPAL CORPORATIONS

§ 1. Definition, Creation and Requisites of Municipal Corporations.

The Legislature may provide for an election to determine whether specific locality should be incorporated, but a provision that only persons who had resided in the area for not less than a year should be eligible to election as municipal officers is void; the valid part of the statute will be upheld as separable from the invalid provisions. *Starbuck v. Havelock*, 176.

In such election, neither a minority vote in a legal election nor a majority vote at election held in such manner as to deprive the citizens of full opportunity to vote could produce corporate existance. *Ibid.*

While such election could not produce a *de facto* corporation, it could present an opportunity for a *de facto* corporation to arise if there be colorable compliance with the statute and also an exercise of corporate power pursuant thereto. *Ibid.*

§ 2. Territorial Extent and Annexation.

City held not entitled to expand proceeds of water and sewer bonds outside of city until such areas have been annexed, but may do so after annexation. *Upchurch v. Raleigh*, 676; *Eakley v. Raleigh*, 683.

§ 4. Legislation Control and Supervision and Powers of Municipal Corporations in General.

Legislature has power to determine how municipality may come into existance, the powers it may exercise, the area in which it may act, the number of officials, and other incidental matters. *Starbuck v. Havelock*, 176.

The delegation of power to municipal corporations to determine the necessity of a Urban Redevelopment Commission is valid. *Redevelopment Com. v. Bank*, 595.

The authority of a municipality to extend its public utilities to customers residing outside its corporate limits, G.S. 160-255, and to do so without a certificate of public convenience and necessity when no revenue bond issue is involved, is subject to reasonable limits, not only in regard to the territorial extent of the venture, but also in regard to the public benefit, not only as to residents of the city, but also in regard to the rate structure in the area and the possible result of discrimination in rates, the increase in rates to customers of utilities operating within the territory, and damage to the capital structure of such utilities. *Service Co. v. Shelby*, 816.

§ 5. Distinction between Governmental and Private Powers.

Action of the city manager of a municipal corporation in instigating the arrest and prosecution of a municipal employee for embezzlement is done in the performance of a governmental function imposed upon the city manger by statute. *McDonald v. Carper*, 29.

§ 7. Officers and Agents.

Nothing else appearing, it will be assumed that the powers and duties of the city manager of a municipal corporation are those conferred and defined by the General Statutes. G.S. 160-349. *McDonald v. Carper*, 29.

Legislature may not prescribe qualifications for municipal officers at variance with those prescribed by Constitution. *Starbuck v. Havelock*, 176.

§ 10. Liability for Torts.

A city may not be held liable for a tort committed by its city manager

in the discharge of a governmental duty imposed upon him by statute. *McDonald v. Carper*, 29.

§ 12. Injuries from Defects and Obstructions in Streets and Sidewalks.

A municipality is not an insurer of the safety of travelers on its streets and sidewalks and the doctrine of *res ipsa loquitur* does not apply in actions to recover for injuries received by a pedestrian in a fall on a sidewalk, nor does the existence of a hole in the sidewalk establish negligence *per se*, but plaintiff must show that the officers of the municipality knew or by the exercise of due care should have known of the defect and could have reasonably foreseen that such defect might have caused injury to travelers using the sidewalk in a proper manner. *Smith v. Hickory*, 316.

Evidence that plaintiff fell to her injury when she stepped into a hole in the sidewalk, some three inches deep and some six to seven inches long, is insufficient to be submitted to the jury on the issue of the municipality's negligence in the absence of evidence as to how long the hole had existed in the sidewalk prior to the injury, nor is this hiatus supplied by evidence that the sides of the hole were smooth in the absence of evidence that the edges of the hole were at any time jagged or sharp and had been worn smooth by pedestrian use. *Ibid.*

§ 16. Appropriation of Private Water and Sewer Systems by Municipality.

Appropriation of water mains to entitle owner to compensation, and appropriation occurred when city exercised exclusive dominion over the mains and not when city limits were extended. *Styers v. Gastonia*, 572. Contract that city should own mains upon extension of limits held to preclude recover of compensation. *Honey Properties, Inc. v. Gastonia*, 567.

Plaintiffs constructed water mains as a business venture, permitting property owners to tap the mains for a fee. The city sold water to plaintiffs' licensees and agreed to reimburse plaintiff for the mains when the boundaries of the city were enlarged to include the locus. *Held:* Even though the contract with the city is invalid, the plaintiff is entitled, upon the extension of the city limits and the appropriation by the city of the mains, to recover the value of his property so appropriated. *Styers v. Gastonia*, 572.

§ 18. Municipal Franchises.

Requirement of municipality that telephone company, in exchange for privilege of using streets should furnish service to city free or at reduced rates is void. *Utilities Com. v. Wilson*, 640.

§ 25. Zoning Ordinances and Building Permits.

A zoning ordinance which permits the continuance of nonconforming uses subsisting at the time of the enactment of the ordinance may prohibit an enlargement of such nonconforming uses. *In re Appeal of Hastings*, 327.

Under the zoning ordinance in question petitioner was permitted to continue a nonconforming use subsisting at the time of the enactment of the ordinance. Petitioner sought a permit for an additional construction upon contentions that the construction was merely to complete facilities under his original plan subsisting at the time of the enactment of the ordinance. *Held:* Whether the petitioner was seeking the right to complete facilities for the subsisting nonconforming use, or was seeking

to enlarge a nonconforming use in violation of the ordinance, is a question of fact to be determined by the administrative board. *Ibid.*

§ 34. Enforcement, Validity and Attack of Ordinances.

Findings *held* sufficient to support order enjoining enforcement of ordinance against maintenance of business signs over sidewalks. *Restaurant v. Charlotte*, 324.

Whether petition for permit was for completion of facilities for subsisting nonconforming use or was for enlargement of nonconforming use *held* for determination of administrative board. *In re Appeal of Hastings*, 327.

An individual may not seek to restrain the violation of a municipal zoning ordinance upon mere allegation of the conclusions that defendant's use was a violation of the ordinance and would result in irreparable injury to plaintiff, but plaintiff is required to allege the facts supporting the conclusions of defendant's violation of the ordinance and irreparable injury to plaintiff. *Pharr v. Garibaldi*, 803.

§ 36. Issuance of Bonds and Levy of Taxes.

A city may issue bonds for water and sewer facilities without a vote when the proceeds of the bonds are to be used for the benefit of its citizens but may not extend such services to those residing outside the city for profit without a vote. *Eakley v. Raleigh*, 683. But may expend such funds to newly annexed areas upon annexation. *Ibid. Upchurch v. Raleigh*, 684.

§ 37. Application of Revenue.

Proceeds of water and sewer bonds may be expended in newly annexed areas notwithstanding neither bond ordinance nor ballots disclosed such intent. *Upchurch v. Raleigh*, 684.

NEGLIGENCE

§ 1. Acts and Ommissions Constituting Negligence in General.

The violation of a statute which imposes upon a person a specific duty for the protection of others is negligence *per se*. *Drum v. Bisaner*, 305.

§ 7. Proximate Cause and Foreseeability of Injury.

Although foreseeability is an essential element of proximate cause it is not required that the injury in the exact form in which it occurred be foreseeable but only that consequences of a generally injurious nature might have been expected. *Bondurant v. Mastin*, 190.

Defendant's negligence need not be the sole proximate cause in order for the issue of negligence to be answered in the affirmative. *Richardson v. Grayson*, 476.

§ 8. Concurring and Intervening Negligence.

The test of whether the negligence of one tort-feasor is insulated as a matter of law by the independent act of another is whether such intervening act and the resultant injury could have been reasonably foreseen. *Bryant v. Woodlief*, 488.

The primary negligence of one party cannot be insulated by the negligence of the other so long as the primary negligence continues to con-

NEGLIGENCE—*Continued.*

stitute a proximate cause of the injury, or so long as the intervening negligence could have been reasonably foreseen under the circumstances. *Watters v. Parrish*, 787.

§ 11. Contributory Negligence in General.

Contributory negligence *ex vi termini* presupposes negligence on the part of the defendant. *Pruett v. Inman*, 520.

§ 14. Sudden Peril and Emergencies.

A party is not entitled to the benefit of the doctrine of sudden emergency if he himself brings about the emergency or contributes to its creation. *Watts v. Watts*, 352.

§ 21. Presumptions and Burden of Proof.

Negligence is never presumed from the mere fact of an accident or injury, but plaintiff has the burden of proving negligence and proximate cause and also that his injuries resulted from the alleged negligence. *Watts v. Watts*, 352.

Contributory negligence is an affirmative defense which defendant must plead and prove. *Pruett v. Inman*, 520.

§ 23. Questions of Law and of Fact.

What is negligence is a matter of law, and where the facts are admitted or established it is for the court to say whether negligence exists and if so whether such negligence was the proximate cause of injury. *Rogers v. Green*, 214.

Proximate cause is ordinarily to be determined by the jury as a fact from the attendant circumstances, and conflicting inferences of causation arising from the evidence carry the issue to the jury. *Pruett v. Inman*, 520.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Nonsuit is proper in an action to recover for negligence only if the evidence is free from material conflict and the only reasonable inference to be drawn therefrom is that there was no negligence on the part of the defendant or that the negligence of the defendant was not the proximate cause of the injury. *Lane v. Dorney*, 90.

On motion to nonsuit in a negligence action the evidence must be considered in the light most favorable to plaintiffs and the motion overruled if the evidence, so considered, tends to support all essentials of actionable negligence. *Drum v. Bisaner*, 305.

While discrepancies, even in plaintiff's evidence, are ordinarily for the jury to resolve in the exercise of its function in determining the weight to be given the testimony, this rule does not apply when the only testimony favorable to plaintiff on a material point is in direct conflict with the physical facts established by plaintiff's uncontradicted evidence, and when such aspect of the evidence favorable to plaintiff is inherently impossible upon the undisputed physical facts, nonsuit is proper. *Jones v. Schaffer*, 368.

Nonsuit may not be allowed if plaintiff's evidence is sufficient to establish as a proximate cause of his injuries any one of the negligent acts enumerated in the complaint. *Krider v. Martello*, 474.

NEGLIGENCE—*Continued.*

§ 24c. Sufficiency of Circumstantial Evidence of Negligence.

It is not required that negligence be proven by direct evidence, but proof of facts and circumstances establishing negligence and proximate cause as the more reasonable probability is sufficient to take the issue to the jury. *Austin v. Austin*, 283; *Lane v. Dorney*, 90; *Drum v. Bisaner*, 305.

Direct evidence of negligence is not required, but negligence may be inferred from the facts and attendant circumstances, and if the facts proven establish negligence and proximate cause as the more reasonable probability nonsuit cannot be entered notwithstanding that the possibility of accident may also arise on the evidence. *Patton v. Dail*, 425.

Whether circumstantial evidence of negligence is sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts must be determined in relation to the attendant facts and circumstances of each case. ***Drum v. Bisaner*, 305.**

The evidence must take the case out of the realm of conjecture and into the field of legitimate inference from established facts in order to be sufficient to be submitted to the jury, and nonsuit must be entered upon evidence which raises a mere conjecture or possibility of the existence of actionable negligence. *Smith v. Hickory*, 316.

Circumstantial evidence that fire was result of negligence of defendant held sufficient to be submitted to the jury. ***Patton v. Dail*, 425.**

§ 26. Nonsuit for Contributory Negligence.

A defendant may avail himself of his plea of contributory negligence by motion for compulsory nonsuit when the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can reasonably be drawn therefrom. *Pruett v. Inman*, 520.

Nonsuit on the ground of contributory negligence is proper only when the facts necessary to show contributory negligence appear so clearly that no other conclusion can be reasonably drawn from the evidence. *Bondurant v. Mastin*, 190.

Nonsuit on the ground of contributory negligence is properly denied unless plaintiff's own evidence establishes the facts necessary to show contributory negligence as a matter of law so clearly that no other conclusion can be reasonably drawn therefrom. *Ray v. Membership Corp.*, 380.

Nonsuit on the defense of contributory negligence is proper only when plaintiff proves himself out of court, and nonsuit may not be entered on this ground if it is necessary to rely in any aspect upon defendant's evidence, notwithstanding that defendant's evidence on such aspect is not in conflict with plaintiff's evidence but tends to explain or clarify it. *Pruett v. Inman*, 520.

Plaintiff's evidence must be considered in the light most favorable to him in passing upon defendant's motion to nonsuit on the ground of contributory negligence, and contradictions in plaintiff's evidence will be resolved in plaintiff's favor in passing upon such motion. *Ibid.*

§ 27. Nonsuit for Intervening Negligence.

The question of whether the independent act of one tort-feasor insulates the negligence of another is ordinarily for the determination of the jury, and it is only when the evidence is susceptible to the sole reasonable conclusion that the intervening and independent act could not

have been reasonably foreseen that nonsuit is proper on this ground. *Bryant v. Woodlief*, 488.

§ 28. Instructions in Negligence Actions.

An instruction on the issue of negligence which places the burden upon plaintiff to prove that defendant's negligence was the proximate cause of plaintiff's injuries held prejudicial, since the issue of negligence must be answered in the affirmative if defendant's negligence is a proximate cause of the injuries. *Richardson v. Grayson*, 476.

An instruction to answer the issue of negligence in the affirmative if the jury should find that defendant's negligence was the proximate, rather than a proximate cause, of the accident, is favorable to defendant, and defendant, not being prejudiced thereby, will not be heard to complain. *Dinkins v. Booe*, 731.

§ 29. Issues.

The issues of contributory negligence and last clear chance do not arise when there is insufficient evidence to be submitted to the jury on the issue of negligence. *Reaves v. Beam*, 479.

§ 37a. Definition of Invitees.

A member of a dance band engaged to play for a dance at a country club is a licensee of the club while on its premises for the purpose of his employment. *Cupita v. Country Club*, 346.

An invitee going on a part of the premises outside the scope of the invitation is not an invitee but a licensee. *Ibid.*

§ 37b. Duties of Proprietor to Invitees in General.

The proprietor of a store is not an insurer of the safety of his customers but owes them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils of unsafe conditions insofar as they can be ascertained by him from reasonable inspection and supervision. *Case v. Cato's, Inc.*, 224.

The proprietor owes a positive duty to an invitee to exercise ordinary care to have its premises in a reasonably safe condition for use by the invitee in a manner consistent with the purpose of the invitation, and to give him, when using the premises for such purpose, timely notice and warning of latent or concealed perils insofar as can be ascertained by reasonable inspection and supervision or are known by it and not by him. *Cupita v. Country Club*, 346.

A proprietor is not an insurer of the safety of an invitee. *Ibid.*

A proprietor is not under duty to an invitee to keep his premises in a reasonably safe condition for uses which are outside the scope and purpose of the invitation, for which the property was not designed, and which could not reasonably have been anticipated, except where he is present and actively cooperates with the invitee in the particular use of the premises. *Ibid.*

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence tending to show that the floor upon which a customer fell had been waxed the previous night, without any evidence that the waxing was done other than in the usual and customary manner with ma-

terial approved and in general use, and without any evidence of any accumulation of wax at the spot where plaintiff fell or any evidence of negligence in the application of the wax, is insufficient to be submitted to the jury on the issue of the proprietor's negligence. *Case v. Cato's Inc.*, 224.

Evidence tending to show that a customer slipped and fell when she stepped on a coat hanger lying partly in the waxed aisle and partly hidden by a display of dresses, without any evidence as to who was responsible for the hanger being on the floor or how long it had been there, is insufficient to be submitted to the jury on the issue of the store proprietor's negligence. *Ibid.*

Evidence held insufficient predicate for liability of proprietor to invitee going on part of premises outside the scope of the invitation. *Cupita v. Country Club*, 346.

§ 37g. Nonsuit for Contributory Negligence of Invitee.

Evidence *held* to disclose contributory negligence on matter of law on part of invitee in going on part of premises outside the scope of the invitation. *Cupita v. Country Club*, 346.

§ 38. Duties and Liabilities to Licensees.

Where an invitee goes to a place on the premises not covered by the invitation and not embraced within the ordinary aberrations or casualties of travel, such person becomes a licensee, and the proprietor's duty is only to refrain from acts of wilful or wanton negligence and to refrain from doing any act which increases the hazard to such person while on the premises. *Cupita v. Country Club*, 346.

NUISANCE

§ 1. Conditions Constituting Private Nuisance.

The maintenance and operation of a State prison is not a nuisance *per se*. *Pharr v. Garibaldi*, 803.

§ 7. Abatement of Nuisances.

Maintenance of prison may not be enjoined in absence of allegation of any unauthorized or unlawful conduct on part of officials. *Pharr v. Garibaldi*, 803.

PARTIES

§ 2. Parties Plaintiff.

An action must be prosecuted in the name of the real party in interest. G.S. 1-57. *Skinner v. Transformadora, S. A.*, 320.

§ 5. Representation by Members of a Class or by Person Representing a Class.

Heirs who are *sui juris* are not represented by a guardian *ad litem* for all unknown heirs of the deceased, the guardian having expressly denied his authority to represent the competent heirs *sui juris*. *Bank v. Jordan*, 419.

PARTNERSHIP

§ 5. Liability of Partners for Torts Commited by One of Partners.

An unsatisfied judgment against a servant or one partner does not

PARTNERSHIP—*Continued.*

bar the injured person from suing the master or the other partner, but such judgment may be properly pleaded by defendant in the subsequent action, since the liability of the employer or the other partner cannot exceed that of the actual tort-feasor. *Griffin v. McBrayer*, 54.

PAYMENT

§ 3. Application of Payment.

Where payments are made by the maker of a series of notes under an agreement that such payments were to be applied to all the notes, such payments being held by the payee without application to any specific note, such payments will be applied by the law rateably to each of the notes so as to start the statute of limitations running anew as to each note, since neither the debtor nor the creditor having directed application of payment, the law will make such application as will best protect and maintain the rights of the interested parties. *Pickett v. Rigsbee*, 200.

PLEADINGS

§ 2. Statement of Cause of Action.

Plaintiff must plead a municipal ordinance relied upon by him. *Pharr v. Garibaldi*, 803.

§ 5. Verification of Complaint or Petition.

It is not required that a petition in an *ex parte* proceeding be unified. *Gillikin v. Gillikin*, 1.

§ 6. Filing of Answer, Time of Filing and Extension of Time.

Where a defendant has a consent judgment against her set aside on the ground that she did not employ the attorney who filed answer and did not authorize him to consent to the judgment in her behalf, she may not rely upon the answer filed by the attorney, and the court, upon its finding that she has no meritorious defense, properly refuses to exercise its discretionary power to permit her to file answer after the expiration of the time allowed, and properly enters judgment by default. *Owens v. Voncannon*, 461.

§ 8. Counterclaims and Cross-Actions.

A counterclaim is in effect a statement of a cause of action on the part of the defendant against the plaintiff. *Ray v. Membership Corp.*, 380.

The allowance of nonsuit in favor of a defendant sought to be held liable under the doctrine of *respondeat superior* does not affect such defendant's counterclaim against plaintiff for damages to property. *Williamson v. Varner*, 446.

The defendant in a civil action for assault and battery may not set up a counterclaim for malicious prosecution based upon a prior prosecution of the defendant instigated by plaintiff for the same assault. *Kersey v. Smith*, 468.

In order for a cause of action in tort to be available as a counterclaim it must have arisen at the time of and out of the facts and circumstances constituting the basis of plaintiff's cause of action. *Ibid.*

PLEADINGS—*Continued.*

§ 10. Office and Necessity for Reply.

Where plaintiff alleges negligence on the part of the defendant driver and that the driver was the agent of defendant owner, there is no necessity, upon the filing of a counterclaim by defendant owner to recover for damages to his vehicle, for plaintiff to repeat the allegation of negligence and the imputation of such negligence to defendant owner, and the filing of a reply to the counterclaim is not required. *Williamson v. Varner*, 448.

§ 12. Office and Effect of Demurrer.

The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *McDonald v. Carper*, 29.

Upon demurrer, the complaint will be liberally construed with a view to substantial justice between the parties. *Jones v. Loan Asso.*, 626.

§ 24. Motions to Be Allowed to Amend.

Notwithstanding that a demurrer comes on to be heard prior to the expiration of time for filing answer, G.S. 1-161, the court may refuse plaintiff's motion for a continuance, interposed in order that he might file an amended complaint, when the hearing is more than five days after acceptance of service of the demurrer by the plaintiff, G.S. 1-129, although plaintiff, upon the sustaining of the demurrer, may thereafter apply for leave to amend. *Upchurch v. Raleigh*, 676.

§ 25. Scope of Amendment to Pleadings.

An amendment to make the allegations conform to the proof will not be allowed when the proof is insufficient predicate for liability upon the theory sought to be alleged. *Lynn v. Clark*, 289.

When the rights of innocent third persons are not affected, an amendment relates back to the commencement of the action. *Ray v. Membership Corp.*, 380.

§ 28. Variance between Proof and Allegation.

Plaintiffs may recover, if at all, only upon the cause of action set up in their complaint, and *allegata* and *probata* must concur to establish a cause of action. *Gainey v. Brotherhood*, 256.

§ 29. Issues Raised by Pleadings and Necessity for Proof.

Where plaintiff offers in evidence allegations of answer he is bound by the averments which he himself introduced in evidence, and defendant is entitled to the benefit thereof. *Meece v. Dickson*, 300.

§ 34. Right to Have Allegations Striken on Motion.

Allegations relating to matters which the pleader is precluded from showing in evidence because of the parol evidence rule should be stricken upon motion. *Products Corp. v. Chestnutt*, 269.

Allegations and an exhibit which the pleader could not support by or offer in evidence at the trial should be stricken on motion. *Wade v. Wade*, 330.

PRINCIPAL AND AGENT

§ 4. Proof of Agency.

The fact of agency cannot be proved by the extra-judicial declarations of the alleged agent. *Williams v. Highway Com.*, 514.

PRINCIPAL AND SURETY

§ 2. Actions on Surety Bonds in General.

Where the performance bond of a subcontractor provides that the principal and surety should be jointly and severally bound, the obligee of the bond may sue the subcontractor and the surety jointly or separately. *Crain & Denbo, Inc. v. Construction Co.*, 836.

PRISONS

§ 1. Establishment and Operations.

The Director of Prisons, subject to the rules and regulations adopted by the State Prison Commission, is expressly authorized to designate where prisoners committed to his custody shall serve their sentence, and the Commission has the discretionary authority to determine whether the operation of a particular prison should be continued or enlarged and whether such prison should be operated as a "minimum security prison." *Pharr v. Garibaldi*, 803.

The maintenance of a prison may not be enjoined in the absence of allegation of any unauthorized or unlawful conduct on the part of the prison officials. *Ibid.*

PROCESS

§ 9. Service by Publication.

Service by publication is in derogation of the common law and strict compliance with the statute is required. *Bank v. Jordan*, 419.

Notice by publication must set forth the names of those defendants who are known, and notice to all "unknown heirs or next of kin" of the deceased is insufficient in such instance; since notice by publication is not only to alert the individuals named, but also their friends and acquaintances who may see the publication and give them actual notice. *Ibid.*

§ 10. Service on Unincorporated Associations and Unions.

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. *Gainey v. Brotherhood*, 256.

§ 15½. Service on Federal Agencies.

The United States or an agency of the Federal Government cannot be sued except in accordance with its consent, and the statutes relating to the maintenance of such suits and the service of process therein must be strictly construed. *Finch v. Small Business Administration*, 50.

The Small Business Administration is not a corporate entity but is an agency of the United States, and while the statute provides that its administrator may sue and be sued, there is no statutory provision for it to sue or be sued in its own name, and therefore where service of process

PROCESS—*Continued.*

is directed to the administration, its motion to dismiss for want of jurisdiction is properly allowed. *Ibid.*

PUBLIC OFFICERS

§ 4. Qualification and Bonds.

Provision of an act that any qualified elector who had resided in the area for not less than one year should be eligible to be nominated for mayor or a member of the board of commissioners of a proposed municipality, places a statutory qualification for office in conflict with Article VI, Sections 2 and 7 of the State Constitution and is void. *Starbuck v. Havelock*, 176.

RAPE

§ 1. Elements of the Offense of Rape.

The slightest penetration of the sexual organ of the female by the sexual organ of the male is sufficient to constitute this element of the offense of rape. *S. v. Burell*, 115.

§ 4. Sufficiency of Evidence and Nonsuit in Prosecutions for Rape.

The evidence in this case, considered in the light most favorable to the State, *is held* sufficient to warrant the submission to the jury of the question of defendant's guilt of rape. *S. v. Burell*, 115.

§ 8. Elements of Offense of Carnal Knowledge of Female under Twelve Years of Age.

The act of carnally knowing and abusing a female child under the age of 12 years is rape irrespective of force, intent, or her consent. *S. v. Browder*, 35.

§ 10. Competency and Relevancy of Evidence in Prosecution for Carnal Knowledge of Female under Twelve.

In a prosecution for carnal knowledge of a female under 12 years of age, her testimony to the effect that defendant had repeatedly had intercourse with her during the prior several years is competent in corroboration of the offense charged, and the first such occasions will not be held too remote when the evidence discloses that such acts were repeated with regularity up to the date specified in the indictment. *S. v. Browder*, 35.

§ 11. Sufficiency of Evidence and Nonsuit in Prosecution for Carnal Knowledge of Female under Twelve.

The evidence in this prosecution for carnal knowledge of a female under the age of 12 years *held* amply sufficient to carry the case to the jury. *S. v. Browder*, 35.

SALES

§ 12½. Transfer of Title — Rights of Purchaser.

Where personalty is acquired by a *bona fide* purchaser for value without notice, who thus obtains good title, every subsequent purchaser from him is entitled to the same protection, irrespective of notice, unless he

SALES—*Continued.*

was a former purchaser of the same property with notice. *Bank v. Ramsey*, 339.

§ 30. Actions for Injuries from Defects.

The manufacturer of a truck is under duty to the ultimate purchaser, irrespective of contract, to use reasonable care in the manufacture of the article and to make reasonable inspection so as not to subject the purchaser to injury from a hidden or latent defect. *Gwyn v. Motors, Inc.*, 123.

Manufacturing of brakes held not to constitute notice to the purchaser of latent defect, and manufacturer's liability for injuries from latent defect held not insulated by failure of repairman to remedy the defect. *Ibid.*

STATE

§ 3. Claims against the State.

The State Highway Commission is an agency of the State and is subject to suit only in the manner prescribed by statute; therefore, when statutory procedure is available to recover compensation for the taking of a property right by the Commission the owner may not maintain a common law action against the Commission. *Williams v. Highway Com.*, 772; *Ferrell v. Highway Com.*, 830.

A suit against the members of the State Prison Commission and the Director of Prisons to enjoin the maintenance and operation of a prison and the enlargement thereof, without allegation of any unlawful conduct on the part of the individual defendants, is a suit against the State and may not be maintained, there being no constitutional or legislative waiver of the State's immunity to suit in such instance. *Pharr v. Garibaldi*, 803.

§ 3a. Tort Claims Act.

Under the State Tort Claims Act, the State waives its immunity from liability for injuries resulting from the negligence of its officers, employees and servants if under the same conditions a private person would be liable, and the Industrial Commission is given jurisdiction to hear and pass on such tort claims. *Ivey v. Prison Dept.*, 615.

Liability for the death of a prisoner killed as the result of the negligence of a State employee while the prisoner was performing an assigned task is not limited to funeral expenses under the Compensation Act, but recovery may be had under the State Tort Claims Act. ***Ibid.***

STATUTES

§ 3. Enactment by Reference.

On July 13, 1957 the N. C. Building Code of 1953 had the force of law by virtue of G.S. 143-138(f). *Drum v. Bisaner*, 305.

§ 5a. General Rules of Construction.

A statute must be interpreted to effectuate the legislative intent. *Coach Co. v. Currie*, 181; *Shue v. Scheidt*, 561.

§ 5d. Construction of Statutes — Statutes in Pari Materia.

Statutes *in pari materia* are to be construed together and harmonized, if possible, so as to give effect to all of the provisions of each. *Justice v. Scheidt*, 361.

STATUTES—*Continued.*

§ 6. Construction in Regard to Constitutionality.

Where one part of a statute is valid and another part thereof is invalid, but the two parts are independent and separable, the valid portion of the act will stand. *Starbuck v. Havelock*, 176.

§ 13. Repeals by Implication and Construction.

Repeals by implication are not favored by the law and will not be indulged if there is any other reasonable construction. *Ivey v. Prison Dept.*, 615.

TAXATION

§ 1c. Classification of Businesses and Trades for Taxation.

Even if the fee charged applicants for real estate brokers' and agents' licenses be regarded as a tax, it is equal and uniform in application upon all of the same class, and places no arbitrary or unreasonable burden upon the pursuit of the occupation, and is valid. *S. v. Warren*, 690.

§ 4. Necessary Expenses and Necessity for Vote.

The contention that the issuance of water and sewer bonds by a municipality for improvements within annexed areas would violate Art. VII, Sec. 7 of the State Constitution because the residents of the areas annexed had not voted in the bond election, is untenable when the bonds have been approved by the electors residing within the city limits as they existed at the time of the election. *Eakley v. Raleigh*, 683.

A municipality has the power to expend funds for the construction and operation of water and sewer facilities without a vote when such facilities are for the benefit of the citizens of the municipality, G.S. 160-239, G.S. 160-255, but extension of such facilities outside its corporate limits for the purpose of profit is a proprietary function requiring a vote of its citizens. *Ibid.*

When a bond election authorizes the issuance of water and sewer bonds for the benefit of the citizens of the municipality, but does not authorize such bonds for financial gain by the city from the sale of such services to those residing beyond its corporate limits, the expenditure of the proceeds in areas intended to be annexed by the city is properly restrained until the date such annexation is effected. *Ibid.*

The courts determine whether a given project is a necessary expense of a county, but the board of commissioners of the county determines in its discretion whether such project is necessary or needed in the designated locality. *DeLoatch v. Beamon*, 754.

An expenditure by a governmental agency for the maintenance of public peace, the administration of justice, the discharge of a governmental function, or in the exercise of a portion of the State's delegated sovereignty, is a necessary expense within the meaning of the Constitution. *Ibid.*

The County Commissioners of Alamance County are directed to provide a county-wide revaluation of all real property in the County and are authorized to employ expert appraisers to assist county officials in the discharge of this duty, and therefore sums paid by the County to an appraising company as conpensation for the performance of this duty pursuant to contract are for a necessary expense and need not be authorized by a vote. *Ibid.*

TAXATION—*Continued.*

§ 5. Public Purpose.

Where funds expended by a municipal redevelopment commission under provisions of the Urban Redevelopment Law are not derived from tax revenues, the provisions of Art. V, Sec. 3, of the Constitution of North Carolina are not applicable. *Redevelopment Com. v. Bank*, 595.

§ 20. Exemptions of Charitable, Educational and Religious Institutions from Taxation.

In determining whether property is exempt from *ad valorem* taxes, the use to which the property is devoted rather than the character of the owner is controlling, while in determining exemption from franchise taxes, G.S. 105-125, the character of the owner is controlling, and in determining exemption from income taxes, G.S. 105-138(3), the character of the recipient of the income and the use the recipient makes of such income is controlling. *In re Vanderbilt University*, 743.

§ 23½. Construction of Taxing Statutes in General.

The interpretation given tax statutes by the Commissioner of Revenue will be given due and careful consideration, but such interpretation is not controlling and cannot be followed when it is in conflict with the clear intent and purpose of the statute under consideration. *In re Vanderbilt University*, 743.

§ 27. Levy and Assessment of Franchise Taxes.

The requirement imposed by a municipality upon a telephone company that it furnish the city service free or at a reduced rate in exchange for the use of the city streets for pole lines amounts to an imposition of a franchise tax by the city in violation of statute. *Utilities Com. v. Wilson*, 640.

An educational institution of another state which engages in the business of renting real estate in this State is exempt from franchise taxes under G.S. 105-125 when no part of its net earnings inures to the benefit of any individual or private stockholder and its business here is carried on solely in its capacity of a nonprofit educational institution. *In re Vanderbilt University*, 743.

§ 29. Levy and Assessment of Income Taxes.

Where the net operating income of a bus carrier is ascertained in accordance with the statutory formula after State taxes other than income taxes have been included in computing its operating expenses, such carrier is not entitled under the provisions of G.S. 105-136 (prior to its repeal by Chapter 1340, S.L. 1957) to deduct again from its net operating income allocated to its business within this State the amount of State taxes other than income taxes, the proviso of the act applying only when the net operating income is ascertained without deducting State taxes other than income taxes. *Coach Co. v. Currie*, 181.

The income realized by an educational institution of another state from the rental of real estate owned by it in this State is exempt from income taxes under G.S. 105-138(3), when such income is placed in the general fund of such educational institution and is used exclusively for educational purposes. *In re Vanderbilt University*, 743.

§ 40c. Foreclosure of Tax Liens.

In an action to enforce the lien for taxes under G.S. 105-414, each

TAXATION—*Continued.*

person having an estate in the land is a necessary party if his equity of redemption is to be barred, and where at the time of the institution of the proceeding the persons named in the summons and complaint as owners of the land are dead, and their heirs or devisees are not made parties, judgment of foreclosure and sale of the land thereunder cannot divest the title of the heirs or devisees. *Page v. Miller*, 24.

TELEPHONE COMPANIES

§ 1c. Rates.

Telephone company cannot grant service to municipality free or at reduced rate in exchange for use of city streets. *Utilities Com. v. Wilson*, 640.

TORTS

§ 6. Right to Contribution Among Tort-Feasor.

Where the insurance carrier of one joint tort-feasor pays the balance due on the tort judgment and has it assigned to a trustee for the insured, the carrier has no right of contribution under G.S. 1-240 against other joint tort-feasors. The carrier's right arises under the subrogation provision of the insurance contract. *Squires v. Sorahan*, 589.

TRIAL

§ 2. Call of Cases.

A court has inherent power to control the call of cases on its docket so as to dispose of them with economy of time and effort for itself, for counsel and for litigants. *Watters v. Parrish*, 787.

§ 4. Time of Trial and Continuance.

A motion for a continuance is addressed to the sound discretion of the trial judge, and his denial of the motion will not be disturbed in the absence of a showing of manifest abuse of discretion. *Watters v. Parrish*, 787.

Where a passenger in one car institutes action against the drivers of both cars involved in the collision and thereafter one of the drivers institutes suit against the other, the denial of the motion of such driver that his action be first called for trial will not be disturbed in the absence of a showing of any unusual or extraordinary circumstances or any clear inequity, since plaintiff passenger cannot be compelled to stand aside while another action is litigated except in a clear case of hardship to the other parties, the matter being addressed to the sound discretion of the trial court. *Ibid.*

§ 5½. Pretrial and Stipulations.

Where the parties in open court waive any right or claim they may have in a particular fund, the judicial disclaimer is binding upon them. *Parker v. Parker*, 399.

§ 7. Argument and Conduct of Counsel.

Any impropriety in permitting counsel to read portions of irrelevant statutes to the jury is cured by the action of the court in instructing the jury to answer the issues submitted under instructions of law by the court without reference to the irrelevant statutes. *McCombs v. Trucking Co.*, 699.

§ 11. Consolidation of Actions for Trial.

Even in those instances in which a consolidation of actions for trial is permissible, a motion for consolidation is addressed to the discretion of the trial court. *Phelps v. McCotter*, 66.

§ 19. Province of Court and Jury in Regard to Evidence.

The discretion to determine the competency of a witness on the basis of age or mentality, in the same manner as the power to determine the qualification of experts or the voluntariness of confessions, is the power to determine a factual question in accordance with established rules of law and is not an arbitrary power, and therefore when the court hears evidence to determine the question of competency its factual conclusions are binding if supported by any evidence, but if the court applies to the facts found by it an incorrect legal principle, the conclusion is reviewable and will be corrected on appeal. *Artesani v. Gritton*, 463.

§ 21. Office and Effect of Motion to Nonsuit.

Upon a motion to nonsuit the court does not pass upon the weight or credibility of the evidence, but is required to determine only whether there is any evidence sufficient to make out plaintiff's cause of action. *Gwyn v. Motors, Inc.*, 123.

Where a charitable hospital is immune from liability for negligence as a matter of law is not presented in the lower court by motion to nonsuit. *Robinson v. Hospital Authority*, 185.

Appellant cannot challenge correctness of rulings on its motion to nonsuit by challenging the exercise of the court's discretion in setting aside the verdict. *House v. Ins. Asso.*, 189.

§ 21½. Necessity for Motion to Nonsuit and Renewal of Motion and Appeal.

Where, in an action against two defendants, nonsuit is entered as to one and the trial proceeds against the other and results in a mistrial, plaintiff may not present his contention that the nonsuit entered in favor of the first defendant was erroneous by moving to set aside the ruling theretofore made. *Lynn v. Clark*, 289.

§ 22. Consideration of Evidence on Motion to Nonsuit.

While discrepancies and contradictions in the evidence are for the jury and not the court to resolve, where the evidence is insufficient to make out a cause of action in plaintiff's favor under any version of the evidence, nonsuit is proper. *Gamble v. Sears*, 706.

While discrepancies, even in plaintiff's evidence, are ordinarily for the jury to resolve in the exercise of its function in determining the weight to be given the testimony, this rule does not apply when the only testimony favorable to plaintiff on the question is in direct conflict with the physical facts established by plaintiff's uncontradicted evidence, and when such aspect of the evidence favorable to plaintiff is inherently impossible upon the undisputed physical facts, nonsuit is proper. *Jones v. Schaffer*, 368.

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, giving him the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, and defendant's evidence is not to be considered except in so far

as it is not in conflict with that of plaintiff, but tends to explain or make clear plaintiff's evidence. *McCombs v. Trucking Co.*, 699.

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff. *Gamble v. Sears*, 706.

On motion to nonsuit, plaintiff is entitled to have the evidence considered in the light most favorable to her, and contradictions and discrepancies, even in plaintiff's evidence, do not justify nonsuit. *Watters v. Parrish*, 787.

Upon motions to nonsuit, entered by the several defendants after all the evidence of plaintiff and all the defendants is in, the court may consider so much of both defendants' evidence, or the evidence of either of them, as is favorable to plaintiff or tends to clarify or explain evidence offered by plaintiff, but will disregard defendants' evidence which tends to contradict or impeach plaintiff's evidence. *Ibid.*

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

There must be legal evidence of every material fact necessary to support a verdict, and a verdict may not be based upon mere speculation or possibility. *Rogers v. Green*, 214.

§ 24a. Nonsuit on Affirmation Defense.

In passing upon a motion to nonsuit based upon an affirmative defense, the court must examine all the evidence and may not rely upon defendant's evidence only, and nonsuit on this ground may not be allowed if different inferences arise upon the entire evidence. *Hill v. Casualty Co.*, 649.

§ 26. Form and Effect of Judgment of Nonsuit.

The allowance of nonsuit in favor of a defendant sought to be held liable under the doctrine of *respondeat superior* does not affect such defendant's counterclaim against plaintiff for damages to property. *Williamson v. Varner*, 446.

§ 28. Form and Distinctions between Directed Verdict and Peremptory Instructions.

Where defendant's evidence is insufficient to raise a controversy upon the issue, the court, although it may not direct a verdict for plaintiff, may instruct the jury to answer the issue in the affirmative if the jury should find by the greater weight of the evidence the facts to be as all the evidence tends to show, since such instruction leaves it to the jury to pass upon the credibility of the evidence. *In re Will of Harrington*, 105.

§ 30. Peremptory Instructions in Favor of Defendant.

Where the uncontradicted evidence tends to establish facts precluding recovery, the court may correctly instruct the jury that if they believe the evidence they should answer the issue accordingly. *Wesley v. Lea*, 540.

§ 31b. Statement of Evidence and Application of Law Thereto.

An instruction as to the statutory law applicable is sufficient, it not being required that the court read the applicable statutes to the jury. *Kennedy v. James*, 434.

Where the court adequately charges the jury on an aspect of the case arising upon the evidence, the failure of the court to give more explicit instructions in regard thereto will not be held for error in the absence

of a special request, notwithstanding that appellant would have been entitled to have more explicit instructions given had request therefor been aptly made, especially when the more explicit instructions would have to be predicated upon the jury's rejection of appellant's own testimony. *King v. Powell*, 506.

It is error for the court to charge upon an abstract principle of law which is not presented by the evidence in the case. *McGinnis v. Robinson*, 574.

The court is required to declare and explain the law arising on the evidence as to all substantial features of the case, and a mere declaration of the law in general terms and a statement of the contentions of the parties are insufficient. *Rowe v. Fuquay*, 769.

§ 32. Requests for Instructions.

Where the record does not show that a request for special instructions were signed and tendered in apt time, an exception to the failure of the court to give such instructions will not be sustained. *In re Will of Hall*, 70.

It is not required that the court give instructions requested in the exact language, it being sufficient if the pertinent and applicable portions of the requested instructions are substantially given in the charge. *Ibid; Dinkins v. Booe*, 731.

§ 33. Additional Instructions.

In a protracted trial it is not error for the court, after the jury had been deliberating for a number of hours, to have the jury returned to the courtroom and to remind the jury of the gravity and importance of their position and the duty imposed on them to discuss and consider the evidence with deliberation, and to compose their differences and return a verdict if they can conscientiously do so. *In re Will of Hall*, 70.

§ 36. Form and Sufficiency of Issues in General.

The issues arise upon the pleadings only and no exact formula can be prescribed for the form of the issues, but the issues submitted will be held sufficient if they present to the jury proper inquiries as to all determinative facts in dispute and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *Williams v. Highway Com.*, 514.

The court is not required to submit an issue which does not arise upon the pleadings and is not supported by evidence. *Bowling v. Bowling*, 527.

While the trial court is required to submit such issues as are necessary to settle the material controversies arising on the pleadings, where the issue submitted is determinative of the controversy and permits the parties to present all contentions arising upon the pleadings and evidence, an exception to the issue submitted cannot be sustained. *Wesley v. Lea*, 540.

§ 44. Inpeaching the Verdict.

Jurors will not be allowed to attack or overthrow their verdict, nor will evidence from them be received for such purpose. *In re Will of Hall*, 70.

§ 49. Motions to Set Aside Verdict as Contrary to Weight of Evidence.

Motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court. *Creed v. Whitlock*, 336.

TRIAL—*Continued.*

A motion to set aside the verdict is addressed to the discretion of the trial court, and a contention based on a question of law is not presented by an exception to the refusal of the court to set aside the verdict. *Abbitt v. Bartlett*, 40.

Where the court sets aside the verdict in the exercise of its discretion there is no judgment from which an appeal can lie, and appellant may not present the correctness of the court's ruling on its motion to nonsuit by challenging the exercise of the court's discretion in setting aside the verdict. *House v. Ins. Asso.*, 189.

§ 52. Setting Aside Verdict by Court Ex Mero Motu.

The failure of the court to set aside a verdict in its discretion upon learning that one of the jurors took into the jury room an Encyclopedia and read to the other jurors a definition of law involved in the suit, will not be disturbed on appeal, it appearing that the definition contained in the Encyclopedia was more favorable to appellants than the correct rule of law and that the incident, although erroneous as a matter of law, was not sufficiently prejudicial to require the exercise of the discretionary power of the court. *In re Hall*, 70.

§ 54. Trial by Court — Hearings, Evidence and Additional Findings.

Where the parties waive a jury trial and submit the cause to the court upon stipulated facts, the court has no authority to make additional findings of fact unless so authorized by the stipulations. *Swartzberg v. Ins. Co.*, 150.

If the facts stipulated are insufficient predicate for a judgment, the court should proceed to trial to have the crucial issues of fact determined by a jury. *Ibid.*

§ 55. Findings and Judgment.

Where the parties stipulate that the court should determine the amount which should be awarded for maintenance and cure, the court's findings in regard thereto have the same force as a verdict of the jury. *Benton v. Willis, Inc.*, 166.

TRUSTS

§ 4. Resulting Trusts.

Where husband invests entire proceeds of sale of land held by the entireties, a trust arises by operation of law in favor of the wife for her share of the proceeds in the absence of evidence that she intended to make a gift to him. *Bowling v. Bowling*, 527.

The fact that a beneficiary of a trust acquiesces in the investment of the trust funds does not support an inference or conclusion that she is estopped to assert her rights under the rule of trust pursuit. *Ibid.*

§ 19a. Income and Profits.

Where discretion is vested in the trustees in determining what items should be considered income and what items *corpus* of the estate, the exercise of such discretion will not be disturbed unless in contravention of the intent of testator as expressed in the instrument or unless the discretion is manifestly abused. *Little v. Trust Co.*, 229.

UTILITIES COMMISSION

§ 3. Hearings, Judgments and Orders.

The Utilities Commission properly requires that a public utility should make no unreasonable discrimination in its rates or tariffs, but should charge the same rates to all customers within a particular classification who receive the same kind and degree of service. G.S. 62-68, G.S. 62-69, G.S. 62-72. *Utilities Com. v. Wilson*, 640.

The Utilities Commission properly proscribes a telephone company from furnishing service to certain municipalities within its territory free or at a reduced rate, and contractual agreements of a telephone company to do so in consideration for franchise rights to use the streets, alleys and roads in such municipalities for its pole line and underground conduits, are void, since such concessions constitute discrimination against other customers similarly situated, G.S. 62-69, and, further, since such concessions are not in accord with the rates and tariffs filed with the Utilities Commission. G.S. 62-68. *Ibid.*

§ 5. Appeal and Review.

If the superior court remands a cause to the Utilities Commission under G.S. 62-26.10, it should specify the ground upon which its order is based, and where upon an appeal from the Utilities Commission upon exceptions to the findings of fact and to other portions of the order, the superior court remands the cause to the Utilities Commission without passing upon the exceptions and without reference to G.S. 62-26.9 or G.S. 62-26.10, the Supreme Court may vacate the order and remand the cause to the superior court for further proceedings in accordance with law. *Utilities Com. v. Transport Co.*, 776.

VENDOR AND PURCHASER

§ 2. Requisites and Validity of Contracts to Convey.

Letter by owner of farm to son-in-law held insufficient to constitute a contract to convey the farm or an offer to convey. *Yeager v. Dobbins*, 824.

§ 23. Remedies of Purchaser — Specific Performance.

A contract whereby the owner of land grants to another for a valuable consideration the right to purchase the land within a specified time upon stated terms and conditions, is irrevocable, and upon acceptance in accordance with its terms gives rise to a contract specifically enforceable. *Byrd v. Freeman*, 724.

The right to specific performance must be determined by the court in accordance with the equities arising upon consideration of all the facts and circumstances of each particular case. *Ibid.*

Evidence held to disclose acceptance by purchasers in accordance with terms of option contract. *Ibid.*

Purchasers waiving agreement for division of agricultural allotments inserted in contract for their benfit may enfore specific perfomance. *Ibid.*

WAIVER

§ 2. Acts Constituting Waiver.

Acts of a party cannot constitute a waiver of a right when such party at the time has no knowledge of the existence of the right. *Swartzberg v. Ins. Co.*, 150.

WATERS AND WATER COURSES

§ 5a. Subterranean Waters in General.

Subterranean waters are generally classified as (1) streams or bodies of water flowing in fixed or definite channels, the existence and location of which are known or ascertainable from surface indications or other means without excavations for that purpose, and (2) percolating waters, which ooze, seep or filter through the soil beneath the surface, or which flow in a course that is unknown or undefined, and not discoverable from surface indication without excavations for that purpose. *Jones v. Loan Asso.*, 626.

§ 5b. Subterranean Streams.

The rights and liabilities of adjacent land owners in regard to subterranean streams are governed, so far as practical, by the rules governing surface streams. *Jones v. Loan Asso.*, 626.

A person who obstructs the flow of a subterranean stream, in like manner as a person who obstructs the flow of a surface stream, is liable in damages for the resulting flooding of lands of a contiguous owner, since ordinarily he knows to a substantial certainty that such action will result in the flooding of the adjacent land. *Ibid.*

Allegations to the effect that defendant obstructed a subterranean stream, resulting in the flooding of the basement of plaintiff's house on an adjacent lot, *are held* sufficient to state a cause of action for the obstruction of a subterranean stream, it not being required that the complaint set forth the legal definition of a subterranean stream. *Ibid.*

Evidence held insufficient to establish predicate for application of law of subterranean streams. *Ibid.*

§ 5c. Perculating Waters.

A land owner who obstructs or diverts percolating waters ordinarily does not know to a substantial certainty what the consequences will be, and he is not liable for damage resulting to a contiguous land owner so long as his acts do not exceed the bounds of a reasonable exercise of his proprietary rights or a reasonable use of such precolating waters, and therefore do not violate the maxim "*sic utere tuo ut alienum non laedas.*" *Jones v. Loan Asso.*, 626.

The complaint in this action, together with its amendment, *is held* to state facts sufficient to constitute a cause of action for the obstruction of percolating water in a negligent manner and the failure to use reasonable care to provide adequate drainage. *Ibid.*

Evidence held sufficient to make out cause of action for negligent obstruction of percolating waters. *Ibid.*

WILLS

§ 4. Requisites and Validity of Contracts to Devise.

A letter written by the owner of a farm to his son-in-law expressing the owner's desire to divide the farm among his son-in-law and his two sons, or those of them who would like to keep the farm and work it, requesting the son-in-law to come to the farm as soon as possible, expressing the desire to turn the farm over to the son-in-law to make what he could from it, and then, when the two sons had finished school, the three could carry on from there, and suggesting that the son-in-law might

WILLS—*Continued.*

not like it after a trial and that it was impossible to tell whether the sons, or either of them, would like farming, *is held* insufficient to constitute a contract or offer to convey the farm or devise it to the son-in-law. *Yeager v. Dobbins*, 824.

§ 7. Subscribing Witnesses.

Where there are only two subscribing witnesses, they may not take under the will. *Brown v. Byrd*, 454.

§ 17. Caveat in General.

The fact that an executor named in a paper writing has qualified under the instrument does not estop him from thereafter filing a caveat to the will upon his discovery of an instrument later executed by the testator, even though he is named sole beneficiary in the later instrument, when he acts in good faith and with due diligence after the discovery of the second paper writing, since it was his legal duty to deliver the second instrument to the court upon its discovery. G.S. 31-15, G.S. 14-77, and since he took no action prejudicial to the heirs after the discovery of the second will. *In re Will of Covington*, 546.

§ 21b. Mental Capacity.

The mental capacity of a testator to execute a will must be determined in accordance with the circumstances facing him at the time of the execution of the instrument, unaffected by the happening of subsequent contingencies. *In re Will of Harrington*, 105.

§ 22. Burden of Proof in Caveat Proceedings.

The burden is upon appealing caveators to show prejudicial error in the exclusion of evidence. *In re Will of Hall*, 70.

§ 23b. Competency and Relevancy of Evidence on Issue of Mental Capacity.

Testimony of testatrix's mental incapacity before and after the execution of the instrument is competent only insofar as it tends to throw light upon her testamentary capacity at the time of executing the instrument, and therefore such testimony must be limited to a reasonable time before and after the crucial time, and what is a reasonable time must be determined in accordance with the facts and circumstances of each particular case. *In re Will of Hall*, 70.

Prior occurrences held too remote in point of time to be competent on issue of mental capacity. *Ibid.*

A witness may relate incidents of conversation, conduct and demeanor of testator which tend to show testamentary capacity or want thereof, and it is not necessary that such witness have or express an opinion as to the mental capacity of testator, or that the incident or incidents related be known to another witness who expresses such opinion. *Ibid.*

The exclusion of testimony of one witness as to an incident bearing upon testatrix's mental incapacity will not be held for prejudicial error when the incident excluded is remote in point of time to the execution of the paper writing and an abundance of testimony of other witnesses is admitted in regard to incidents less remote. *Ibid.*

Fact that testator devised lands held by entireties held not evidence of mental incapacity under facts of this case. *In re Will of Harrington*, 105.

WILLS—*Continued.*

The widow's election to dissent from the will is without probative value on the issue of the mental capacity of the husband to make a will, and the exclusion of evidence of such dissent is proper. *Ibid.*

§ 23c. Competency and Relevancy of Evidence of Fraud and Undue Influence.

While former inconsistent will may be competent on issue of undue influence, parol testimony of such prior will is incompetent when its unavailability is not shown. *Hall, In re Will of*, 70. Testimony of declarations of testator in regard to remote occurrence may be competent to show state of mind at time of executing instrument, but such testimony is incompetent to prove facts stated therein and is properly excluded in absence of request that it be admitted for restricted purpose. *Hall, In re Will of*, 70. Prior incidents between testator and beneficiary may be competent to show undue influence if not too remote in point of time. *Ibid.*

§ 24. Sufficiency of Evidence, Nonsuit and Directed Verdict in Caveat Proceedings.

While it is technical error for the court to direct a verdict on the issue of the due execution of the paper writing propounded, where the evidence is to the effect that all the requirements of the law were strictly complied with in the formal execution and publication of the will, and the parties so stipulate, an instruction that the jury should answer the issue of due execution in the affirmative cannot be prejudicial. *In re Will of Harrington*, 105.

§ 31. General Rules of Construction.

The intent of testator is his will and must be effectuated if not in contravention of some well-settled rule of law. *Miller v. McLean*, 171.

A will must be construed to ascertain the intent of the testator as gathered from the four corners of the instrument, read in the light of all facts and circumstances surrounding and known to the testator. *Little v. Trust Co.*, 229; *Bank v. Hannah*, 556.

§ 32. Presumptions.

The presumption against partial intestacy is merely a rule of construction, and cannot have the effect of transferring property in the face of contrary provisions of the will. *Little v. Trust Co.*, 229.

The law presumes that the possibility of issue is not extinct until death. *Bank v. Hannah*, 556; *Parker v. Parker*, 399.

§ 33b. Rule in Shelby's Case.

The rule in *Shelly's* case does not apply to a devise to a named son for the term of his natural life, with remainder to the son's children. *Parker v. Parker*, 399.

§ 33c. Vested and Contingent Limitations and Defeasible Fees.

A devise of an estate in trust with provision that the income therefrom should be paid to a designated beneficiary for life and, upon her death, the corpus should be divided among her children, with further provision that the child or children of any deceased child of the life tenant should take such child's share, requires that the remaindermen be as-

certained upon the falling in of the life estate, who then take under the will and not as heirs of the life tenant. *Blades v. Spitzer*, 207.

Beneficiaries held to take vested interest defeasible in the event of death without issue prior to termination of trust. *Little v. Trust Co.*, 229.

Share of ultimate beneficiary held exempt from clause providing for defeasance upon death without issue prior to termination of trust. *Ibid.*

The law favors the early vesting of estates, and an estate vests as of the death of testator if there is no condition precedent to its present enjoyment save the termination of a preceeding estate, unless the will itself provides a later time by express language or necessary implication, and adverbial clauses designating time do not ordinarily indicate such intent but will be construed as designating the time when the enjoyment of the estate is to begin. *Ibid.*

Where there is a devise of land for life with limitation over to the grandchildren of the life tenant, and the same grandchildren are living at the death of the testator and at the death of the life tenant, such grandchildren take regardless of which date the roll is called, and the estate is no longer subject to be opened up to let in grandchildren who may thereafter be born. *Arnold v. Battley*, 364.

As a general rule remainders vest at the death of the testator unless some later time for vesting is clearly expressed in the will or is necessarily implied therefrom, and a devise will be held to take effect at the earliest moment the language of the will permits. *Parker v. Parker*, 399.

An estate is vested when there is either an immediate right of present enjoyment or a present vested right of future enjoyment. *Ibid.*

Where land is devised to testator's son for life with remainder to such son's children, with further provision that in the event any of the son's children should predecease him the issue of such child should take his parent's share, vests the remainder in testator's grandchildren *in esse* as of the date of testator's death, subject to be opened up to let in any children thereafter born to testator's son, and since the estate in remainder would vest during the son's life or within the period of gestation after his death, such devise does not violate the rule against perpetuities. *Ibid.*

Where there is a devise of an estate in trust with provision that the *corpus* should be distributed to members of a class upon the termination of the trust, and there is no gift of the income or other interest to the beneficiaries except the provision for final distribution, termination of the trust marks both the time of the vesting and the time of the enjoyment of the estate. *Ibid.*

§ 33d. Estates in Trust.

The will in question set up a trust fund with direction that testator's wife be paid out of the net income a specified sum monthly during her life or as long as she remained a widow, with further provision that the trustees might sell, exchange, or reinvest any or all of his personal estate in order to carry out this provision. *Held:* The trustees are not limited to income as a source of payment of the annuity but have the power and duty, if necessary, to use the *corpus* of the fund to make the monthly payments, and therefore what will be left for division to the ultimate beneficiaries cannot be determined until the trust estate terminates, and no

WILLS—*Continued.*

part of the estate may be sold for advancement to the ultimate beneficiaries until the termination of the trust estate. *Miller v. McLean*, 171.

Trust in this case held to terminate upon the majority of the youngest grandchild living at time of testator's death. *Bank v. Hannah*, 556.

§ 33h. Rule Against Perpetuities.

The rule against perpetuities requires that an estate vest not less than twenty-one years, plus the period of gestation, after the life or lives of persons in being at the time of the creation of the estate, and if there is a possibility that a future interest may not vest within the time prescribed the gift is void. *Parker v. Parker*, 399.

The rule against perpetuities refers solely to the vesting of estates and is not concerned with their possession or enjoyment. *Ibid.*

The rule against perpetuities is one of law and not of construction. *Ibid.*

A devise to testator's son for life with remainder to son's children does not violate rule against perpetuities even though vested interest to grandchildren is subject to be opened up to let in after born grandchildren; but devise to trustee, without division of net income to children, and with provision for distribution of *corpus* to grandchildren when youngest grandchild should reach twenty-eight, does violate rule against perpetuities. *Ibid.*

§ 33½. Parties Enlisted to Take under Will.

Where there are only two subscribing witnesses to an attested will, such witnesses may not take under the will, G.S. 31-10, and judgment that such witnesses were entitled to take their respective shares bequeathed to them by the will as members of a class must be held for error. *Brown v. Byrd*, 454.

§ 34a. Designation of Devisees and Legatees in General.

A will is to be construed in favor of those who are the natural or special objects of testator's bounty. *Bank v. Hannah*, 556.

§ 39. Actions to Construe Wills.

Under the provisions of G.S. 6-21, the court properly directs in the exercise of its discretion that the costs of an action to construe a will, including reasonable counsel fees, be paid out of the *corpus* of the estate. *Little v. Trust Co.*, 229.

§ 33e. Income and Corpus and Annuities.

Under the terms of a will bequeathing a business interest to testator's brother, with a further bequest of a percentage of the income from a trust estate from which was to be deducted the net value of the business interest theretofore bequeathed, *held*, the deductions from the brother's share of the income in the amount of the specific bequest was properly added to the *corpus* of the trust, and was not income to be disbursed to the income beneficiaries. *Little v. Trust Co.*, 229.

Under the terms of the trust in this case, share of income of beneficiary dying without issue should be added to income for distribution. *Ibid.*

§ 38. Residuary Clauses.

Under terms of this trust, lapsed legacy of person who was also residuary legatee held not to pass under residuary clause. *Little v. Trust Co.*, 229.

WITNESSES

§ 4. Competency of Witnesses — Age.

The test of the competency of a child to testify is not age but capacity to understand and relate under the obligation of an oath a fact or facts which will assist the jury in determining the truth with respect to the ultimate facts, and a ruling excluding the testimony of a child on the arbitrary basis of age of the child, is error. *Artesani v. Gritton*, 463.

Whether a child possesses sufficient mental capacity to testify is to be determined on the basis of the mental capacity of the child at the time he is called upon to testify and not his capacity at the time the subject matter of the testimony transpired. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-27. Under rewritten statute, payment by maker without knowledge or ratification of sureties does not bind sureties. *Pickett v. Rigsbee*, 200.

1-47; 1-52. Three-year statute applies to sureties even though suretyship is under seal. *Pickett v. Rigsbee*, 200.

1-52(9). Is applicable to right to rescind policy of insurance for material misrepresentations in application. *Swartzberg v. Ins. Co.*, 150.

1-52; 1-53. City does not appropriate private water system until it exercises dominion over mains, and action filed less than one year thereafter is not barred. *Styers v. Gastonia*, 572.

1-57. Action must be prosecuted in name of real party in interest. *Skinner v. Transformadora, S. A.*, 320.

1-69.1; 1-97(6). Unincorporated labor union doing business in this State may be served under the statute. *Gainey v. Brotherhood*, 256.

1-122(2). Pleader is not required to plead law and should not plead evidentiary facts. *Jones v. Loan Asso.*, 626.

1-134.1. General appearance no longer waives objection to jurisdiction. *Finch v. Small Business Administration*, 50.

1-139. Contributory negligence is affirmative defense which must be pleaded and proven. *Pruett v. Inman*, 520.

1-151. Complaint will be liberally construed upon demurrer. *Jones v. Loan Asso.*, 626.

1-161; 1-129; 1-131. Notwithstanding that demurrer is heard prior to time for filing answer, court may refuse to allow amendment when hearing is more than five days after acceptance of service of demurrer, although plaintiff may thereafter move to amend. *Upchurch v. Raleigh*, 676.

1-180. Court is required to declare law arising on all substantial features of the case and mere statement of contentions is insufficient. *Rowe v. Fuquay*, 769.

1-183. Only motion made at close of all evidence will be considered on appeal. *Drum v. Bisaner*, 305.

1-240. Insurance carrier paying balance due on tort judgment and having it assigned to its insured is not entitled to contribution against other tort-feasors under the statute. *Squires v. Sorahan*, 589.

1-253. Complaint need not refer to statute if facts alleged bring the action within its purview. *Little v. Trust Co.*, 229.

1-271. Only party aggrieved may appeal. *Utilities Com. v. Transport Co.*, 776.

1-276. Where proceedings before the clerk are brought before Superior Court in any manner the Superior Court acquires jurisdiction to hear all matters in controversy. *Blades v. Spitzer*, 207.

1-277. Interlocutory judgment is not appealable unless it effects substantial right which may not be protected by appeal from final judgment. *Utilities Com. v. Transport Co.*, 776.

1-282. Exceptions to the charge can be taken within the time allowed for preparation of case on appeal. *Conrad v. Conrad*, 412.

GENERAL STATUTES, CONSTRUED—*Continued.*

G.S.

1-400; 1-402. Settlement in accordance with judgment in valid *ex parte* proceeding is binding. *Gillikin v. Gillikin*, 1.

1-407; 1-407.2. Where court decrees sale for reinvestment, trustee should give bond notwithstanding that will stipulates that trustee should not be required to give bond. *Blades v. Spitzer*, 207.

6-21. Under the statute the court may properly direct that cost of action to construe will, including counsel fees, be paid out of the *corpus* of the estate. *Little v. Trust Co.*, 229.

6-21(6). Order held one apportioning costs in exercise of court's discretion. *Tyser v. Sears*, 65.

14-21. Carnal knowledge of female child under 12 years is rape irrespective of force, intent or her consent. *S. v. Browder*, 35.

14-23. Evidence of defendant's guilt of rape held sufficient to be submitted to jury. *S. v. Burell*, 115.

14-44; 14-45. Statutes create separate offenses, the first to protect the unborn child under which the State must prove the child was quick; the second to protect the mother and proof that the child was quick is not required. *S. v. Hoover*, 133.

14-72. Larceny from the person in any amount is punishable by as much as ten years in prison. *S. v. Stevens*, 331.

15-170. Statutory indictment for manslaughter will not support conviction of assault with deadly weapon. *S. v. Rorie*, 579.

15-180.1. Where judgment recites suspension of judgment with defendant's consent he may not contend that he did not consent in the absence of anything to indicate withdrawal of consent. *S. v. Warren*, 690.

18-11; 18-48; 18-50. Possession of nontaxpaid liquor in any quantity is unlawful and raises presumption that possession is for purpose of sale. *S. v. Guffey*, 60.

18-32. Possession of more than one gallon of intoxicating liquor raises presumption of possession for purpose of sale. *S. v. Rogers*, 499.

18-48. Possession may be either actual or constructive. *S. v. Guffey*, 60.

20-38(1). Each entrance of intersecting highway is a separate intersection. *Pruett v. Inman*, 520.

20-71.1. Does not dispense with necessity of allegation that driver was agent of owner. *Lynn v. Clark*, 289.
Allegation of agency and proof of ownership raises issue of respondeat superior for jury. *Williamson v. Varner*, 446.

20-124(a). Person who lends his car to another wtih express or implied knowledge of defective brakes is liable for such negligence. *Austin v. Austin*, 283.

20-129. Operation of automobile on public highway at night without lights is negligence *per se*. *Williamson v. Varner*, 446.

20-134; 20-161. Neither statute is applicable to mere temporary stop when there is no intent to break continuity of travel. *Meece v. Dickson*, 300.

20-140; 20-141(b)(3); 20-141(c); 20-146; 20-148. Prescribe legislative standards of care which are absolute. *Bondurant v. Mastin*, 190.

20-141(c); 20-155(a). It is sufficient if court charge applicable law of stat-

GENERAL STATUTES, CONSTRUED—*Continued.*

G.S.

utes and it is not required that court read statutes to jury. *Kennedy v. James*, 434.

20-146; 20-148; 20-138. It is negligence *per se* to operate a motor vehicle while under the influence of intoxicating liquor or to fail to give an approaching vehicle one-half the main traveled portion of the highway. *Watters v. Parrish*, 787.

20-150(c). Prohibits passing not only at marked intersections but also at street intersections. *Adams v. Godwin*, 471; *Pruett v. Inman*, 520.

20-155(a). Has no application to an intersection governed by automatic traffic control signals. *Jones v. Schaffer*, 368.

20-155(b). Car first in intersection has right of way. *Kennedy v. James*, 434. First vehicle in intersection, regardless of whether it is turning or not, has right of way. *Carr v. Stewart*, 118.

20-163; 20-124(b). Parking of vehicle on a grade without properly setting brake and turning wheels toward curb is negligence *per se*. *Watts v. Watts*, 352.

20-174(a). Pedestrian crossing highway other than at marked cross-walk or street intersection is required to yield right of way to vehicular traffic, but his failure to do so is not negligence *per se*. *Gamble v. Sears*, 706.

20-174(e). Even when motorist has right of way over pedestrian the motorist is under duty to exercise due care to avoid colliding with pedestrian and must blow horn when necessary. *Gamble v. Sears*, 706.

20-279.14. 1953 statute does not apply to accident, or judgment arising therefrom, occurring before effective date of the statute. *Justice v. Scheidt*, 361.

22-1. Agreement of president of company, owning practically all its stock, to answer for debt of company is original promise not coming within statute. *May v. Haynes*, 583.

28-1; 28-24. Clerk may appoint administrator c.t.a. *Mitchell v. Downs*, 430.

28-147. Action against personal representative on claim against the estate may be brought initially in Superior Court. *Mitchell v. Downs*, 430.

29-141(d); 20-161.1; 20-40(b)4. Conviction of driving 75 miles per hour in zone designated as 45 mile per hour zone requires mandatory thirty-day suspension of driver's license. *Shue v. Scheidt*, 561.

31-10. Subscribing witness may not take under the will. *Brown v. Byrd*, 454.

31-15; 14-77. Executor qualifying under will is under duty to bring to court's attention later executed instrument. *In re Will of Covington*, 546.

32-12; 31-13; 28-40. Where executor qualifying under will discovers later executed instrument and brings it to attention of court, clerk should revoke letters testamentary, and notice is not required. *In re Will of Covington*, 551.

41-11. Proceedings for sale of estate for reinvestment held valid. *Blades v. Spitzer*, 207.

44-38.1(a)(b)(c). Lien of conditional sale contract registered in another State after the vehicle had been brought into this State is not binding on *bona fide* purchaser. *Bank v. Ramsey*, 339.

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45-21.26; 45-21.29. Fact that trustee's report is not filed within five days does not deprive clerk of authority to order resale. *Gallos v. Lucas*, 480.

50-11. Instruction that alimony allowed would be terminated by subsequent divorce held prejudicial, since subsequent divorce terminates alimony only in certain instances. *Bowling v. Bowling*, 527.

50-14; 50-16. Limitations prescribed by G.S. 50-14 should be used as guide in fixing alimony without divorce under G.S. 50-16. *Conrad v. Conrad*, 412.

50-15; 50-16. Alimony *pendente lite* may be awarded the wife under the statutes if she is the plaintiff, and under the common law if she is the defendant. *Sguros v. Sguros*, 408.

50-16. Allegations and evidence held sufficient to make out *prima facie* case for alimony without divorce. *Bowling v. Bowling*, 527.

51.1. Upon sale of land held by entirety, proceeds become personalty and belong to husband and wife in common in absence of agreement to contrary. *Bowling v. Bowling*, 527.

53-2; 53-4; 53-5; 53-92. Action will not lie to compel Commissioner of Banks to issue certificate when procedure for review by State Banking Commission has not been followed. *Young v. Roberts*, 9.

62-26.10; 62-26.9. Superior Court should specify ground for remand of cause to Utilities Commission. *Utilities Com. v. Transport Co.*, 776.

62-68; 62-69; 62-72. Utilities Commission properly proscribes telephone company from furnishing service to municipalities within territory free or at reduced rates. *Utilities Com. v. Wilson*, 640.

93A. Statute regulating real estate brokers is constitutional. *S. v. Warren*, 690.

97-2(2). Injury to National Guardsman while on active duty is compensable under the Act. *Wesley v. Lea*, 540.

97-10. Industrial Commission has exclusive jurisdiction of claim of National Guardsman for injuries inflicted by another Guardsman while on active duty. *Wesley v. Lea*, 540.

(Prior to 1959 amendment.) Employee executing settlement with third person *tort-feasor* may not maintain proceedings under Compensation Act to recover one-half attorney's fee. *Hefner v. Plumbing Co.*, 277.

Insurance carrier has exclusive right for six months to bring action against third person *tort-feasor;* repeal of the statute does not affect injuries occurring prior to its ratification. *Ray v. Membership Corp.*, 380.

97-38; 97-39. Where deceased employee leaves dependent mother and widower, they share equally in compensation for employee's death. *Shealy v. Associated Transport*, 738.

97-38(1). Commuted value of future installments is properly paid to personal representative of deceased beneficiary. *Hill v. Cahoon*, 295.

97-47; 97-82. Industrial Commission retains jurisdiction until a final award is entered. *Pratt v. Upholstery Co.*, 716.

97-86. Findings are conclusive in absence of exceptions thereto. *Pratt v. Upholstery Co.*, 716.

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97-87. Approval by Industrial Commission of agreement of parties for compensation is judicial act and the approved agreement becomes award. *Pratt v. Upholstery Co.*, 716.

105-120(f). Requirement of municipality that telephone company should furnish it service free or at a reduced rate would constitute municipal franchise tax in violation of statute. *Utilities Com. v. Wilson*, 640.

105-125; 105-138(3). Rental business of educational institution of another state and income from such business are exempt from franchise and income taxes. *In re Vanderbilt University*, 743.

105-136. (Prior to repeal by Ch. 1340, S.L. 1957.) Carrier deducting State taxes other than income taxes in computing operating expenses held not entitled to deduct such taxes again in computing income allocated to business carried on in this State. *Coach Co. v. Currie*, 181.

105-230; 105-231. Fact that corporation has its charter revoked prior to its assignment of bid at judicial sale does not deprive its assignee of rights as purchaser. *Page v. Miller*, 23.

105-414. Service of process against deceased owners does not bind heirs or devisees. *Page v. Miller*, 23.

136-19; 40-12. Action at common law against State Highway Commission will not lie to recover compensation if there is statutory remedy available. *Ferrell v. Highway Commission*, 830.

143-138(f). Building Code of 1953 has force of law. *Drum v. Bisaner*, 305.

143-291; 97-13(c). Personal representative of deceased prisoner is not remitted to Compensation Act but may maintain proceeding under Tort Claims Act. *Ivey v. Prison Department*, 615.

148-1(b); 148-1(c); 148-4; 148-6; 148-26; 148-22.1. Maintenance of prison cannot be enjoined in absence of allegation of any unlawful or unauthorized conduct on part of prison officials. *Pharr v. Garibaldi*, 803.

153-64.1; 105-278; 105-295; 105-291. County commissioners may expend funds under contract for revaluation of property for taxation. *DeLoatch v. Beamon*, 754.

160-239; 160-255. Vote is not necessary for expenditure of funds by city for water and sewer systems within its limits but vote is necessary to expenditure of such funds for utilities outside its limits. *Eakley v. Raleigh*, 683.

160-255. Authority of city to extend its public utilities ouside its limits is subject to reasonable limitations. *Service Co. v. Shelby*, 816.

160-349. Institution of prosecution against employee for embezzlement is in discharge of duties by city manager. *McDonald v. Carper*, 29.

160-379(b)(1); 160-379(d); 160-382; 160-255. Proceeds of water and sewer bonds may be expended in newly annexed areas notwithstanding neither bond ordinance nor ballots disclose such intent. *Upchurch v. Raleigh*, 676; *Eakley v. Raleigh*, 683.

160-456(q). Urban Redevelopment Act prescribes adequate standards to guide municipalities in determining whether law should be invoked, and is constitutional. *Redevelopment Co., v. Bank*, 596.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, sec. 1; Art. I. sec. 17; Art. II. sec. 1. Urban Redevelopment Act is constitutional. *Redevelopment Com. v. Bank*, 595.

I, secs. 1, 7, 17, 31. Statute regulating real estate brokers is constitutional. *S. v. Warren*, 690.

I, sec. 7. Urban Redevelopment Act is constitutional. *Redevelopment Co. v. Bank*, 595.

IV, secs. 2 and 7. Statute prescribing qualifications for office in conflict with those prescribed by Constitution is void. *Starbuck v. Havelock*, 176.

IV, sec. 9. State Highway Commission may be sued only in manner authorized by statute. *Ferrell v. Highway Commission*, 830.

V, sec. 3. Where funds expended by Redevelopment Commission are not derived from taxation, provisions of this section are not involved. *Redevelopment Com. v. Bank*, 595.

VII, sec. 7. Where water and sewer bonds have been authorized by vote of residents, proceeds may be expended in newly annexed areas notwithstanding that residents of newly annexed areas did not vote in the election. *Eakley v. Raleigh*, 683.

County may expend funds under contract for revaluation of property for taxation without a vote. *DeLoatch v. Beamon*, 754.

X, sec. 6. Upon sale of land held by entirety, proceeds become personalty and belong to husband and wife in common in absence of agreement to contrary. *Bowling v. Bowling*, 527.

XI, secs. 1, 41, 5. Maintenance of prison cannot be enjoined in absence of allegation of any unauthorized or unlawful conduct on part of prison officials. *Pharr v. Garibaldi*, 803.

CONSTITUTION OF THE UNITED STATES, SECTION OF, CONSTRUED.

U.S. Fourteenth Amendment. Statute regulating real estate brokers is constitutional. *S. v. Warren*, 690.