NORTH CAROLINA REPORTS

Vol. 253

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CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

---

FALL TERM, 1960

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JOHN M. STRONG

REPORTER

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RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1961

# CITATION OF REPORTS

**Rule 46 of the Supreme Court is as follows:**

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

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1 and 2 Martin, Taylor & Conf. | as | 1 | N. C. | 9 Iredell Law | as | 31 | N. C. |
| 1 Haywood | " | 2 | " | 10 " " | " | 32 | " |
| 2 " | " | 3 | " | 11 " " | " | 33 | " |
| 1 and 2 Car. Law Repository & N. C. Term | " | 4 | " | 12 " " | " | 34 | " |
| | | | | 13 " " | " | 35 | " |
| 1 Murphey | " | 5 | " | 1 " Eq. | " | 36 | " |
| 2 " | " | 6 | " | 2 " " | " | 37 | " |
| 3 " | " | 7 | " | 3 " " | " | 38 | " |
| 1 Hawks | " | 8 | " | 4 " " | " | 39 | " |
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| 3 " | " | 10 | " | 6 " " | " | 41 | " |
| 4 " | " | 11 | " | 7 " " | " | 42 | " |
| 1 Devereux Law | " | 12 | " | 8 " " | " | 43 | " |
| 2 " " | " | 13 | " | Busbee Law | " | 44 | " |
| 3 " " | " | 14 | " | " Eq. | " | 45 | " |
| 4 " " | " | 15 | " | 1 Jones Law | " | 46 | " |
| 1 " Eq. | " | 16 | " | 2 " " | " | 47 | " |
| 2 " " | " | 17 | " | 3 " " | " | 48 | " |
| 1 Dev. & Bat. Law | " | 18 | " | 4 " " | " | 49 | " |
| 2 " " | " | 19 | " | 5 " " | " | 50 | " |
| 3 & 4 " " | " | 20 | " | 6 " " | " | 51 | " |
| 1 Dev. & Bat. Eq. | " | 21 | " | 7 " " | " | 52 | " |
| 2 " " | " | 22 | " | 8 " " | " | 53 | " |
| 1 Iredell Law | " | 23 | " | 1 " Eq. | " | 54 | " |
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| 7 " " | " | 29 | " | 1 and 2 Winston | " | 60 | " |
| 8 " " | " | 30 | " | Phillips Law | " | 61 | " |
| | | | | " Eq. | " | 62 | " |

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

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

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

# JUSTICES

OF THE

# SUPREME COURT OF NORTH CAROLINA

**FALL TERM, 1960.**

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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:

THOMAS WADE BRUTON.

---

ASSISTANT ATTORNEYS-GENERAL:

HARRY W. McGALLIARD,
PEYTON B. ABBOTT,
RALPH MOODY,
KENNETH WOOTEN, JR.,[1]
F. KENT BURNS,
LUCIUS W. PULLEN,
H. HORTON ROUNTREE,
GLENN L. HOOPER, JR.[2]
THOMAS L. YOUNG

---

SUPREME COURT REPORTER:

JOHN M. STRONG.

---

CLERK OF SUPREME COURT:

ADRIAN J. NEWTON.

---

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

---

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

BERT M. MONTAGUE.

[1]Resigned 1 October, 1960. Succeeded by Harrison Lewis.
[2]Succeeded by G. Andrew Jones, Jr., 1 January, 1961.

# 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 |
| KENNETH A. PITTMAN[1] | Eighth | Snow Hill. |

## SECOND DIVISION

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

## THIRD DIVISION

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

## FOURTH DIVISION

| | | |
|---|---|---|
| J. FRANK HUSKINS | Twenty-Fourth | Burnsville. |
| JAMES C. FARTHING | Twenty-Fifth | Lenoir. |
| FRANCIS O. CLARKSON | Twenty-Sixth | Charlotte. |
| HUGH B. CAMPBELL | Twenty-Sixth | Charlotte. |
| P. C. FRONEBERGER | Twenty-Seventh | Gastonia. |
| W. K. MCLEAN | Twenty-Eighth | Asheville. |
| J. WILL PLESS, JR. | Twenty-Ninth | Marion. |
| GEORGE B. PATTON | Thirtieth | Franklin. |

## SPECIAL JUDGES.

| | |
|---|---|
| GEORGE M. FOUNTAIN | Tarboro. |
| SUSIE SHARP | Reidsville. |
| J. B. CRAVEN, JR. | Morganton. |
| W. JACK HOOKS | Kenly |

## EMERGENCY JUDGES.

| | |
|---|---|
| H. HOYLE SINK | Greensboro. |
| W. H. S. BURGWYN | Woodland. |
| Q. K. NIMOCKS, JR. | Fayetteville. |
| ZEB V. NETTLES | Asheville. |
| J. PAUL FRIZZELLE | Snow Hill. |

[1]Succeeded by Albert W. Cooper, Kinston, 1 December, 1960.

# SOLICITORS

## EASTERN DIVISION

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

## WESTERN DIVISION

| | | |
|---|---|---|
| HARVEY A. LUPTON | Eleventh | Winston-Salem. |
| HORACE R. KORNEGAY[1] | Twelfth | Greensboro. |
| M. G. BOYETTE | Thirteenth | Carthage. |
| GRADY B. STOTT[2] | 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. |
| LEONARD LOWE | Eighteenth | Caroleen. |
| ROBERT S. SWAIN | Nineteenth | Asheville. |
| GLENN W. BROWN | Twentieth | Waynesville. |
| CHARLES M. NEAVES | Twenty-first | Elkin. |

[1]Succeeded 31 December 1960 by Edward K. Washington, Jamestown.
[2]Succeeded 7 February 1961 by Max Childers, Mount Holly.

# SUPERIOR COURTS, FALL TERM, 1960.

## FIRST DIVISION

### FIRST DISTRICT
**Judge Bone**

Camden—Sept. 26.
Chowan—Sept. 12; Nov. 28.
Currituck—Sept. 5; Oct. 10†.
Dare—Oct. 24.
Gates—Oct. 17(A).
Pasquotank—Sept. 19†; Oct. 17† Nov. 14*; Dec. 5†.
Perquimans—Oct. 31.

### SECOND DISTRICT
**Judge Frizzelle**

Beaufort—Sept. 5†; Sept. 19*; Oct. 17†; Nov. 7*; Dec. 5†.
Hyde—Oct. 10; Oct. 31†.
Martin—Aug 8†; Sept. 26*; Nov. 21†(2); Dec. 12.
Tyrrell—Aug. 29†; Oct. 3.
Washington—Sept. 12*; Nov. 14†.

### THIRD DISTRICT
**Judge Morris**

Carteret—Oct 17†; Nov. 7.
Craven—Sept. 5(2); Oct. 3†(2); Oct. 31; Nov. 14; Nov. 28†(2).
Pamlico—Aug 8(2).
Pitt—Aug. 22(2); Sept. 19†(2); Oct. 10 (A); Oct. 24†; Oct. 31; Nov. 21; Dec. 12.

### FOURTH DISTRICT
**Judge Paul**

Duplin—Aug. 29; Sept. 5†; Oct. 10*; Nov. 7*; Dec. 5†;(2).
Jones—Sept. 26; Oct. 31†; Nov. 28.
Onslow—July 18‡(A); Oct. 3; Nov. 14† (2).
Sampson—Aug. 8(2); Sept. 12†(2); Oct. 17*; Oct. 24†; Nov. 23*(A).

### FIFTH DISTRICT
**Judge Bundy**

New Hanover—Aug. 1*; Aug. 8†; Aug. 22*; Sept. 12†(2); Oct. 3*; Oct. 10†(2); Oct. 31*(2); Nov. 21†(2); Dec. 5*(2).
Pender—Sept. 5†; Sept. 26; Oct. 24†; Nov. 14.

### SIXTH DISTRICT
**Judge Stevens**

Bertie—Aug. 29; Sept. 5†; Nov. 21.
Halifax—Aug. 15(2); Oct. 3†(2); Oct. 24*; Dec. 5(2).
Hertford—July 25(A); Sept. 12; Sept 19†; Oct. 17.
Northhampton—Aug. 8; Oct. 31(2).

### SEVENTH DISTRICT
**Judge Mintz**

Edgecombe—Sept. 19*; Sept. 26†;(A)(2); Oct. 10*(2); Nov. 7†(2).
Nash—Aug. 22*; Sept. 12†; Sept. 26†; Oct. 3*; Oct. 24†(2); Nov. 21*(2); Dec. 5† (A).
Wilson—July 18*; Aug. 29*(2); Oct. 24*(A)(2); Dec. 5†(2).

### EIGHTH DISTRICT
**Judge Parker**

Greene—Oct. 12†(A); Oct. 17*(A); Dec. 5.
Lenoir—Aug. 22*; Sept. 12†(2); Oct. 10† (2); Oct. 24*(2); Nov. 21†(2); Dec. 12.
Wayne—Aug. 15*; Aug. 29†(2); Sept. 26†(2); Nov. 7(2); Dec. 5†(A).

## SECOND DIVISION

### NINTH DISTRICT
**Judge Carr**

Franklin—Sept. 19†(2); Oct. 17*; Nov. 28†(2).
Granville—July 25; Oct. 10†; Nov. 14(2).
Person—Sept. 12; Oct. 3†(A)(2); Oct. 31.
Vance—Oct. 3*; Nov. 7†.
Warren—Sept. 5*; Oct. 24†.

### TENTH DISTRICT
**Judge McKinnon**

Wake—July 11*(A)(2); July 25†(A); Aug 8†; Aug. 15*(2); Aug. 29†; Sept. 5†(A)(2); Sept. 5*(2); Sept. 19†(2); Oct. 3*(A)(2); Oct. 10†(2); Oct. 24†(2); Oct. 31*(A)(2); Nov. 7†(2); Nov. 21*(2); Nov. 21†(A)(2); Dec. 17*.

### ELEVENTH DISTRICT
**Judge Hobgood**

Harnett—Aug. 15†; Aug. 29*(A); Sept. 12†(A)(2); Oct. 10†(2); Nov. 14*(A)(2).
Johnston—Aug. 22; Sept. 26†(2); Oct. 24; Nov. 7†(2); Dec. 5(2).
Lee—Aug. 1*; Aug. 8†; Sept. 12*; Sept. 19†; Oct. 31*; Nov. 21†.

### TWELFTH DISTRICT
**Judge Bickett**

Cumberland—Aug. 8†; Aug. 15*; Aug. 29*(2); Sept. 12†; Sept. 26*(2); Oct. 10† (2); Oct. 24†(2); Nov. 7*(2); Nov. 28†(2); Dec. 12*.
Hoke—Aug. 22; Nov. 21.

### THIRTEENTH DISTRICT
**Judge Williams**

Bladen—Oct 24*; Nov. 14†.
Brunswick—Sept. 19; Oct. 17†.
Columbus—Sept. 5*(2); Sept. 26†(2); Oct. 10*; Oct. 31†(2); Nov. 21*(2).

### FOURTEENTH DISTRICT
**Judge Clark**

Durham—July 11*(A)(2); Aug. 1(2); Aug. 29*; Sept. 5†; Sept. 12*(2); Oct. 3*(2); Oct. 17†(2); Oct. 31*(2); Nov. 14†(2); Nov. 28(2); Dec. 12*.

### FIFTEENTH DISTRICT
**Judge Mallard**

Alamance—July 18†(A); Aug. 1†; Aug. 15*(2); Sept. 12†(2); Oct. 17*(2); Nov. 14†(2); Dec. 5*.
Chatham—Aug. 29†; Oct. 10; Oct. 31†; Nov. 7†; Nov. 28.
Orange—Aug. 8*; Sept. 26†(2); Dec. 12.

### SIXTEENTH DISTRICT
**Judge Hall**

Robeson—July 11†(A); Aug 5*; Aug. 29†; Sept. 5*(2); Sept. 19†(2); Oct. 10†(2); Oct. 24*(2); Nov. 14†(2); Nov. 28*.
Scotland—July 25†; Aug. 22; Oct. 3†; Nov. 7†; Dec. 5(2).

## THIRD DIVISION

### SEVENTEENTH DISTRICT
**Judge Olive**

Caswell—Nov. 14*(A); Dec. 5†.
Rockingham—Sept. 5*(2); Sept. 26†(A)(2); Oct. 17†; Oct. 24*(2); Nov. 21†(2); Dec. 12*.
Stokes—Oct. 3*; Oct 10†.
Surry—July 11†(2); Sept. 19*(2); Nov. 7†(2); Dec. 5(A).

### EIGHTEENTH DISTRICT
**Schedule A—Judge Gambill**

Guilford Gr.—July 11*; July 25*; Aug. 29*; Sept. 5†; Sept. 12†(2); Oct. 3*; Oct. 10†(2); Oct. 24*; Nov. 7*; Nov. 14†(2); Nov. 28*; Dec. 5*.
Guilford H.P.—July 18*; Sept. 26*; Oct. 31*; Dec. 12*.

**Schedule B—Judge Gwyn**

Guilford Gr—Sept. 12*(2); Sept. 26†(2); Oct. 10*(2); Oct. 24†(2); Nov. 21†(2).
Guilford H.P.—Sept. 12†(A); Oct. 17†(A); Nov. 7†(2).

### NINETEENTH DISTRICT
**Judge Preyer**

Cabarrus—Aug. 22*; Aug. 29†; Oct. 10(2); Nov. 7†(A)(2).
Montgomery—July 11(A); Sept. 26†; Oct. 3; Oct. 31(A).
Randolph—July 18†(A)(2); Sept. 5*; Nov. 7†(2); Nov. 28†; Dec. 5*(2).
Rowan—Sept. 12(2); Oct. 24†(2); Nov. 21*; Dec. 5†(A).

### TWENTIETH DISTRICT
**Judge Crissman**

Anson—Sept. 19*; Sept. 26†; Nov. 21†.
Moore—Aug. 15*(A); Sept. 5†(2); Nov. 14.
Richmond—July 18*; July 25†; Oct. 3*; Oct. 10†; Dec. 5†(2).
Stanly—July 11; Oct. 17†(2); Nov. 28.
Union—Aug. 22†(A); Aug. 29; Oct. 31(2).

### TWENTY-FIRST DISTRICT
**Judge Armstrong**

Forsyth—July 11†(2); July 25(2); Aug. 29†**; Sept. 5(2); Sept. 12†(A)(2); Sept. 26†(2); Oct. 10(2); Oct. 24†(2); Nov. 7(2); Nov. 21†(2); Dec. 5†(A)(2); Dec. 5(2).

### TWENTY-SECOND DISTRICT
**Judge Phillips**

Alexander—Sept. 26.
Davidson—July 18†(A); Aug. 22; Sept. 12†(2); Oct. 10†; Oct. 17†(A); Nov. 14(2); Dec. 12†.
Davie—Aug. 1; Oct. 3†; Nov. 7.
Iredell—Aug. 29; Sept. 5†; Oct. 17†; Oct. 24(2); Nov. 28†(2).

### TWENTY-THIRD DISTRICT
**Judge Johnston**

Alleghany—Aug. 29; Oct. 3.
Ashe—July 18*; Sept. 12†; Oct. 24*.
Wilkes—July 25; Aug 15(2); Sept. 19†(2); Oct. 10; Oct. 31†(2); Nov. 16(A); Dec. 5.
Yadkin—Sept. 5*; Nov. 14†(2); Nov. 28.

## FOURTH DIVISION

### TWENTY-FOURTH DISTRICT
**Judge Pless**

Avery—July 11(A)(2); Oct. 17(2).
Madison—July 25*; Aug. 29†(2); Oct. 3*; Oct. 31†; Dec. 5*; Dec. 12†.
Mitchell—Aug. 1†(A); Sept. 12(2).
Watauga—Sept. 26*; Nov. 7†(2).
Yancey—Aug. 8; Aug. 15†(2); Nov. 21(2).

### TWENTY-FIFTH DISTRICT
**Judge Patton**

Burke—Aug. 15; Oct. 3(2); Nov. 21.
Caldwell—Aug. 29; Sept. 19†(2); Dec. 5(2).
Catawba—Aug. 1(2); Sept. 5†(2); Nov. 7(2); Nov. 28†.

### TWENTY-SIXTH DISTRICT
**Schedule A—Judge Huskins**

Mecklenburg—July 11*(A)(2); Aug. 1*(2); Aug. 15†(A)(2); Aug. 29†(2); Sept. 12†; Sept. 19†(2); Oct. 3*(2); Oct. 17†; Oct. 24†(2); Nov. 7†; Nov. 14†(2); Nov. 28†; Dec. 5*(2).

**Schedule B—Judge Farthing**

Mecklenburg—Aug. 15†(3); Sept. 5*(2); Sept. 19†(2); Oct. 3†(2); Oct. 17†(2); Oct. 31*(2); Nov. 14†(2); Nov 28†; Dec. 5†(2).

### TWENTY-SEVENTH DISTRICT
**Judge Campbell**

Cleveland—July 11(2); Sept. 26†(2); Oct. 24*; Nov. 28†(A)(2).
Gaston—July 25*; Aug. 8†(A)(2); Sept. 19*; Oct. 10†(2); Nov. 14*(2); Dec. 5†(2).
Lincoln—Sept. 5(2).

### TWENTY-EIGHTH DISTRICT
**Judge Clarkson**

Buncombe—July 11*(A)(2); July 25†(A); Aug. 1†(3); Aug. 22*(2); Sept. 5†(3); Sept. 19*(A)(2); Sept. 26†(3); Oct. 17*(2); Oct. 31†(3); Nov. 21*(A)(2); Nov. 21†; Nov. 28†(3).

### TWENTY-NINTH DISTRICT
**Judge Froneberger**

Henderson—Aug. 15†(2); Oct. 17.
McDowell—Sept. 5(2); Oct. 3†(2).
Polk—Aug. 29.
Rutherford—Aug. 15*†(A); Sept. 19†*(2); Nov. 7*†(2).
Transylvania—July 11(2); Oct. 24(2).

### THIRTIETH DISTRICT
**Judge McLean**

Cherokee—July 25; Nov. 7(2).
Clay—Oct. 3.
Graham—Sept. 5.
Haywood—July 11; Sept. 19†(2); Nov. 21(2).
Jackson—Oct. 10(2).
Macon—Aug. 1; Dec. 5(2).
Swain—July 18; Oct. 24.

* Indicates criminal term.
† Indicates civil term.
‡ Indicates jail and civil cases.
No designation indicates mixed term.

(A) Indicates judge to be assigned.
No number indicates one week term.
**Indicates non jury term.

# UNITED STATES COURTS FOR NORTH CAROLINA

## DISTRICT COURTS

*Eastern District*—ALGERNON L. BUTLER, *Judge*, Clinton.
*Middle District*—EDWIN M. STANLEY, *Judge*, Greensboro.
*Western District*—WILSON WARLICK, *Judge*, Newton.

## EASTERN DISTRICT

*Terms*—District courts are held at the time and place as follows:

Raleigh, Criminal, Civil and Grand Jury, 13 February, 1961. SAMUEL A. HOWARD, Clerk, Raleigh.

Fayetteville, Criminal and Civil, 20 March, 1961. MRS. LILA C. HON, Deputy Clerk, Fayetteville.

Elizabeth City, Criminal and Civil, 27 February, 1961. LLOYD S. SAWYER, Deputy Clerk, Elizabeth City.

New Bern, Criminal and Civil, 24 April 1961. MRS. ELEANOR G. HOWARD, Deputy Clerk, New Bern.

Washington, Criminal and Civil, 8 May 1961. MRS. JEANETTE H. ATTMORE, Deputy Clerk, Washington.

Wilson, Temporarily Closed.

Wilmington, Criminal and Civil, 5 June 1961. R. EDMON LEWIS, Deputy Clerk, Wilmington.

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; JOAN E. BELK, 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.
ABNER ALEXANDER, 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 U. S. District Court, Asheville, N. C.

# LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 5th day of August, 1960, and said persons have, as of this date, been issued certificates of this Board.

ADAMS, EDMUND IVAN ..... Kinston
AMMONS, JAMES FLOYD ..... Fayetteville
ARROWOOD, WILLIAM DREW ..... Concord
AYSCUE, EDWIN OSBORNE, JR. ..... Monroe
BALL, ERNEST HAROLD ..... Mooresville
BALLINGER, MAX DEWEY ..... Guilford College
BATTS, BERNICE RODRIC ..... Wallace
BEARD, JOHN QUINCY ..... Erwin
BEEKER, NED ARTHUR ..... Asheboro
BELL, ROBERT BARNARD ..... Durham
BLAKEY, GEORGE ROBERT ..... Burlington
BLANKSTEIN, CHARLES SIDNEY ..... Greensboro
BRAWLEY, PRESSLEY BELL, JR. ..... Mooresville
BRYANT, ALFRED SCALES ..... Durham
BURROUGHS, JAMES DILLARD ..... Reidsville
BYRUM, DAVID EDWIN ..... Hickory
CANADY, DONALD RAYMOND ..... Fayetteville
COHAN, RICHARD ARMOR ..... Alexandria, Virginia
CRANFORD, DWIGHT LITTLE ..... Albemarle
DAUGHERTY, HILARY DEXTER ..... Kinston
DAVIS, HARRY GLENN ..... Winston-Salem
DAVIS, HERBERT OWEN ..... Roxboro
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Given over my hand and the seal of the Board of Law Examiners, this 21st day of December, 1960.

EDWARD L. CANNON, *Secretary*
*Board of Law Examiners*
*The State of North Carolina*

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*Maynard v. R.R.,* 251 N.C. 783. Reversed 20 February 1961.

*S. v. Case,* 253 N.C. 130. Petition for *certiorari* denied 20 February 1961.

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# CASES

ARGUED AND DETERMINED
IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

## RALEIGH

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## FALL TERM, 1960

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WILLIAM W. MOORE v. W O O W, INC.

(Filed 21 September, 1960.)

**1. Corporations § 7—**

Allegations to the effect that a named individual acting in his capacity as vice president, director and incorporator of a broadcasting company purchased from plaintiff certain equipment used in connection with broadcasting, and that thereafter the broadcasting company retained and used the equipment in its business, sufficiently alleges that the individual was the agent, real or apparent, of the defendant corporation, since an officer of a corporation ordinarily has authority to purchase for it equipment necessary to its business.

**2. Same—**

Where an officer or agent is held out by a corporation or has been permitted by it to act for it in the management of its affairs in the usual course of the corporate business, so that a reasonably prudent person is justified in assuming that the officer or agent has authority to act for the corporation in such matters, the corporation is bound by such apparent authority and is estopped from denying such authority as against a person dealing with the officer or agent in good faith.

**3. Pleadings § 12—**

Exhibits attached to the complaint and made parts thereof are to be considered in passing upon a demurrer.

**4. Same—**

A demurrer admits the truth of factual averments well stated and

such relevant inferences of fact as may be deduced therefrom, but it does not admit conclusions of law asserted by the pleader.

**5. Same—**

Upon demurrer, a complaint will be liberally construed with a view to substantial justice between the parties, and the pleader given the benefit of every reasonable intendment in his favor. G.S. 1-151.

**6. Pleadings § 2—**

The complaint should state in a plain and concise manner the essential or ultimate facts constituting the cause of action, but it should not allege the evidence to prove such facts, and need not plead the law. G.S. 1-122(2).

**7. Sales § 20—**

The fact that a complaint has attached to it as an exhibit a memorandum stating that the memorandum was executed pending the preparation and signing of the sales contract in question does not render the complaint demurrable for failure to allege an executed contract when in other parts of the complaint it is specifically alleged that the parties agreed to a sale at a stated price and that the purchaser thereafter retained and used the subject matter of the sale, etc., since such additional allegations present the reasonable inference that the contract mentioned in the exhibit was actually consummated.

**8. Corporations § 7—**

The evidence in this case is held amply sufficient to be submitted to the jury upon the question of the apparent authority of the vice president of defendant corporation to execute for the corporation the contract sued on, or the estoppel of the corporation to deny such authority.

**9. Pleadings § 25—**

In this action on a sales contract, defendant contended that plaintiff did not own the property plaintiff purported to sell to defendant, but that the property belonged to a corporation of which plaintiff was an officer, that such corporation had theretofore sold the property to defendant and that plaintiff was attempting to sell the same property twice. *Held:* There being no sufficient evidence of estoppel against plaintiff, and defendant's contention as to ownership of the property having been fully submitted to the jury in the instructions of the court, plaintiff's motion in the Supreme Court for leave to amend its answer to allege plaintiff's want of ownership and estoppel is denied.

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

APPEAL by defendant from *Preyer, J.*, May Term, 1960, of BEAUFORT.

Civil action to recover $2,000.00 allegedly due on certain equipment owned by plaintiff and used by Pamlico Broadcasting Company, Inc., and sold by him to defendant.

The jury found by its verdict that plaintiff was the owner on

about 19 February 1958 of this equipment as described in Annex A of his complaint, that plaintiff agreed to sell and defendant agreed to buy this equipment as described in Annex A of the complaint, and that plaintiff was entitled to recover $2,000.00 from defendant. The jury further found by its verdict that plaintiff was not the owner of and entitled to the possession of the FM Tuner and FM Booster described in the complaint.

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

*Wilkinson and Ward for plaintiff, appellee.*
*S. M. Blount and Rodman & Rodman for defendant, appellant.*

PARKER, J. Defendant has filed with his brief a demurrer in the Supreme Court in which it avers that the complaint fails to state a cause of action, in that "the complaint fails to allege that Walter Stiles was the agent, real or apparent, of the defendant corporation, or that he was acting within the course and scope of his authority."

The allegations in the complaint in respect to the sufficiency of the complaint as challenged by the demurrer are in substance: In February 1958 Walter Stiles, vice president, a promoter, and an incorporator of defendant corporation, discussed with plaintiff the possibility of purchasing from him certain equipment owned by him and used at the time by Pamlico Broadcasting Company, Inc. Plaintiff made a list of the equipment owned by him, and indicated a willingness to sell it for $3,000.00. Walter Stiles, acting in his capacity as vice president, a promoter, and incorporator of defendant corporation indicated that the price was agreeable, and said if the incorporators of defendant were successful in their efforts to operate a radio station, the corporation would like to hire plaintiff as its general manager. Defendant corporation commenced business about 13 April 1958, and hired plaintiff as its general manager. A few days thereafter Walter Stiles acting as vice president of defendant told plaintiff the price of $3,000.00 for the equipment was satisfactory.

A few days subsequent to 13 April 1958, Walter Stiles acting in his capacity as vice president of defendant told plaintiff the defendant corporation desired to purchase certain equipment from plaintiff — a list of which is attached — and that the price of $3,000.00 was satisfactory to defendant.

In August 1958 plaintiff inquired of Walter Stiles when the defendant would be ready to purchase the equipment. A short time

before this he had asked Walter Stiles when payment would be made, and Stiles said defendant corporation was not then able to set a definite date, that the financial position of defendant was such it could not pay $3,000.00 in cash. Plaintiff then prepared an inventory. Walter Stiles acting in his official capacity as an officer and incorporator of defendant examined the inventory, and said defendant had no use for the tape recorder. Plaintiff agreed to remove the tape recorder, and in order to reach a binding agreement reduced the price to $2,500.00. When plaintiff made this reduction, Walter Stiles acting in his capacity as officer, director, and incorporator of defendant and in furtherance of its purposes told plaintiff the defendant would pay $2,500.00, but did not name a definite time, saying it would be within two or three days.

About 6 September 1958, as nothing had been done to consummate the tentative agreement, plaintiff told Stiles that it would be necessary for the corporation to make immediate arrangements to pay all or a part of the $2,500.00. Thereupon the defendant through its officer and agent Stiles caused the following memorandum to be prepared, which is attached to the complaint as Exhibit B and made a part thereof:

"AGREEMENT

September 6, 1958.

"William W. Moore has offered for sale to W O O W, Inc., certain pieces of equipment and program material, all of which are owned solely by him, in consideration of $2,500. A listing of said equipment and program material is included herewith.

"Pending the preparation and signing of a mutually agreeable sales contract covering the above, by William W. Moore and John P. Gallagher, President of W O O W, Inc., Five Hundred Dollars ($500), receipt of which is hereby acknowledged, is being advanced to William W. Moore, by W O O W, Inc., (W O O W, Inc., check # ch. 220, dated 9/8/58).

Accepted:

W O O W, Inc.
(s) WALTER STILES
By: WALTER STILES, V. P.

Witness_____
(s) WM. W. MOORE
WILLIAM W. MOORE
Date: 9-8-58."

During the months of September and October thereafter plaintiff repeatedly reminded defendant that the remaining $2,000.00 on the price of the equipment was due and unpaid, and on each occasion he was put off though all the equipment listed in the written agreement of 6 September 1958 was being used daily by the defendant corporation for its purposes and benefit. In October Stiles told plaintiff that defendant corporation was attempting to move to Greenville, North Carolina, that pending action on its application by the Federal Communications Commission, payment could not be made, but immediately after such application had been acted upon, which would be in a few days, the defendant would pay immediately.

Defendant corporation has never paid plaintiff any part of the $2,000.00, although the defendant has continued to retain possession of the equipment listed in the agreement of 6 September 1958, and has continued to use the same for its purposes. There was a valid sale of this equipment to plaintiff by defendant for a price stated and agreed.

There is this averment in the complaint, "there was a valid sale of the same (relating to the articles listed in Annex A attached to the complaint) by plaintiff to defendant for a price stated and agreed." Considering the character of defendant's business as alleged in the complaint, it was unquestionably in the power of defendant corporation to give authority to its own officers to purchase this equipment listed in Annex A to the complaint which the nature of defendant's business required in its operation. A corporation must necessarily act and contract through its officers or agents. 13 Am. Jur., Corporations, p. 852.

There is this fundamental and well settled rule of law that when, in the usual course of the corporate business, an officer or other agent is held out by the corporation or has been permitted to act for it or manage its affairs in such a way as to justify third persons dealing with such officer or agent in good faith in inferring or assuming that he is doing an act or making a contract within the scope of his authority, and who deals with him in good faith in reliance on such authority, the corporation is bound thereby, even though such officer or agent has not the actual authority from the corporation to make such a contract. This authority is known as apparent or ostensible authority. *Bank v. Hay*, 143 N.C. 326, 55 S.E. 811, quoted with approval in *R. R. v. Lassiter & Co.*, 207 N.C. 408, 177 S.E. 2d 9; 13 Am. Jur., Corporations, §890, where cases from many jurisdictions are cited; 19 C.J.S., Corporations, §996.

It would seem that this apparent authority rule is closely related to, and is based upon the same principle as authority by estoppel. Fletcher, Cyclopedia Corporations, Per. Ed., Vol. 2, §449. This is said in 13 Am. Jur., Corporations, p. 871: "A corporation which, by its voluntary act, places an officer or agent in such a position or situation that persons of ordinary prudence, conversant with business usages and the nature of the particular business, are justified in assuming that he has authority to perform the act in question and deal with him upon that assumption is estopped as against such persons from denying the officer's or agent's authority." See also *Barrow v. Barrow*, 220 N.C. 70, 16 S.E. 2d 460; 2 Am. Jur., Agency, §104 — Estoppel of Principal to Deny Authority.

Annex A and Exhibit B are attached to the complaint and made parts thereof, therefore, they can be considered on the demurrer. 71 C.J.S., Pleading, §257; 41 Am. Jur., Pleading, §246.

A demurrer admits 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. In considering a demurrer we are required to construe the pleading challenged liberally with a view to substantial justice between the parties, and to make every reasonable intendment in favor of the pleader. N.C. G.S. 1-151; *Hedrick v. Graham*, 245 N.C. 249, 96 S.E. 2d 129.

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. N.C. 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. *Jones v. Loan Association*, 252 N.C. 626, 114 S.E. 2d 638; McIntosh, N.C. Practice and Procedure, 2nd Ed., p. 528.

The complaint alleges there was a valid sale of the equipment listed in Annex A, which is attached to the complaint and made a part thereof, by plaintiff to defendant corporation for a price stated and agreed. While the written agreement marked Exhibit B attached to the complaint and made a part thereof speaks of pending the preparation and signing of a mutually agreeable contract covering this equipment by plaintiff and John P. Gallagher, president of defendant, the complaint avers "the defendant has continued to retain possession of and dominion over the said articles set out in Annex A and has continued to use same for its own purposes." This, and other allegations in the complaint, permit the reasonable infer-

ence that the contract to be made mentioned in Exhibit B was actually consummated by the parties with Walter Stiles acting for defendant. There are these significant allegations in substance in the complaint, *inter alia:* During the negotiations between plaintiff and Stiles, the price of $3,000.00 for the equipment was stated by Stiles as satisfactory to defendant, and Stiles said the defendant had no use for the tape recorder. Whereupon, the price was reduced to $2,500.00. And further during the negotiations Stiles told plaintiff if the incorporators of defendant were successful in their efforts to operate a radio station, defendant would like to hire plaintiff as its general manager, and when the defendant commenced business in April 1958, defendant hired plaintiff as its general manager.

While the complaint is inartistically drafted, yet construing it liberally as we are required to do in passing on a demurrer, it is our opinion that it avers facts sufficient to establish apparent authority of Walter Stiles to make the contract for defendant or estoppel by the corporation to deny agency so as to bind defendant corporation, and to prevent its being overthrown by the demurrer filed in the Supreme Court.

Defendant offered no evidence. It assigns as error its motion for judgment of involuntary nonsuit made at the conclusion of plaintiff's evidence. Defendant's argument seems to be that the evidence is insufficient to show that Walter Stiles was an agent for defendant with sufficient authority to bind defendant, and it relies upon *Hoover v. Indemnity Co.,* 206 N.C. 468, 174 S.E. 308; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911. These cases are clearly distinguishable: all three are tort actions for damages in which the defendants were sought to be held liable upon the doctrine of *respondeat superior.* We conclude from a careful reading of the evidence that it substantially supports the allegations of the complaint, and is sufficient to carry the case to the jury upon the doctrine of apparent authority or estoppel as set forth above. The trial court correctly denied the motion for an involuntary nonsuit.

Defendant has a number of assignments of error to the admission of evidence over its objection, to failure to strike certain evidence, to the charge of the court, and to the denial of the court of its motion for a peremptory instruction on the first issue. All of these assignments of error have been considered, and all are overruled. It would serve no useful purpose to discuss them in detail.

By a motion filed in this Court on 16 August 1960 defendant prays for leave to amend its answer so as to plead that plaintiff

is estopped to assert any title or interest in the property described in Annex A attached to the complaint, and made a part thereof, for the alleged reason that all this property in February 1958 was owned by Pamlico Broadcasting Company, Inc., and was used by it in the operation of Radio Station W H E D, and that plaintiff as president, general manager, and majority stockholder of Pamlico Broadcasting Company, Inc., and L. B. Wynne sold and conveyed in April 1958 all the tangible assets of Pamlico Broadcasting Company, Inc., to John P. Gallagher. In support of its motion defendant alleges in it that defendant "did not know until after plaintiff testified that he would admit that the items set out in Annex A were used in connection with the operation of Station W H E D or that they had ever been owned by Pamlico Broadcasting Company, Inc."

The complaint in paragraph three alleges, *inter alia*, that "Walter Stiles, presently Vice President of defendant corporation, a promoter and an incorporator of said corporation, discussed with plaintiff the possibility of purchasing from plaintiff certain equipment owned by him and at that time used by the said Pamlico Broadcasting Company, Inc. That plaintiff made a list of certain items of personal property owned by him, indicating the value of said items, and further indicating a willingness to sell same for $2,000.00." This is the answer to paragraph three of the complaint: "It is admitted that prior to April 13, 1958, the facilities being used by the defendant as a radio station were in the possession of Pamlico Broadcasting Company, Inc., and that on or about April 13th the defendant commenced business operations as a radio station, having purchased the physical plant and equipment from John P. Gallagher; and it is further admitted that defendant employed plaintiff as its General Manager. Except as herein admitted the allegations of section 3 are denied."

Defendant had knowledge from the complaint that plaintiff alleged the property in suit here was owned by him, and was used at the time by the Pamlico Broadcasting Company, Inc. Plaintiff's evidence shows that Pamlico Broadcasting Company, Inc., operated Station W H E D, and the motion to amend contains language of similar import.

The pleadings raised the issue as to whether or not plaintiff owned this equipment.

Counsel for defendant cross-examined plaintiff at length in respect to the contract of sale and conveyance by Pamlico Broadcasting Company, Inc., to Gallagher, had plaintiff to identify it, and read parts of it to him. Plaintiff testified on cross-examination

that Pamlico Broadcasting Company, Inc., in consideration of back salary it owed him and could not pay conveyed to him the property he afterwards sold to defendant, that the list of property he owned and submitted to Stiles for a price of $3,000.00 was the same list set forth in Annex A to the complaint, and that he told Stiles this property belonged to him and did not belong to Pamlico Broadcasting Company, Inc.

On redirect-examination plaintiff read in evidence the agreement to sell the property to Gallagher, which agreement was later consummated. This agreement contains this language: "There is excepted however from the terms of this transfer the following articles: one gas heater, one conelrad unit, two tape recorders, various meteorological instruments, one TV tuner, a long play record appendix with 350 records, a 45 RPM record appendix containing approximately 3,000 records, one water cooler, one amplifier, one power unit, one FM tuner, one FM booster, one clock, one national short wave receiver, two mobile units, two roof antennas and one transformer. These articles are all the individual property of W. W. Moore and are separate and apart from the other equipment of the said station which same belongs to the said Wynne." Immediately thereafter plaintiff testified: "All of the property described in Annex A of my complaint is also listed in the contract from which I have just read."

On the first issue the court stated the contentions of defendant on the first issue, to which defendant has no objection, in substance: The defendant contends that these items of property belonged to Pamlico Broadcasting Company, Inc., that the jury ought not to believe it transferred these items to plaintiff, but that the jury ought to believe that it sold these articles with everything else they had to defendant, when Station W H E D was sold to defendant, that plaintiff is selling these items twice, that it was the owner of these items and not plaintiff, and it sold all of them to defendant, and that the jury should answer the first issue No.

So far as the record discloses defendant at no time made a motion to amend its answer in the Superior Court.

The issue of ownership of the property listed in Annex A to the complaint was ably contested before the jury, fairly presented to the jury by the court, and answered by the jury. Defendant saw fit to introduce no evidence. Upon the facts in the record before us, we see nothing to support a plea of estoppel, as contended by de-

fendant. This Court denies defendant's motion to amend its answer filed in this Court.

In the trial below no prejudicial error is made to appear.

No error.

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

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JAMES MAURICE BIGGS, BY HIS NEXT FRIEND, JIM BIGGS, PLAINTIFF v. NORMA JEAN BIGGS, BY HER GUARDIAN AD LITEM, NORA WEITERS, DEFENDANT.

(Filed 21 September, 1960.)

**1. Appeal and Error § 21a: Trial § 21½—**

The correctness of the court's ruling on motion to nonsuit is not presented by an exception to the refusal of the motion at the conclusion of all the evidence when the record fails to show a supporting exception, or, indeed, that the motion to nonsuit was renewed after the introduction of evidence by defendant, since the failure to renew the motion after the close of all the evidence waives the motion made at the close of plaintiff's evidence. G.S. 1-183.

**2. Trial § 21½—**

Involuntary nonsuit is solely statutory, and the statutory procedure must be strictly followed. G.S. 1-183.

**3. Appeal and Error § 19—**

An assignment of error must be based upon an exception duly noted.

**4. Husband and Wife § 7—**

Neither the husband nor wife is competent to testify as to nonaccess where the legitimacy or paternity of a child is directly in issue or is a necessary inquiry in determining a material issue.

**5. Same: Divorce and Alimony § 3—**

Where, in the husband's action for divorce on the ground of adultery, the wife pleads condonation and testifies to intercourse with him after he forgave the alleged adultery and that she was pregnant as a result of such intercourse, it is competent for the husband to deny the intercourse and to testify to nonaccess at the time in question, since the question of paternity is not in issue, and, by virtue of G.S. 50-11 his testimony could not have the effect of rendering illegitimate any child conceived during coverture.

**6. Same—**

Where the wife sets up condonement as a defense in the husband's action for divorce on the grounds of adultery, it is competent for the

husband to deny the intercourse relied on as a basis for the condonement and to testify as to nonaccess, there being no collusion, since his testimony in denial of the defense of condonation is not testimony for or against the wife on the issue of adultery and therefore does not come within the purview of G.S. 50-10 or G.S. 8-56. Any inference of adultery results from testimony introduced by her in regard to her pregnancy.

**7. Evidence § 12—**

While an act of intercourse between husband and wife is a confidential communication between them within the purview of G.S. 8-56, the statute does not preclude the husband from voluntarily denying the intercourse with the wife, asserted by her as condonation in his action for divorce on the ground of adultery, his testimony being otherwise competent, since the statute does not preclude the voluntary disclosure of confidential communications but provides merely that neither spouse may be compelled to divulge such communications.

APPEAL by defendant from *Pless, J.*, March 1960 Mixed Term, of SWAIN.

This is an action for divorce *a vinculo* on the ground of adultery. Summons was issued and complaint filed 16 December 1958.

Plaintiff husband alleged in substance: Requisite North Carolina residence. The parties were married 24 November 1955 and separated after six months cohabitation. A child, Serita Rosanna Biggs, was born to the union on 12 December 1956. Defendant wife committed adultery in February and March 1958. Plaintiff had knowledge of the acts of adultery more than six months prior to the initiation of the action.

Defendant's answer denied the allegations of adultery. By leave of court defendant filed amendment to answer in October 1959 and set up the defense of condonation, as follows: "THAT the Plaintiff and Defendant reunited and resumed their marital relations and cohabitation with each other as husband and wife at Homestead, Florida, Sunday night, October 18th, 1959, and said fact is hereby plead as condonation by the Plaintiff of the acts of adultery alleged by him against the Defendant in his Complaint, which acts are again denied by the Defendant, and as a bar to the recovery sought by the Plaintiff in his said Complaint."

Plaintiff in reply denied the allegations of condonation.

On trial both plaintiff and defendant offered evidence.

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

"1. Has the plaintiff been a resident of North Carolina, Swain County, for more than six months next preceding the bringing of this action? ANSWER: YES.

"2. Was the plaintiff and defendant married as alleged in the complaint? ANSWER: YES.

"3. Did the defendant commit adultery as alleged in the complaint? ANSWER: YES.

"4. If so, did the plaintiff condone the said adultery? ANSWER: NO.

From judgment granting plaintiff an absolute divorce defendant appealed and assigned errors.

*Sanford W. Brown for defendant, appellant.*
*Styles and Styles for plaintiff, appellee.*

MOORE, J. (1) Defendant assigns as error the failure of the court to nonsuit the action.

At the close of plaintiff's evidence defendant moved for nonsuit. The motion was overruled and defendant excepted. Thereafter defendant introduced evidence and plaintiff offered evidence in rebuttal. At the close of all the evidence there was no renewal of the motion to nonsuit. Defendant assigns as error both the refusal of the court to nonsuit at the close of plaintiff's evidence and the failure to dismiss at the close of all the evidence.

Assignment of error No. 5 is as follows: "EXCEPTION #7 (R. p. 53). At the conclusion of all the evidence, the defendant renewed her motion for the dismissal of the action as of nonsuit and for a directed verdict in her favor on her plea in bar therein. Motion denied. Exception by defendant."

There is no exception shown at page 53 of the record. A page by page examination of the record does not disclose an exception numbered 7 nor any renewal of the nonsuit motion after defendant began the introduction of evidence.

"If the defendant introduces evidence he thereby waives any motion for dismissal or judgment of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." G.S. 1-183. "The power of the court to grant an involuntary nonsuit is altogether statutory and must be exercised in accord with the statute." *Warren v. Winfrey,* 244 N.C. 521, 522, 94 S.E. 2d 481; *Ward v. Cruse,* 234 N.C. 388, 389, 67 S.E. 2d 257. The defendant, having failed to move for dismissal at the close of all the evidence and having waived her motion made at the close of plaintiff's evidence, has failed to provide proper basis for the assignments of error for failure to nonsuit, and they are not sustained.

With respect to the supposed motion for directed verdict, the record does not show that any such motion was made. The assignment of error relating thereto is not based on an exception. "The Supreme Court will not consider questions not properly presented by objections duly made and exceptions duly entered. The assignments of error must be based on exceptions duly noted . . ." 1 Strong: N. C. Index, Appeal and Error, s. 19, pp. 88-9. *Waddell v. Carson,* 245 N.C. 669, 677, 97 S.E. 2d 222.

(2) Defendant maintains that she is entitled to a new trial for error in the admission of incompetent evidence.

Defendant denied that she committed adultery but alleged that, if it should be found she had indulged in adulterous acts, defendant forgave her and condoned the acts by resuming the marital relationship.

She testified in part: In October 1959 after the institution of this divorce action, plaintiff, who was a member of the U. S. Air Force and stationed in Florida, telephoned and asked her to come to Florida and bring their daughter, Serita, he thought they could get back together. She and Serita went to Florida on 17 October 1959 and registered at a motel where plaintiff spent the night with them. He had sexual intercourse with defendant at the motel. The next day he told her he was coming to Asheville and they would live together. He said he would drop the divorce case. She is pregnant as a result of the intercourse with plaintiff in Florida. He later repudiated his agreement to drop the case and live with her.

Before the above testimony of defendant was given, plaintiff, on cross examination by defendant's counsel, stated: Defendant came to Florida. She arrived on 17 October 1959, called him at the Base and told him he could come to see Serita if he wanted to. He went to the motel with two friends. He met his wife downstairs and talked to her about twenty minutes. He carried Serita to the room and remained there about a minute and a half. His friends were present. He then returned to the Base. He did not spend the night with his wife; she is not pregnant from having intercourse with him at the motel.

On redirect examination he testified:

"Question. State whether or not you had sexual relations with Norma Jean Biggs down in Florida when she was down there?

"Defendant objects. Overruled. (Exception).

"Answer. No sir.

"Question. How long were you in her presence in the room with her when you were down there?

"Defendant objects. Overruled. (Exception).

"Answer. I would say about a minute and a half; I took the child to the door and I stood there about a minute and a half."

Defendant's contention is that plaintiff was not competent to testify to nonaccess.

In the light of the pleadings and evidence in this case, the question for decision is: Where, in an action by a husband for divorce on the ground of adultery, the wife pleads condonation and testifies that the husband had intercourse after agreeing to forgive her and that she is pregnant as a result of the intercourse, is it error to permit the husband to deny the intercourse?

The answer to this question involves a consideration of the Lord Mansfield rule and several statutory provisions of our law.

In *Goodright v. Moss,* 2 Cowp. 591 (1777), Lord Mansfield declared that "it is a rule founded in decency, morality and policy that they (husband and wife) shall not be permitted to say after marriage, that they have had no connection, and therefore the offspring is spurious." Under this rule a husband or wife is incompetent to testify to the husband's nonaccess where such testimony would tend to bastardize or prove a child conceived after marriage illegitimate. This rule is generally recognized in the United States. Stansbury: N. C. Evidence, s. 61, p. 107. In early North Carolina decisions the rule was recognized and applied. *Boykin v. Boykin,* 70 N.C. 262; *State v. Pettaway,* 10 N.C. 623. Later the court apparently considered that the rule had been abrogated by statute (G.S. 8-56). *State v. McDowell,* 101 N.C. 734, 7 S.E. 785. However, the latest decisions in this jurisdiction uniformly recognize and apply the rule in cases where the legitimacy or paternity of a child is directly in issue or is a necessary inquiry in determining a material issue. *State v. Campo,* 233 N.C. 79, 62 S.E. 2d 500; *State v. Bowman,* 231 N.C. 51, 55 S.E. 2d 789; *Ray v. Ray,* 219 N.C. 217, 13 S.E. 2d 224; *West v. Redmond,* 171 N.C. 742, 88 S.E. 341. We find no decision of this Court which applies the rule of Lord Mansfield where legitimacy of a child is not in issue.

In defendant's able brief we find an exhaustive list of authorities from other jurisdictions. Because of statutory limitations, often at variance with our statutes, and the difference in factual situations involved, we find these of little help in the situation here presented. Defendant chiefly relies upon the following cases: *Adams v. Adams,* (Vt. 1930) 148 A. 287; *Harward v. Harward,* (Md. 1938) 196 A.

318; *Admire v. Admire,* (N.Y. 1943) 42 N.Y.S. 2d 755. In the *Adams* case the wife brought an action for divorce on the grounds of cruelty and desertion. The husband defended on the ground that plaintiff had given birth to an illegitimate child. He thereby raised the issue of legitimacy in his pleadings. In *Harward* the plaintiff sued for divorce on the ground of adultery and alleged that his wife had been delivered of an illegitimate child as a result of her adulterous acts. Thus, he placed the paternity of the child directly in issue, and the Court declared it to be an issue in the case. In the *Admire* case the husband sued "for divorce and for an adjudication that child born during coverture was illegitimate." Paternity was an issue in all these cases. There was much dicta favorable to defendant's contention but the situations involved were different from that in the case *sub judice.*

In the instant case paternity was not in issue. The challenged evidence was merely a denial of defendant's affirmative defense of condonation by act of intercourse. *Abbott v. Abbott,* (N.Y. 1928) 228 N.Y.S. 611. The testimony of the defendant had no tendency to bastardize the child then *in ventre sa mere.* It would have had no such effect in law had the child been born prior to the testimony. Parenthetically, it is unknown to the Court whether or not a child has since been born, but this makes no difference in the decision of this case. ". . . (N)o judgment of divorce shall render illegitimate any child *in esse,* or begotten of the body of the wife during coverture. . ." G.S. 50-11. Since the evidence in question did not in any respect tend to bastardize a child and the question of legitimacy was not in issue, the nonaccess rule has no application in this case.

There is the further contention that the challenged testimony was incompetent by reason of G.S. 8-56. The pertinent provisions of this statute are: "In any trial . . . the husband and wife of any party thereto . . . shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit. . . . Nothing herein shall render any husband or wife competent or compellable to give evidence *for* or *against* the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery . . . Provided, however, that in all such actions and proceedings, the husband and wife shall be competent to prove, and may be required to prove, the fact of marriage. No husband or wife shall be *compellable* to disclose any confidential communication made by one to the other during their marriage." (Emphasis ours.)

"At common law husband and wife were absolutely incompetent

to testify in an action to which either was a party." Stansbury: N. C. Evidence, s. 58, p. 99. G.S. 8-56 was designed to remove the common law disabilities, except in the instances therein set out. It disqualifies both spouses from testifying *for* or *against* the other in any action or proceeding in consequence of adultery or for divorce on account of adultery. The purpose of the exception is to prevent collusion in divorce actions. *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933. But it does not prevent the party charged with adultery from denying the charge. *Broom v. Broom,* 130 N.C. 562, 41 S.E. 673.

In the *Broom* case two of plaintiff's witnesses said they had had intercourse with defendant wife since her marriage to the plaintiff. Defendant denied the testimony of these witnesses. Referring to the exceptions in G.S. 8-56, the Court said: "If the intention had been to exclude the husband and wife absolutely as witnesses in such cases, . . . the proviso . . . would have been that . . . the husband and wife were 'not competent or compellable as witnesses.' The proviso merely disqualifies both spouses from testifying *for* or *against* the other. The Court held that her testimony was not prohibited by the statute because "she did not testify *for* the husband so as to enable him to obtain a collusive divorce, nor did she testify *against* him to prove anything against him. Her evidence was in defense of herself, and not 'for or against' the other party, and the statute disqualifies neither as a witness in his or her own behalf, except only when it is for or against the other . . . . These words (for or against each other) mean something, and when given their natural significance simply prevent either party proving a *ground* of divorce *against* the other or *for* the other by his or her own testimony."

The situation in the instant case is somewhat analogous. Any contention that Mrs. Biggs was not competent "in an action or proceeding for divorce on account of adultery," to testify in her own behalf in support of her affirmative defense of condonation would be untenable. It is true that it is testimony against the husband in the sense that it tends to oppose the ultimate purpose of the suit. But the same was true in the *Broom* case. The wife's denial of the acts of adultery was calculated to affect the ultimate outcome against the husband, but was not collusive. By the same reasoning the testimony of plaintiff Biggs in denial of the alleged condonative act of intercourse with his wife was purely defensive, related only to the issue of condonation, and was not collusive. He was not disqualified by the statute to defend himself against the charge of condonation.

It is true that an act of intercourse between husband and wife is a confidential communication. But the statute merely provides that

"no husband or wife shall be *compellable* to disclose any confidential communication." His testimony (and that of his wife) was voluntarily given; there was no effort to compel such testimony.

Defendant further contends that the plaintiff was not competent to give the challenged testimony by reason of G.S. 50-10, which provides in part: In a divorce action "neither the husband nor wife shall be a competent witness to prove the adultery of the other." *Hooper v. Hooper, supra.*

But this statute does not apply to the factual situation here presented. The husband gave no testimony with respect to the allegations of adultery in his complaint. Nothing said by him would have any tendency to prove the issue of adultery in the case. In the challenged testimony he merely states that he did not have sexual intercourse with his wife in Florida and was in her room only one and one-half minutes. But defendant insists that the testimony permits an inference of adultery. If so, it is because of evidence elicited by her from her husband on cross examination and her own later testimony that pregnancy resulted from intercourse with plaintiff during the Florida visit. Plaintiff's voluntary testimony contains no charge of adultery against defendant. It was competent in denial of condonation. If an inference of adultery resulted from defendant's own later testimony and evidence elicited by her on cross examination, it has no tendency to "prove" the issue of adultery according to the allegations of the complaint, and cannot avail her on this appeal. She will not be heard to complain of error induced by her, if error there be.

The New York Court, in a factual situation almost identical with that of the instant case, had no hesitancy in ruling that on a plea of condonation husband's denial of sexual intercourse with his wife was admissable. *Abbott v. Abbott, supra.* It is noted that the New York Court's application of Lord Mansfield's rule and New York's statutory provisions are in many respects more restrictive than those in this jurisdiction. *Admire v. Admire, supra.*

To decide this case otherwise would have the effect, in many instances, of making a plea of condonation an unanswerable and absolute defense, in divorce cases on the ground of adultery, should the wife choose to testify that she became pregnant as a result of condonative sexual intercourse with her husband.

In the trial of this case we find

No error.

## WILLIAM EDWARD CAPPS v. LAWRENCE LYNCH.

(Filed 21 September, 1960.)

**1. Evidence § 14—**

The statutory provision making communications between physician and patient privileged, which privilege extends not only to information orally communicated by the patient but to knowledge obtained by the physician or surgeon by his own observation or examination, is a qualified and not an absolute privilege, and the judge of the Superior Court has the discretionary authority to compel disclosure of such communications if, in his opinion, such disclosure is necessary to a proper administration of justice and he so finds and enters such finding on the record.

**2. Appeal and Error § 46—**

Where the record discloses that the court refused to determine a discretionary matter in the exercise of its discretion, but determined the question as a matter of law, the ruling is reviewable, and the objecting party is entitled to have the proposition reconsidered and passed upon as a discretionary matter.

**3. Appeal and Error § 55—**

Where a ruling of the court is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light.

**4. Evidence § 14—**

The qualified privilege attaching to communications between physician and patient is for the benefit of the patient alone, and the patient may waive such privilege not only by express contract but also by implication, and whether there has been waiver by implication must be determined largely upon the facts and circumstances of each particular case.

**5. Same—**

While a patient does not waive his right to assert that a communication between himself and his physician is privileged by merely testifying as to his own physical condition or his injuries when he does not go into detail and does not refer to communications made to him by his physician, where the patient does voluntarily go into detail regarding the nature of his injuries and testifies in regard to the nature and results of the operation performed by the surgeon, he waives the privilege, and the surgeon is competent and compellable to testify in regard thereto, since the patient will not be allowed to close the mouth of the only witness in a position to contradict him and fully explain the facts.

**6. Appeal and Error § 41—**

While ordinarily the exclusion of evidence can not be ascertained to be harmful when the record fails to show what the witness would have testified had he been permitted to answer, where the record discloses that the court refused to permit the witness to testify even in the absence of the jury and affirmatively shows that the testimony of the

witness was on a material point and that the appellee went to great lengths to preclude the testimony, the exclusion of the testimony may not be held harmless.

**7. Appeal and Error § 54—**

The Supreme Court has the discretionary power to grant a retrial of the whole case even though the errors relate to a single issue.

APPEAL by defendant from *McLean, J.*, February 1960 Term, of HENDERSON.

This is an action to recover for personal injuries and property damages resulting from a collision of automobiles. Plaintiff alleges that he sustained personal injury and property damage by reason of the actionable negligence of defendant. Defendant pleads sole negligence of plaintiff, contributory negligence, and counterclaim for damages.

The collision occurred 20 July 1959 on Capps Drive near the village of Balfour in Henderson County. Capps Drive is a narrow, winding, unpaved highway. Plaintiff and defendant owned the vehicles involved and were operating them at the time of the collision. Plaintiff was proceeding northwardly, defendant southwardly. The cars met and collided on a curve.

The jury resolved the issues in plaintiff's favor and awarded damages in the amount of $5,250.00. From judgment entered in accordance with the verdict defendant appealed and assigned errors.

*Williams, Williams & Morris for defendant, appellant.*

*Arthur J. Redden, M. F. Toms, Van Winkle, Walton, Buck & Wall and O. E. Starnes, Jr., for plaintiff, appellee.*

MOORE, J. Plaintiff testified that he suffered a broken bone in his right wrist as a result of the accident and that Dr. R. Joe Burleson, an orthopedic surgeon, operated on the wrist. Plaintiff pushed up his sleeve and exhibited his arm to the jury.

Direct examination continued:

"Q. Now, Mr. Capps, what did the doctor do to your arm?

"A. He operated on it and took out the - - -

"Mr. WILLIAMS: OBJECTION. I'll be glad to qualify him. He testified he was put to sleep and there is no way in the world he can know what he did.

"BY THE COURT: Objection overruled - exception. Go ahead. (Question read).

"A. I was operated on and the lunate bone was taken out.

"The defendant moves to strike - denied - exception."

On cross examination plaintiff testified in part as follows: "While I was in Asheville in the hospital, it is true that I was put to sleep for the treatment that Dr. Burleson gave to my wrist. I do not know of my own knowledge what took place. During that period I was asleep. As to how I know what took place while I was asleep, I read the doctor's report and that is the only way I knew about it."

At this juncture defendant again moved to strike plaintiff's testimony as to "what was done during the operation." The motion was denied and defendant excepted.

Thereafter, Dr. T. H. Joyner testified for plaintiff. After stating that he had examined plaintiff's arm during the week preceding the trial, he gave the following testimony: "I had had occasion to examine his arm and wrist prior to that time. I saw him on October 18, 1958 (nine months prior to collision). At that time he was complaining of pain in his wrist. I diagnosed it as arthritis and treated him. At that time he gave me a history that he had been cutting corn or something of that nature and that that had resulted in swelling. Osteochondritis is an inflammation. . . . It would be difficult to differentiate the pain of arthritis and osteochondritis. . . . I did not x-ray his wrist at that time, so I don't know whether there was any deterioration or absorption of the lunate bone back at that time." (Parentheses ours.)

Plaintiff did not call Dr. Burleson, the surgeon, as a witness.

The following took place in the absence of the jury:

Defendant called Dr. Burleson as a witness. Plaintiff inquired as to the purpose of the examination.

"THE COURT: I am not going to let you ask him any confidential communication in the presence of the jury. I think we have had enough of that. If you want to put him on the witness stand as your witness to examine him with reference to this plaintiff without their objection, you may do so, or if they want to call him, they may do so."

Dr. Burleson then testified with reference to his education, training and experience as a surgeon. He stated: "Osteochondritis specifically, we think of it meaning perhaps a dying or degeneration of a bone, perhaps due to circulatory deficit rather than real infection. . . . Well, I don't believe there would be any difference in the symptoms of osteochondritis and a type of degenerative arthritis." He then testified that it could not be determined which condition prevailed except by "x-ray or perhaps opening the bone up."

Q. Now, then, Doctor, did you have occasion to do surgery upon the plaintiff, William Edward Capps, at any time - - -

"The plaintiff OBJECTS.

"THE COURT: Let's don't go into that.

"MR. WILLIAMS: Your Honor will not even permit it to go into the record for the appeal to pass upon?

"THE COURT: This is a confidential matter between the doctor and the plaintiff and if they have no objection to you using him for that, you may do so. If they object to it, I will not let him say anything about it. He has no right to say anything about it without the consent of the plaintiff.

"MR. WILLIAMS: If your Honor pleases, the Supreme Court has said a good many times that the Court - - and your Honor is the presiding Court - has discretion in this matter.

"THE COURT: No, sir, they have not. They have just recently said, Mr. Williams, that you have no right to use a doctor that is confidential and that I have no right to let you use him. Now, that's the rule that I'm going to adhere to and I just don't understand how you can have a confidential relation with a person and then I can bring him in here and let him testify. Then the confidence is devoid and gone.

"MR. WILLIAMS: Would your Honor take a look at a decision in the Metropolitan Insurance Company - - -

"THE COURT: No sir, I don't need to read any decisions on it because that is my ruling on it."

Defendant contends that the court should have permitted and required Dr. Burleson to give testimony as to his examination, findings, surgical procedure, treatment and prognosis with respect to plaintiff's wrist. Defendant asserts: (1) the court was in error in that it ruled, as a matter of law, that it had no discretionary authority to require him to so testify, over the objection of plaintiff; and (2) the court erred in failing to rule that plaintiff had waived his right to object to such testimony.

Communications between physician and patient were not privileged at common law. *State v. Martin*, 182 N.C. 846, 849, 109 S.E. 74. Most of the states, if not all, have by statute made such communications privileged. N.C. G.S. 8-53 provides: "No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."

"It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but

to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe." *Smith v. Lumber Co.*, 147 N.C. 62, 64, 60 S.E. 717.

The privilege established by the statute is for the benefit of the patient alone. It is not absolute; it is qualified by the statute itself. A judge of superior court at term may, in his discretion, compel disclosure of such communications if, in his opinion, it is necessary to a proper administration of justice and he so finds and enters such finding on the record. *Yow v. Pittman*, 241 N.C. 69, 84 S.E. 2d 297; *Sawyer v. Weskett*, 201 N.C. 500, 160 S.E. 575; *State v. Newsome*, 195 N.C. 552, 143 S.E. 187; *Insurance Co. v. Boddie*, 194 N.C. 199, 139 S.E. 228; *State v. Martin, supra.*

In the instant case the trial judge was vested with discretionary authority in accordance with the rule stated above, to compel the surgeon to give testimony of his examination, findings, surgery, treatment and prognosis. This, counsel aptly brought to the attention of the court. The court denied categorically that he had such discretion and ruled as a matter of law that the proffered evidence was absolutely privileged. Where, as here, the court is clothed with discretion, but rules as a matter of law, without the exercise of discretion, the offended party is entitled to have the proposition reconsidered and passed upon as a discretionary matter. *Woody v. Pickelsimer*, 248 N.C. 599, 104 S.E. 2d 273; *Tickle v. Hobgood*, 212 N.C. 762, 194 S.E. 461; *In re Trust Co.*, 210 N.C. 385, 186 S.E. 510; *Temple v. Telegraph Co.*, 205 N.C. 441, 171 S.E. 630. "And it is uniformly held by decisions of this Court that where it appears that the judge below has ruled upon the matter before him upon a misapprehension of the law, the cause will be remanded to the superior court for further hearing in the true legal light." *State v. Grundler*, 249 N.C. 399, 402, 106 S.E. 2d 488.

We now come to the question of waiver of privilege. "That this purely statutory privilege may be waived is undisputed." 16 N. C. Law Review, 54. Since the privilege is that of the patient alone, it may be waived by him and cannot be taken advantage of by any other person. Stansbury: N. C. Evidence, s. 63, p. 110. *State v. Martin, supra.*

The waiver may be express or implied. Where the patient consents that the physician be examined as a witness by the adverse party with respect to the communication, the privilege is expressly waived. The privilege may be expressly waived by contract in writing.

*Fuller v. Knights of Pythias,* 129 N.C. 318, 40 S.E. 65. See also *Creech v. Woodmen of the World,* 211 N.C. 658, 191 S.E. 840.

"Unless a statute requires express waiver, the privilege may be waived by implication." 16 N. C. Law Review 54. The North Carolina statute does not require express waiver. The privilege is waived by implication where the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician. 16 N. C. Law Review 55. *Hayes v. Ricard,* 244 N.C. 313, 93 S.E. 2d 540; *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84.

A patient may surrender his privilege in a personal injury case by testifying to the nature and extent of his injuries and the examination and treatment by the physician or surgeon. Whether the testimony of the patient amounts to a waiver of privilege depends upon the provisions of the applicable statute and the extent and ultimate materiality of the testimony given with repect to the nature, treatment and effect of the injury or ailment. The question of waiver is to be determined largely by the facts and circumstances of the particular case on trial.

"According to the weight of authority, one does not, by voluntarily testifying as to his own physical condition or to his injuries or his ailment, without going into detail and without referring to communications made to his physician, waive the privilege of the statute in favor of communications between physician and patient." 58 Am. Jur., Witnesses, s. 448, p. 253. *Harpman v. Devine,* (Ohio 1937) 10 N.E. 2d 776, 114 A.L.R. 789; *Polin v. Union Depot Co.,* (Minn. 1924) 199 N.W. 87; *Cohodes v. Traction Co.,* (Wis. 1912) 135 N.W. 879; *Williams v. Johnson,* (Ind. 1887) 13 N.E. 872. ". . . (W)here the patient voluntarily goes into detail regarding the nature of his injuries and either testifies to what the physician did or said while in attendance, or relates what he communicated to the physician, the privilege is waived, and the adverse party may examine the physician." 58 Am. Jur., Witnesses, s. 447, p. 253. *In re Roberto,* (Ohio 1958) 151 N.E. 2d 37; *Cuthbertson v. Cincinnati,* (Ohio 1957) 145 N.E. 2d 467; *Lazzell v. Harvey,* (Okla. 1935) 49 P. 2d 519; *Roeser v. Pease,* (Okla. 1913) 131 P. 534. The question of waiver of privilege is fully discussed with exhaustive citations of authority in 114 A.L.R., Annotation - Testimony by Physician - Privilege - Waiver, pp. 798-806.

In the instant case plaintiff testified in detail as to injury to his right wrist, surgery by Dr. Burleson and removal of a lunate

bone, and condition of the wrist following the operation. He stated that while he was under anesthesia Dr. Burleson removed a lunate bone from his wrist. He did not call Dr. Burleson as a witness. He testified, on cross examination, that in November 1958 he had a hurting in his wrist and saw Dr. Joyner once or twice about it. He stated: "It was not the same place in my wrist that this was." Dr. Joyner testified he diagnosed the condition as arthritis, the symptoms of arthritis and osteochondritis were difficult to differentiate, he did not x-ray the wrist and did not know whether there was any deterioration of the bone at that time. Dr. Burleson testified that it could not be determined which condition prevailed except by "x-ray or perhaps opening the bone up." According to plaintiff's testimony Dr. Burleson did "open up" the bone. The plaintiff did not consent that Dr. Burleson testify to the condition he found. The court refused to allow the testimony even in the absence of the jury. For this reason the record does not affirmatively show that the exclusion of Dr. Burleson's testimony was harmful to defendant's cause. But we gain the definite impression that there were pertinent facts within the knowledge of Dr. Burleson which plaintiff desired to suppress. To avoid the necessity of using Dr. Burleson as a witness plaintiff voluntarily entered the realm of hearsay and testified to the facts concerning the operation. He now contends that the statutory privilege closes the mouth of the only witness who is in position to contradict him and fully explain the facts. It seems clear that defendant sought to show by Dr. Burleson that there had been a prior injury to, or pre-existing ailment of, plaintiff's wrist, that plaintiff was suffering from osteochondritis at the time of the accident, and that the lunate bone was in a state of deterioration. Thus, the true condition of the bone as disclosed by the operation was very material to a proper and just determination of the extent of damage, if any, caused by the accident.

Plaintiff voluntarily testified with respect to the operation, its nature, procedure and results. In so doing he waived his statutory privilege and upon that trial Dr. Burleson was competent and compellable as a witness as to these matters. Under the circumstances the court erred in its ruling that plaintiff had not waived his statutory privilege. It is not the purpose of the statute "to conceal the truth. It is a shield and not a sword to those who can, or may not, speak." *Insurance Co. v. McKim,* (Ohio 1935) 6 N.E. 2d p. 12.

There were other assignments of error. We do not discuss these for the reason that there must be a new trial, and the errors, if any, probably will not recur upon a rehearing.

The errors discussed in this opinion both relate to the damage

issue. However, from examination of the record as a whole we are persuaded that the case should be retried upon all the issues raised by the pleadings, and in our discretion we so order. *Parker v. Belotta*, 215 N.C. 87, 200 S.E. 887. McIntosh: N. C. Practice and Procedure, Vol. 2, ss. 1597(3) and 1800(5), pp 103 and 241.

New trial.

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CITY OF WASHINGTON v. GLADYS ELLSWORTH, MADELINE E. EDENS AND HUSBAND, FRANCIS L. EDENS; H. KIRKWOOD ELLSWORTH AND WIFE, LOUISE ELLSWORTH; DORNTON G. ELLSWORTH AND WIFE, NAOMI L. ELLSWORTH; MARELYN GREENE AND HUSBAND, GEORGE C. GREENE, JR.; JOHN H. BONNER, TRUSTEE; REBECCA V. ELLSWORTH, LEE SHAMBURGER ELLSWORTH, REBECCA HARVEY ELLSWORTH, CAROL WINN ELLSWORTH.

(Filed 21 September, 1960.)

1. **Trusts § 26—**

A voluntary trust is revocable when it is created for the benefit of trustor or some person *in esse* with a future contingent interest limited to some person not *in esse* or not determinable until the happening of a future event, G.S. 39-6, but even so, it is revocable only as to the interest of persons not *in esse* or not determinable at the time the instrument of revocation is executed, and is not revocable as to vested interests of persons *in esse* unless they join in executing the instrument of revocation.

2. **Same—**

A voluntary trust provided that the corpus, after the termination of the life estates, should be distributed *per stirpes* to the children or the representatives of deceased children of one of the life tenants. The trustor and the life tenants executed an instrument purporting to revoke the trust as to one of the ultimate beneficiaries then *in esse* so that the entire property would go to the other beneficiaries and their heirs as designated in the original instrument. *Held:* The interest of the beneficiary was vested, and therefore the revocation was ineffectual under G.S. 39-6.

3. **Same—**

Where the trustor in a voluntary trust reserves the right to sell or dispose of the property with the written consent of the life beneficiary and the trustee, such right is limited to the power to dispose of the property in furtherance of the purpose for which the trust was established, and contemplates an actual *bona fide* sale for an adequate consideration, and does not empower the trustor to modify the trust by revoking the vested interest of one of the ultimate beneficiaries for the benefit of the other beneficiaries.

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

APPEAL by respondents Rebecca V. Ellsworth, Lee Shamburger Ellsworth, Rebecca Harvey Ellsworth, and Carol Winn Ellsworth, from *Paul, J.*, at Chambers, in Washington, North Carolina, 16 May 1960. From BEAUFORT.

The City of Washington brought a condemnation proceeding against all of the heirs at law of W. H. Ellsworth and wife, Alice T. Ellsworth, condemning certain lands for the use of the petitioner. There is no controversy with respect to the regularity or validity of the condemnation proceeding but only as to whether the judgment correctly adjudged and directed the proper distribution of the proceeds derived from the condemnation of the lands described in the petition.

In order to understand the question with respect to the distribution of the damages assessed and paid by the petitioner for the condemned lands, two trust instruments must be construed. The first instrument, dated 11 May 1939, from Gladys A. Ellsworth to John H. Bonner, Trustee, conveys the property in question in trust for the following uses and purposes and none other:

(1) To hold the property for the use and benefit of W. H. Ellsworth for and during the term of his natural life.

(2) After the death of said W. H. Ellsworth (who is now deceased), to hold the property for the sole use and benefit of Gladys A. Ellsworth, for and during the term of her natural life or until she should marry. Upon the death or marriage of said Gladys A. Ellsworth, the trustee will hold said property to the use and benefit of all the children and representatives of any deceased children of W. H. Ellsworth and wife, Alice T. Ellsworth, *per stirpes*, share and share alike. Upon the happening of these contingencies, the trustee will convey the legal title to the said property to all of the heirs at law of the said W. H. Ellsworth and Alice T. Ellsworth.

(3) In the event Gladys A. Ellsworth deems it advisable to sell or dispose of the property, then the right of alienation is expressly reserved to the life tenants and trustee and they "may sell and fully convey in fee simple with no liability to the remaindermen or heirs at law of W. H. Ellsworth and Alice T. Ellsworth."

The second instrument, executed on 29 January 1946 by Gladys A. Ellsworth and W. H. Ellsworth to John H. Bonner, Trustee, recites: (1) the execution of the first instrument; (2) the reservation of the right of alienation to the life tenants; and (3) the desire of the life tenants "to restrict the final disposition of the remainder interests" in the property so as to exclude therefrom William T. Ellsworth, his heirs and assigns, because William T. Ellsworth received property from W. H. Ellsworth by deed dated 14 May 1937

(note that this transaction occurred two years prior to the execution of the first trust instrument). William T. Ellsworth is now dead, and the appellants herein are his widow and his three minor children.

The second instrument purports to reform the first instrument so that the property shall be held as follows: (1) For the use of the same designated life tenants; (2) then to be held for the use and benefit of only four of the children of W. H. Ellsworth and wife, Alice T. Ellsworth, to wit, Mary Lillian E. Smith, Madeline E. Edens, H. Kirkwood Ellsworth and Dornton G. Ellsworth, or their heirs; and (3) excepting and excluding any remainder interest conveyed to William T. Ellsworth, his heirs and assigns, by the original trust agreement. Both of the foregoing instruments were duly registered.

The court below upheld the exclusion and directed that the $20,000 received from the condemnation of the property involved herein should be invested for the benefit of Gladys A. Ellsworth for the term of her natural life or until she marries, and upon her death or marriage such funds shall be distributed in equal proportions to the four above-named children of W. H. Ellsworth and wife, Alice T. Ellsworth, or their heirs.

The respondents, Rebecca V. Ellsworth, widow of William T. Ellsworth, and the minor children of William T. Ellsworth, to wit, Lee Shamburger Ellsworth, age 12, Rebecca Harvey Ellsworth, age 9, and Carol Winn Ellsworth, age 7, by their duly appointed guardian *ad litem*, W. P. Mayo, excepted to the foregoing judgment and appealed, assigning error.

*Robert W. Arnold, Jr., Waverly, Virginia; Allsbrook, Benton & Knott for appellants.*

*Rodman & Rodman for appellees.*

DENNY, J. The first question for determination on this appeal is whether the trustor, an appellee herein, revoked the interest of William T. Ellsworth and his heirs and assigns by the execution and registration of the instrument dated 29 January 1946, the pertinent parts of which are hereinabove set out.

Those parts of G.S. 39-6 pertinent to the present inquiry are as follows: "The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons *in esse* with a future contingent interest to some person or persons not *in esse* or not determined until the happening of a

future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not *in esse* or not determined by a proper instrument to that effect * * *."

In the case of *MacRae v. Trust Co.*, 199 N.C. 714, 155 S.E. 614, *Stacy, C. J.*, speaking for the Court, stated: "To bring a case within the terms of this statute, it should appear: First, that the trust is a voluntary one; second, that it was created for the benefit of the trustor, or some person *in esse*, with a future contingent interest limited to some person not *in esse*, or not determinable until the happening of a future event; and, third, that if the instrument creating the trust has been recorded, the deed of revocation has likewise been recorded. *Stanback v. Bank*, 197 N.C. 292, 148 S.E. 313."

There can be no serious question that the trust created by the instrument dated 11 May 1939 was a voluntary one. *Stanback v. Bank, supra.* On the other hand, there can be no doubt about the fact that William T. Ellsworth was *in esse* when the original trust instrument involved herein was executed.

The motion in the court below requesting the court to include the minor appellants as distributees, states that W. H. Ellsworth and his wife, Alice T. Ellsworth, both of whom are dead, were the parents of six children, namely: Dornton G. Ellsworth; H. Kirkwood Ellsworth; Madeline E. Edens; Gladys A. Ellsworth; Mary Lillian E. Smith (she and her husband are both dead), survived by a daughter, Marelyn S. Greene; and William T. Ellsworth (who is dead), survived by his widow, Rebecca V. Ellsworth, and three minor children, Lee Shamburger Ellsworth, Rebecca Harvey Ellsworth and Carol Winn Ellsworth.

The second trust instrument describes William T. Ellsworth as the nephew of Gladys A. Ellsworth and the grandson of W. H. Ellsworth. Even so, the record supports the view that the William T. Ellsworth whose interest was sought to be withdrawn by the second agreement was *in esse* when each of the trust instruments was executed and was a beneficiary under the provisions of the original trust instrument.

Therefore, we hold that, under the provisions of the original trust instrument, the interest of William T. Ellsworth was a vested interest at the time the trustor sought to withdraw his interest in the property involved herein. *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E. 2d 341.

G.S. 39-6 gives the trustor no right to withdraw a vested interest

in property held by one who was *in esse* when the trust was created, but only to withdraw a future contingent interest to some person or persons not *in esse* or not determinable until the happening of a future event. Moreover, the second instrument does not purport to withdraw a contingent interest to persons not *in esse* at the time of the execution of the first or second instruments, but only to withdraw the interest of "William T. Ellsworth, his heirs or assigns."

Consequently, we hold that the second instrument purporting to withdraw the interest of William T. Ellsworth and his heirs and assigns was unauthorized by the original trust instrument or by the provisions of G.S. 39-6. *Mackie v. Mackie,* 230 N.C. 152, 52 S.E. 2d 352.

The appellees further contend, however, that since Gladys A. Ellsworth reserved the right "to sell or dispose" of the property involved, with the written consent of W. H. Ellsworth and with the written consent or joinder of John H. Bonner, the Trustee, she had the right to convey the property involved to "Mary Lillian Smith, Madeline E. Edens, Kirkwood Ellsworth and Dornton Ellsworth, as well as any other person." Hence, they contend that the instrument dated 29 January 1946 was the equivalent of a deed to the above-named children of W. H. Ellsworth and his wife, Alice T. Ellsworth. We do not concur in this view. The original instrument contained no provision reserving the right to revoke or modify the trust provisions created therein, it only reserved the right of the trustor with the consent of those parties above-named "to sell or dispose" of the property described in the instrument.

In Scott on Trusts, Vol. III, Second Edition, section 330.1, at page 2394, it is said: "Where the creation of a trust is evidenced by a written instrument which purports to include the terms of the trust, and there is no provision in the instrument expressly or impliedly reserving to the settlor power to revoke the trust, the trust is irrevocable."

The last cited authority, section 331, at page 2413, states: "The same principles are applicable to the modification of a trust as are applicable to the revocation of a trust. If the settlor does not by the terms of the trust reserve a power to alter or amend or modify it, he has no power to do so."

The mere reservation of a power to sell or dispose of property included in a trust, only reserved the right to sell or dispose of such property in furtherance of the purposes for which the trust was established. *Spring Green Church v. Thornton, Trustees,* 158 N.C. 119, 73 S.E. 810.

In our opinion, the reserved power "to sell or dispose" of the property described in the trust instruments involved herein, contemplated an actual *bona fide* sale made for an adequate consideration in order to carry out the purposes of the trust and did not authorize the trustor to make a gift of the property or to sell it for a nominal consideration. *Taylor v. Phillips,* 147 Ga. 761, 95 S.E. 289, and cited cases.

In the last cited case, the property was conveyed in trust for the use of the grantor and his family for the life of the grantor and his wife and at the death of the survivor to be equally divided among the children of the grantor, the representatives of any deceased children taking the share to which its deceased parent would have been entitled. The trust provided further that the trustee "shall, upon the written request of" the wife of the grantor "sell and convey the said lots and premises to such person and on such terms as she may direct, and the receipt of the" wife "for the said purchase-money shall be a complete discharge to the said" trustee "of all liability for the same." The wife, who survived the grantor, executed a deed to a child of a deceased daughter conveying part of the trust property in consideration for the love and affection and appreciation which the wife had for the grandchild. The Court held that such a deed was an improper exercise of the power given to the wife in the original trust instrument and that the original trust instrument did not give the wife power to make a gift of the land. It held that the trust instrument created life estates in the wife and grantor with a vested remainder in the children. The Court said: "The remainder so created was subject to be divested only under circumstances stated in the paper, namely, by sale by the trustee, at the written request of the wife. The sale contemplated was an actual *bona fide* sale made upon a valuable consideration. It was not contemplated that the life estates reserved to the grantor and his wife, or the vested remainder, should be defeated by a mere gift, or a conveyance upon a nominal valuable consideration."

In view of the conclusions we have reached and the authorities cited herein, we hold that upon the death or marriage of Gladys A. Ellsworth, the principal now held for investment by the Clerk of the Superior Court of Beaufort County, North Carolina, for the benefit of Gladys A. Ellsworth, pursuant to the judgment of his Honor, Judge Paul, filed in the office of said Clerk on 16 May 1960, shall be distributed as follows: one-fifth each to Dornton G. Ellsworth, H. Kirkwood Ellsworth, Madeline E. Edens and Marelyn S.

Greene, and one-fifteenth each to Lee Shamburger Ellsworth, Rebecca Harvey Ellsworth and Carol Winn Ellsworth, or their respective heirs at law.

The judgment of the court below is modified to the extent hereinabove set out.

Modified and affirmed.

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

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HAYWOOD GARLAND BUNDY v. JAMES L. BELUE, GREAT SOUTHERN TRUCKING COMPANY, ROBERT SALMON AND HELMS MOTOR EXPRESS, INC.

(Filed 21 September, 1960.)

1. **Automobiles § 21—**

The failure of a motorist to equip his vehicle with adequate brakes and to maintain the brakes in good working condition, G.S. 20-124(a), or the failure of a motorist to set the brakes when required by statute, G.S. 20-124(b) and G.S. 20-163, is negligence.

2. **Automobiles § 12—**

A motorist who backs into a highway without taking reasonable precautions to warn and protect others using the highway and without seeing that such movement can be made in reasonable safety is negligent, and it is immaterial whether such movement is intentional or is due to the failure of the motorist to maintain his brakes in good working condition.

3. **Automobiles § 41k— Evidence that vehicle with defective brakes was stopped on shoulder so that it rolled back into the highway held to take issue of negligence to jury.**

Defendant admitted stopping his vehicle which had defective brakes on a grade on the right shoulder of the highway. Plaintiff's evidence tended to show that after the vehicle was so parked it rolled back into the highway because of the defective brakes, blocking the northbound traffic lane, that the driver of a following vehicle, in the emergency, veered to his left into the southbound lane to avoid the backing vehicle, and collided with plaintiff's vehicle which was traveling south. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence in parking the vehicle with defective brakes so that it would back into the highway, since injury could have been foreseen as a result of such circumstance.

4. **Pleadings § 28—**

Plaintiff must prove his case in conformity with the facts alleged as the basis of liability.

**5. Trial § 22a—**

On motion to nonsuit, plaintiff's evidence must be interpreted in the light of his allegations to the extent that the evidence is supported by the allegations, since to interpret the evidence as contradictory to the allegations would compel nonsuit for variance.

**6. Automobiles § 19: Negligence § 3—**

A person confronted with a sudden emergency is held only to that degree of care which a reasonably prudent man would exercise under like circumstances and he is not chargeable with negligence merely because he fails to make the wisest choice.

**7. Automobiles § 41c— Evidence held insufficient to show negligence in veering to left in emergency caused by another vehicle backing into the highway.**

Plaintiff's evidence tended to show that defendant driver was confronted with a sudden emergency when a tractor-trailer, traveling in front of him on the highway, stopped on the right shoulder of the highway, and then backed into the highway because of defective brakes, that defendant driver, traveling north, in attempting to avoid the backing vehicle, veered to his left into the southbound traffic lane, resulting in a collision with plaintiff's southbound automobile. *Held:* In the absence of evidence that defendant driver drove further to the left than a reasonably prudent man would have done when confronted with a similar emergency, and in the absence of evidence of any unlawful speed on the part of defendant driver, nonsuit should have been allowed on the issue of such defendant's negligence.

APPEALS by plaintiff and defendants Belue and Great Southern Trucking Company from *Morris, J.*, April 1960 Term, of MARTIN.

Plaintiff seeks compensation for injuries sustained in a collision between his automobile and a tractor-trailer owned by Great Southern Trucking Company (hereafter called Great Southern) operated for it by defendant Belue.

The collision occurred about 2:45 a.m. 18 January 1957 on Highway 49 near Denton. At the point of collision, the highway runs north and south. Plaintiff was traveling south. The tractor-trailer of Helms Motor Express, Inc. (hereafter called Helms), operated for it by defendant Salmon, was headed north. Traveling north, a vehicle would ascend a steep grade for a distance of one-half mile before reaching the crest of the hill just below which the collision occurred. A vehicle traveling south would likewise ascend a grade. The evidence does not disclose the length or acuteness of this grade. Highway 49 is a two-lane paved highway, one lane for vehicles traveling north, the other for vehicles traveling south.

Plaintiff in his original complaint alleged the vehicle of each defendant was traveling at an unlawful rate of speed, that the Great

Southern vehicle, in following the Helms vehicle, pulled to its left and into the lane of travel for southbound vehicles when the two were a short distance from the crest of the hill, and that when he came over the crest, the paved portion of the highway was occupied by the defendants, that he pulled to his right, seeking to avoid collision but was unable to do so, notwithstanding the careful manner in which he was operating.

Salmon and Helms demurred to the complaint for that it failed to allege actionable negligence by them. The demurrer was sustained. Plaintiff was permitted to file an amended complaint.

The amended complaint alleged excessive speed by each tractor-trailer and reckless operation of each vehicle. Defendant charged Salmon and Helms with negligence in operating a motor vehicle with defective brakes, a broken air hose; that Salmon, instead of proceeding to the crest of the hill where he could park in safety, pulled to the shoulder of the road a short distance from the crest where he undertook to park; that because of the lack of brakes and the negligent manner in which the vehicle was parked on the incline, it backed into the highway in front of the Great Southern tractor-trailer then in close proximity to it, blocking or partially blocking the northbound lane; that Belue, in trying to pass the backing Salmon truck, negligently traveled further into the southbound lane than was reasonable, and, because of the proximity of the vehicles when Belue pulled into the south lane, plaintiff was unable to avoid the collision.

Each defendant denied the charge of actionable negligence. Each pleaded contributory negligence in that plaintiff was operating his vehicle while under the influence of intoxicating liquors, in excess of the maximum speed permitted by law, and in excess of a reasonable speed under existing conditions.

Defendants Belue and Great Southern alleged they acted in an emergency created by the sudden and unlawful backing of the Helms truck on the highway just in front of their vehicle, that Belue went no further into the southbound lane than was necessary to avoid the Helms vehicle.

At the conclusion of plaintiff's evidence each defendant moved for nonsuit. The motion was allowed as to defendants Salmon and Helms. Plaintiff excepted and appealed.

The motion of defendants Belue and Great Southern was overruled. They did not offer evidence. Issues relating to the asserted negligence of Belue and Great Southern, contributory negligence of

plaintiff, and damages were submitted to the jury. The issues were answered in favor of plaintiff. Judgment was entered on the verdict and these defendants appealed.

The evidence necessary to a determination of the appeals is set out in the opinion.

*Peel and Peel for plaintiff.*

*Griffin & Martin for Robert Salmon and Helms Motor Express, Inc.*

*Battle, Winslow, Merrell, Scott & Wiley for James L. Belue and Great Southern Trucking Company.*

RODMAN, J. Plaintiff's Appeal. That plaintiff sustained serious injuries in the collision is not controverted. Hence this appeal presents only these questions: (1) Is there evidence which will permit but not compel a jury finding of actionable negligence by Salmon and Helms? (2) Does the evidence compel the conclusion that plaintiff negligently contributed to the collision and resulting injuries?

Plaintiff testified that he was traveling south on his way to Charlotte from his home in Williamston. He had stopped in Raleigh for supper. He was driving a new Buick and had not exceeded 55 m.p.h. anywhere on the trip. As he traveled up the hill he could see the reflection of headlights on the other side of the hill but could not tell how many until he reached and passed the crest of the hill. When he reached the crest of the hill, he was traveling 40 to 45 m.p.h. He then saw the two approaching vehicles, one in the east lane (correct side for vehicles going north), the other in plaintiff's lane attempting to pass the easternmost vehicle. He recognized these vehicles as tractor-trailers, or large trucks by their body lights. The vehicle in plaintiff's lane was "trying his best to get back in his line of traffic, pass the other truck and get back in his line of traffic." Plaintiff thought the driver of the approaching truck would succeed in his attempt to pass and get into the proper lane. The tractor portion did so, but the trailer portion did not clear plaintiff's lane, and he was unable to avoid striking the rear portion of the trailer. Plaintiff did not immediately apply his brakes when he passed the crest and saw the approaching vehicle.

To supplement his own testimony, plaintiff called defendant Belue as a witness. Belue testified: He first saw the Helms truck when he was ascending the hill. It was a quarter of a mile away, parked or stopped on the east shoulder of the road about one foot from and parallel with the paved portion. It was 100 to 150 yards south of the crest of the hill. When he was 50 feet south of the Helms truck, it,

without warning, began backing into the paved portion and directly in his line of travel. He was traveling at that time about 20 m.p.h. To avoid a collision he pulled to his left and partially into the west lane. Plaintiff suddenly appeared over the hill as the witness was passing the Helms truck. Witness sought to get his vehicle back into the east lane. He succeeded except for the rear portion of the trailer. When Belue passed the Helms truck, it continued backing into and completely across the highway. Plaintiff was traveling 70 m.p.h when he crested the hill and did not reduce his speed before colliding with the trailer.

The highway patrolman who investigated the accident, a witness for plaintiff, expressed the opinion on cross-examination that plaintiff was under the influence of intoxicating liquors. Plaintiff denied this testimony, testifying that he had not consumed any alcoholic beverage for several years.

Defendants Salmon and Helms, in their answer, admit the failure of the brakes on their vehicle and because of such failure parking the vehicle on the shoulder of the road. They allege the entire paved area was free of any obstruction created by it and deny any backing of their vehicle.

Motorists are required to equip their vehicles with adequate brakes and to maintain these brakes in good working condition, G.S. 20-124(a). When a vehicle is parked, our statutes require a setting of the brakes, G.S. 20-124(b), G.S. 20-163. A violation of these statutes is negligence. *Arnett v. Yeago*, 247 N.C. 356, 100 S.E. 2d 855.

One who backs a vehicle into a highway without taking reasonable precautions to warn and protect others using the highway and without seeing that such movement can be done in reasonable safety is negligent. *Clark v. Emerson*, 245 N.C. 387, 95 S.E. 2d 880; *Murray v. Wyatt*, 245 N.C. 123, 95 S.E. 2d 541; *Gentile v. Wilson*, 242 N.C. 704, 89 S.E. 2d 403; *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332; *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330; *Croom v. Petty*, 215 N.C. 465, 2 S.E. 2d 374.

While defendants Salmon and Helms admit parking on an incline with defective brakes, they deny any movement by their vehicle. Plaintiff's evidence, if accepted by the jury as true, is sufficient to establish such movement and a movement in an unsafe manner. If such an unsafe movement was made, it is immaterial whether it was an intentional movement or was caused by the defective brakes. The operator could have foreseen Belue's effort to avoid the backing truck, throwing him into the lane of southbound traffic.

There is a conflict in the evidence with respect to the facts pleaded as contributory negligence.

Plaintiff is entitled to have a jury ascertain the facts on the issues arising on the pleadings.

On plaintiff's appeal: Reversed.

Defendants' Appeal.

The theory on which plaintiff originally sought to hold Belue and Great Southern responsible for his injuries was the asserted negligent attempt by Belue to pass the Helms vehicle moving in the same direction in violation of G.S. 20-150. When plaintiff filed his amended complaint charging the Helms vehicle with a negligent backing into the highway in front of the approaching Great Southern truck, he abandoned his original theory of the case. He alleged facts creating a sudden emergency confronting Belue and sought to hold Belue and Great Southern liable on his allegation that Belue should have known of plaintiff's approach and with that knowledge went further into plaintiff's line of travel than was reasonably necessary to avoid the backing Helms vehicle.

The evidence conforms to the allegation in the amended complaint with respect to the asserted negligence of Salmon and Helms and is sufficient to require submission to the jury as held in plaintiff's appeal.

Plaintiff must prove his case in conformity with the facts he alleges to create liability. *Moore v. Singleton,* 249 N.C. 287, 106 S.E. 2d 214; *Spaugh v. Winston-Salem,* 249 N.C. 194, 105 S.E. 2d 610; *Lucas v. White,* 248 N.C. 38, 102 S.E. 2d 387; *Calloway v. Wyatt,* 246 N.C. 129, 97 S.E. 2d 881. He is entitled to have his testimony interpreted in the light of his allegations if fairly susceptible to such an interpretation. Plaintiff's testimony that when he came over the crest of the hill the lights of one vehicle indicated it was in the northbound lane and the lights of the other vehicle in the southbound lane, interpreted in the light of plaintiff's allegation, serves to support and corroborate the testimony of Belue that Salmon had backed into the highway, forcing Belue into the other lane. It should not be construed to mean that both vehicles were proceeding northwardly and in so proceeding Belue had negligently attempted to pass the Helms vehicle. Such interpretation would be in contradiction of his allegations, and if the correct interpretation of his testimony, would defeat his right to recover from either because of the material variance between the evidence and the allegations of the amended complaint.

When one is suddenly confronted with an emergency, he is only

held to that degree of care which a reasonably prudent man would exercise under like circumstances. He is not chargeable with actionable negligence merely because he fails to make the wisest choice. *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383; *O'Kelly v. Barbee,* 223 N.C. 282, 25 S.E. 2d 750; *Bullock v. Williams,* 212 N.C. 113, 193 S.E. 170; *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562.

Plaintiff's evidence did not support his allegation that Belue drove further to the left under the existing conditions than a reasonably prudent man would have done nor did he offer evidence of unlawful speed by Belue. Since he failed to offer evidence on which a jury could find actionable negligence by Belue, it follows that the motion to nonsuit made by Belue and Great Southern should have been allowed.

On defendants' appeal

Reversed.

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## STATE v. WILLARD TURNER.

(Filed 21 September, 1960.)

**1. Criminal Law § 99—**

Defendant's exculpating testimony can not justify nonsuit, since the credibility of defendant's witnesses is for the determination of the jury.

**2. Intoxicating Liquor § 13c— Evidence of constructive possession of intoxicating liquor held sufficient to be submitted to the jury.**

Evidence tending to show that some 18 gallons of nontaxpaid liquor was found in defendant's home is sufficient to be submitted to the jury on a charge of unlawful possession of illicit liquor for the purpose of sale, G.S. 18-50, notwithstanding the testimony of defendant that he had no knowledge that the whiskey was in his home and that it was not there when he left home some several hours prior to the search, and the testimony of defendant's brother-in-law, who had been living in defendant's home for some several weeks, that the whiskey belonged to him, the credibility of the exculpating evidence being for the jury and there being no evidence that the brother-in-law had or attempted to exercise any right of control over any portion of the premises.

**3. Criminal Law § 111—**

A defendant is an interested witness as a matter of law in testifying in his own behalf, and the court may properly instruct the jury to scrutinize his testimony in the light of his interest, but that if after such scrutiny the jury finds he was telling the truth, to give his testimony the same weight as that of any other credible witness.

**4. Same—**

**Where defendant's brother-in-law, living in defendant's house, testifies that the nontaxpaid liquor found in the house belonged to him, an instruction to the effect that the brother-in-law, in testifying for defendant, was an interested witness as a matter of law, is erroneous, since it must be presumed that the interest of the witness against self-incrimination was at least as strong as the bias which would incline him to testify in behalf of a brother-in-law.**

APPEAL by defendant from *McLean, J.*, June Term, 1960, of McDOWELL.

Criminal prosecution on warrant charging unlawful possession of illicit liquors for the purpose of sale in violation of G.S. 18-50, tried *de novo* in superior court on appeal by defendant from conviction and judgment in McDowell County Criminal Court.

The State's evidence consists of the testimony of one of three officers who, as authorized by search warrant, went to and searched defendant's house and premises (about one-half mile west of Old Fort) on April 29, 1960, about 9:00 p.m.

The officer's testimony tends to show: The search warrant was read to defendant's son, a high school boy 15 or 16 years old, the only person in defendant's house or on his premises when the search was made. The officers found (1) in the kitchen, under the sink, a half-gallon jar containing approximately a pint of nontaxpaid whiskey, (2) in the bedroom, "approximately" three cases of nontaxpaid whiskey, each case containing four one-gallon jugs, and (3) in a tool box in defendant's yard, in back of defendant's barn or garage and some ten steps from the back door of defendant's house, six gallons of nontaxpaid whiskey in an undescribed container offered in evidence as State's Exhibit #4. Defendant drove up while the officers were on his premises, after they had found the whiskey, at which time defendant was arrested. Defendant, his wife and his said son had lived in defendant's said house "for several years." The officer testified: "I know now but didn't know at the time, that Thomas Hoyle lived there in the home with Mr. and Mrs. Turner."

The evidence offered by defendant consists of the testimony of defendant, the testimony of Thomas Hoyle, and defendant's affidavit (admitted by agreement of the solicitor) setting forth what his wife would testify if able to attend court.

Evidence for defendant tended to show that he and his wife had owned the property and had lived there since 1944; that Thomas Hoyle, a brother of defendant's wife, had lived in his "daddy's" homeplace, some two miles out of town, until it was sold "to the Old

Fort Golf Course"; that Hoyle, having no home of his own, then came to live with defendant and defendant's wife; and that Hoyle had been living there "about a couple of weeks."

Defendant testified he had no knowledge of the whiskey, that no whiskey was in his house when he left about 11:00 o'clock on the morning of April 29, 1960; and that he was away from home continuously until his return and arrest about 9:00 p.m. He testified the tool box belonged to Donald Cody, his son-in-law, a builder, and that the tool box had a lock on it.

Hoyle testified he owned the whiskey; that, pursuant to his arrangement therefor, the whiskey was transported to defendant's house and premises "about sundown in the evening the law got it"; that he put part of the whiskey in the bedroom where he slept, part in the tool box, took a drink out of one jar and put this jar under the kitchen sink and left; and that defendant was not at home when this was done and knew nothing about it.

Defendant's said affidavit set forth that defendant's wife would testify that she left home about 1:00 p.m. on April 29, 1960, to go to her work at Beacon Manufacturing Company in Swanannoa, and that when she left home there was no whiskey in the house.

The jury returned a verdict of guilty as charged. Thereupon, judgment, imposing a prison sentence, was pronounced. Defendant appealed, assigning errors.

*Attorney General Bruton and Assistant Attorney General Moody for the State.*

*Proctor & Dameron for defendant, appellant.*

BOBBITT, J. As to nonsuit, the crucial question is whether the evidence was sufficient to support the finding that the nontaxpaid whiskey found in defendant's home and in the tool box in his yard, in excess of eighteen gallons, was in defendant's possession, actual or constructive, or was kept on his premises with his knowledge and consent. If so, there was evidence sufficient to support defendant's conviction. *S. v. Avery*, 236 N.C. 276, 72 S.E. 2d 670; *S. v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734.

Defendant relies largely on *S. v. Guffey, supra,* in support of his contention that the court erred in overruling his motion for judgment of nonsuit. But in *Guffey*, according to the State's evidence (the defendant offered none), four adult persons, two who lived in the defendant's house and two outsiders, were present in the defendant's house when the search was made; and, under these circum-

stances, the officers found a half-gallon jar of nontaxpaid whiskey, with the lid off, in plain view. Apart from the fact that neither Guffey nor this defendant was at home when the search was made, the factual situation in *Guffey* is quite different from that here considered.

The only person actually on defendant's premises when the search was made was defendant's teen-age son, who was not offered as a witness. Defendant drove up before the officers had left his premises. Hoyle was not there when the search was made. There was no evidence as to when Hoyle was last in defendant's house or on his premises prior to "about sundown" on the day of the search. Nor was there evidence as to when Hoyle returned to defendant's premises subsequent to the search. Hoyle testified that he "went uptown to (his) sister's" after he had left the whiskey in defendant's house and in the tool box. He testified further that he did not know anything about "it" (presumably the finding of the nontaxpaid whiskey) until the next day when he was told that "they caught Willard." The credibility of Hoyle's testimony to the effect that he had been in defendant's house and on his premises "about sundown" on the day of the search was for jury determination.

The present case is quite different from *S. v. Hanford,* 212 N.C. 746, 194 S.E. 481, cited by defendant, where nontaxpaid liquor was found in the private room of the defendant's tenant, an area of defendant's house over which his tenant had full control. Here the evidence tends to show that Hoyle, for lack of a home elsewhere, was permitted (at least for "a couple of weeks") to live in defendant's house. Nothing in the evidence supports the view that Hoyle had or attempted to exercise any right of control over any portion of defendant's house or premises.

The testimony tending to exonerate defendant comes from defense witnesses. The credibility of each of these witnesses and the weight to be given his testimony were matters for jury determination. *S. v. Avery, supra; S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481. It is noted that the testimony of defendant and of Hoyle was set forth, in our preliminary statement of facts, in the light most favorable to defendant. Suffice to say, the credibility of the testimony of each of these witnesses seems to have been somewhat impaired by the testimony of each on cross-examination.

Defendant's assignment of error directed to the court's refusal of motion for judgment of nonsuit is overruled.

Defendant assigns as error this portion of the charge:

"The Court instructs you that the defendant has gone upon

the witness stand as a witness in his own behalf. Likewise the witness, Thomas Hoyle, went upon the witness stand as a witness for the defendant, he being a brother-in-law of the defendant.

"The Court instructs you that where a defendant goes upon the witness stand in his own behalf, or a near relative goes upon the witness stand in his behalf, that such witnesses are interested witnesses, interested in the outcome of your verdict, and it is your duty to very carefully scan and scrutinize the testimony of such witnesses in the light of their interest in the outcome of your verdict."

Immediately thereafter the court gave this qualifying instruction:

"However, the Court specifically instructs you if after so doing you find that an interested witness is telling the truth, then you would give to the evidence of that witness the same weight and credit you would give to any other disinterested credible witness."

Ordinarily, when so qualified, the instruction set forth in the second paragraph of the challenged portion of the charge is fully supported by our decisions. *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606, and cases cited. Indeed, *S. v. Barnhill,* 186 N.C. 446, 119 S.E. 894, where the defendant's brother-in-law was a principal defense witness, a similar instruction was approved.

Obviously, a defendant is an interested witness. By statute, G.S. 8-54, he may, at his election, testify in his own behalf; but it is noteworthy that "(t)he common law regarded the testimony of a defendant in criminal actions as incompetent upon the theory, among others, that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with crime, if permitted to testify, to swear falsely." *S. v. Wilcox,* 206 N.C. 691, 175 S.E. 122. The reason "a near relative" is considered an interested witness and his testimony subject to close scrutiny before acceptance is "that such relations create a strong bias, and that it is an infirmity of human nature sometimes, in instances of great peril to one of the parties, to yield to the bias produced by the depth of sympathy and *identity of interests* between persons so closely connected." (Our italics.) *S. v. Ellington,* 29 N.C. 61.

While the quoted instructions, as applied to defendant's testimony, are approved, we are constrained to hold that, when considered in the context of the evidence in this particular case, these instructions tended improperly and prejudicially to discredit the testimony of Hoyle. The purport of the instructions is that Hoyle, *as a matter of*

*law*, was to be considered an interested witness and that Hoyle's testimony and defendant's testimony were to be subjected to close scrutiny in like manner.

Hoyle was not present when the whiskey was found in defendant's house and on defendant's premises. There was no evidence that Hoyle had been arrested for or accused of any offense relating to this whiskey. His testimony that he was the sole owner of the whiskey and had put it where the officers found it, in defendant's absence and without defendant's knowledge and consent, was an open admission of criminal conduct for which he was subject to prosecution; and, so far as the record discloses, no evidence to support a prosecution of Hoyle was available until he testified at defendant's trial. Thus, Hoyle's testimony, while it tended to exonerate defendant, definitely and positively incriminated Hoyle and subjected him to criminal prosecution.

The factual situation here is quite different from that considered in *S. v. Barnhill, supra*, where the testimony of defendant's brother-in-law tended to establish defendant's alibi but did not in any way tend to incriminate the witness. In our view, nothing else appearing, the bias that would incline a person to testify in his own interest, that is, in such manner as to protect himself from criminal prosecution, should be regarded at least as strong as the bias that would incline him to testify in behalf of a brother-in-law and against his own interest.

The fact that Hoyle was defendant's brother-in-law as well as the fact that Hoyle's testimony was "to his own hurt," along with other circumstances disclosed by the evidence, were proper for consideration by the jury in passing upon the credibility of Hoyle and the weight to be given his testimony; but to say that Hoyle, under the circumstances here considered, was an interested witness, as a matter of law, in the sense that his testimony was subject to close scrutiny because of bias that would incline him to testify falsely in favor of his brother-in-law, notwithstanding by so doing he definitely and positively incriminated himself, extended the rule in respect of the testimony of close relatives beyond the underlying reason that invokes its application and tended improperly and prejudicially to discredit Hoyle's testimony.

It appearing that prejudicial error as indicated above was committed in respect of the quoted portion of the charge, a new trial is awarded.

New trial.

STATE v. INEZ GUFFEY.

(Filed 21 September, 1960.)

**1. Criminal Law § 136—**

Ordinarily, whether a defendant has violated the conditions of suspension of sentence is for the determination of the court upon the evidence, and its findings are not reviewable if supported by competent evidence unless there is a manifest abuse of discretion.

**2. Same—**

A judge may not activate a suspended judgment upon his findings of defendant's guilt of a subsequent criminal charge if defendant is acquitted of such charge by a jury or competent tribunal, since such acquittal precludes a judge from finding to the contrary.

**3. Same— Order activating suspended sentence cannot stand when the conviction upon which it was based is reversed on appeal.**

Defendant appealed from the Recorder's Court from a judgment of conviction and an order activating a prior suspended judgment based on such conviction. Upon the hearing *de novo*, the judge of the Superior Court found that defendant had violated the terms of suspension, and affirmed the order activating the suspended sentence. Defendant failed to perfect his appeal from this order. Thereafter, the judgment of conviction of the criminal charge was reversed on appeal for lack of sufficient evidence. *Held:* Upon certification of the decision reversing the conviction, another judge of the Superior Court properly struck from the record the order activating the suspended sentence, notwithstanding the failure of defendant to perfect his appeal therefrom, since activation of the sentence cannot be allowed to stand when the judgment of conviction upon which it was based has been reversed.

APPEAL by the State from *McLean, J.*, March Term, 1960, of RUTHERFORD.

The defendant pleaded guilty on 2 January 1959 in the Recorder's Court of Rutherford County to a charge of illegal possession of liquor for sale, as charged in the warrant. The court imposed a sentence of one year in prison, suspended for two years on condition that the defendant pay a fine of $100.00 and costs, and on the further conditions that (1) the defendant not have in her possession or on her premises any intoxicating liquors and that (2) she not violate any of the laws of the State during said two years.

On 10 August 1959 the defendant was convicted in the same Recorder's Court upon a warrant charging that on 16 June 1959 she had in her possession a quantity of nontaxpaid liquor for the purpose of sale. On motion of the Solicitor, the Recorder, on 10 August 1959, following such conviction, entered an order activating the suspended sentence imposed on 2 January 1959, based on the above conviction of the defendant that day in his court.

The defendant appealed to the Superior Court from the judgment entered on 10 August 1959 and from the order activating the suspended sentence entered in the Recorder's Court on 2 January 1959.

At the August Term 1959 of the Superior Court of Rutherford County, his Honor Judge Thompson heard the appeal from the order activating the suspended sentence in the Recorder's Court and found as a fact that the defendant on 16 June 1959 did have in her possession, at her residence and premises, a quantity of nontaxpaid liquor and that the possession of such intoxicating liquor was a violation of the terms of the suspended sentence imposed by the Recorder's Court of Rutherford County on 2 January 1959. Thereupon, Judge Thompson entered an order affirming the order of the judge of the Recorder's Court.

At the November Term 1959 of the Superior Court the defendant moved to arrest the judgment entered by Judge Thompson on the ground that, the defendant had appealed her conviction in the Recorder's Court and had also appealed from the order therein activating the suspended sentence entered in the Recorder's Court on 2 January 1959, and that her appeal from the conviction in the Recorder's Court was still pending in the Superior Court. Judge Pless denied the motion in arrest of judgment on the ground that he was without jurisdiction inasmuch as the defendant appealed from Judge Thompson's judgment to the Supreme Court. The record does not disclose that such appeal was ever perfected.

The appeal from the defendant's conviction in the Recorder's Court on 10 August 1959 was heard *de novo* in the Superior Court before a jury on the original warrant at the November Term 1959; the defendant was found guilty as charged and a prison sentence imposed. Upon appeal therefrom to this Court, the evidence adduced in the trial below was held to be insufficient to support the verdict and the judgment was reversed. See *S. v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734.

At the March Term 1960 of the Superior Court of Rutherford County, his Honor McLean, J., in view of the decision of this Court reversing the conviction of the defendant, entered an order striking from the record the orders theretofore entered activating the suspended sentence. From this order the State excepted and appeals, assigning error.

*Attorney General Bruton, Asst. Attorney General McGalliard for the State.*

*Thomas J. Moss, Stover P. Dunagan for defendant.*

DENNY, J. There is no contention that the defendant violated the terms upon which her sentence was suspended on 2 January 1959 in any respect, except in connection with the charge that on 16 June 1959 she had in her possession a quantity of nontaxpaid liquor for the purpose of sale.

It is the general rule that when judgment is suspended in a criminal action upon good behavior or other conditions, the proceedings to ascertain whether or not the conditions have been violated are addressed to the sound discretion of the judge and do not come within the jury's province. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion. *S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850; *S. v. Hoggard,* 180 N.C. 678, 103 S.E. 891; *S. v. Everitt,* 164 N.C. 399, 79 S.E. 274, 47 L.R.A. (NS) 848.

There is an exception, however, to the above rule, pointed out by *Hoke, J.,* in *State v. Hardin,* 183 N.C. 815, 112 S.E. 593, which is, "* * * where it is properly made to appear that a defendant has been acquitted by a jury or other competent tribunal having jurisdiction of the criminal offense which is the sole basis of the proceedings. As to that fact, and to that extent, the court or judge hearing the matter of the suspended judgment should be concluded."

In our opinion, when a criminal charge is pending in a court of competent jurisdiction, which charge is the sole basis for activating a previously suspended sentence, such sentence should not be activated unless there is a conviction on the pending charge or there is a plea of guilty entered thereto. Consequently, when the defendant appealed from the order entered in the Recorder's Court activating the suspended sentence and also appealed from the conviction in said court, which conviction was the sole basis for activating the suspended sentence, the hearing on the appeal from the order activating the suspended sentence should not have been heard until the defendant was tried on the criminal charge. Such procedure would give a defendant an opportunity to have his conviction, if convicted, and the matters with respect to the activation of a suspended sentence reviewed in a single appeal. In the instant case, the State says and contends this defendant is bound by Judge Thompson's order because she did not perfect her appeal therefrom to this Court. Be that as it may, it is difficult to see what relief this Court could have granted her if she had perfected her appeal while the appeal from the conviction in the Recorder's Court was still pending in the Superior Court.

The facts in the present case are distinguishable from those in

the case of *S. v. Greer*, 173 N.C. 759, 92 S.E. 147. In the *Greer* case, grounds for activating the suspended sentence in the Municipal Court of Winston were based on certain findings of fact and not on the conviction in that court. In the present case, while Judge Thompson heard the appeal from the order entered in the Recorder's Court activating the suspended sentence previously entered therein and found certain facts, he did not enter an independent judgment, based thereon, activating the suspended sentence, but merely affirmed the order entered in the Recorder's Court. *S. v. Thompson*, 244 N.C. 282, 93 S.E. 2d 158. The order in the Recorder's Court was predicated upon the fact that the defendant was convicted on 10 August 1959 of possessing intoxicating beverages on 16 June 1959 for the purpose of sale, in violation of the terms and conditions of the suspended sentence. When this Court determined that the evidence upon which the defendant was found guilty in the Superior Court at the November Term 1959, of possessing nontaxpaid liquor on 16 June 1959 for the purpose of sale, was insufficient to support the jury's verdict, the conviction upon which the Recorder's Court based its order activating the suspended sentence no longer existed. *S. v. Perryman*, 216 N.C. 30, 3 S.E. 2d 285; *S. v. Harrelson*, 245 N.C. 604, 96 S.E. 2d 867; *S. v. Glenn*, 251 N.C. 160, 110 S.E. 2d 794.

In light of the facts disclosed by the record herein, and our decision in this case on the former appeal, *S. v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734, to allow the defendant to be imprisoned when the record fails to show that she has in any way breached the conditions upon which the sentence entered on 2 January 1959 was suspended, cannot be justified either in law or equity.

The judgment of the court below is

Affirmed.

STATE v. HEZZIE ROBBINS.

(Filed 21 September, 1960.)

**1. Criminal Law § 16—**

G.S. 7-393 giving county courts exclusive original jurisdiction of misdemeanors has been modified by G.S. 7-64 so as to give the Superior Court concurrent jurisdiction of misdemeanors except in those counties excluded from the provisions of G.S. 7-64, and therefore where a county court coming within G.S. 7-64 binds a defendant over on a misdemeanor charge, defendant's motion in the Superior Court to remand to the county court is correctly denied.

**2. Anonymous Communications Containing Threats or Obscenity—**

In order to sustain a conviction under G.S. 14-394 there must be a transmission by defendant of an anonymous communication which contains at least one of the categories of language prohibited by the statute, and there can be no transmission without an intended recipient and a delivery of the prohibited writing or a communication of its contents to the intended recipient.

**3. Same—**

A bill of indictment under G.S. 14-394, which fails to name the person to whom defendant transmitted the writing and the kind or character of the language contained therein, is fatally defective, and motion to quash should be allowed.

APPEAL by defendant from *McLean, J.*, January 1960 Term, of McDOWELL.

On the affidavit of W. C. Wilson that defendant did "unlawfully, willfully, and feloniously write and transmit certain letters using vulgar and obscene language and without signing his true name thereto in violation of G.S. 14-394. . ." the Clerk of McDowell County Criminal Court issued an order for the arrest of defendant. Defendant appeared in the County Criminal Court and was "bound over to January, 1960 Term, of McDowell County Superior Court for trial."

At the January 1960 Term of McDowell Superior Court the grand jury returned a true bill of indictment charging that defendant on 1 September 1959 "did unlawfully and willfully write and transmit certain letters using vulgar and obscene language without signing his true name thereto in violation of G.S. 14-394 against the form of the statute in such case made and provided and against the peace and dignity af the State." When the case was called for trial in the Superior Court, defendant moved to remand to McDowell County Criminal Court for that the Superior Court had no jurisdiction. This motion was overruled. Defendant then moved to quash the bill.

This motion was likewise overruled. The jury returned a verdict of guilty. Prison sentence was imposed and defendant appealed.

*Attorney General Bruton and Assistant Attorney General Hooper for the State.*

*Everette C. Carnes for defendant, appellant.*

RODMAN, J. McDowell County Criminal Court was created pursuant to the provisions of art. 36, c. 7 of the General Statutes. The exclusive original jurisdiction given criminal county courts by G.S. 7-393 must now be considered as modified by G.S. 7-64 except as to those counties excluded from its provisions. McDowell County is not one of the excluded counties. Hence by express statutory language the County Criminal Court and the Superior Court of McDowell County have concurrent jurisdiction of misdemeanors, which jurisdiction may be exercised by the court first taking cognizance of the charge. Here McDowell County Criminal Court refused to take cognizance of the charge, that is, to exercise its jurisdiction to hear and determine defendant's guilt, but expressly directed the determination of that question by the Superior Court of McDowell County. Since the Superior Court had taken cognizance of the case, the court correctly declined to allow defendant's motion to remand. *S. v. Shemwell,* 180 N.C. 718, 104 S.E. 885.

The statute, G.S. 14-394, which defendant is charged with violating, declares: "It shall be unlawful for any person. . .to write and transmit any letter, note, or writing. . .without signing his. . .true name thereto, threatening any person. . .with any personal injury or violence or destruction of property of such individuals. . .or using therein any language or threats of any kind or nature calculated to intimidate or place in fear any such persons. . .as to their personal safety or the safety of their property, or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace. . ."

For a conviction under this statute it must be alleged and established that defendant (1) wrote and transmitted to some person an anonymous letter (2) containing (a) threats to person or property, or (b) vulgar or obscene language, or (c) language which if published would bring such person into public contempt and disgrace.

Clearly there must be a transmission of the anonymous letter which contains at least one of the categories of prohibited language. Unless and until there is a transmission, no crime has been committed. What then does the word "transmit," as used in the statute, mean? One of

the dictionary definitions is: "to send or transfer from one person or place to another." Webster's New Int. Dic.

The Supreme Court of South Carolina said: "To transmit is to communicate; to send from one person to another." *Kirby v. Western Union Telegraph Co.*, 58 S.E. 10. That definition met with approval in *Askew v. Telegraph Co.*, 174 N.C. 261, 93 S.E. 773.

There can be no transmission within the meaning of the statute without an intended recipient and a delivery of the prohibited writing or a communication of its contents to the intended recipient. This is emphasized by the words "such person" in the last quoted clause of the statute.

Was it necessary to allege in the bill the name of the person to whom defendant transmitted the letter and the kind and character of vulgar and obscene language used? Although the statute under which defendant was indicted was not enacted until 1921, it is based on and is an enlargement of 27 Geo. II. c. 15, which declared it a crime punishable by death for any person after 1 May 1754 to "knowingly send any letter without any Name subscribed thereto, or signed with a ficticious Name or Names, Letter or Letters, threatening to kill or murder any of his Majesty's Subject or Subjects, or to burn their Houses, Out-houses, Barns, Stacks of Corn or Grain, Hay or Straw, though no Money or Venison, or other valuable Thing shall be demanded in or by such Letter or Letters. . ."

Our own earlier kindred statute (sec. 110, c. 34, Rev. Code of 1854) made it a crime to knowingly send or deliver any letter containing threats.

We find no prior decision by this Court fixing the averments necessary for a bill adequate to sustain a conviction under the statute, but we think English decisions interpreting the English Act, decisions of appellate courts of sister States having related statutes, and our own decisions declaring the general rule for determining the sufficiency of a bill of indictment furnish a definite answer to the question propounded.

The opinion in *Rex v. Richard Paddle*, decided in 1822, reported 168 Eng. Rep. 910, is correctly summarized in the headnote as follows: "Sending a threatening letter within 27 Geo. II. c. 15. To bring the offense within this statute, the letter must be sent to the person threatened, and it must be so stated in the indictment. But it seems that sending the letter to A. in order that he may deliver it to B., is a sending to B. if the letter be delivered by A. to B." Like conconclusions were reached by the Supreme Court of Indiana in *Kessler v. State*, 50 Ind. 229, decided 1875, and by the Court of Criminal

Appeals of Texas in *Goulding v. State*, 70 S.W. 2d 200, decided 1934, where the indictments failed to allege that the communication was made to the person threatened.

The foregoing decisions dealing specifically with the transmission of anonymous communications accord with our pronouncements of the essentials of a valid bill of indictment. *S. v. Bissette*, 250 N.C. 514, 108 S.E. 2d 858; *S. v. Walker*, 249 N.C. 35, 105 S.E. 2d 101; *S. v. Cox*, 244 N.C. 57, 92 S.E. 2d 413; *S. v. Harvey*, 242 N.C. 111, 86 S.E. 2d 793; *S. v. Eason*, 242 N.C. 59, 86 S.E. 2d 774; *S. v. Scott*, 237 N.C. 432, 75 S.E. 2d 154; *S. v. Porter*, 101 N.C. 713; *S. v. Russell*, 91 N.C. 624.

The motion to quash should have been allowed. The bill was insufficient to charge a criminal offense. This conclusion will, of course, not prevent the solicitor from sending a bill adequately charging the transmission to a designated person of letters containing language prohibited by the statute with such particularization of the language so used as may be proper.

Reversed.

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STATE v. N. B. REVIS.

(Filed 21 September, 1960.)

1. **Homicide § 13—**

Evidence tending to show that defendant intentionally shot the deceased, inflicting fatal injury, raises the presumptions that the killing was unlawful and done with malice, constituting murder in the second degree, nothing else appearing, and the burden is then upon the defendant to satisfy the jury of matters in mitigation or justification.

2. **Homicide § 20: Criminal Law § 101—**

Testimony of declarations of defendant, introduced by the State for the purpose of showing an intentional killing, also tended to show that defendant shot deceased in self-defense while defendant was within his own home. Defendant's testimony at the trial, as well as evidence for the State, tended to show that defendant shot the deceased while defendant was on the porch of his house and the deceased was in the yard. *Held:* Nonsuit was correctly denied, since the declarations introduced by the State tending to establish self-defense were contradicted as to the place and circumstances of the killing by the other evidence.

3. **Criminal Law § 156—**

Ordinarily, misstatements in the charge as to the evidence or the

contentions must be brought to the trial court's attention with request for correction before the case is submitted to the jury.

**4. Same: Criminal Law § 112—**

Where the testimony of defendant on cross-examination and on further cross-examination is elicited by the State solely for the purpose of impeaching defendant, and defendant does not base any contention upon the testimony thus elicited by the State, a charge of the court to the effect that the defendant offered the testimony thus elicited and made certain contentions thereon, which statements of contentions also contained erroneous recitation of defendant's testimony upon the cross-examinations, must be held for prejudicial error, notwithstanding the failure of defendant to bring the matter to the court's attention before the submission of the case to the jury.

APPEAL by defendant from *Hooks, Special Judge,* June (Conflict) Criminal Term, 1960, of BUNCOMBE.

Criminal prosecution on bill of indictment charging defendant with first degree murder of Wayne Wilson. Upon call of the case for trial, the solicitor announced that the State would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree or manslaughter as the evidence might justify.

On Friday, February 12, 1960, about 9:00 p.m., defendant, using his .22 rifle, shot Wayne Wilson, his son-in-law. The shooting occurred on defendant's premises. Defendant, Wilson and Edward Revis, defendant's brother, were the only persons on defendant's premises when the shooting occurred.

The jury returned a verdict of guilty of manslaughter. Thereupon, the court pronounced judgment that defendant be confined in the State's Prison for a term of not less than three nor more than five years, from which defendant appealed, assigning errors.

*Attorney General Bruton and Assistant Attorney General McGalliard for the State.*

*Don C. Young for defendant, appellant.*

BOBBITT, J. There was plenary evidence tending to support the finding that defendant intentionally shot the deceased and thereby proximately caused his death. Upon such finding, there arose the presumptions that the killing was (1) unlawful and (2) with malice; and, nothing else appearing, defendant would be guilty of murder in the second degree. *S. v. Adams,* 241 N.C. 559, 85 S.E. 2d 918; *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322. Thereupon, it was incumbent upon defendant to satisfy the jury of the truth of facts which justi-

fied or mitigated the killing in accordance with legal principles too well settled to warrant reiteration.

Defendant relied upon, and testified in support of, his plea of self-defense; and, as the basis for his contention that the court erred in denying his motion for judgment of nonsuit, contends the State's evidence, as well as his own testimony, established that he acted in self-defense, citing *S. v. Tolbert*, 240 N.C. 445, 82 S.E. 2d 201, and cases cited therein.

It is noted that Edward Revis, defendant's brother, did not testify. According to defendant's testimony, Edward was in the living room, asleep and drunk, when the shooting occurred.

The State's evidence consisted, in part, of statements, written and oral, made by defendant to officers who investigated the killing. These statements, which tended to show defendant acted in self-defense after he had been violently assaulted by Wilson and was in imminent danger of further assault, are to the effect that the shooting occurred in defendant's bedroom, and that thereafter Wilson left the bedroom, went through the living room to the front porch, across the porch and down the steps at one end of the porch and fell near the foot of the porch steps. Suffice to say, other evidence for the State was sufficient to support a finding that Wilson, when shot, was outside of defendant's house, that is, near the foot of the porch steps.

In his testimony, defendant, for the first time, stated that the shooting occurred outside his house; that Wilson, after assaulting him, went out the back (kitchen) door; that defendant, when he had sufficiently recovered from the effects of the assault, locked the back door, got his rifle, walked through the living room to the porch, then across the porch to the steps leading to his driveway, all because he was fearful and wanted to flee from the premises, and that he fired the fatal shot from the porch at a time when Wilson, cursing and threatening to kill him, started up the porch steps to attack him. It is noteworthy that both defendant's car and Wilson's car were parked in defendant's driveway, which driveway extended along that side of defendant's house where said porch steps are located.

Defendant contends that his said statements, offered in evidence by the State, suffice to show that he acted in self-defense. But, in addition to evidence for the State of like import, defendant's testimony contradicts his said statements as to where the shooting occurred. "The State, by offering evidence of the declarations or admissions of a defendant, is not precluded from showing that the facts are other than as related by him." *S. v. Tolbert, supra.* Moreover,

where a defendant introduces evidence, the only motion for judgment of nonsuit for consideration on appeal is that made at the close of all the evidence. G.S. 15-173.

At trial, neither the State nor the defendant contended Wilson, when shot, was inside defendant's house. The State relied upon defendant's said statements to establish that defendant intentionally shot and killed Wilson; and evidence offered by the State and defendant's testimony contradict defendant's said statements as to the place and circumstances of the killing. The State contended defendant's said statements as to the place and circumstances of the killing were false and that such false statements made by defendant prior to trial tended to discredit the testimony of the defendant at trial as to the place and circumstances of the killing.

Defendant's motion for judgment of nonsuit was properly overruled.

Defendant excepted to and assigns as error numerous statements in the court's recital of evidence and of contentions, contending such statements were erroneous and misleading. Ordinarily, inaccurate statements of this character are not ground for a new trial unless called to the court's attention with request that correction be made before the case is submitted to the jury. *Morgan v. Bell Bakeries, Inc.*, 246 N.C. 429, 433, 98 S.E. 2d 464, and cases cited. Here, at the conclusion of the charge, defendant objected to the charge on the ground indicated but did not then point out the asserted misstatements now assigned as error.

"While an inaccurate statement of facts contained in the evidence should be called to the attention of the court during or at the conclusion of the charge in order that the error might be corrected, a statement of a material fact not shown in the evidence constitutes reversible error." *S. v. McCoy* 236 N.C. 121, 124, 71 S.E. 2d 921, and cases cited. Careful consideration of the evidence indicates the court, in certain of the statements now challenged, inadvertently erred in respect of what certain witnesses testified. Two such instances are noted below. However, we need not decide whether such erroneous statements, standing alone, were sufficiently prejudicial to warrant a new trial.

Defendant excepted to and assigns as error each of the two portions of the charge quoted below.

After reviewing defendant's testimony on direct examination, the court said: *"The defendant further says and contends that on his own cross-examination he offered evidence which tends to show. . ."*

(Our italics.) Thereupon, the court undertook to review testimony of defendant elicited by the State on cross-examination.

Near the end of the trial, when the State was offering rebuttal evidence, defendant was recalled by the State for further cross-examination. With reference to testimony then elicited by the State, the court, in part, said: *"The defendant further says and contends that he has offered his own testimony which tends to show* that he went out the back door and he locked the door of the kitchen, that is, that Wilson went out the back door; that he was at the foot of the steps when he was shot; that he himself was in the room — or on the porch and a light in the room was burning; that the shade was down, but that the shade was transparent and that the light from inside the room, in the center of the room, reflected through the window; that at the time he shot that rifle that he, himself, was beat up and that in his opinon he was standing in the light and that Wayne Wilson was in the dark except the light that shown through the shade on the window; that before he shot Wayne Wilson he told him not to come in the house any more; . . ." (Our italics.)

We find nothing in defendant's testimony to the effect that defendant was in any room when Wilson was shot. On the contrary, defendant's positive testimony is that he was on the porch, near the top of the porch steps, when he fired the fatal shot. Nor do we find that defendant testified that "in his opinion he was standing in the light and. . .Wayne Wilson was in the dark except the light that shown through the shade on the window" when the shot was fired.

The State, by said further cross-examination of defendant, was undertaking to elicit testimony that might lend support to the theory that defendant shot deceased "from that living room window there as he came walking to his automobile." Defendant denied categorically that he shot Wilson under such circumstances.

It is patent that the testimony of defendant on cross-examination and on further cross-examination was elicited by the State solely for the purpose of impeaching defendant and of discrediting the testimony defendant had given on direct examination, not to elicit testimony relevant to defendant's defense. The testimony so elicited by the State was neither offered by defendant nor did defendant base any contention thereon. The statement that this testimony was offered by defendant, with the implication that defendant relied thereon, was erroneous; and we are of opinion, and so hold, that this erroneous statement, in the circumstances here disclosed, tended

to confuse defendant's position and contentions to such extent as to entitle defendant to a new trial.

For the error indicated, a new trial is awarded. Hence, discussion of defendant's other assignments of error is unnecessary.

New trial.

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STATE v. BOBBY ALEXANDER GURLEY.

(Filed 21 September, 1960.)

**1. Automobiles § 56—**

A wilful or intentional violation of a safety statute or the unintentional or inadvertent violation of such statute when accompanied by a heedless indifference to the safety of others or a thoughtless disregard of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, constitutes culpable negligence, but an unintentional or inadvertent violation of a safety statute, standing alone, is not culpable negligence.

**2. Automobiles § 25—**

The general maximum speed limit of automobiles in North Carolina is 55 miles per hour, G.S. 20-141(b)(4), the limit of 60 miles per hour for certain vehicles on certain highways when authorized by the State Highway Commission being in the nature of an exception. G.S. 20-141 (b)(5).

**3. Automobiles § 60—**

An instruction in a prosecution for manslaughter to the effect that if defendant operated his automobile at a speed in excess of 55 miles per hour and such speed was a proximate cause or one of the proximate causes of the death of deceased, it would be the duty of the jury to return a verdict of guilty as charged, must be held for prejudicial error as being susceptible to the construction that the unintentional or inadvertent violation of the statutory speed limit, standing alone, constitutes culpable negligence.

**4. Criminal Law § 161—**

An erroneous instruction as to the applicable law must be held prejudicial notwithstanding that in other portions of the charge the law is correctly stated, since the jury may have acted upon the incorrect instruction.

APPEAL by defendant from *McLean, J.*, January Term, 1960, of McDOWELL.

Criminal prosecution for manslaughter.

Verdict: Guilty as charged in the indictment. Judgment: Imprisonment in the State's Prison.

Defendant appeals, assigning error.

*T. W. Bruton, Attorney General, and H. Horton Rountree, Assistant Attorney General for the State.*

*Paul J. Story and Boyce Whitmire for Defendant, Appellant.*

PARKER, J. Paul Lee Woody died as a result of injuries sustained when an automobile overturned on a public highway. The State's evidence is to the effect that defendant asked Samuel Martin if he wanted to race automobiles on a public highway, that Martin replied he did not, and thereafter while driving his automobile on a public highway at a speed of about 65 or 70 miles an hour, defendant driving his automobile passed him, and after passing cut back and forth across the highway, hit a culvert, and overturned throwing Woody and defendant out of the automobile. Defendant's evidence is to the effect that he did not ask Martin to race, that Paul Lee Woody was driving his, Martin's, automobile when it overturned, and that it passed the Martin automobile while the Martin automobile was going 55 to 60 miles an hour. The State's evidence is amply sufficient to carry the case to the jury. Defendant made no motion for judgment of involuntary nonsuit.

Defendant assigns as error this part of the charge: "So the court charges you, Gentlemen of the Jury, that if you find from this evidence and beyond a reasonable doubt that on the 15th day of March 1957, that the defendant operated his automobile upon Highway 221 at a speed in excess of 55 miles per hour and you further find that that was the proximate cause or one of the proximate causes of the death of the deceased, Paul Lee Woody, if you find those facts beyond a reasonable doubt, it would be your duty to return a verdict of guilty as charged in the Bill of Indictment."

In preceding parts of the charge the trial judge instructed the jury with respect to actionable negligence and culpable negligence and in respect to an intentional or unintentional violation of a safety statute in substantial compliance with what this Court has said on the subject in *S. v. Cope*, 204 N.C. 28, 167 S.E. 456; *S. v. Hancock*, 248 N.C. 432, 103 S.E. 2d 491, and other decisions.

Culpable negligence, from which death proximately ensues, makes the actor guilty of manslaughter, and under some circumstances guilty of murder. *S. v. Phelps*, 242 N.C. 540, 89 S.E. 2d 132; *S. v. Norris*,

242 N.C. 47, 86 S.E. 2d 916; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Cope, supra.*

In *S. v. Hancock, supra,* the court speaking through *Denny, J.,* has succinctly and accurately said: "The rule in the application of the law with respect to an intentional or unintentional violation of a safety statute is simply this: The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others."

The general maximum speed limit of automobiles in North Carolina is 55 miles an hour. G.S. 20-141(b)(4); *S. v. Norris, supra; Shue v. Scheidt, Comr. of Motor Vehicles,* 252 N.C. 561, 114 S.E. 2d 237. The provisions of G.S. 20-141(b)(5) authorizing the State Highway Commission to designate a speed limit maximum of 60 miles per hour for certain vehicles on certain highways are in the nature of an exception. *S. v. Brown,* 250 N.C. 209, 108 S.E. 2d 233. There is no evidence in the record that the operation of the automobiles at the place here under consideration was in either a residential or business district, as defined in our safety statutes.

In *S. v. Sutton,* 244 N.C. 679, 94 S.E. 2d 797, the defendant was convicted of speeding and reckless driving of an automobile. The court instructed the jury: "Now a mere unintentional violation of a traffic law will not constitute reckless driving, but if one intentionally violates a traffic law, that constitutes reckless driving." In another part of the charge the court instructed the jury with respect to reckless driving in substantial compliance with a former decision of this Court. In awarding a new trial the Court said: "Nevertheless, in our opinion, the instruction did not cure the unequivocal statement complained of, to wit 'if one intentionally violates a traffic law, that constitutes reckless driving.' "

We said in *S. v. Roberson,* 240 N.C. 745, 83 S.E. 2d 798, that the language of our statute in respect to reckless driving, G.S. 20-140, constitutes culpable negligence.

The unintentional or inadvertent driving of a passenger automobile on a public highway at a speed in excess of 55 miles an hour,

where such a maximum speed is authorized, unaccompanied by recklessness or probable consequences of a dangerous nature when tested by the rule of reasonable prevision, is not such negligence as imports culpable negligence or criminal responsibility. *S. v. Cope, supra; S. v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638.

When the trial judge here applied the law to the facts he unequivocally instructed the jury, to wit: "If you find from this evidence and beyond a reasonable doubt that on the 15th day of March 1957, that the defendant operated his automobile upon Highway 221 at a speed in excess of 55 miles per hour and you further find that that was the proximate cause or one of the proximate causes of the death of the deceased, Paul Lee Woody, . . . , it would be your duty to return a verdict of guilty as charged in the bill of indictment." This part of the charge is material error for it is susceptible of the construction that the unintentional or inadvertent driving of the automobile at a speed in excess of 55 miles an hour on Highway 221, standing alone, is culpable negligence, and if death ensues proximately therefrom, it would be the duty of the jury to convict the defendant of manslaughter.

Even though it be conceded that parts of the instructions given were a correct statement of the law, this Court has uniformly held that where the court charges correctly in one part of the charge and incorrectly in another part, it will cause a new trial, since the jury may have acted upon the incorrect part, and this is particularly true when the incorrect part of the charge is the application of the law to the facts. *S. v. Morgan,* 136 N.C. 628, 48 S.E. 670; *S. v. Stroupe,* 238 N.C. 34, 76 S.E. 2d 313; *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223.

For material error in the charge a new trial is ordered.

New trial.

NICHOLAS A. WALKER v. CARL O. STORY.

(Filed 21 September, 1960.)

1. **Ejectment § 6—**

A complaint alleging that plaintiff is the owner of a described tract of land, that defendant claims the land, which claim constitutes a cloud on plaintiff's title, and that plaintiff is entitled to have such cloud removed and to a writ putting him in possession, states a cause of action in ejectment.

2. **Ejectment § 7: Quieting Title § 2—**

In an action in ejectment, the burden is upon plaintiff to prove title good against the whole world or good against the defendant by estoppel. This rule also applies in an action to remove cloud from title.

3. **Ejectment § 10—**

In an action in ejectment instituted prior to the effective date of the 1959 amendment to G.S. 1-42, plaintiff's evidence of chain of title for little more than thirty years prior to the institution of the action, is insufficient to overrule nonsuit. Since the 1959 amendment by its terms does not apply to pending litigation, the effect of this amendment is not presented or decided.

APPEAL by plaintiff from *Fountain, S. J.*, June 6, 1960 Special Term, of POLK.

This action was begun 20 December 1958. The complaint alleges plaintiff is the owner of a described tract of land, that defendant also claims to own the land, which claim constitutes a cloud on plaintiff's title, that plaintiff is entitled to have the cloud so created removed and is also entitled to a writ putting him in possession.

Defendant denied that plaintiff owned the land. He asserted his ownership and rightful possession.

At the conclusion of plaintiff's evidence the court allowed defendant's motion for nonsuit. Plaintiff appealed.

*W. Y. Wilkins, Jr., for plaintiff, appellant.*
*B. T. Jones, Jr., for defendant, appellee.*

RODMAN, J. The action is in substance an action in ejectment with the burden on plaintiff to establish his superior title. *Hayes v. Ricard*, 244 N.C. 313, 93 S.E. 2d 540.

To establish his ownership and right to possession plaintiff offered in evidence a deed dated 1 September 1926 from Nelson Hawkins and wife to Edward Mickler and Helen Ahern for the land in controversy. He also offered in evidence deeds which would vest in him such title, if any, as Mickler and Ahern acquired by the deed to

them. Plaintiff offered no evidence of possession by him or his grantors nor did he offer any evidence tending to estop defendant.

*Avery, J.*, said in *Mobley v. Griffin*, 104 N.C. 112: "The general rule is that the burden is on plaintiff, in the trial of actions for the possession of land, as in the old action of ejectment, to either prove a title good against the whole world or good against the defendant by estoppel." The rule so stated has been consistently applied. *Norman v. Williams*, 241 N.C. 732, 86 S.E. 2d 593, and cases there cited. The rule also applies in an action in which the only relief sought is to remove cloud from title. *Thomas v. Morris*, 190 N.C. 244, 129 S.E. 623.

Plaintiff contends c. 469, S. L. 1959, ratified 8 May 1959, which amends G.S. 1-42, has the effect of relieving plaintiff of the burden of proof as declared in *Mobley v. Griffin, supra*, since he bases his claim of title on an instrument bearing date more than thirty years prior to the institution of the action.

Plaintiff's contention is refuted by sec. 3 of the Act which expressly declares that it shall not apply to pending litigation. This suit was begun and was pending more than five months before the Act relied upon took effect.

We are not now called upon to interpret the statute. The disposition we make of the appeal must not be understood as implying approval of plaintiff's interpretation of the statute.

Affirmed.

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NEW AMSTERDAM CASUALTY COMPANY v. JAMES H. GRAY, JR., AND NINA GRAY WALLACE, TRADING AS G. & S. MOTOR COMPANY, A PARTNERSHIP, AND FORD MOTOR COMPANY.

(Filed 21 September, 1960.)

**Automobiles § 5—**

Evidence tending to show that excessive heat arose from the floor board of the front seat and that fumes were emitted upon the operation of the automobile purchased from defendants, and that on a certain day after the car had been driven a few miles it caught fire while not in operation and unattended, *is held* insufficient to be submitted to the jury in an action against the sellers for breach of implied warranty, there being no evidence from which the cause of the fire might be reasonably inferred.

CASUALTY CO. *v.* GRAY.

APPEAL by plaintiff from *Morris, J.*, May-June 1960 Term, of MARTIN.

This is an action to recover for alleged breach of implied warranty. H. H. Williams purchased a new automobile on 16 March 1959, and procured from plaintiff, Casualty Company, an insurance policy covering loss by fire. Williams was sole operator of the car and drove it at a moderate speed at all times. In operation an excessive amount of heat arose from the floor board of the front seat and fumes were emitted. Williams complained to the dealer. The dealer inspected the vehicle and installed a pressure cap and thermostat. The excessive heating continued. A service station attendant inspected the car and found nothing wrong. On 11 April 1959, while not in operation and unattended, the automobile caught fire. It was almost completely destroyed. The car had been driven less than 1000 miles since purchase and on the day of the fire had been driven only a few miles shortly before the fire was discovered. There was no foreign combustible material left in or about the vehicle. The Casualty Company paid Williams the full value of the car, took a subrogation assignment, and instituted this action against the dealer and manufacturer. Plaintiff alleged latent defect in materials and workmanship and breach of implied warranty of fitness.

At the close of plaintiff's evidence defendants moved for nonsuit. Motion was allowed. From judgment of nonsuit and dismissal of the action plaintiff appealed.

*R. L. Coburn for plaintiff, appellant.*

*James and Speight and William C. Brewer, Jr., for defendant Ford Motor Company, appellee.*

*Griffin & Martin for defendant G. & S. Motor Company, appellee.*

PER CURIAM. If the automobile was defective in any respect, the record fails to disclose any evidence, direct or circumstantial, tending to show what the defect consisted of. No causal connection between the excessive heating and the fire is made to appear. Furthermore, there is no contention that heat or fumes had ever been emitted while the car was not in operation. Recovery may not be predicated on conjecture. No evidence has been adduced from which the cause of the fire may be reasonably inferred.

The judgment below is

Affirmed.

JOHN RICHARD SOLOKY v. MARY HOYLE COOKE AND C. T. COOKE.

(Filed 21 September, 1960.)

APPEAL by defendants from *Morris, J.*, at April Term, 1960, of WASHINGTON.

Civil action to recover property damage resulting from actionable negligence of defendants in a collision between automobile of plaintiff and truck of defendants. The case was submitted to the jury and the jury found for its verdict that plaintiff's automobile was damaged by the negligence of the defendants as alleged in the complaint; that plaintiff did not by his own negligence contribute to his injury and damage; and that plaintiff is entitled to recover of defendants $2,295.00.

Defendants appeal therefrom to Supreme Court, and assign error.

*Mayo & Mayo, Wilkinson & Ward for plaintiff, appellee.*
*Norman & Rodman for defendants, appellants.*

PER CURIAM: Upon careful consideration of the evidence shown in the record of case on appeal taken in the light most favorable to plaintiff, it appears sufficient to support the verdict of the jury, and the verdict is adequate to support the judgment.

The record indicates that the trial was conducted in accordance with law, and error for which the verdict and judgment should be disturbed is not made to appear. Hence in the judgment from which appeal is taken there is

No error.

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EUGENE CARSON, MINOR, BY HIS NEXT FRIEND, MYRTLE CARSON v ESPER DEDMON AND GASTON CLARK WALL.

(Filed 21 September, 1960.)

APPEAL by defendant Wall from *McLean, J.*, January 1960 Term, RUTHERFORD Superior Court.

Civil action for personal injury sustained in a collision between automobiles owned and driven by the defendants. The plaintiff was a passenger in the Wall vehicle. The collision occurred on a one-way bridge over Floyd's Creek in Rutherford County. The plaintiff alleg-

ed, and offered evidence tending to show actionable negligence on the part of each of the defendants and that as a result thereof he sustained injuries and damages.

Each defendant denied negligence, claiming he was first on the bridge, and that the other was at fault. Motions for nonsuit were overruled. Dedmon introduced evidence; Wall did not.

The court submitted separate issues of negligence which the jury answered in favor of Dedmon and against Wall. From the judgment on the verdict, Wall appealed.

*C. O. Ridings, Jack M. Freeman, Stover P. Dunagan, for plaintiff, appellee.*

*A. Clyde Tomblin, for defendant, appellant.*

PER CURIAM: The jury resolved the issues of fact against the appellant Wall. The evidence was sufficient to sustain the findings. The court's rulings and charge are in accordance with established law.

No error.

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LESESNE LEWIS MEEGAN AND TRYON BANK & TRUST COMPANY, A BANKING CORPORATION, AS TRUSTEE FOR LESESNE LEWIS MEEGAN v. FLETCHER JOURNEY GRUBBS.

(Filed 21 September, 1960.)

APPEAL by plaintiffs from *Fountain, Special Judge,* 6 June 1960 Special Term, of POLK.

This is an action to recover damages for personal injuries sustained in an accident which occurred between the plaintiff Mrs. Meegan and the automobile of the defendant, on the night of 1 June 1957, on U. S. Highway 16, between 40th and 41st Streets, approximately 141 feet south of 41st Street where it intersects with Highway 17, in the Town of Myrtle Beach, South Carolina. That portion of Highway 17 where the accident occurred is composed of two northbound lanes, separated by a grassy strip, approximately a car length in width, from the southbound lanes. The shoulder of the road east of the northbound lanes is about ten feet wide.

According to the evidence, the defendant was driving north in the right-hand lane. The plaintiff Mrs. Meegan was first observed on

the highway by the defendant when she was only ten feet away, and the defendant's car struck her. She was facing south.

The officer who investigated the accident found the defendant's automobile to be in good condition mechanically; there was a bent place on the right front fender and on the hood on the right front side. After the accident Mrs. Meegan was found on the dirt, off the right side of the highway. She was seriously injured. The plaintiff was 79 years of age on 17 January 1957.

At the close of plaintiffs' evidence the defendant moved for judgment as of nonsuit. The motion was allowed and the plaintiffs appeal, assigning error.

*McCown, Lavender & McFarland; Gaines & Vermont for plaintiffs.*

*Van Winkle, Walton, Buck & Wall, and O. E. Starnes, Jr., for defendant.*

PER CURIAM. The evidence offered in the trial below, in our opinion, was insufficient to make out a case of actionable negligence against the defendant under the South Carolina decisions. There is no evidence of excessive speed on the part of the defendant; neither is there any evidence as to how long the injured plaintiff had been on the highway prior to the accident. The plaintiff was not mentally competent to testify in the hearing below. Negligence is not presumed from the mere fact that an injury has been inflicted.

Affirmed.

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GLENN MAZE SEARCY, EMPLOYEE v. HARRY J. BRANSON, d/b/a/ HARRY JAMES BRANSON COMPANY, EMPLOYER; AND NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 28 September, 1960.)

**1. Master and Servant § 93—**

On appeal from an award of the Industrial Commission, the courts may not review the findings except to determine whether they are supported by competent evidence, since the findings of the Commission which are supported by competent evidence are conclusive, even though there be evidence that would support a contrary finding.

**2. Master and Servant § 63—**

Evidence tending to show that the injury to the employee's back resulted when, in the course of his employment, he bent over to one

side to lift a section of prefabricated chimney weighing some forty pounds, *is held* sufficient to support a finding that the injury resulted from an accident arising out of and in the course of his employment.

APPEAL by defendants from *Nettles, J.*, March "A" Term, 1960, of BUNCOMBE.

Claim for compensation under the Workmen's Compensation Act. The pertinent facts are as follows:

1. The defendant Harry J. Branson does business under the name of Harry James Branson Company, employer, and the Nationwide Mutual Insurance Company is the carrier.

2. The plaintiff was regularly employed as a carpenter by the defendant employer at the time of his injury on 9 September 1958.

3. At the time of his injury, plaintiff was engaged in erecting a prefabricated chimney in a house which he and others were constructing. The prefabricated chimney was made up of sections which were approximately two feet in length and about sixteen inches in diameter; they had to be set one on top of the other, and each section weighed from forty to fifty pounds. The plaintiff had not put up any of these sections. He had cut a hole in the attic so that the sections of the chimney could be put in place. He testified: "I had to lean over to my left side to pick up the first section. As I bent to my left when I picked it up I felt a sharp pain in my back right down low. * * * As I picked it up my body was in a twisted position. I had never had any difficulty with my back prior to this occasion. When I first picked it up a pain occurred. I got it up about two inches off of the floor. I dropped it. I had to stand bent over for a few minutes. It was a very severe pain."

4. The plaintiff was cross-examined about a prior written statement which he had signed and which read: "I did not slip, slide, scoot, fall or get into any unusual position. I bent straight over to pick up this flue. I did not get into any squatting position. I did not twist my back. I used the same motion and movement I have used in the past to pick up objects of equal weight and also heavier."

5. Dr. Walter M. Watts, an admitted medical expert and orthopedic surgeon, testified that he examined the plaintiff and admitted him to the hospital on 13 September 1958; that "I have an opinion satisfactory to myself as to the injury he had at that time. I thought that he had a protruded intervertebral disc, with acute sciatica on the left. I have an opinion satisfactory to myself as to whether the condition I found could or might have been caused by the injury he related. I think the condition I found could have been caused by

the injury that he described. I treated him from September 13, 1958 until October 24, 1958. * * * I referred him to Dr. Van Blaricom who is a neurosurgeon." The plaintiff testified that Dr. Lawrence S. Van Blaricom operated on his back for a ruptured disc on 5 November 1958.

6. The hearing commissioner found as a fact that the plaintiff was injured by accident arising out of and in the course of his employment with the defendant employer, while lifting a heavy section of the flue or chimney tile while in a turned or twisted position; that he was temporarily totally disabled by such injury from 10 September 1958 until 1 March 1959, when he was able to return to light work. Compensation was awarded accordingly.

7. The defendants filed exceptions and appealed to the full Commission. After a hearing by the Commission, it adopted as its own the findings of fact and conclusions of law of the hearing commissioner and affirmed the award. Upon appeal, the Superior Court, after considering the exceptions of the defendants, overruled the exceptions and affirmed the award of the Industrial Commission.

The defendants appeal, assigning error.

*Elmore & Martin for plaintiff.*
*Williams, Williams & Morris; J. N. Golding for defendants.*

DENNY, J. The appellants insist that the evidence of the plaintiff is insufficient to support the finding that his injury arose out of and in the course of his employment.

Under our practice, if there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. *Creighton v. Snipes*, 227 N.C. 90, 40 S.E. 2d 612; *Rewis v. Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97; *Kearns v. Furniture Co.*, 222 N.C. 438, 23 S.E. 2d 310.

In our opinion, there is competent evidence to support the Commission's crucial findings in this case. The record presents only a factual dispute which we are not permitted to review except to determine whether or not the findings of the Commission are supported by any competent evidence. "The courts are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached. *Tennant v. R. R.*, 321 U.S. 35, 88 L. Ed. 525." *Rewis v. Ins. Co., supra.*

In the instant case, as in *Edwards v. Publishing Co.*, 227 N.C. 184,

41 S.E. 2d 592, the medical testimony is to the effect that the lifting of the section of tile in the manner described by the plaintiff was, in the opinion of the medical expert, sufficient to have produced his injury. See also *Faires v. McDevitt & Street Co.*, 251 N.C. 194, 110 S.E. 2d 898 and *Smith v. Creamery Co.*, 217 N.C. 468, 8 S.E. 2d 231. The facts in the cases of *Hensley v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289; *Holt v. Mills Co.*, 249 N.C. 215, 105 S.E. 2d 614; and *Turner v. Hosiery Mills*, 251 N.C. 325, 111 S.E. 2d 185 are distinguishable from those herein.

The judgment of the court below is

Affirmed.

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EFFRON SMITH v. EUGENE W. RAWLINS.

(Filed 28 September, 1960.)

**1. Automobiles § 14—**

**The violation of the provisions of G.S. 20-152(a) prohibiting the driver of a motor vehicle from following another vehicle more closely than is reasonable and prudent with regard to the safety of others, the traffic and the condition of the highway, is negligence *per se*, and is actionable if injury proximately results therefrom.**

**2. Automobiles § 7—**

**It is the duty of a motorist to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstanes, and in the exercise of such care it is incumbent upon him to keep his vehicle under control and to keep a reasonably careful lookout so as to avoid collision with persons or vehicles upon the highway.**

**3. Trial § 22a—**

**Upon motion to nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable intendment upon the evidence and every legitimate inference to be drawn therefrom.**

**4. Automobiles §§ 41d, 42c—**

**Evidence tending to show that plaintiff, in a line of traffic, stopped when some four cars ahead of him stopped, and that after he had been stopped in the line of traffic for some thirty seconds he was struck from the rear by the automobile driven by defendant, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in following plaintiff's vehicle too closely or in failing to keep a proper lookout, and not to show contributory negligence as a matter of law on the part of plaintiff.**

**5. Negligence § 26—**

Contributory negligence is an affirmative defense, and nonsuit on the ground of contributory negligence is proper only when plaintiff's own evidence establishes the defense so clearly that no other reasonable conclusion can be drawn from plaintiff's evidence.

APPEAL by plaintiff from *Bundy, J.*, 30 March 1960 Civil Term, of ONSLOW.

Civil action to recover damages for personal injuries and damage to an automobile. Defendant in his answer denies that he was negligent in any respect in the operation of his automobile, and pleads, if he were negligent, contributory negligence of plaintiff as a bar to recovery.

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

*Joseph C. Olschner for plaintiff, appellant.*

*James and Speight and William C. Brewer, Jr., for defendant, appellee.*

PARKER, J. Plaintiff's evidence consists of his own testimony, and the testimony of doctors in respect to his injuries.

Plaintiff's testimony tends to show the following: He is employed as Head Engineer at the steam plant, which is located on the Air Facility, Camp Lejeune, North Carolina. Plaintiff testified as follows: "On September 4, 1958, at about 4:10 p. m. after completing a days work, I started to drive to my home. I was driving my car, a 1951 Studebaker, and was proceeding in a westerly direction along a road that connects Camp Lejeune and U. S. Highway #17. I was in a line of traffic, there were four cars in front of me, when the traffic stopped, I stopped and after being stopped for about 30 seconds the rear of my car was struck by an automobile driven by the defendant. I was knocked forward for a distance about the length of a car, I was shocked and my head was snapped back." Following the impact plaintiff got out of his automobile, and talked to the defendant, Captain Rawlins. The rear bumper of plaintiff's automobile was bent in about four inches, its trailer hitch was pushed in and sprung open, and the front seat was knocked out of the seat track.

N.C. G.S. 20-152(a), and the complaint alleges a violation of this statute, provides "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent,

with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and the condition of the highway" (In N. C. G.S. Vol. 1 C, 1953, the word "and" preceeding the words "the condition of the highway" by inadvertence was omitted. Public Laws of North Carolina, Regular Session 1937, Ch. 407, §114(a), p. 837; G.S. N.C. Vol. 1, Motor Vehicles, Ch. 20, §20-152(a), 1943).

A violation of N.C. G.S. 20-152(a) is negligence *per se*, and if injury proximately results therefrom, it is actionable. *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Cozart v. Hudson*, 239 N.C. 279, 78 S.E. 2d 881; *Crotts v. Transportation Co.*, 246 N.C. 420, 98 S.E. 2d 502.

This Court said in *Badders v. Lassiter*, 240 N.C. 413, 82 S.E. 2d 357: "It is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway."

Accepting plaintiff's evidence as true (*Polansky v. Ins. Asso.*, 238 N.C. 427, 78 S.E. 2d 213), and considering his evidence in the light most favorable to him, and giving to him the benefit of every reasonable intendment upon the evidence and every legitimate inference to be drawn therefrom (*Bridges v. Graham*, 246 N.C. 371, 98 S.E. 2d 492), as we are required to do in passing on the motion for judgment of involuntary nonsuit, it permits a legitimate inference by a jury that defendant was following plaintiff's automobile ahead more closely than was reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles ahead and the traffic upon and the condition of the highway, or was not keeping a reasonably careful lookout considering the conditions then and there existing, so as to avoid collision with plaintiff's automobile ahead, and that such negligence proximately contributed to plaintiff's injuries and damage to his automobile. 10 Blashfield Cyclopedia of Automobile Law and Practice, Per. Ed., Vol. 10, p. 600, says: "The mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely."

This Court said in *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360: "Contributory negligence is an affirmative defense which the defendant must plead and prove. G.S. 1-139. Nevertheless the rule is firmly em-

bedded 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. (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.*, 207 N.C. 787, 178 S.E. 601."

Defendant in his brief contends the judgment of involuntary nonsuit should be upheld, for the reason that plaintiff has no evidence tending to show negligence on defendant's part. He does not contend that plaintiff's action is barred on the ground of contributory negligence on plaintiff's part. The judgment of involuntary nonsuit does not specify upon what ground it was based.

In our opinion, plaintiff's evidence is sufficient to carry his case to the jury on the ground of actionable negligence on the part of the defendant, and that plaintiff has not proved himself out of court, so as to require the entry of a judgment of involuntary nonsuit on the ground of contributory negligence.

The judgment below is

Reversed.

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ALICE McGINNIS v. GERALD THOMAS SMITH AND THOMAS ENNIS SMITH.

(Filed 28 September, 1960.)

**1. Automobiles § 41d—**

In plaintiff's action to recover for a collision resulting when the vehicle driven by defendant ran into the rear of plaintiff's car, an admission by defendant of his violation of G.S. 20-152(a) requires the submission of the issue of negligence to the jury.

**2. Automobiles § 42c—**

Plaintiff's evidence to the effect that he stopped suddenly to avoid colliding with a vehicle which had stopped ahead of him, when he was struck from the rear by the car driven by defendant, *is held* not to disclose contributory negligence as a matter of law.

APPEAL by plaintiff from *Phillips, J.*, August 8, 1960 Civil Term, of GASTON.

Plaintiff seeks compensation for personal injuries and property dam-

ages alleged to have resulted from a collision between her automobile, driven for her by her husband, and an automobile owned by Thomas Ennis Smith and driven by Gerald Thomas Smith as agent for the owner. Both vehicles were traveling northwardly on Main Street in Stanley. The collision occurred about 6:15 p.m. on 3 November 1959. The Smith car ran into the rear of plaintiff's car when it stopped to avoid colliding with a vehicle which had stopped ahead of it. Plaintiff alleged negligence on the part of defendants in failing to maintain a proper lookout, failing to keep their vehicle under control, and in following too closely in violation of G.S. 20-152. Following the collision, defendant driver entered a plea of guilty to a charge of violating this statute.

Defendants pleaded violations of the provisions of G.S. 20-154 by the operator of plaintiff's vehicle to defeat plaintiff's recovery. Following the collision, the signal lights on plaintiff's vehicle were found to be in operating condition.

At the conclusion of plaintiff's evidence the court allowed defendant's motion to nonsuit and plaintiff appealed.

*Dolley & DuBose for plaintiff, appellant.*
*Whitener & Mitchem for defendant appellees.*

PER CURIAM. The admission by defendant driver of a violation of G.S. 20-152(a) is sufficient to require jury determination of the question of actionable negligence. The evidence with respect to contributory negligence is sufficient to permit but not compel an affirmative answer to that issue raised by the pleadings.

Reversed.

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H. B. SPRUILL AND WIFE, NANCY T. SPRUILL, AND A. E. BOWEN, JR., AND WIFE, ANNA BELLE BOWEN v. J. C. WHITE.

(Filed 28 September, 1960.)

**Deeds § 19—**

Where the owner of a subdivision containing some 117 lots sells the lots therein with reference to a plat containing no notation that the lots were to be subject to restrictions, the fact that his deeds to 20 of the lots contained restrictions limiting the use of the property to residential purposes does not impose such restriction on the other lots sold by deeds containing no such restriction.

SPRUILL *v.* WHITE.

APPEAL by defendant from judgment of *Parker, Resident Judge,* entered August 20, 1960, in Chambers, in action pending in BERTIE Superior Court.

Civil action for specific performance.

Defendant, having contracted to purchase from plaintiffs Lots 35, 36, 51, 52 and a part of Lots 34 and 53, as shown on map of Spruill Park Development, refused to accept the tendered deeds and to pay the agreed purchase price solely on the asserted ground that plaintiffs' said lots were encumbered by restrictions limiting the use thereof to residential purposes.

The court, upon waiver of jury trial, made findings of fact based on admissions in the pleadings and stipulations of the parties. The (undisputed) facts necessary to decision are set forth below.

A tract of land, subsequently subdivided as shown on said map, was acquired by C. W. Spruill in 1944. The said plat, on which some 117 lots appear, "shows no scheme or purpose of limiting the said property to a residential development or other conditions or restrictions of any nature." All lots shown on said plat have been conveyed by C. W. Spruill. His deeds for twenty (20) of said lots "contained restrictions limiting the use of the lots therein conveyed to residential purposes." His deeds for the remaining lots "contained no language limiting the use of said lots to residential purposes."

The deeds from C. W. Spruill to plaintiffs or their predecessors in title for the lots here involved and now owned by plaintiffs in fee simple "contain no language specifically limiting the said property to use for residential purposes or other use."

It was adjudged that plaintiffs own their said lots in fee simple, free from any restriction or condition limiting the use thereof to residential purposes, and that defendant accept the tendered deeds and pay the purchase price.

Defendant excepted and appealed.

*Pritchett & Cooke for plaintiffs, appellees.*
*Gillam & Gillam for defendant, appellant.*

PER CURIAM. None of the deeds constituting plaintiffs' chains of title contains any restriction purporting to limit the use of the property conveyed thereby to residential purposes. Nor does the recorded plat bear any notation indicating that lots appearing thereon are to be sold subject to such restriction. Moreover, it does not appear, and defendant does not contend, that the deed for any of the twenty lots conveyed subject to such restriction contains any provision pur-

porting to subject C. W. Spruill's remaining property to such restriction or to obligate him to convey his remaining property subject to such restriction. (See *Reed v. Elmore,* 246 N.C. 221, 98 S.E. 2d 360.) In short, nothing in this record shows that a restriction limiting the use thereof to residential purposes was ever imposed at anytime or in any manner on plaintiffs' lots. See *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. Hence, the judgment of the court below is affirmed.

Affirmed.

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**ROBERT JAMES KING, JR., BY HIS NEXT FRIEND, ROBERT J. KING v. ELIZABETH S. STOUT**

**AND**

**ROBERT JAMES KING v. ELIZABETH S. STOUT.**

**(Filed 28 September, 1960.)**

APPEAL by defendant from *Bundy, J.,* March Term, 1960, of DUPLIN.

Robert James King, Jr., a minor, sustained severe and permanent injuries resulting from a collision between an automobile and a tractor-trailer, when riding as a guest passenger in a family purpose automobile owned by defendant and driven by her minor son. The first action is by Robert James King, Jr., who sues by his father as next friend, to recover damages for personal injuries. The second action is brought by Robert James King, father of Robert James King, Jr., to recover damages for loss of his unemancipated son's earnings during his minority and for expenses incurred for necessary medical treatment.

The two cases by consent of all the parties were tried together. The following issues, to which there is no exception, were submitted to the jury, and answered as appears:

"ISSUES AND VERDICT (First Case).

"1. Was the plaintiff, Robert James King, Jr., injured by the negligence of the defendant, as alleged in the Complaint?

ANSWER: Yes.

"2. What damages, if any, is the plaintiff entitled to recover on account of his injuries?

ANSWER: 18,900.00.

"ISSUES AND VERDICT (Second Case).

"1. Was the plaintiff, Robert J. King, damaged by the negligence of the defendant as alleged in the Complaint?

ANSWER: Yes.

"2. What damages, if any, is the plaintiff entitled to recover?

ANSWER: 3341."

Separate judgments were entered in each case in accordance with the verdict. From these judgments defendant appeals.

*Rivers D. Johnson, Jr., and Vance B. Gavin for plaintiff, appellee.*
*John G. Dawson and Albert W. Cowper for defendant, appellant.*

PER CURIAM. The jury, under the application of well settled principles of law, resolved the issues of fact against the defendant. While appellant has numerous assignments of error to the admission of evidence over her objections and exceptions, and six assignments of error to the charge, a careful examination of all her assignments of error discloses no new question or feature requiring extended discussion. Neither reversible nor prejudicial error has been made to appear. All of defendant's assignments of error are overruled. The verdict and judgments will be upheld.

No error.

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GRACE MAE MUNCIE v. TRAVELERS INSURANCE COMPANY.

(Filed 12 October, 1960.)

**1. Appeal and Error § 61—**

The doctrine of *stare decisis* does not extend to *obiter dicta*, and language in an opinion which is not necessary to decision of the question therein involved should not influence a subsequent decision unless it logically assists therein, and will not be applied when contrary to well settled rules of law.

**2. Constitutional Law § 17: Contracts § 1—**

Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our constitutional guaranties. Constitution, Art. I, sec. 17.

**3. Contracts § 12—**

Valid contractual provisions must be enforced as written and the court in interpreting a contract may not ignore any of its provisions.

**4. Insurance § 60—**

The provision in an automobile liability policy that notice of an ac-

cident within the coverage of the policy should be given insurer as soon as practicable as a condition precedent to insurer's liability is not contrary to public policy and, except as to a limited kind of policy within the purview of G.S. 20-279.21, is not prohibited by statute, and therefore such provision is valid and must be enforced by the courts as written.

**5. Same: Insurance § 65—**

In an action on a liability policy by the injured person after recovery of judgment by the injured person against the insured, the burden is upon plaintiff to show compliance with a provision of the policy requiring as a condition precedent to liability of insurer that notice of an accident should be given insurer as soon as practicable. *Obiter* in *MacClure v. Casualty Co.*, 229 N.C. 305, in regard to the burden of proof, disapproved.

**6. Same—**

In an action on an automobile liability policy, plaintiff's evidence disclosing that notice of the accident was not given insurer until some eight months after the happening of the accident, without any explanation for the delay, is insufficient to show compliance with the provisions of the policy requiring as a condition precedent that notice of an accident covered by the policy be given insurer as soon as practicable, and insurer's motion to nonsuit for plaintiff's failure to show compliance with the condition precedent should have been allowed.

PARKER, J., concurring in result.

APPEAL by defendant from *Clark, J.*, November 1959 Mixed Term, of HOKE, docketed and argued as No. 596 at the Spring Term, 1960.

Summarized, the facts alleged by plaintiff to support her claim against defendant are: On 24 October 1954, while riding as a guest in an automobile owned and operated by Arvie L. Crosby, she sustained serious injuries as a result of the negligent operation of the automobile; on 29 November 1956 she recovered judgment against Crosby in the Superior Court of Hoke County for $23,500 as compensation for the injuries negligently inflicted in the operation of Crosby's automobile; Travelers Insurance Company, in March 1954, for a valuable consideration, issued to Crosby a policy of insurance protecting him against liability resulting from the negligent operation of his automobile; the insurance so provided was limited to $5,000 for injuries to one person; this policy of insurance was in full force and effect in October 1954 when plaintiff was injured; Crosby complied with all the terms and conditions of the policy; plaintiff, as third party beneficiary, is, because of the judgment establishing Crosby's liability, entitled to recover from defendant the sum of $5,000.

Defendant admitted plaintiff was injured while riding in the vehicle described in the policy of insurance issued by it, and the rendition of the judgment in Hoke County. It denied plaintiff's averment that Crosby, the insured, had complied with the conditions of the policy precedent to its liability, expressly averring that, notwithstanding plaintiff was injured on 24 October 1954, no notice was given to it of such injuries until 20 June 1955, when it received a letter from Crosby dated 10 June 1955. It alleged the policy required the insured to give notice of the accident as soon as practicable.

The policy provisions pertinent to a decision of the case read:

"Subject to the limits, exclusions, conditions and other terms of this policy," defendant obligated itself:

"1. . .To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury. . .caused by accident arising out of the ownership, maintenance or use of the automobile."

"CONDITIONS

"1. . .When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses."

"17. . .No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

Plaintiff offered no evidence to show that Crosby, the insured, had given notice required by the quoted condition. Defendant moved to nonsuit. Its motion was overruled. Defendant then offered evidence that it first had notice of the accident on 20 June 1955 when it received a letter from insured dated 10 June 1955. On 22 June 1955 it addressed a reply to its insured, Sergeant Crosby, at his APO address, San Francisco, California, in which it stated:

"This letter is to advise you that we are accepting this report and that we are making an investigation of this case under a full reservation of rights and we call your attention to the policy provisions which requires that a prompt report be made of all accidents. We feel that our interest may well have been very definitely preju-

diced by your failure to promptly report this accident to us and if after completing our investigation, we find that our rights have been prejudiced by this delay, we would necessarily have to decline to afford you any coverage under our policy."

On 30 September 1955 defendant wrote its insured at his address at Fort Bragg, stating in substance that because of the delay in giving notice as required by the policy, it felt that its rights were seriously prejudiced, concluding its letter as follows: "In view of the above, we must respectfully advise that we cannot afford coverage to you in this case and that in case suit is filed against you, it will be up to you to provide your own defense."

Sometime thereafter plaintiff instituted her suit in the Superior Court of Hoke County against Crosby, the insured. Defendant had knowledge of the institution of the action but was not a party and did not appear or defend for Crosby. A default judgment was rendered against Crosby. Inquiry was had at the November 1956 Term of Hoke, and judgment was entered on the jury's answer to the issue as to the amount of damage. Defendant renewed its motion to nonsuit at the conclusion of the evidence.

The court submitted this issue to the jury: "Did the insured, Arvie L. Crosby, give to the defendant, Travelers Insurance Company notice of the accident which occurred on October 24, 1954, as soon as practicable under the terms of the policy of insurance sued upon?" The jury answered the issue in the affirmative. Judgment was rendered on the verdict for $5,000, the limit of liability fixed by the policy, and defendant appealed.

*Hostetler & McNeill and H. D. Harrison, Jr., for plaintiff, appellee.*
*Bynum & Bynum for defendant, appellant.*

RODMAN, J. The court overruled defendant's motions to nonsuit. It charged the jury the burden of proof was on defendant to show that notice had not been given in a reasonable time, and that defendant was prejudiced by such failure to give notice.

There is no allegation that defendant has in any manner waived the policy provisions, nor is there contention that there is any evidence tending to show earlier notice to defendant of the accident of 24 October 1954 than the letter from Crosby dated 10 June 1955, received 20 June 1955. Nor is it contended there is evidence tending to explain such delay or justify the delay as reasonable. It is asserted by plaintiff that defendant has not offered evidence of nor in fact suffered prejudice from the failure to give earlier notice. The rulings

therefore present for determination these questions: Who had the burden of proof with respect to notice required by the policy? Is the evidence sufficient to permit a finding that the policy provisions have been complied with? Plaintiff has the right, of course, to the benefit of any evidence offered by defendant which tends to support her allegations that the conditions of the policy were complied with.

The learned trial judge presumably based his rulings and charge on *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742. It must be conceded that the language there used supports his honor's rulings. There can be, we think, no question that the Court in that case reached the correct result, but it is, we think, apparent from the facts as there stated that the Court used language not necessary to support its conclusion.

There insured promptly gave notice of the accident and of the institution of the action by the injured party against the insured. Pursuant to this notice the insurer assumed the defense of that action but permitted a default judgment to be rendered against the insured. It based its assertion of nonliability on these facts: the insured was the proprietor of a carnival; he traveled with the show throughout the South; because of such travel insurer experienced delay in locating the insured and in having him verify the answer which the insurer's attorneys had prepared. Because of the difficulty in locating the insured, the attorneys, on 7 April, asked permission to withdraw as his counsel. That day the insured received letter written by counsel employed by the insurance company. He replied by telegraph the next morning, the earliest possible moment. Counsel then sought to impose conditions on which they would agree to continue to represent him. Counsel for plaintiff in the personal injury action had agreed that counsel for insured might file an answer, and that they would waive verification. A verified answer was received from insured on 16 April, but permission to counsel to withdraw was not granted until May. The injured then brought suit against the insurance company. It disclaimed liability on the assertion that the insured had failed to comply with a condition precedent, to wit: full co-operation in the defense of the litigation. The trial court held as a matter of law that the defense was established and entered judgment in favor of the insurance company. *Justice Seawell*, speaking for the Court, said: "There is no question here as to the validity and importance of clauses in liability insurance policies similar to that with which we are dealing, to the materiality of which appellee's counsel address many citations of authority. But the issue here concerns the manner in which the breach of the co-operation clause may

be ascertained, and by which branch of the court it may be determined,—judge or jury." Thereafter he said: "As we are dealing with a nonsuit of plaintiff's action based on an affirmative defense set up by the defendant while the burden of proof with respect thereto rested on him, it is well to say that we are advertent to the fact that the policy names compliance with all its terms a condition precedent to the maintenance of the suit. In passing it may be observed that defendant made no objection to the pleading in that respect, *and voluntarily undertook to prove its affirmative defense in avoidance of liability.*" (Emphasis added.)

It is apparent from the opinion that the Court was not called upon to determine who had the burden of proof. Whether rightly or wrongly, the insurance company had voluntarily assumed that burden. It would not on appeal be permitted to shift its position and assert that the burden was in fact on plaintiff. *Bowling v. Bowling*, 252 N.C. 527; *Rhyne v. Mount Holly*, 251 N.C. 521, 112 S.E. 2d 40; *Bivins v. R. R.*, 247 N.C. 711, 102 S.E. 2d 128; *Gorham v. Insurance Co.*, 214 N.C. 526, 200 S.E. 5; *Webster v. Trust Co.*, 208 N.C. 759, 182 S.E. 333. The question for decision in the *MacClure* case was: Did the admitted facts establish as a matter of law a failure of the insured to co-operate? The trial court answered in the affirmative, and this Court properly held that the facts did not as a matter of law establish failure to co-operate, but the evidence required the submission of an issue to a jury. This was all the Court was called upon to decide. That portion of the opinion dealing with the burden of proof, being unnecessary to a decision, was merely *obiter dicta* and should not influence the decision in this case unless it logically assists in answering the question we are now called upon to decide. *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673; *Washburn v. Washburn*, 234 N.C. 370, 67 S.E. 2d 264; *Suskin v. Hodges*, 216 N.C. 333, 4 S.E. 2d 891.

To determine the application of the language of the *MacClure* case to this case we must recognize established rights and be guided by well-settled rules repeatedly declared for the protection of those rights.

Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our constitutional guaranties. Constitution, Art I, sec. 17; *Alford v. Insurance Co.*, 248 N.C. 224, 103 S.E. 2d 8; 12 Am. Jur. 641, 642.

The policy provision requiring notice of facts which may impose liability on the insured as a result of the operation of his motor vehicle does not violate public policy, and, except as to a limited kind of policy, G.S. 20-279.21, is not declared invalid by statute.

Since the contractual provision is, as related to the facts of this case, a valid one, the parties are entitled to have it enforced as written. We cannot ignore any part of the contract. *Suits v. Insurance Co.*, 249 N.C. 383, 106 S.E. 2d 579; *Peirson v. Insurance Co.*, 248 N.C. 215, 102 S.E. 2d 800; *Ray v. Hospital Care Assoc.*, 236 N.C. 562, 73 S.E. 2d 475; *Federal Reserve Bank v. Manufacturing Co.*, 213 N.C. 489, 196 S.E. 848; *Whitaker v. Insurance Co.*, 213 N.C. 376, 196 S.E. 328.

The policy makes the giving of notice a condition precedent to insurer's liability. Prior and subsequent to the decision in the *MacClure* case this Court has consistently held that plaintiff has the burden of showing that he has complied with those conditions precedent to his right to maintain his action. Illustrative of this well-settled rule are cases under the wrongful death statute as originally enacted, *Wilson v. Chastain*, 230 N.C. 390, 53 S.E. 2d 290; *Webb v. Eggleston*, 228 N.C. 574, 46 S.E. 2d 700; *Hatch v. R. R.*, 183 N.C. 617, 112 S.E. 529; filing of a claim as required by G.S. 153-64 to impose liability by contract on a municipal corporation, *Nevins v. Lexington*, 212 N.C. 616, 194 S.E. 293; filing of a bond by caveators as required by G.S. 31-33, *In re Winborne*, 231 N.C. 463, 57 S.E. 2d 795; contract to pay money on the happening of a specified event, *Jones v. Realty Co.* 226 N.C. 303, 37 S.E. 2d 906; notice of loss under a fire insurance policy, *Gardner v. Insurance Co.*, 230 N.C. 750, 55 S.E. 2d 694; *Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703; *Zibelin v. Insurance Co.*, 229 N.C. 567, 50 S.E. 2d 290; notice of accidental death or injury as required in accident policies, *Gorham v. Insurance Co., supra; Fulton v. Insurance Co.*, 210 N.C. 394, 186 S.E. 486; *Dewease v. Insurance Co.*, 208 N.C. 732, 182 S.E. 447; *Rhyne v. Insurance Co.*, 196 N.C. 717, 147 S.E. 6; *Woodfin v. Insurance Co.*, 51 N.C. 558; policy provision that the injured may not bring an action on the policy "unless and until execution against the assured is returned unsatisfied," *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12; *Anderson & Co. v. Insurance Co.*, 212 N.C. 672, 194 S.E. 281.

The general rule requiring plaintiff to establish compliance with contractual conditions precedent has general recognition. *Murray v. Cunard S. S. Co.*, 139 N.E. 226 (N.Y.); *Prudential Ins. Co. v. Myers*, 44 N.E. 55 (Ind.); *Wachovia Bank & Trust Co. v. Independence Indemnity Co.*, 37 F. 2d 550; *A. Perley Fitch Co. v. Continental Ins. Co.*, 49 A.L.R. 2d 156 (N.H.); *Public National Ins. Co. v. Wheat*, 112 S.E. 2d 194; *Segal v. Aetna Casualty Co.*, 148 N.E. 2d 659; *American Fidelity Co. v. Hotel Poultney*, 102 A. 2d 322; *Depot Cafe*

*v. Century Indemnity Co.*, 72 N.E. 2d 533; *Lauritano v. American Fidelity Fire Insurance Co.*, 147 N.Y.S. 2d 748; *Houran v. Preferred Acc. Ins. Co. of New York*, 195 A. 253; *Zingerle v. The Commonwealth Insurance Co. of N. Y.*, 321 P. 2d 636; *Horacek v. Smith*, 191 P. 2d 41.

The general rule imposing on plaintiff the burden to establish his compliance with conditions precedent to the maintenance of his action has been frequently applied in actions on liability policies by courts of sister states. The identical question which we are called upon to decide was presented to the Supreme Court of Nevada in *State Farm Mut. Auto Ins. Co. v. Cassinelli*, 216 P. 2d 606, 18 A.L.R. 2d 431. That Court, in a well-considered opinion by *Badt, J.* (later *C.J.*), held that the burden rested on the plaintiff to establish compliance with the notice provision, by the policy, made a condition precedent. The note appearing in the A.L.R. report is exhaustive. It is not necessary to lengthen this opinion by inclusion of the cases cited and analyzed in that note. *Northwestern Mut. Ins. Co. v. Independence Mut. I. Co.*, 319 S.W. 2d 898, decided in January 1959, follows the reasoning and conclusion reached in the *Cassinelli* case, citing in support of its conclusion a number of recent cases. See also 5A Am. Jur. 150-151; 8 Appleman Ins. L. & P., pp 103 & 145; 45 C.J.S. 1274.

Plaintiff does not contend that she has any greater right against insurer than Crosby, the insured, would have. Any failure of Crosby to give notice defeating his right to indemnity would likewise prevent plaintiff from asserting any rights under the policy. *Alford v. Insurance Co., supra; Peeler v. Casualty Co.*, 197 N.C. 286, 148 S.E. 261; *Fulwiler v. Traders & General Ins. Co.*, 285 P. 2d 140; *Kentucky Farm Bureau Mut. Ins. Co. v. Miles*, 267 S.W. 2d 928; *Indemnity Ins. Co. of North America v. Smith*, 78 A. 2d 461; *McFarland v. Farm Bureau Mut. Automobile Ins. Co.*, 93 A. 2d 551; 5A Am. Jur. 188.

Notice without explanation for the delay, given eight months after the happening of the accident, resulting in injuries as serious as depicted by plaintiff's judgment against Crosby, cannot be said to be given "as soon as practicable." Since plaintiff has failed to establish compliance with the condition or to justify the delay, it follows that she has failed to establish her right to maintain the action.

We treat the action as one by plaintiff against The Travelers Indemnity Company in which it has entered an appearance. The policy of insurance on which plaintiff bases her action was issued by The

Travelers Indemnity Company and The Travelers Fire Insurance Company. By the terms of the policy each company agreed to indemnify the insured upon the happening of specific contingencies. The agreement with respect to bodily injuries is, by the terms of the policy, the obligation of The Travelers Indemnity Company. The case was treated in the trial below as if process had issued for The Travelers Indemnity Company, and it was in fact the defendant before the court. No suggestion was made here to the contrary. Hence, notwithstanding the caption of the cause, we are of the opinion and hold that The Travelers Indemnity Company was properly before the court.

Reversed.

PARKER, J., concurring in result.

The policy requirements as to giving notice of accident, and action against the company are set forth in the Court's opinion. The policy requires that the notice shall be given "as soon as practicable," and that "no action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy."

All the evidence shows these facts: One. The accident in which plaintiff was injured occurred on 24 October 1954. Two. The insured Arvie L. Crosby gave defendant notice in June 1955—more than seven months after the accident occurred.

Plaintiff has no allegation in her complaint that the insurer has by waiver or estoppel lost its right to defeat a recovery under the liability policy because of the insured's failure to comply with the policy provision that the giving of notice as soon as practicable by the insured is an express condition precedent to liability under the policy.

The insured has offered no excuse or extenuating circumstances for his delay in giving the insurer notice of the accident. The policy requires that notice of the accident shall be given by the insured to the insurer "as soon as practicable." That means to give such notice within a reasonable time, for the word "practicable" means "capable of being put into practice, done, or accomplished; feasible." Webster's New International Dictionary, 2nd Ed.; *Unverzagt v. Prestera*, 339 Pa. 141, 13 A. 2d 46; *Callaway v. Central Surety & Ins. Corp.*, 107 F. 2d 761; *London Guarantee & Accident Co. v. Shafer*, 35 F. Supp. 647; *American Lumbermen's Mutual Casualty Co. v. Klein*, 63 F. Supp. 701; *Young v. Travelers Ins. Co.*, 119 F. 2d 877; Anno. 18 A.L.R. 2d p. 462, §14.

What is a reasonable time, when the facts are not in dispute, as here, is a question of law to be decided by the Court. *Depot Cafe v. Century Indemnity Co.*, 321 Mass. 220, 72 N.E. 2d 533; *Unverzagt v. Prestera, supra.*

In *Houran v. Preferred Acc. Ins. Co. of New York*, 109 Vt. 258, 195 A. 253, the Supreme Court of Vermont said: "The rule established by the weight of authority is that where, by the terms of the insurance contract, a specified notice of accident, given by or on behalf of the insured to the insurer, is made a condition precedent to liability on the part of the latter, the failure to do so will release the insurer from the obligations imposed by the contract, although no prejudice may have resulted. Among the cases so holding are *Meyer v. Iowa Mutual Liability Ins. Co.*, 240 Ill. App. 431, 436; *Phoenix Cotton Oil Co. v. Royal Indem. Co.*, 140 Tenn. 438, 205 S.W. 128, 130; *Lee v. Metropolitan Life Ins. Co.*, 180 S.C. 475, 186 S.E. 376, 381; *Jefferson Realty Co. v. Employers' Liability Assur. Corp.*, 149 Ky. 741, 149 S.W. 1011, 1014; *Sherwood Ice Co. v. U. S. Casualty Co.*, 40 R.I. 268, 100 A. 572, 576; *Employers' Liability Assurance Corp., v. Perkins*, 169 Md. 269, 181 A. 436, 442; *St. Louis Architectural Iron Co. v. New Amsterdam Casualty Co.* (C.C.A.), 40 F. (2d) 344, 347, *certiorari* denied 282 U.S. 882, 51 S. Ct. 86, 75 L. Ed. 778. Other decisions might be cited, but instead reference may be had to those mentioned in the opinions in the foregoing cases, and in annotation, 76 A.L.R. 182 ff.

"Indeed, much of the conflict of authority upon this question is more apparent than real. Many of the cases which hold that a showing of prejudice is necessary turn upon a construction of the language of the policy, while recognizing, tacitly at least, the rule stated above. In *Southern Surety Co. v. MacMillan Co.* (C.C.A.), 58 F. (2d) 541, 546, 549, *certiorari* denied 287 U.S. 617, 53 S. Ct. 18, 77 L. Ed. 536, it was held that, where the giving of notice is a condition precedent, the failure to give it relieves the insurer from liability, but that in the particular case the language of the contract could not be said to be unambiguous and to impose a condition, and so, no prejudice to the insurer being shown, recovery was allowed. A very similar case is *Caldwell v. Life & Casualty Ins. Co. of Tenn.*, 38 Ga. App. 589, 144 S.E. 678, *Sokoloff v. Fidelity & Casualty Co.*, 288 Pa. 211, 135 A. 746, 747, is to the same effect."

See supplemental annotations, 123 A.L.R. 981, and 18 A.L.R. 2d 452, where additional later cases are collected. In 18 A.L.R. 2d 452, it is said: "It appears to be well settled that if a liability policy

expressly makes the insured's failure to give timely notice a ground of forfeiture, or compliance a condition precedent to liability, no recovery can be had where timely notice has not been given. The following later cases support this general rule either expressly or by necessary implication." The later cases are cited.

See the scholarly and exhaustive opinion in *State Farm Mut. Auto. Ins. Co. v. Cassinelli,* 66 Nev. 227, 216 P. 2d 606, 18 A.L.R. 2d 431, where numerous cases are cited and discussed, and in which the Court closes its opinion with these words: "By reason of the overwhelming weight of authority of the courts of last resort within the United States, we are compelled to hold that on account of the respondent's failure to perform the condition precedent, stipulated in the policy as such, of giving notice of the suit and forwarding summons and complaint within a reasonable time, no action on his part lay against the company. Lack of prejudice, under the terms of the policy, was immaterial." To the same effect see also: *Standard Acci. Ins. Co. v. Turgeon,* 140 F. 2d 94; *Harmon v. Farm Bureau Mut. Automobile Ins. Co.,* 172 Va. 61, 200 S.E. 616; *Whittle v. Associated Indemnity Corp.,* 130 N.J.L. 576, 33 A. 2d 866; *Preferred Acci. Ins. Co. v. Castellano,* 148 F. 2d 761; *Ross v. Mayflower Drug Stores,* 338 Pa. 211, 12 A. 2d 569.

The policy here has no express forfeiture clause. *Peeler v. Casualty Co.,* 197 N.C. 286, 148 S.E. 261, was a case involving automobile accident insurance, and the insurer was given no written notice of the accident. In that case this Court said: "The provision requiring written notice is a condition precedent to the assured's right to recover damages, although it contains no express forfeiture clause." In closing its opinion the Court said: "It would be extravagant to hold that the plaintiff in this action, who is not a party to the contract between the defendant and Graham, acquired rights under the policy which are superior to Graham's and that the defendant is liable to him although it is not liable to the party with whom the contract was made. One who seeks to take advantage of a contract made for his benefit — if in any view the contract of insurance can be construed as made for the plaintiff's benefit — must take it subject to all legal defenses, such as the nonperformance of conditions. 13 C.J., 699, sec. 799. As the assured failed to comply with the contract, and as the plaintiff has no rights superior to those of the assured, the plaintiff cannot maintain his action. The motion for nonsuit should have been allowed."

The liability policy made requirement as to notice an express condition precedent to any liability. It is obvious that this express con-

dition precedent is of the essence of the contract in insurance of this kind. In insurance of this character it is a matter of the first importance to the insurer, to be informed as soon as practicable of the time, place and circumstances of the accident, and of the names and addresses of the injured and of available witnesses. In a very little time the facts may in a great measure fade out of memory, or become distorted, witnesses may go beyond reach, physical conditions may change, and more perilous than all, fraud and cupidity may have had opportunity to perfect their work.

In the following cases where the policy required the insured to give the insurer notice of the accident "as soon as practicable" or a similar provision, and the insured offered no excuse or extenuating circumstances for the delay, these delays in giving notice were held fatal: 28 days in *Vanderbilt v. Indemnity Ins. Co. of N. A.*, 265 App. Div. 495, 39 N.Y.S. 2d 808; 46 days in *Depot Cafe v. Century Indemnity Co., supra*; 66 days in *Ohio Casualty Ins. Co. v. Miller*, 29 F. Supp. 993; 2½ months in *Whittle v. Associated Indemnity Corp., supra;* 94 days in *Weller v. Atlantic Casualty Ins. Co.*, 128 N.J.L. 414, 26 A. 2d 503; 7 months in *Standard Acci. Ins. Co. v. Turgeon, supra*; 7 months in *Dworkin v. Aetna Casualty & Surety Co.*, 194 Misc. 501, 87 N.Y.S. 2d 77; 16 months in *Star Transfer Co. v. Underwriters at Lloyds of London*, 323 Ill. App. 90, 55 N.E. 2d 109; 2½ years in *Harmon v. Farm Bureau Mut. Auto. Ins. Co., supra*; 29 days in *Associated Indemnity Corp. v. Garrow Co.*, 39 F. Supp. 100, affirmed 125 F. 2d 462; 6 weeks in *Preferred Acci. Ins. Co. v. Castellano, supra*; 4½ months in *State Farm Mut. Auto. Ins. Co. v. Cassinelli, supra*; 5 months in *Brown Materials Co. v. Pacific Auto. Ins. Co.*, 52 Cal. App. 2d 760, 127 P. 2d 51; 8 months in *State Farm Mut. Auto. Ins. Co. v. Grimmer*, 47 F. Supp. 458; 11 months in *Arthur v. London Guarantee & Acci. Co.*, 78 Cal. App. 2d 198, 177 P. 2d 625. For numerous other cases holding as a matter of law that an unexcused delay in giving notice for varying lengths of time was fatal, see Anno. 76 A.L.R. 66 *et seq.*; 123 A.L.R. 962.

The statement in the Court's opinion to the effect, that plaintiff has the burden of showing that Crosby, the insured, has complied with the express condition of giving notice to the insurer of the accident "as soon as practicable" precedent to liability under the policy, is supported by the overwhelming weight of authority in the Courts of last resort in the United States, and meets with my entire approval. The statement in *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742, to the effect, that the failure of insured in a policy similar to the one here to comply with an express condition precedent to

liability under the policy is an affirmative defense which the insurer has the burden of proving, is, in my opinion, erroneous and should be disapproved or overruled by the Court.

The law cannot make a better contract for the insured Crosby than he chose to make for himself. *Whittle v. Associated Indemnity Corp., supra.* "One who seeks to take advantage of a contract made for his benefit — if indeed the contract of insurance can be so construed — must take it subject to all its terms and conditions." *Sears v. Casualty Co.*, 220 N.C. 9, 16 S.E. 2d 419.

The delay of the insured Crosby in giving notice to the defendant insurer was unreasonable, and is fatal to plaintiff's action. The court below erred in overruling defendant's motion for judgment of involuntary nonsuit, and I agree with the Court's opinion that its judgment should be reversed.

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STATE v. ELMER DAVIS, JR.

(Filed 12 October, 1960.)

**1. Criminal Law § 71—**

Confessions of a defendant are competent in evidence when, and only when, they are in fact voluntarily made.

**2. Same—**

Evidence upon the *voir dire* to the effect that the officers advised defendant that he need not answer questions and need not make any statements, that if he did they might be used against him, that defendant was not threatened or mistreated in any way, that his sole request to communicate with any person was granted, *is held* substantial and competent evidence sufficient to support the court's finding that the confessions made by defendant were voluntary.

**3. Same—**

The voluntariness of a confession is to be determined in a preliminary inquiry before the trial judge upon evidence adduced, and the determination of the trial court is conclusive on appeal if supported by competent evidence.

**4. Homicide § 20—**

In this prosecution for murder committed in the perpetration of the felony of rape, the confession of defendant together with evidence of other numerous facts tending to establish the *corpus delicti* and the presence of defendant at the scene of the crime at the time it was perpetrated, *is held* sufficient to be submitted to the jury, and defendant's motion to dismiss was properly denied.

**5. Constitutional Law §§ 1, 30—**

The State Court, in the discharge of its duty to protect defendant's rights, is governed by the State decisions in interpreting the State Constitution and law, but is governed by the decisions of the Supreme Court of the United States in interpreting defendant's rights under the Fourteenth Amendment to the Federal Constitution.

**6. Constitutional Law § 30: Criminal Law § 71—**

The admission in evidence of voluntary confessions made by defendant while he was being questioned by officers of the law after his apprehension and arrest as an escaped convict, even though 16 days elapsed between his apprehension and the filing of a murder charge against him and his arraignment thereon, does not violate the Due Process Clause of the Federal Constitution, since under the federal decisions the rule denying the admission in evidence of confessions obtained before prompt arraignment is a rule of evidence adopted for the federal courts and is not a constitutional limitation on the states.

**7. Constitutional Law § 30: Arrest and Bail § 7—**

The fact that a notation that defendant was not to be allowed to see or call anyone is copied on the arrest sheet from a memorandum on an envelope made by the arresting officer, does not establish a violation of defendant's right under the Due Process Clause when the undisputed evidence is to the effect that no officer had the right to enter any such order, that it was not enforced, and that the sole request of defendant to communicate with any person was granted, since in such instance the notation is nothing more than an unauthorized and unenforced entry made by the arresting officer.

**8. Arrest and Bail § 3—**

An officer of the law has authority to apprehend and arrest an escaped convict.

**9. Prisons § 2—**

Where an escaped convict has been apprehended by municipal police officers who notify the Director of Prisons, the Director has authority to designate the place of imprisonment, and he may authorize the officers to hold the prisoner pending their investigation of crimes committed while the prisoner was at large.

**10. Indictment and Warrant § 1—**

The object of a preliminary hearing is to inquire into the legality of the arrest and detention and to effect a release for one who is held in violation of law, and the rule that a defendant is entitled to a prompt hearing upon his arrest can have no application where the defendant is in lawful custody as an apprehended escapee from the State's prison.

**11. Constitutional Law § 30: Criminal Law § 71—**

The rule that the trial court's findings supporting its determination as to the voluntariness of defendant's confession are conclusive when supported by competent evidence and that review upon appeal is restricted to the undisputed facts, obtains in the federal courts in de-

termining whether there has been a violation of defendant's rights under the Due Process Clause of the Fourteenth Amendment.

**12. Criminal Law § 94—**

Where the record discloses that defense counsel made repeated interruptions during the testimony of a State's witness, the trial court may properly command counsel to sit down and permit the witness to complete his answer without interruption, and the court's further comment that "this is not a Roman circus" does not amount to an expression of opinion by the court as to the facts in the case.

**13. Homicide § 13: Indictment and Warrant § 17—**

Where the indictment charges murder committed in the perpetration of the specific felony of rape, the State must make out its case in conformity with the indictment and must prove that defendant killed deceased in the perpetration of or attempt to perpetrate that particular felony in order to justify a verdict of murder in the first degree.

**14. Homicide § 23—**

Where the indictment charges murder while perpetrating the crime of rape, an instruction to the effect that the jury must be satisfied from the evidence beyond a reasonable doubt that defendant caused the death of deceased while perpetrating or attempting to perpetrate that particular felony, and that otherwise the jury should return a verdict of not guilty, is not unfavorable to defendant, and the court is not required to give further instructions requested by defendant to the effect that defendant could not be convicted if the jury found he killed deceased while perpetrating another and distinct felony.

APPEAL by defendant from *Campbell, J.*, at the December 7, 1959, Regular Criminal Term, MECKLENBURG Superior Court.

Criminal prosecution upon the following bill of indictment:

"STATE OF NORTH CAROLINA IN THE SUPERIOR COURT
MECKLENBURG COUNTY NOV. 2d TERM, 1959

"The jurors for the State upon their oath present that: Elmer Davis, Jr., late of the County of Mecklenburg, on the 20th day of September, 1959, with force and arms, at and in the County aforesaid did unlawfully, willfully, feloniously while perpetrating felony, to-wit; rape, kill and murder Foy Bell Cooper against the form of the statute and in such case made and provided and against the peace and dignity of the State.

"James E. Walker, Solicitor."

The Grand Jury returned the foregoing a TRUE BILL.

Upon arraignment the defendant, through counsel of his own selection, entered a plea of not guilty. A jury trial began on December 14, 1959.

The State offered evidence tending to show the following: At about two o'clock on Sunday afternoon, September 20, 1959, the deceased, Mrs. Foy Bell Cooper, an elderly lady, was seen to enter Elmwood Cemetery located on Seventh Street and near the railroad tracks in the city of Charlotte. At the time, she was carrying a handbag and a newspaper. Elmwood is a cemetery maintained for the burial of white people. Adjoining is Pinewood Cemetery, maintained for the burial of colored people. Separating the two is a wire fence along which trees, vines, and shrubbery form a hedge.

The deceased had been, for many years, in the habit of visiting her mother's grave located in the Elmwood Cemetery a few feet from the fence and hedge separating it from Pinewood. Near the mother's grave was a stone bench where Mrs. Cooper was accustomed to sit during her stay in the cemetery. About 25 or 30 feet from this bench and near the hedge was a large tombstone (3½ feet high and 6½ feet wide) marking the Nivens burial plot. Across the fence and hedge from the Nivens plot and at the foot of the hill in the Pinewood Cemetery was located the Jones mausoleum. This mausoleum had a heavy wooden door composed of four panels. The lower right-hand panel had been broken out or removed.

At about five o'clock on Sunday afternoon, September 20, some white and colored boys playing in the cemeteries looked through the open panel in the door of the mausoleum and discovered the body of Mrs. Foy Bell Cooper. They notified the police who called the coroner. The police made an intensive search of the premises, found a ladies' hairnet behind the Nivens monument, a pair of torn ladies' panties between the monument and the mausoleum, and Mrs. Cooper's handbag (wrapped in a newspaper) and her glasses hidden in the hedge.

The coroner, admitted to be a medical expert specializing in pathology, performed an autopsy, testified that Mrs. Cooper had been dead an hour or two when he saw her body, about five o'clock in the afternoon. "It is my opinion she died from strangulation. . . . In her vagina I found spermatozoa, . . . the lining was rather red. This would indicate that she had an intercourse."

At 11:00 o'clock p.m. on September 21, the defendant, Elmer Davis, Jr., was arrested by police officers in Belmont, a town in Gaston County located about 12 miles from Charlotte. At the time of the arrest, Davis was an escapee from a prison camp near Asheville where he was serving sentences of 17-25 years for robbery and assault with intent to commit rape. These offenses had been committed within two blocks of Elmwood Cemetery. The escape, his fourth dur-

ing this and prior terms of imprisonment, took place some time between September 1st and the 20th.

At the time of arrest he was wearing a pair of reddish brown shoes and dark clothing different from his prison uniform. He had in his possession a shoe box containing several pairs of ladies' panties and he carried one soiled pair in his pocket. He also had a billfold containing a social security card and blood donation receipts bearing the name Bishel Buren Hayes. The Belmont officers surrendered the prisoner to Lt. Gilleland, Holmburg and Porter, members of the Charlotte police force, who placed him in the City Jail and notified the State prison director of the arrest. The director authorized them to hold Davis pending their investigations.

The officers first interrogated the prisoner about his escape, the clothing he was wearing, the ladies' panties, and the billfold and contents. He said he "obtained" the articles of clothing between Canton and Asheville after his escape. He said a railroad bum gave him the billfold and contents. The police officers, with the prisoner's consent, took him to Asheville and Canton but he was unable to point out where he had stolen any of the articles.

On October 2, for the first time, the officers questioned the prisoner about the death of Mrs. Cooper. He denied any knowledge of her death or that he had been near the cemetery since his escape. As the officers picked up additional information they continued their questioning. Lt. Sykes, who had been on vacation until the 5th of October, interrogated the prisoner for the first time on October 6. At the beginning of the interrogation Officers Hucks and Festerman were present. The prisoner, in reply to a question, stated he would like to talk to Lt. Sykes alone. Hucks and Festerman left the room.

The State sought to have Lt. Sykes testify as to the statements made by the prisoner. Upon objection and request for preliminary investigation to determine whether the statements were voluntary, the court proceeded to hear evidence in the absence of the jury.

The defendant testified, in substance, he neither knew about nor had anything to do with Mrs. Cooper's death. He did not make the confession and did not understand the writing he signed contained the admissions on Page 1. If he did make any admissions of guilt they were induced by fear and threats of violence, by solitary confinement without opportunity to confer with relatives, and without proper food; that he signed some paper not because he was guilty, but in order to get out of the city jail where he could get better food and a hot bath; that his food in jail was limited to two meals per day consisting of two sandwiches only, and that he was hungry.

On cross-examination he admitted a long criminal record and at least four escapes while serving prison sentences. When arrested he was out on his second escape while serving current sentences.

The prisoner introduced the police department's record of his arrest. It contained this notation: "Date: 9/21/59. Hold for Hucks & Festerman, Re-Mrs. Cooper. Escapee from Haywood County still has 15 years to pull. Do not allow anyone to see Davis. Or allow him to use the telephone." A police officer testified that the notation was taken from a memorandum on the back of an envelope turned in by the arresting officers, copied on the arrest sheet, and the envelope destroyed. The Chief of Police testified no one had authority to make such an order. Captain McCall testified it was not enforced; that the prisoner made the request that he would like to see his sister. He does not claim to have made any other request. The police searched for and found the sister who visited him in jail and was permitted to do so in private.

The officers testified the prisoner was served the same food as other prisoners in the city jail. They testified that at no time was the prisoner threatened or mistreated in any way; that no promises or inducements were made to him, and he was told that he was neither required to answer questions nor to make a statement unless he wanted to; and that any statement he did make "might be used for or against him in a court of law." These statements were repeated in the paper which the defendant signed.

On the day following the signing of the confession, Dr. J. S. Nathaniel Tross, a minister, publisher of the Charlotte Post, author of a radio program, and a former pastor of a church in Belmont which the prisoner and his family attended, visited the prisoner in jail and had a private interview with him and prayer service. The visit lasted a full hour. Dr. Tross testified: "He told me Lt. Sykes prayed with him; that he enjoyed it and had faith in it. . . . The first question I asked him were the officers taking good care of him and his answer was yes. I asked him specifically about having not been fed properly and he said he was well taken care of."

At the conclusion of the preliminary investigation Judge Campbell ruled the signed statement and the oral admissions to the officers were voluntary. The jury was recalled, the written confession and the oral admissions to Officer Hucks and other police officers were admitted in evidence over the defendant's objection.

The details of the admissions made by the prisoner need not be repeated here. In addition to the confession and before it was writ-

ten and signed, and before the oral admissions to Detective Hucks, the prisoner went voluntarily to the cemetery with the officers and there showed them where he crossed the hedge, slipped up behind Mrs. Cooper, seized and choked her, dragged her behind the Nivens monument and there committed a crime against nature and rape. He said he saw someone in the cemetery and hid behind a bush, then carried the body to the Jones "little house," pushed it through the broken panel in the door, returned to the place of assault, wrapped up Mrs. Cooper's pocketbook in the paper she was sitting on, hid them and her glasses in the hedge.

According to his further story, he left the cemetery and just outside he came upon a man in a drunken stupor, took from him his billfold, shoes and socks; stole some other clothes from a clothesline near the railroad, changed into them and hid his discarded clothes and his convict shoes. He took the officers to the spot and without difficulty found the discarded clothes, including his shoes.

The State called as a witness John Shannon, a school boy 18 years of age, who testified in substance that he went to Elmwood Cemetery at about 2:00 or 2:15 on the afternoon of September 20 for the purpose of picking up his father and mother. He saw them in the cemetery and about the time he got out of his car he saw a colored man hide behind a bush near the stone bench. After seeing an account of Mrs. Cooper's death in the paper next morning he reported to the police having seen a colored man hiding in the hedge. He was unable to identify the prisoner as the man he saw; that he had recently moved to Charlotte from Syracuse, New York, where there were very few negroes, and that it was difficult for him to tell one from another. "Most of them look alike to me."

The State called Bishel Buren Hayes, a resident of South Carolina, who testified he was in Charlotte near a cemetery (he now knows to be Elmwood) on September 20; that he met up with an acquaintance. They drank some liquor and while his friend went in search of more liquor he went to sleep. When he awoke his shoes and socks, billfold and contents were gone. He identified as his these articles which were taken from the prisoner at the time of his arrest.

At the conclusion of the State's case the defendant moved for dismissal or judgment of nonsuit, and excepted to the court's refusal to grant the motion. While the defendant offered evidence before the trial judge on the question whether his confessions were voluntary, he did not offer evidence before the jury.

In apt time the defendant requested the court to give the jury

special instructions. The court refused to charge as requested. The defendant excepted. The jury returned for its verdict, "Guilty of murder in the first degree." From the judgment of death in the manner prescribed by law, the defendant appealed.

*T. W. Bruton, Attorney General and Harry W. McGalliard, Assistant Attorney General for the State.*

*Charles V. Bell, W. B. Nivens for defendant, appellant.*

HIGGINS, J. Counsel for the prisoner contend the trial court committed five prejudicial errors: (1) Holding the confessions voluntary and permitting the State to offer them in evidence. (2) Overruling defendant's motion to dismiss. (3) Failing to set aside the judgment upon the ground the confessions were involuntary and obtained and offered in evidence in violation of the prisoner's rights under the Due Process Clause of the Fourteenth Amendment. (4) Ordering counsel for the prisoner to sit down and reminding him the trial is not a Roman circus. (5) Denying prisoner's timely request for special instructions.

The first three errors assigned in reality present one question: Were the prisoner's admissions to the officers voluntary? If voluntary, as the term is defined by our Court, they were admissible in evidence. As stated by *Henderson, J.*, in *State v. Roberts*, 12 N.C. 259, "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, . . ."

In the case of *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d, 572, *Justice Ervin* collected and analyzed our leading authorities on confessions. We quote one paragraph from his opinion:

> "An extrajudicial confession of guilt by an accused is admissible against him when, and only when, it was in fact voluntarily made. *S. v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620; *S. v. Moore*, 210 N.C. 686, 188 S.E. 421; *S. v. Anderson*, 208 N.C. 771, 182 S.E. 643. A confession is presumed to be voluntary, however, until the contrary appears. *S. v. Mays*, 225 N.C. 486, 35 S.E. 2d 494; *S. v. Grier*, 203 N.C. 586, 166 S.E. 595; *S. v. Christy*, 170 N.C. 772, 87 S.E. 499. When the admissibility of a confession is challenged on the ground that it was induced by improper means, the trial judge is required to determine the question of

fact whether it was or was not voluntary before he permits it to go to the jury. *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Andrew,* 61 N.C. 205. In making this preliminary inquiry, the judge should afford both the prosecution and the defense a reasonable opportunity to present evidence in the absence of the jury showing the circumstances under which the confession was made. *S. v. Gibson,* 216 N.C. 535, 5 S.E. 2d 717; *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11; *S. v. Smith,* 213 N.C. 299, 195 S.E. 819; *S. v. Blake,* 198 N.C. 547, 152 S.E. 632; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603. The admissibility of a confession is to be determined by the facts appearing in evidence when it is received or rejected, and not by the facts appearing in evidence at a later stage of the trial. *S. v. Richardson,* 216 N.C. 304, 4 S.E. 2d 852; *S. v. Alston, supra.* When the trial court finds upon a consideration of all the testimony offered on the preliminary inquiry that the confession was voluntarily made, his finding is not subject to review, if it is supported by any competent evidence. *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Alston, supra.* A confession is not rendered incompetent by the mere fact that the accused was under arrest or in jail or in the presence of armed officers at the time it was made. *S. v. Litteral, supra; S. v. Bennett,* 226 N.C. 82, 36 S.E. 2d 708; *S. v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24; *S. v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657."

Without repeating the testimony which is recited in the statement of facts, the trial court had the evidence of the officers that the prisoner was advised he need not make a statement; that if he did it might be used against him. These statements are repeated in the paper signed by him. The officers testified the prisoner had not been mistreated in any way; that he had the same food as other prisoners; that he did not ask to see or communicate with any person except his sister. This request was granted. On the day after the confession the prisoner told Dr. Tross, his former pastor — a member of his own race — that he had been well treated by the officers. Thus Judge Campbell had before him on the preliminary inquiry substantial and competent evidence upon which to base his finding the admissions of the prisoner were voluntary.

According to our practice the question whether a confession is voluntary is determined in a preliminary inquiry before the trial judge. He hears the evidence, observes the demeanor of the witnesses,

and resolves the question. The appellate court must accept the determination if it is supported by competent evidence. *State v. Fain*, 216 N.C. 157, 4 S.E. 2d 319; *State v. Whitener*, 191 N.C. 659, 132 S.E. 603; *State v. Andrew*, 61 N.C. 205.

The confession is corroborated in many essential particulars: By the findings of the pathologist; by John Shannon who saw a person hiding in the hedge near the Nivens monument as the prisoner told the officers he had done; by the police having previously found Mrs. Cooper's pocketbook (wrapped in a newspaper) and her glasses in the hedge where he said he had hidden them; by Bishel Buren Hayes who testified his shoes and socks, billfold and contents were stolen from him as the prisoner had admitted to the officers; by the fact the prisoner was able to take the officers to the bushes near the railroad track and recover his discarded clothing. The evidence was amply sufficient to make out a case of murder in the perpetration of the crime of rape. The motion to dismiss was properly denied.

The prisoner has urged that the trial court denied him his rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Of course, it is as much the duty of the State courts to protect the prisoner's rights under the Due Process Clause of the Fourteenth Amendment as it is to protect his rights under the State Constitution and State laws. There is this difference, however, as we understand it: We place our own interpretation on our State Constitution and laws; but we are required to accept the interpretation the Supreme Court of the United States has placed on the Due Process Clause. *Constantian v. Anson County*, 244 N.C. 221, 93 S.E. 2d 163; Constitution of North Carolina, Article I, Sections 3 and 5; *Norris v. Telegraph Co.*, 174 N.C. 92, 93 S.E. 465.

In support of their contention the trial court denied to the prisoner due process rights, they cite many cases in which confessions have been rejected when a prisoner has been held beyond the time when he should have been taken before a committing magistrate for preliminary hearing. Careful examination will disclose that confessions were rejected under a rule of evidence set up for trials in the Federal courts and not for violation of constitutional rights under the Due Process Clause.

In the case of *Brown v. Allen*, 344 U.S. 443 at p. 476, the Supreme Court of the United States said: "If the delay in the arraignment of petitioner was greater than that which might be tolerated in a federal criminal proceeding, due process was not violated. Under the leadership of this Court a rule has been adopted for federal courts.

that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. *McNabb v. U. S.*, 318 U.S. 332; *Upshaw v. U. S.*, 335 U.S. 410. . . . This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance. But the federal rule does not arise from constitutional sources. The Court has repeatedly refused to convert this rule of evidence for federal courts into a constitutional limitation on the States. *Gallegos v. Nebraska,* 342 U.S. 55, 63-65. Mere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained."

The prisoner argues the notation on the arrest sheet that he is to be held for Hucks and Festerman re Mrs. Cooper and not allowed to see or call anyone was a violation of his Due Process rights by the police department. The undisputed evidence, however, is the notation was made by the arresting officer on an envelope at the time of arrest and copied on the arrest sheet at the time the prisoner was placed in jail. The undisputed evidence as testified to by the chief of police is that no one in the department had authority to enter any such memorandum or order. Likewise undisputed is the evidence of Captain McCall that the notation or order was not enforced. The prisoner asked to see his sister, whom the officers searched for, after some difficulty found, and delivered the prisoner's message. She appeared at the jail and Captain McCall admitted her to a private conference with the prisoner. In fact the prisoner does not even claim he requested or wanted to see any other person. The notation on the record, therefore, becomes nothing more than an unauthorized and unenforced entry made by the arresting officer at the time of the arrest. There is no question about the right of the officer to make the arrest. Even a private citizen of the State "shall have authority to apprehend any convict who may escape before the expiration of his term of imprisonment whether he be guilty of a felony or misdemeanor, and retain him in custody and deliver him to the State Prison Department." G.S. 148-40.

At all times after the arrest the defendant was the prisoner of the State under the custody and control of the Director of Prisons. G.S. 148-4. The Charlotte officers gave the director prompt notice that they had the prisoner in custody. The director might have ordered the prisoner's return to the State's prison, in which case the Charlotte officers would have been required to travel long distances in

order to question him. Instead, the director authorized that he be held until they completed their investigation. The arrangement was one of convenience. The place of imprisonment was properly left to the director. The prisoner's term as a State's prisoner began and continued to run from the time of his arrest.

In reviewing a trial court's decision holding a confession voluntary, Federal appellate courts follow our State rule and accept the findings of the trial court if suported by competent evidence. This holding is based upon the ground appellate courts are not tryers of the facts. In *Stroble v. California,* 343 U.S. 181, the Supreme Court of the United States said: "This Court has frequently stated that, when faced with the question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession, it must make an independent determination on the *undisputed* facts (emphasis added) . . . We adhere to that rule."

The rule is stated in another way in *Watts v. Indiana,* 338 U.S. 49: "In the application of so embracing a constitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various states in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication."

The record on this appeal discloses the prisoner was arrested as an escapee with 15 years to serve. The State prison authorities authorized the Charlotte police to hold him in custody until they had completed their investigation into the suspicious character of some of the articles of clothing, ladies' panties, billfold and contents, etc. The officers first took him to Canton and Asheville where he was unable to identify the place where he claimed to have stolen these articles. The officers were searching especially for Bishel Buren Hayes whose social security, blood donation cards, etc., were in a billfold taken from the defendant. The prisoner's explanation that he got the billfold and contents from a railroad bum aroused suspicion. These matters were inquired into following the arrest. While it is fair to assume the prisoner from the first was a suspect in the *Cooper* case, he was not questioned about it until October 2. Four days later he confessed and the following day was specifically charged with the crime of murder. Counsel argue the prisoner's detention for 16 days

without filing the murder charge violated Due Process rights, citing *Ashcraft v. Tennessee*, 322 U.S. 143; *Snyder v. Massachusetts*, 291 U.S. 97; *Upshaw v. U. S.*, 335 U.S. 410. This, however, is not a case in which a prisoner was held without formal arraignment to determine the legality of his arrest or detention. It is a case in which the officers questioned the prisoner in lawful custody about crimes committed while he was at large as an escapee. Escape from a felony sentence is a felony. Larceny from the person is a felony.

The object of a preliminary hearing is to effect a release for one who is held in violation of his rights. Counsel's argument is answered by the Supreme Court of the United States in the case of *United States v. Carignan*, 342 U.S. 36: "So long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given. . . . We decline to extend the McNabb fixed rule of exclusion to statements to police or wardens concerning other crimes while persons are legally in detention on criminal charges."

The record fails to disclose any violation of the prisoner's rights under the Due Process Clause of the Fourteenth Amendment. His assignment of error with respect thereto is not sustained.

Likewise without merit is the assignment based on the court's command to counsel to sit down and permit the witness (Lt. Sykes) to complete his answer without interruption, and the comment by the court that "this is not a Roman circus." The trial court did not thus express any opinion as to the facts in the case. It may be noted that it is the practice of some superior court judges to require counsel to remain seated at the counsel table when examining witnesses in order to facilitate orderly procedure. The idea is to prevent counsel from approaching too closely to the witness, especially when charging the witness with improper conduct. The prior exchange of comments between counsel and the witness justified the order.

Finally, the prisoner contends he should be awarded a new trial for failure of the court to charge the jury: "If the evidence produced in the trial for this case has proven to you beyond a reasonable doubt that the defendant murdered the deceased in the perpetration of a felony 'crime against nature' and has failed to prove to you beyond a reasonable doubt that the deceased was murdered by the defendant in the perpetration of a felony 'rape,' then it would be your duty to return a verdict of not guilty."

The bill of indictment as drawn required the State to satisfy the jury by the evidence beyond a reasonable doubt that the prisoner

murdered Foy Bell Cooper in the perpetration or attempt to perpetrate the crime of rape in order to justify a verdict guilty of murder in the first degree.

Ordinarily the State is better advised if the bill of indictment is drawn in the form approved by this Court in *State v. Kirksey,* 227 N.C. 445, 42 S.E. 2d 613. When the bill is drawn as thus approved, the State may make out a case of murder in the first degree by satisfying the jury from the evidence beyond a reasonable doubt the murder was "perpetrated by means of poison, lying in wait, imprisonment, starvation, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony." G.S. 14-17. By specifically alleging the offense was committed in the perpetration of rape the State confines itself to that allegation in order to show murder in the first degree. Without a specific allegation, the State may show murder by any of the means embraced in the statute.

In the charge as given, to which no exception was taken, the court defined all essential elements of the offense charged, properly placed upon the State the burden of satisfying the jury "from the evidence and beyond a reasonable doubt the defendant on September 20, 1959, while perpetrating the crime of rape, as that term has been defined to you, or while attempting to perpetrate the crime of rape, as that term has been defined to you, upon one Mrs. Foy Bell Cooper, the defendant caused her death, that then it would be your duty to return a verdict of guilty." Then follows the charge as to the verdict of guilty with a recommendation that the punishment be for life in the State's prison. . . . "In conclusion, the court again instructs you that in this case, depending on how you find the facts to be, bearing in mind the defendant has no burden of proof, the burden of proof remaining at all times upon the State of North Carolina, to satisfy you from the evidence and beyond a reasonable doubt as to each and every element necessary to constitute the guilt of the defendant before you may enter any verdict of guilty, and you may return either one of three verdicts in this case; first, the verdict of guilty of murder in the first degree, . . . or 2, guilty of murder in the first degree with a recommendation of life imprisonment, . . . or, 3, you may return a verdict of not guilty."

The charge placed upon the State the burden of proving murder in the commission, or attempt to commit rape; otherwise the court instructed the jury to return a verdict of not guilty. The charge certainly was not unfavorable to the prisoner.

In view of the gravity of the verdict and judgment, we have not only reviewed all assignments of error, the reasons given and authorities cited in support, but in addition we have examined the record proper. In the trial we find

No error.

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McCREARY TIRE AND RUBBER COMPANY; C. M. McCLUNG AND COMPANY, INC.; GLOBE RUBBER PRODUCTS CORPORATION; NU ERA CORPORATION; ROBBINS TIRE AND RUBBER COMPANY, INC.; UNIVERSAL TOOL AND STAMPING COMPANY; GATES RUBBER COMPANY, SALES DIVISION, INC., A WYOMING CORPORATION, PLAINTIFFS v. JACK CRAWFORD D/B/A CRAWFORD TIRE COMPANY, DEFENDANT; AND B. W. ACCEPTANCE CORPORATION, INTERVENOR.

(Filed 12 October, 1960.)

**1. Appeal and Error § 21—**

An exception to the signing of the judgment presents the questions whether the facts found support the judgment and whether error of law appears upon the face of the record.

**2. Chattel Mortgages and Conditional Sales § 1—**

Trust receipts under which the trustor agrees that title to the subject chattels should remain in the *cestui* and that trustor should not sell or dispose of the chattels without paying the *cestui* the amount shown in the release price column, etc., constitute conditional sales contracts, which are treated under our law as chattel mortgages.

**3. Chattel Mortgages and Conditional Sales § 8—**

An unregistered chattel mortgage or conditional sales contract is valid as between the parties.

**4. Same: Registration § 5c—**

G.S. 47-20 protects from the lien of an unregistered conditional sales contract or chattel mortgage only purchasers for a valuable consideration from the bargainor or mortgagor and creditors who have first fastened a lien on the personalty in some manner sanctioned by law.

**5. Fraudulent Conveyances § 1—**

G.S. 39-23 does not apply to the seller's repossession of chattels under conditional sales contracts, even though the chattels constitute the bulk of the purchaser's stock of merchandise, since the debts secured by the instruments are not pre-existent but contemporaneous with the conditional sales.

**6. Chattel Mortgages and Conditional Sales § 8: Registration § 5c: Execution § 7— Judgment creditors may not levy upon chattels repossessed by mortgagee prior to issuance of execution.**

The owner of chattels sold same under trust agreements amounting to conditional sales contracts. The purchaser resold some of the articles by conditional sales which conditional sales contracts were assigned by him to the original seller. The original seller took possession of some of the articles by virtue of the trust agreement and took possession of other chattels by virtue of the assigned conditional sales contracts, and had the chattels stored in a warehouse prior to levy of execution on judgments obtained by creditors of the original purchaser. *Held:* The unregistered trust agreements being valid as between the parties and the original seller having repossessed the chattels before the judgment creditors had fastened any lien on the property, the original seller is entitled to restrain sale under the executions on the judgments. This result is not affected by the fact that the original pur-

Crawford Tire Company, and levy made on personal property in

chaser had a sum on deposit with the original seller at the time the chattels were repossessed to save the original seller harmless from any loss in financing retail conditional sales assigned to the original seller, and the legal rights in such sum is not presented by the appeal.

**7. Execution § 7—**

Where an intervenor seeking to restrain execution on certain chattels fails to introduce evidence of his title or right to possession of such chattels, motion of the judgment creditors to dismiss his claim to such chattels is properly allowed.

APPEAL by B. W. Acceptance Corporation, intervenor, from *Patton, J.*, November Term, 1959, of CHEROKEE.

Written motion in the cause by B. W. Acceptance Corporation, intervenor, to have recalled executions caused to be issued by plaintiffs, judgment creditors of the defendant, Jack Crawford d/b/a the possession of Gibbs Hardware Company, and that the Sheriff be restrained from selling this property under such executions, and that the intervenor be allowed to recover this property as its own.

Plaintiffs filed an answer to the motion. Defendant Crawford filed no pleading.

When the motion came on to be heard, plaintiffs and the intervenor stipulated, *inter alia*, as follows: One. This matter is properly before the court and there are no procedural irregularities. Two. A jury trial is waived, and the judge is authorized to find the facts, make conclusions of law, and enter judgment thereon.

## SUMMARY OF FINDINGS OF FACT.

For several years prior to 22 August 1959 Jack Crawford, a citi-

zen and resident of Cherokee County, operated an appliance business and store in the town of Murphy under the trade name of Crawford Tire Company, and sold appliances and merchandise from his store to the general public.

On 23 February 1959 and 26 June 1959 defendant Crawford confessed judgments in favor of the plaintiffs — the said judgments total $10,699.81.

Intervenor, B. W. Acceptance Corporation, is a foreign corporation with an office in Charlotte, North Carolina, and is engaged in the finance business.

On 20 October 1958 intervenor sold and shipped to the defendant Crawford at Murphy three items of merchandise, one of which was a Refrigerator, Model No. D-858, Serial No. 874470. In payment of such merchandise Crawford on the same day executed and delivered his promissory note payable to the order of intervenor three months after date in the sum of $452.63, and contemporaneously therewith executed and delivered to intervenor a Trust Receipt for such merchandise. The part of the Trust Receipt set forth in the findings of fact is as follows:

> "I (We) hereby acknowledge that said articles and any substitutions, exchanges or replacements thereto are the property of said B. W. Acceptance Corporation and agree to take and hold the same, at my (our) sole risk as to all loss or injury, for the purpose of storing said property, and I (we) hereby agree to keep said articles brand new and to return said articles to said B. W. Acceptance Corporation, or its order, upon demand, and to pay and discharge all taxes, encumbrances and claims relative thereto. I (we) hereby agree not to sell, loan, deliver, pledge, mortgage, or otherwise dispose of said articles to any other person until after payment of amounts shown in release price column above. I (we) further agree that the payment made by me (us), in connection with this transaction, may be applied for reimbursement for any expense incurred by B. W. Acceptance Corporation, in the event of breach of this Trust or repossession of said articles. I (we) further agree to keep said articles fully insured under standard fire and extended coverage policies written by a responsible insurance company. It is further agreed that no one has authority to vary the terms of this Trust Receipt."

On 5 December 1958 an exactly similar transaction took place between Crawford and intervenor as to five items of merchandise,

three of which were: a Norge Refrigerator, Model No. CS-913, Serial No. 907861, a Norge Refrigerator, Model No. C-911, Serial No. 914959, and a Norge Refrigerator, Model No. D-858, Serial No. 904685, except that the amount payable in the note and its maturity date differ.

On 5 March 1959 an exactly similar transaction took place between Crawford and intervenor in respect to a Refrigerator, Model No. CBH-1158, Serial No. 825631, a Refrigerator, Model No. D-911, Serial No. 956024, and a Refrigerator, Model No. C-911, Serial No. 914231, except that the amount of the note and its maturity date differ, and except that the Trust Receipt does not require that the articles be kept fully insured.

On 6 March 1959 an exactly similar transaction took place between Crawford and intervenor as to six items of merchandise, two of which were a Range, Model No. E-38, Serial No. 254697, and a Washer, Model No. AW-28, Serial No. 95204, except that the amount of the note differs, and except that the Trust Receipt does not require that the articles be kept fully insured.

On 19 May 1959 an exactly similar transaction took place between Crawford and intervenor as to three items of merchandise, one of which was a Freezer, Model No. CF-16, Serial No. 107097, except that the amount of the note differs, and except that the Trust Receipt does not require that the articles be kept fully insured.

On 16 June 1959 an exactly similar transaction took place between Crawford and intervenor as to five items of merchandise, two of which were as follows: a Refrigerator, Model No. D-1158, Serial No. 807447, and a Refrigerator, Model No. C-1158, Serial No. 788210, except that the amount of the note differs, and except that the Trust Receipt does not require that the articles be kept fully insured.

Neither these notes nor these Trust Receipts were registered in Cherokee County, or elsewhere.

On 19 August 1959 the intervenor, through its agent, C. Y. Bumgarner, came to Murphy, and took from out of Crawford's store and into its possession the Refrigerators, the Range, the Washer, and the Freezer set forth above, and also the following articles: a Freezer, Model No. CF-20, Serial No. 111718, a Washer, Model No. AW-16-LF, Serial No. 274279, an Olympic T. V., Model No. 18 BT61, Serial No. 620668, a Philco T. V., Model No. 22C4113, Serial No. ....., an RCA 21" T. V., Model No. 21S500R, Serial No. A2233623, a Motorola 21", Model No. 21T16, Serial No. 415598, an RCA 17", Model No. 6T-71, Serial No. B2781215, and an ABC

Semi-Auto Washer, Model No. ....., Serial No. ....., and placed them in Jim Gibbs' warehouse in the town of Murphy for storage, and the articles were accepted by Gibbs for such purpose. Intervenor took possession of these articles from Crawford, because Crawford had previously sold and disposed of four items of merchandise covered by Trust Receipts similar to the Trust Receipt set forth above before paying intervenor for them. These articles taken by intervenor constituted a large part of Crawford's stock of merchandise. At the time intervenor took into its possession from Crawford the articles set forth above, it obtained from Crawford a Release, which recites in substance that Crawford, in consideration of financial services rendered to him by the intervenor, and in consideration of the intervenor's forbearance from instituting legal proceedings to effect repossession of the merchandise therein described, in behalf of himself, his assigns, heirs and successors in interest released, and forever discharged intervenor, its assigns and successors in interest from any and all actions or causes of actions, suits, claims, demands or judgments on account of repossession by intervenor from the premises of Crawford, the following merchandise. Then follows a description by Model Numbers and Serial Numbers of all the articles specifically set forth above upon which articles Crawford had executed and delivered to intervenor Trust Receipts.

On 20 August 1959 the clerk of the Superior Court of Cherokee County issued an execution on each of the judgments of the plaintiffs, and placed these executions in the hands of the sheriff of Cherokee County. Under the authority of such executions, the sheriff on 23 August 1959 levied upon and took possession of all the articles taken out of Crawford's store by intervenor, and stored by him in Jim Gibb's warehouse.

Of the articles taken out of Crawford's store by intervenor, and levied on by the sheriff in Jim Gibbs' warehouse, the Olympic T. V., Model No. 18 BT61, Serial No. 620668, and the RCA 21" T. V., Model No. 21S500R, Serial No. A2233623 had been previously sold by Crawford — the first article to G. D. Frankum on 5 June 1959 and the last article to Stizy Ferguson on 31 January 1959 — under conditional sales contracts, which conditional sales contracts Crawford for value assigned to intervenor. Subsequently Frankum and Ferguson defaulted in their payments due under the conditional sales contracts, and Crawford repossessed these television sets, and placed them back in his store. Of the articles levied upon and taken possession

of by the sheriff, intervenor offered no evidence of ownership as to the following: a Freezer, Model No. CF-20, Serial No. 111718, a Washer, Model No. AW-16-LF, Serial No. 274279, a Philco T. V., Model No. 22C4113, Serial No. ....., a Motorola 21", Model No. 21T16, Serial No. 415598, and RCA 17", Model No. 6T-71, Serial No. B2781215, and an ABC Semi-Auto Washer, Model No. ....., Serial No. .....

The defendant Jack Crawford had on deposit with the intervenor at the time intervenor took possession of the merchandise and property, as hereinbefore set out, and at the time of the hearing of this matter a sum of money greater in amount than the value of all of the property and merchandise levied upon and taken possession of by the sheriff, as hereinbefore set out, and intervenor had said money in its physical possession and control at the date of this hearing as well as at the date of the levy. Said money was deposited with intervenor by the defendant Jack Crawford for the purpose of saving intervenor harmless from any loss it might sustain in financing retail conditional sales contracts assigned by defendant to intervenor.

## CONCLUSIONS OF LAW.

The judgment recites that the statements following the findings of fact are the opinion of the court — they are in reality conclusions of law, and in substance are as follows:

The intervenor is not the owner of, and is not entitled to the possession of the property levied upon, and taken possession of by the sheriff, and that such property should be sold and the proceeds applied to the payment of the plaintiffs' judgments.

The Trust Receipts are in effect conditional sales contracts, and are required to be registered under the provisions of N. C. G.S. 47-20 in order to be valid against defendant Crawford's creditors. The Trust Receipts were not registered in Cherokee County, or elsewhere, at the date of the sheriff's levy, and, therefore, intervenor cannot claim title to the property under instruments invalid as to Crawford's creditors.

As to the Olympic T. V. Set and the RCA 21" T. V. Set, which Crawford had sold under conditional sales contracts, which conditional sales contracts he assigned to intervenor, intervenor has sustained no loss due to the fact that it has in its possession sufficient money deposited with it by Crawford for the purpose of securing it against such type loss.

As to the following articles of property levied upon and taken possession of by the sheriff, a Freezer, Model No. CF-20, Serial No. 111718, a Washer, Model No. AW-16-LF, Serial No. 274279, a Philco T. V., Model No. 22C4113, Serial No. ....., a Motorola 21", Model No. 21T16, Serial No. 415598, an RCA 17", Model No. 6T-71, Serial No. B2781215, and an ABC Semi-Auto Washer, Model No. ....., Serial No. ....., intervenor did not offer any evidence of ownership. The burden of proof is upon intervenor claiming title to this property to prove its title by the greater weight of the evidence.

Whereupon, the court adjudged and decreed that intervenor is not the owner of, and is not entitled to the possession of the property levied on by the sheriff, and the motion of the intervenor be dismissed, that the property levied on by the sheriff be sold and the proceeds of the sale be applied to the payment of the judgments of plaintiffs, and that intervenor be taxed with the costs.

From the judgment intervenor appeals.

*McKeever & Edwards for appellees.*

*Weinstein, Muilenburg, Waggoner & Bledsoe for Appellant, Intervenor.*

PARKER, J. Intervenor has one assignment of error: The court erred in signing the judgment, and in not allowing intervenor's motion to recall the executions.

The exception to the signing of the judgment presents two questions: One, do the facts found support the judgment, and two, does any error of law appear upon the face of the record. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486, and cases there cited.

Plaintiffs in their written and verified answer to intervenor's written motion aver that the Trust Receipts executed and delivered by Crawford to intervenor were in effect chattel mortgages. Judge Patton's legal conclusion — stated by him as his opinion — was that these Trust Receipts are in effect conditional sales contracts.

The Trust Receipt set forth in *General Motors Acceptance Corporation v. Mayberry*, 195 N.C. 508, 142 S.E. 767, is almost identical with the Trust Receipts here, with the exception of a few recitals immaterial in the instant case. In that case the Court held that insofar as it affected creditors of either party, the transaction was a conditional sale. In this jurisdiction, conditional sales contracts for personalty in which title is retained as security for the debt

are treated as chattel mortgages. *Mitchell v. Battle,* 231 N.C. 68, 55 S.E. 2d 803, and cases and text books there cited.

It has been uniformly held in this State that a chattel mortgage or a conditional sales contract for personalty, although not recorded, is valid as between the parties. *Sales Co. v. Weston,* 245 N.C. 621, 97 S.E. 2d 267; *Realty Co. v. Dunn Moneyhun Co.,* 204 N.C. 651, 169 S.E. 274; *General Motors Acceptance Corporation v. Mayberry, supra; Thomas v. Cooksey,* 130 N.C. 148, 41 S.E. 2; *Butts v. Screws,* 95 N.C. 215. See *Leggett et al v. Bullock,* 44 N.C. 283.

G.S. 47-20 does not protect every creditor or purchaser against unrecorded chattel mortgages or conditional sales contracts of personalty. It protects only (1) purchasers for a valuable consideration from the bargainor or mortgagor, and (2) creditors who have first fastened a lien on the personalty in some manner sanctioned by law. *Sales Co. v. Weston, supra; Finance Corporation v. Hodges,* 230 N.C. 580, 55 S.E. 2d 201.

"A judgment constitutes no lien upon the personal estate of the judgment debtor, a seizure thereof by an officer under authority of an execution creates a special property therein and a lien thereon for the purpose of satisfying the execution. It is the levy under execution that creates the lien in favor of the judgment creditor." *Finance Corporation v. Hodges, supra.*

Jones, "Chattel Mortgages and Conditional Sales," 6th Ed., Vol. 1, Sec. 178, says: "If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity."

In 21 Am. Jur., Executions, Sec. 441, it is said: "The general rule is that a levy may not be made on mortgaged personal property under an execution against the mortgagor while the mortgagee is in possession. *A fortiori,* mortgaged personal property may not be seized and taken from a mortgagee after it has been surrendered to him to sell in satisfaction of the mortgage." To the same effect see 33 C.J.S., Executions, p. 177.

In *Cowan v. Dale,* 189 N.C. 684, 128 S.E. 155, the Court held that where D. E. Flowers, before making a deed of assignment for the benefit of creditors, had given a mortgage on his stock of merchandise (personal property), and the mortgagee was in peaceful possession thereof at the time the deed of assignment for the benefit of creditors was made, the trustee under this deed takes with notice, notwithstanding the mortgage was ineffectual under our registration

law as constructive notice, and a temporary restraining order of sale under the mortgage was properly dissolved. The Court, after quoting with approval what we have quoted above from Jones, "Chattel Mortgages and Conditional Sales," states immediately thereafter:

"To the same effect is a uniform line of decisions. 'The object of requiring a mortgage of personal property to be filed or recorded is to give creditors and subsequent purchasers notice of its existence when the mortgagor retains possession of the property. If the actual possession of the property is changed, then the necessity for recording or filing the chattel mortgage fails. And the same may be said in respect to an imperfect or insufficient description of the mortgaged property. If the mortgagee takes possession of the mortgaged property, that is sufficient. That is an identification and appropriation of the specific property to the mortgagee.' *Morrow v. Reed,* 30 Wis., 81. 'If a mortgagee or pledgee takes possession of the mortgaged or pledged chattels before any other lien attaches thereto, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, although the mortgage was not filed or the chattels delivered when the contract of pledge was made.' *Prouty v. Barlow,* 76 N.W., (Minn.), 946. 'If a mortgagee take possession of mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not acknowledged and recorded, or the record be eneffectual by reason of any irregularity. *Chipron v. Feikert,* 68 Ill., 284; *Frank v. Miner,* 50 Ill., 444; *McTaggart v. Rose,* 14 Ind., 230; *Brown v. Webb,* 20 Ohio, 389. Subsequent possession cures all such defects. *Morrow v. Reed,* 30 Wis., 81. No particular mode of taking or retaining possession is required. It is not necessary that the property be delivered to the mortgagee in person; delivery to his agent is equally effectual.' *Bank v. Commission Co.,* 64 N.E. (Ill.), 1097, 1104. See, also, *Ogden v. Minter,* 91 Ill. App., 11; *Bank v. Gilbert,* 174 Ill., 485. 'In case of a mortgage (of personal property) the right of property is conveyed to the mortgagee, by a perfect title, which title is liable to be defeated by the payment of the mortgage debt, and if the mortgagee takes possession of the property, he takes it as his own, and not as the mortgagor's.' *Janvrin v. Fogg,* 49 N.H., 310, 351. 'Such a lien (mortgage) is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely.' *Hauselt v. Harrison,*

105 U.S. 401, 26 Law Ed., 1075. See, also, 11 C.J., 587, sec. 281.

"Upon reason and authority therefore we are of opinion that the plaintiff is not entitled to a continuance of the restraining order. This conclusion does not impair the validity of our statutes regulating the registration of written instruments or modify the force and effect of the decisions which hold that no actual notice of a prior unrecorded mortgage will supply the place of registration; but it upholds the principle that where a mortgagee takes possession of mortgaged property in good faith for the purpose of foreclosing a chattel mortgage which secures his debt before any other right or lien attaches, his title under the mortgage is good and a subsequent encumbrancer takes subject to the mortgagee's lien."

As to the ariticles of personalty sold by intervenor to Crawford for which Crawford executed and delivered to intervenor his promissory notes for the purchase prices secured by Trust Receipts, which Trust Receipts, according to *General Motors Acceptance Corporation v. Mayberry, supra,* are conditional sales agreements, and in this State are treated, according to our decisions, as chattel mortgages, such Trust Receipts, although not recorded, are valid as between intervenor and Crawford. Plaintiffs contend that intervenor had no right to repossess such personalty. Such a contention is unsound, for the reason that the Trust Receipts provide that Crawford agreed "to return said articles to said B. W. Acceptance Corporation, or its order, upon demand." Intervenor's legal right to repossess these articles of personal property is not impaired by the fact that Crawford had on deposit with intervenor at the time it repossessed this property a sum of money for the purpose of saving intervenor harmless from any loss it might sustain in financing retail conditional sales contracts assigned by defendant to intervenor. What the legal rights are as to this sum of money is not before us for decision on this appeal.

As to the Olympic T. V., Model No. 18BT61, Serial No. 620668, and the RCA 21" T. V., Model No. 21S500R, Serial No. A2233623 previously sold by Crawford under conditional sales contracts, which contracts Crawford for value assigned to intervenor, and which articles Crawford by reason of default in the payments due under such contracts repossessed and placed in his store, such conditional sales contracts, although not recorded, are valid as between the parties. As to such articles, intervenor was the owner, *Realty Co. v. Dunn Moneyhun Co., supra,* and had a right to take possession of them, and this legal right is not impaired by the sum of money Crawford had on deposit with intervenor, as set forth above.

The court found as a fact that the articles taken out of Crawford's store by intervenor, and stored by it in Jim Gibbs' warehouse, constituted a large part of Crawford's stock of merchandise. Plaintiffs' contention that this constituted a transfer of a large part of Crawford's stock of merchandise without a valuable consideration and is void as against creditors, and violates G.S. 39-23, is without merit. Under our decisions the Trust Receipts given by Crawford cannot be deemed violative of G.S. 39-23 or void as against creditors, because the debts secured by the Trust Receipts were not pre-existent but contemporaneous with the contract of purchase from intervenor, constituting a part of one continuous transaction. *Cowan v. Dale, supra,* and the cases there cited. Certainly the assignment by Crawford to intervenor of the conditional sales contracts as to the Olympic T. V. and the RCA 21" T. V. do not violate G.S. 39-23, and is not void as to creditors.

Intervenor took possession of the articles of personal property for which Crawford had given him Trust Receipts and the two articles of personal property upon which he held conditional sales contracts assigned to it for value by Crawford before any right or lien of plaintiffs attached, and therefore its title under the Trust Receipts and conditional sales contracts was good against plaintiffs, as it was previously valid between the parties, although such instruments were not recorded. Under such facts a levy cannot be made on such property under plaintiffs' executions here.

Upon the facts found by the learned judge, he was in error in concluding as a matter of law that the intervenor is not the owner of, and is not entitled to the possession of the Refrigerators, the Range, the Washer and the Freezer, which it had taken and had in its possession by virtue of the Trust Receipts for such articles executed and delivered to him by Crawford to secure the purchase money notes for said articles, and of the Olympic T. V. and the RCA 21" T. V., which it had taken and had in its possession by virtue of the conditional sales contracts assigned to it for value by Crawford. Upon the facts found by the learned judge, he was in error in concluding as a matter of law that the Trust Receipts were required to be registered under the provisions of N. C. G.S. 47-20 to be valid against Crawford's creditors, and as they were not registered, intervenor cannot claim title to the property under these Trust Receipts. The judge was in error in adjudging that intervenor is not the owner of, and is not entitled to the possession of the articles taken possession of by intervenor by virtue of the

Trust Receipts and of the conditional sales contracts and levied on by the sheriff, in dismissing as to these articles intervenor's motion, and in ordering that this property levied on by the sheriff be sold and the proceeds of the sale be applied to the payment of plaintiffs' judgments, and in taxing intervenor with the costs. These errors of law appear upon the face of the record.

As to the six articles which intervenor took into its possession, and about which it offered no evidence of ownership — which facts found by the judge are not challenged by intervenor —, intervenor is not the owner of, or entitled to the possession of these six articles, and it makes no specific contention in its brief that its motion should be allowed as to these six articles. Such being the case as to these six articles, intervenor's motion should be dismissed as to these six articles.

The case is ordered remanded to the lower court, which shall make proper conclusions of law pursuant to this opinion, and enter judgment allowing intervenor's motion as to the Refrigerators, the Range, the Washer, and the Freezer held in its possession by intervenor by virtue of the Trust Receipts, and as to the Olympic T. V. and the RCA 21" T. V. held in its possession by intervenor by virtue of the conditional sales contracts.

The judgment recites the parties stipulated that the judgment could be signed out of term and out of the county. The judgment was signed on 31 December 1959 by Judge Patton in chambers at his home in Franklin. Cherokee County is in the 30th Judicial District. By our rules appeals from the 30th Judicial District were required to be docketed by 10:00 a.m., Tuesday, 12 January 1960. We allowed the petition for a writ of *certiorari*, and ordered the case to be heard in regular order at the Fall Term, 1960.

Error and remanded.

JAMES H. POTTER, JR., JAMES H. POTTER, III, AND GILBERT M. POTTER, T/A AND D/B/A POTTER'S STORE, A PARTNERSHIP; AND NEW HAMPSHIRE INSURANCE COMPANY, A CORPORATION v. CAROLINA WATER COMPANY, A CORPORATION.

(Filed 12 October, 1960.)

1. **Municipal Corporations § 18: Negligence § 1: Contracts §§ 14, 15—**

A property owner whose property is damaged as a result of the breach by a private water corporation of its contract to supply water to the municipality for fire protection may maintain an action against the water company either as the third party beneficiary of the contract or for negligent failure of the water company to comply with the contract, certainly when the contract does not exclude such liability and the language of the contract discloses that the parties were advertent to such liability under the prior decisions of the Court.

2. **Appeal and Error § 61—**

The doctrine of *stare decisis* requires in the interest of sound public policy that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after ample consideration, should not be disturbed except for most cogent reasons.

3. **Municipal Corporations § 18: Negligence § 1: Contracts §§ 14, 15—Contract to furnish water for fire protection contemplates that supply and pressure of water should be reasonably sufficient to accomplish its purpose.**

The fact that a contract between a private water company and a municipality to maintain fire hydrants within the municipality fails to stipulate an expiration date or to specify the quantity of water to be furnished or the pressure to be maintained does not render the contract too indefinite to support recovery by a citizen for private damages resulting from its breach when both parties to the contract recognized it as a continuing one and in force at the time of the fire, and when the language of the contract and the order of the Utilities Commission approving the application of the parties for the sale of the franchise to the water company disclose that the water company was to provide water for fire protection, it being presumed that the parties contemplated that the water company would exercise reasonable care to provide such water supply and pressure as might be reasonably necessary to accomplish the purpose of the contract.

4. **Same—**

Where a contract between a municipality and a water company provides that the water company should not be liable for any failure or neglect to supply service by reason of strike or accident beyond its control, the burden is upon the water company to prove that its failure to provide service as contemplated by the contract was due to either of these grounds.

APPEAL by defendant from *Paul, J.*, May Civil Term, 1960, of CARTERET.

Plaintiffs seek to recover from defendant the value of their stock of merchandise and fixtures destroyed by fire.

Plaintiffs in brief allege: Tide Water Power Co. and the City of Beaufort, on 13 November 1931, entered into a contract which provided:

"The parties hereto for and in consideration of the mutual covenants herein contained, do mutually agree as follows:

"FIRST: The party of the first part will furnish and maintain for the use of the party of the second part ..... fire hydrants of the type now installed in the above town, at the price of THIRTY DOLLARS ($30.00) per hydrant per year.

"SECOND: During the term hereof the party of the first part will furnish at the rate of THIRTY DOLLARS ($30.00) per hydrant per year additional hydrants of a similar size and type to those now installed, provided that the party of the first part shall not be required to furnish any additional hydrants other than at the then existing six inch or larger water mains of the Company. However, the party of the first part would extend its water main a distance of three hundred (300) feet for each additional hydrant contracted for by the party of the second part at the above unit price per hydrant, and under the terms and conditions of this contract.

"THIRD: The party of the first part will move and replace at new locations for the party of the second part, at its direction, any and all hydrants from one location to another for the actual cost thereof.

"FOURTH: The party of the second part agrees to use for the term of this contract the hydrants hereinabove specified and to pay therefor at the rates and in the manner above set forth.

"FIFTH: The party of the first part shall not be liable for any failure or neglect to supply service to the said hydrants by reason of strike or accident beyond its control.

"SIXTH: Water will be supplied to the flush tanks at the rate of FIFTY DOLLARS ($50.00) per tank per year and the company reserves the right to check the amount of water used by such tanks and in case of excessive amount of water being used, they shall be promptly adjusted.

"SEVENTH: Water used by the Municipality in excess of the present normal requirements shall be paid for at the rate of 20 cents per thousand gallons.

"This agreement shall be binding upon the successors and assigns of the parties hereto and may be renewed by mutual agreement."

Tide Water Power Co. and Carolina Power & Light Co. merged. Following the merger, Carolina Power & Light supplied water in conformity with the terms of the contract. On 30 June 1954 Carolina Power & Light sold to defendant its water properties used to perform its contractual obligations to Beaufort. Thereupon defendant assumed the contractual obligations originally imposed on Tide Water Power Co. This sale and assignment was approved by the Utilities Commission of North Carolina upon joint application of defendant and Beaufort. Plaintiffs' place of business is on Front Street in Beaufort. It adjoins House's Drug Store. On the night of 11 December 1958 fire broke out in the furnace room of the drug store. An alarm was sounded. The fire department responded promptly. Fire engines were coupled to hydrants and adequate pressure was supplied to fight the fire for a short time. When the fire was almost extinguished and could have been extinguished if pressure had been maintained, defendant negligently failed to maintain the pressure or to supply any water, thus negligently failing to comply with its contract. This negligent failure to supply water left the fire department without means to control the fire, and as a natural and proximate result the fire increased in intesity and spread to and destroyed the property of plaintiffs.

Defendant answered and admitted the execution of the contract by Beaufort and Tide Water Power. It admitted the merger of Tide Water and Carolina Power & Light and the assumption by Carolina Power & Light of the contract obligations of Tide Water. It admitted that it undertook to furnish water service to Beaufort in accordance with the terms of the contract between Tide Water Power and Beaufort dated 13 November 1931. It denied it negligently failed to furnish water, and denied that plaintiffs had a right under the contract to maintain an action against it either for breach of contract or in tort.

Plaintiffs' evidence (defendant offered none) tends to show a fire alarm was sounded about 11:55 p.m.; the fire department promptly responded with adequate fire-fighting equipment; one of the engines responding carried a water tank containing 500 gallons; this water was used in an effort to extinguish the fire; another engine was coupled to a hydrant some 250 feet away from the burning building; water hose was then laid to the fire; a hose from the first engine was coupled to another hydrant some 250 feet away; both engines were pumping and had an adequate supply of water for some thirty to forty minutes, or more, at which time the fire was under control

and could have been extinguished if the water supply had continued to the hydrants; suddenly and without warning there was a total failure of water supply; this failure related not only to the hydrants to which the engines were coupled but to the water outlets in other parts of Beaufort; the fire department was without water pressure for a period variously estimated by witnesses at some thirty minutes to one and one-half hours; when water again came to the hydrants, the building occupied by plaintiffs was on fire; it was then impossible to save the building or its contents.

To determine liability, the court submitted to the jury issues which were answered as follows:

"1. At the time of the damage to and destruction of plaintiff's property by fire on the night of December 11, 1958, had defendant, Carolina Water Company, contracted and agreed to furnish to the Town of Beaufort, a supply of water and service to the fire hydrants within said Town of Beaufort?

"Answer: Yes.

"2. Did the defendant on the night of December 11, 1958, at the time of said fire, fail and neglect to furnish water to said fire hydrants within the Town of Beaufort as it had agreed to do?

"Answer: Yes.

"3. If so, was plaintiffs' stock of merchandise and fixtures damaged or destroyed by the negligence of the defendant as alleged in the complaint?

"Answer: Yes.

"4. If so, what amount are plaintiffs entitled to recover as damages to their stock of merchandise?

"Answer: $10,000.00.

"5. If so, what amount are the plaintiffs entitled to recover as damages to their fixtures and furnishings?

"Answer: $5,000.00."

Judgment was entered on the verdict and defendant excepted.

*C. R. Wheatly, Jr., and Thomas S. Bennett for plaintiff appellees.*

*John G. Dawson, Albert W. Cowper, and Luther Hamilton for defendant, appellant.*

RODMAN, J. Defendant, by motion to nonsuit and by exception to the charge as a whole, challenges plaintiffs' right to recover notwithstanding the undisputed testimony that there was a total failure to furnish any water to the hydrants during the critical period, and because of such failure plaintiffs' property was destroyed. It bases its denial of liability on two propositions: (1) Breach of a definite and

specific contract between a private corporation and a municipality to furnish water for fire purposes creates no right of action in a citizen who suffers damage as a result of such breach; (2) even if such right of action may exist for breach of a contract definite and specific in its terms, the contract on which plaintiffs base their claim is so indefinite and uncertain that plaintiffs' evidence fails to establish a breach.

Counsel for defendant open their argument with the statement: ". . . the question here directly presented is almost a brand new question in this state to the present generation of lawyers." They then concede that the question which they first pose for determination was decided adversely to their contention in *Gorrell v. Water Co.*, 124 N.C. 328, decided at the Spring Term 1899, followed by *Fisher v. Water Co.*, 128 N.C. 375, decided at the Spring Term 1901 (See *Guardian Trust & D. Co. v. Fisher*, 200 U.S. 57, 50 L. Ed. 367), *Jones v. Water Co.*, 135 N.C. 553, decided at the Spring Term 1904, s.c. 138 N.C. 383, *Morton v. Water Co.*, 168 N.C. 582, 84 S.E. 1019, decided at the Spring Term, 1915, and *Powell v. Water Co.*, 171 N.C. 290, 88 S.E. 426, decided at the Spring Term, 1916, all holding that a citizen injured by breach of a contract by a private corporation to supply water to his municipality for fire protection might maintain an action for damages personal to him resulting from a breach of the contract, and he might sue for a breach of the contract or for a negligent failure to comply with the contract.

Counsel for defendant urge us to now overrule those cases and to hold that no such action may be maintained. True, as defendant points out, the *Gorrell* case was decided by a divided Court, but Gorrell was unanimously accepted as the law of this State in *Fisher* and *Jones*.

In 1915 this Court was asked to re-examine the question and to join with the majority of the states in holding that property owners have no right of action because of a breach of such contract. *Morton v. Water Co., supra.* That the question again propounded was carefully considered is manifest from the several opinions and an inspection of the cases cited in the opinions of *Justice Allen*, who spoke for the majority, and *Justice Walker*, who spoke for the minority. An examination of the cases there cited will disclose that North Carolina, Kentucky, and Florida were in accord, and the decisions in other states were to the contrary. Kentucky and Florida continue to adhere to the rule as declared by us in the *Gorrell* case. See *Clay v. Catlettsburg, Kenova & Ceredo Water Co.*, 192 S.W. 2d 358; *Florida Public Utilities v. Wester*, 7 So. 2d 788.

The *Morton* case was followed a year later by *Powell v. Water Co., supra,* where the right to sue was again recognized.

It is manifest from the decision in the *Morton* case that the doctrine of *stare decisis* played an important part. *Allen, J.,* said: "Another reason for refusing to sustain the position of the defendant is that it entered into the contract with the city of Washington in 1901, two years after the *Gorrell* case, *supra,* was decided, and as all laws relating to the subject matter of a contract enter into and form a part of it as if expressly referred to or incorporated in its terms (citations), it was within the contemplation of the parties at the time the contract was made that the defendant would be liable to the citizen for loss by fire caused by its negligent failure to perform the terms of the contract, as held in the *Gorrell* case, *supra,* and the hold otherwise now would relieve the defendant of a responsibility which it knowingly affirmed."

*Brown, J.,* concurring in the result, said: "I recognize the fact that the overwhelming weight of authority, including that of the Supreme Court of the United States, is against the decisions of this Court in the *Gorrell, Fisher,* and *Jones* cases, *supra,* cited in the opinions in this case. But all three of those cases were decided and the opinions published before the contract in this case was entered into. Those decisions were well known to be the law of North Carolina when the franchise given to the defendant was applied for, and when it was agreed upon and its terms accepted.

"Whether those cases were correctly decided or not, they were the accepted law of this State at that time, and upon well established priciples entered into and formed a part of the contract under which the defendant operated, unless there is something to be found in the contract excluding such hypothesis."

The conclusion reached in the cases we are now asked to overrule has not been challenged for nearly half a century. To the contrary, the priciples enunciated have been repeatedly approved. Illustrative, see Shepard Citations for the cases citing with approval the *Gorrell* case. See also *Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893; *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551; *Jones v. Elevator Co.,* 231 N.C. 285, 56 S.E. 2d 684.

The reasons why a court should adhere to conclusions deliberately reached in prior cases was well stated by *Johnson, J.,* in *Williams v. Hospital,* 237 N.C. 387, 75 S.E. 2d 303: "The salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting

vital business interests and social values, deliberately made after ample consideration, should not be disturbed except for most cogent reasons." *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257; *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521; *Wilkinson v. Wallace,* 192 N.C. 156, 134 S.E. 401; *Fowle v. O'Ham,* 176 N.C. 12, 96 S.E. 639; *Hill v. R. R.,* 143 N.C. 539.

The contract here under consideration bears evidence, we think, that Tide Water and Beaufort were advertent to and recognized the rule in the *Gorrell* and other cases which followed. The contract provides: "The party of the first part shall not be liabile for any failure or neglect to supply service to the said hydrants by reason *of strike or accident beyond its control.*" (Emphasis supplied.) Here was apparently a recognition of the water company's right as declared by *Brown, J.,* in *Morton v. Water Co., supra.* He said: "It could easily have been made to appear from the contract, if such was the agreement of the parties, that the defendant was dealing exclusively with the city, and was accountable only to it." Had it been the intent of the parties to the contract under consideration to deny a right of action to a property owner injured by failure to furnish water for fire protection, more inclusive language would have been chosen.

We are not justified, under the facts here presented, in reversing the rulings made in *Gorrell v. Water Co., supra; Morton v. Water Co., supra* and *Powell v. Water Co., supra.*

Is the contract so indefinite that the intent and agreement of the parties cannot be determined?

Certainly failure to include a date on which the contract would expire cannot relieve defendant of the duty to comply so long as it recognizes the contract as a continuing one. Defendant might have the right to terminate upon reasonable notice, *Fulghum v. Selma,* 238 N.C. 100, 76 S.E. 2d 368, but defendant did not defend on the ground that the contract was not in force at the time of the fire. To the contrary, the evidence tended to establish that the parties thereto recognized the contract as being in effect.

Defendant's contention that the contract does not show an agreement on its part to provide water for fire protection is, we think, without merit. True the contract does not in express language so provide, nor does it prescribe the quantity of water to be furnished or the pressure to be maintained. It does, however, obligate defendant to furnish and maintain "fire hydrants." It obligates Beaufort to use and pay the rental fixed for the hydrants furnished. It exculpates defendant from liability for failure "to supply service to the said

hydrants by reason of strike or accident beyond its control." The order of the Utilities Commission, based on the joint application of Beaufort and defendant seeking approval of the sale by Carolina Power & Light and rates to be charged, provided: "Water in excess of present ordinary city's requirements for flushing sewers, streets, *and fire protection* to be metered and billed." (Emphasis supplied.) It is, we think, apparent that the parties contemplated that defendant would exercise reasonable care to provide such water supply and pressure to the hydrants as might be reasonably necessary to accomplish the purpose for which the contract was made, that is, to furnish fire protection to property in Beaufort.

The agreement to provide and maintain the fire hydrants is analagous to a sale of an article by a manufacturer for a particular purpose, that is, to provide fire protection. Such sale imposes an obligation to provide an article reasonably suitable for the purpose for which it is purchased. *Lumber Co. v. Chair Co.*, 250 N.C. 71, 108 S.E. 2d 70; *Stokes v. Edwards*, 230 N.C. 306, 52 S.E. 2d 797. The rule finds a parallel in contracts for services. *Hazelwood v. Adams*, 245 N.C. 398, 95 S.E. 2d 917; *Hagan v. Jenkins*, 234 N.C. 425, 67 S.E. 2d 380; *Ivey v. Cotton Mills*, 143 N.C. 189; Annotations to *Robertson v. Wolfe*, 49 A.L.R. 473; 35 Am. Jur. 530.

The Court of Appeals of Kentucky said with respect to a similar situation: "When a public service corporation such as a gas company obtains the privilege of occupying and using the streets for a particular public service that will be beneficial to the people of the city, and there is no express contract between it and the city defining its duties and obligations, the law will raise an implied and enforceable contract to take the place of the omitted express contract, and impose on the company the obligation to render the service that was reasonably within the contemplation of the parties when the contract was made." *Humphreys v. Central Kentucky Natural Gas Co.*, 190 Ky. 733, 21 A.L.R. 664.

Plaintiffs have stated a cause of action based on the negligent failure to reasonably comply with its contract. The total failure to furnish water under the existing conditions for a period of time variously estimated at from thirty minutes to one and one-half hours is sufficient to support a finding of negligence. The court placed the burden of establishing negligence on plaintiffs. Defendant took no exception to this portion of the charge. It has neither pleaded nor offered evidence that its failure to perform was due to a strike or accident. To exculpate itself on either of these grounds, it would carry the

burden of proof. *Fallins v. Insurance Co.*, 247 N.C. 72, 100 S.E. 2d 214; *Thomas-Yelverton Co. v. Insurance Co.*, 238 N.C. 278, 77 S.E. 2d 692; *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16; *Jones v. Waldroup*, 217 N.C. 178, 7 S.E. 2d 366; *Steamboat Co. v. Transportation Co.*, 166 N.C. 582, 82 S.E. 956.

The other assignments of error have been examined. We find nothing to indicate prejudicial error. None is of sufficient importance to require discussion.

No error.

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BESSIE J. SWAIN v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 12 October, 1960.)

1. **Insurance § 3—**

Statutory provisions in effect at the time of the execution of a contract of insurance become a part of the contract to the same extent as though actually written into it.

2. **Insurance §§ 60, 65— Under 1957 Vehicle Financial Responsibility Act violation of policy provisions by insured after liability has become absolute cannot defeat rights of injured party.**

The Vehicle Financial Responsibility Act of 1957, G.S. 20-309, *et seq.*, specifies that proof of financial responsibility shall be evidenced by a certificate of insurance, or otherwise, as defined in Article 9A, G.S. Chapter 20, and therefore as to an accident occurring subsequent to the effective date of the 1957 Act the provisions of G.S. 20-279.21(f) are applicable, so that to the extent of coverage required by the Act the failure of the insured to comply with the provisions of the policy requiring him to give notice of any claim or suit brought against him cannot defeat recovery by the injured party against insurer within the amount of the statutory coverage, even though the policy is not an assigned risk claim.

3. **Same—**

Under G.S. 20-279.21(f)(1), if insured becomes legally obligated for the payment of damages on account of a collision occurring after the effective date of G.S. 20-309, insurer's liability becomes absolute as of the date of the collision if the policy is then valid and in force, and subsequent violations of policy provisions by the insured cannot affect the liability of insurer to a person injured in such collision as the result of insured's negligence, although insured may be liable to insurer for damages resulting to insurer as the result of breach of the policy provisions. G.S. 20-279.21(h).

**4. Constitutional Law § 23—**

An insurer who voluntarily issues its automobile liability policy with full knowledge of statutory provisions that failure of insured to give notice of a claim or an action against insured should not defeat the injured person's rights as against insurer, may not challenge the constitutionality of the statutory provisions on the ground that the liability of insured to the injured person, for which insurer is liable under the policy, was established in an action of which it had no notice and in which it was given no opportunity to be heard. Constitution of North Carolina, Art. I, sec. 17; Fifth Amendment to the Federal Constitution.

APPEAL by defendant from *Fountain, Special Judge,* June Special Term, 1960, of POLK.

This appeal is from a judgment which, after recitals, including a recital that the parties had waived jury trial, provides:

"And the Court, having considered the evidence and stipulations of counsel and the contentions of the parties relative thereto, from said evidence and stipulations, finds the following facts:

"1. That the plaintiff is an individual and the defendant is a corporation duly organized and existing under and by virtue of the law, and both parties are properly before the Court, and the Court has jurisdiction of this matter.

"2. That on the 30th day of September 1958, there was in full force and effect a policy of liability insurance issued by the defendant to one, Joseph Avery Owens, said policy bearing No. 61-151-437, and insuring the said Joseph Avery Owens for property damage and personal injury liability arising out of the operation of a 1951 Studebaker automobile, the limits of said policy being in excess of the amount in controversy in this action.

"3. That said policy of insurance was a standard automobile liability insurance policy and contained, among others, the following terms and conditions:

" ' LIABILITY — To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

" ' Coverage D: injury to or destruction of property, including loss of use thereof, hereinafter called "property damage," arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile;

" ' Coverage E: bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person, arising out of the ownership, mainte-

nance or use of the owned automobile or any non-owned automobile';

"and

" ' CONDITIONS — 3 NOTICE — In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

" ' . . .

" ' 5 ASSISTANCE AND COOPERATION OF THE INSURED (Parts 1 and 11)

'The insured shall cooperate with the Company and, upon the Company's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.'

"4. That the defendant had furnished the said Joseph Avery Owens with a certificate of insurance necessary for the registration of the aforementioned Studebaker automobile, as provided in Section 20-309 of the General Statutes of North Carolina, and that same had been filed under and pursuant to Article 13 of the Motor Vehicle Act, commonly referred to as the Vehicle Financial Responsibility Act of 1957, but said policy was not issued by the defendant as an assigned risk, or as a result of Article 9-A of the Motor Vehicle Act, commonly referred to as the Motor Vehicle Safety and Financial Responsibility Act of 1953, and that said contract of insurance was a voluntary insurance contract between the defendant and the said Joseph Avery Owens for which only the standard premium with no surcharge was paid.

"5. That on the said 30th day of September 1958, the aforesaid Studebaker automobile described in the aforesaid insurance policy, while being driven by the said Joseph Avery Owens, was

involved in an automobile collision with a 1950 Chevrolet automobile operated by the plaintiff herein, Bessie J. Swain.

"6. That thereafter the said Joseph Avery Owens reported the occurrence of said collision to the defendant, and, after investigation, the defendant through its adjustor or Field Claimsman denied liability to the said Bessie J. Swain upon the contention that Joseph Avery Owens was not negligent or liable and that in any event the said Bessie J. Swain was contributorily negligent, and upon advising counsel for the plaintiff of said denial of liability, said adjustor or Field Claimsman was advised by the plaintiff's attorneys of their intention to susequently institute suit against Joseph Avery Owens.

"7. That thereafter, on March 12, 1959, the plaintiff herein instituted a civil action in the Superior Court of Polk County by filing a Complaint and issuing a Summons against the said Joseph Avery Owens wherein the plaintiff sought damages for personal injuries and damage to her automobile in the total sum of $9,487, and that on the 13th day of March 1959, said Summons and a copy of the Complaint were served upon the said Joseph Avery Owens by the Sheriff of Polk County.

"8. That at no time thereafter did the said Joseph Avery Owens deliver said papers to the defendant or in any way give the defendant notice of the existence of said civil action, or the service of said papers upon him, and on the 20th day of April 1959, a Judgment by Default and Inquiry was entered against the said Joseph Avery Owens by reason of the failure of the said Joseph Avery Owens to file an answer, or give notice of said action to the defendant herein; that on September 3, 1959, at the Regular September 1959 Term, of the Superior Court of Polk County, inquiry was submitted to the jury, and a jury verdict rendered awarding the plaintiff the sum of $1,252.00 as damages for personal injuries and property damage against the said Joseph Avery Owens.

"9. That judgment was duly entered thereon, and, upon return of execution under said judgment by the Sheriff of Polk County 'unsatisfied,' this action was instituted on the 9th day of December 1959.

"10. That the Summons in this action was served upon the defendant in due course, and said Summons and copy of the Complaint were the first notice to the defendant of the institution or existence of the aforesaid civil action against Joseph Avery Owens, the said Joseph Avery Owens having failed and

neglected to advise the defendant herein at any time of said action, Judgment by Default and Inquiry or jury verdict and final judgment.

"11. That the plaintiff has demanded payment of the aforesaid judgment against the said Joseph Avery Owens, and the defendant has failed and refused to pay same.

"And the Court being of the opinion, upon the foregoing facts, that the plaintiff is entitled to judgment against the defendant in this action:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant the sum of $1,252.00, together with interest from the 3rd day of September 1959, the date of the judgment rendered against Joseph Avery Owens, and the costs of this action to be taxed by the Clerk."

Defendant excepted "to the foregoing judgment and the signing thereof" and appealed; and defendant, on appeal, assigns as error "the foregoing judgment and the signing thereof."

*McCown, Lavender & McFarland for plaintiff, appellee.*
*Williams, Williams & Morris for defendant, appellant.*

BOBBITT, J. "Proof of financial responsibility" is defined in the "Motor Vehicle Safety-Responsibility Act of 1953" (S.L. 1953, c. 1300, sec. 1(10), as amended by S.L. 1955, c. 1355, sec. 1; G.S. 20-279.1, 1959 Cumulative Supplement), as follows: "Proof of ability to respond in damages for liability, on account of accident occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of $5,000 because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of $10,000 because of bodily injury to or death of two or more persons in any one accident, and in the amount of $5,000 because of injury to or destruction of property of others in any one accident."

The 1953 Act repealed the "Motor Vehicle Safety and Responsibility Act" of 1947 (S.L. 1947, c. 1006; G.S. 20-224 through G.S. 20-279) "except with respect to any accident or violation of the motor vehicle laws of this State occurring prior to January 1, 1954, or with respect to any judgment arising from such accident or violation, and as to such accidents, violations or judgments Chapter 1006 of the Session Laws of 1947 shall remain in full force and effect."

S.L. 1953, c. 1300, secs. 35, 37 and 42; G.S. 20-279.35 and G.S. 20-279.36, 1959 Cumulative Supplement.

The provisions of the 1953 Act are codified in the 1959 Cumulative Supplement, under the heading "Article 9A," as G.S. 20-279.1 through G.S. 20-279.39.

Under the 1953 Act, as under the 1947 Act, a person whose driver's license had been suspended or revoked as provided therein was required to furnish proof of financial responsibility as a prerequisite to the reinstatement thereof. The great majority of licensed drivers, whose prior conduct had not resulted in the suspension or revocation of their licenses, were not required to furnish proof of financial responsibility. As to these licensed drivers, and persons legally responsible for their conduct, there was no assurance that they could, to any extent, discharge the liability imposed upon them by law for damages arising from the negligent operation of a motor vehicle. To provide greater protection for injured parties, the General Assembly enacted the Vehicle Financial Responsibility Act of 1957. S.L. 1957, c. 1393. Specific provisions (of the 1953 and 1957 Acts) will be referred to hereafter by their respective designations as codified in the 1959 Cumulative Supplement.

The 1957 Act, in pertinent part, provides:

"No self-propelled motor vehicle shall be registered in this State unless the owner at the time of registration shows proof of financial responsibilty. Proof of financial responsibility shall be evidenced by a certificate of insurance or certificates of financial security bond or a financial security deposit or by qualification as a self-insurer, as these terms are defined and described in article 9A, chapter 20 of the General Statutes of North Carolina." G.S. 20-309.

"The provisions of Article 9A, chapter 20 of the General Statutes which pertain to the method of giving and maintaining proof of financial responsibility and which govern and define 'motor vehicle liability policy' and assigned risk plans shall apply to filing and maintaining proof of financial responsibility required by this article." G.S. 20-314.

G.S. Article 9A, Chapter 20, contains G.S. 20-279.21(f) which provides:

> "(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> "1. The liability of the insurance carrier with respect to the insurance required by this article shall become absolute whenever injury or damage covered by said motor vehicle liability

policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy;

"2. The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

"3. The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision 2 of subsection (b) of this section;

"4. The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the article shall constitute the entire contract between the parties."

The 1957 Act required *every owner* of a motor vehicle, as a prerequisite to the registration thereof, to show "proof of financial responsibility" in the manner prescribed by G.S. Article 9A, Chapter 20, to wit, the 1953 Act. The manifest purpose of the 1957 Act was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle; and, in respect of a "motor vehicle liability policy," to provide such protection notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claims. As stated by *Stabler, J.*, in *Ott v. American Fidelity & Casualty Co.* (S.C.), 159 S.E. 635, 76 A.L.R. 4, to bar recovery from the insurer on account of such policy violations would "practically nullify the statute by making the enforcement of the rights of the person intended to be protected dependent upon the acts of the very person who caused the injury." In accord: *Gillard v. Manufacturers' Ins. Co.* (N.J.), 107 A. 446; *Arizona Mut. Auto Ins. Co. v. Bernal* (Ariz.), 203 P. 338.

Owens obtained registration of his 1951 Studebaker by filing with the Commissioner of Motor Vehicles, as proof of financial responsibility, defendant's certificate of insurance. By the issuance of said certificate for such purpose, defendant represented that it had issued, and there was in effect, an owner's "motor vehicle liability policy" as defined in G.S. 20-279.21 covering Owens' Studebaker.

"Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it." *Howell v. Indemnity Co.*, 237 N.C. 227, 229, 74 S.E. 2d 610, and cases cited.

The policy provisions required defendant "(t)o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages" because of "property damage" and "bodily injury" as defined therein. Hence, under G.S. 20-279.21(f)(1), if Owens is "legally obligated" for the payment of such damages on account of the collision of September 30, 1958, defendant's liability became absolute when such collision occurred.

Plaintiff's action is to recover the amount of her judgment against Owens. This judgment, unless and until set aside, establishes conclusively the legal liability of Owens to plaintiff on account of the collision of September 30, 1958. In this connection, attention is called to *Sanders v. Chavis*, 243 N.C. 380, 90 S.E. 2d 749. The policy involved in *Sanders* was an assigned risk policy furnished as proof of financial responsibility in accordance with the 1947 Act. The 1947 Act provided, in respect of such policy, that "no violation of the terms of the policy shall operate to defeat or avoid the policy so as to bar recovery within the limits provided in this article." G.S. 20-227(5)(f). The fact that the liability insurance carrier had received no notice prior to judgment of the institution and pendency of the action against its insured was held irrelevant in determining whether the judgment should be set aside on the ground of surprise or excusable neglect under G.S. 1-220.

Defendant pleads, in bar of plaintiff's right to recover, violations by Owens subsequent to September 30, 1958, of certain policy provisions, to wit, those requiring Owens, in the event of suit against him, to forward immediately to defendant "every demand, notice, summons or other process received by him or his representative," and to cooperate with defendant in defending such suit. No issues relevant to the legal liability of Owens to plaintiff are raised.

As to accidents occurring prior to the effective date (January 1, 1958) of the 1957 Act, such policy violations constitute a valid and complete defense. *Muncie v. Ins. Co.*, *ante* 74, and cases cited. Moreover, the law as stated in *Muncie* is presently applicable as to coverage "in excess of or in addition to the coverage specified for a motor vehicle liability policy" as defined in G.S. 20-279.21. See G.S. 20-279.21(g). However, as to the compulsory coverage provided by a "motor vehicle liability policy," as defined in G.S. 20-279.21, issued as "proof of financial responsibility" as defined in G.S. 20-279.1,

G.S. 20-279.21(f)(1) provides explicitly that "no violation of said policy shall defeat or void said policy." Plaintiff's judgment against Owens is for an amount substantially less than the compulsory coverage.

If plaintiff suffers loss on account of the failure of Owens to comply with said policy provisions, such loss is attributable solely to derelictions of its insured. Under G.S. 20-279.21(f)(1), such policy violations do not defeat or avoid the policy in respect of plaintiff's right to recover from defendant the amount of the judgment establishing Owens' legal liability to her. Different questions are presented as to the rights and liabilities of defendant and Owens *inter se*. Indeed, G.S. 20-279.21(h) provides: "(h) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article." It would seem that the General Assembly had in mind a factual situation such as that here considered.

Defendant contends that G.S. 20-279.21(f)(1) when so construed deprives it of due process of law in violation of Article I, Section 17, Constitution of North Carolina, and of the Fifth Amendment to the Constitution of the United States. It insists it has had no notice or opportunity to be heard in respect of the issues determinative of the legal liability, if any, of Owens to plaintiff.

There is no contention that plaintiff had (or has) any legal right under policy or statutory provisions to sue defendant unless and until she first obtained a final judgment against Owens. Defendant's right to notice of plaintiff's action and to an opportunity to defend such action in Owens' name is based on contractual obligations of Owens. Plaintiff has done nothing to deprive defendant of such notice and opportunity to defend. There is no contention that defendant was deprived of such notice and opportunity to defend in an action instituted by plaintiff, or which plaintiff was legally entitled to institute, against defendant.

The policy here involved was voluntarily issued by defendant to Owens. It is not an assigned risk policy. See G.S. 20-279.34. Defendant's risk, under policy and statutory provisions, was voluntarily assumed.

The decision in *Merriman v. Maryland Casualty Co.* (Wash.), 266 P. 682, cited by defendant, was based solely on policy provisions. No provision, either policy or statutory, such as G.S. 20-279.21(f)(1), was involved, and no constitutional question was considered. The

cases referred to below, not cited in the briefs, deal with factual situations similar to that here involved.

In *Vance v. Burke* (Mass.), 166 N.E. 761, the policy contained this provision: "(c) No statement made by the Assured or on his behalf and no violation of the terms of this policy shall operate to defeat or avoid this policy so as to bar recovery within the limit provided in this policy by a judgment creditor proceeding under the provisions of Section 113 of Chapter 175 and clause 10 of Section 3 of Chapter 214 of the General Laws." The opinion of *Rugg, C. J.*, states: "We are of opinion that no constitutional question of this nature is open to the insurer on this record. It issued the policy. That is admitted. So far as appears on this record, that action was entirely voluntary on the part of the insurer. Its assumption of the liability here sought to be enforced was optional, not compulsory. The liability of the insurer in this particular has become contractual and is not statutory. Having entered into a contract freely, the insurer cannot be heard to complain of its terms. One cannot assume an obligation of his own free will and then successfully assail its constitutionality." It is noted that the Justices of the Supreme Judicial Court of Massachusetts, *In re Opinion of the Justices,* 147 N.E. 681, 699, had previously declared: "The provision that no statement made by or on behalf of the insured and no violation of the terms of the policy shall defeat the claim of a judgment creditor, injured by negligence in the operation of the insured motor vehicle, proceeding in accordance with the statute to collect damages permitted by the proposed bill, does not offend against any provision of the Constitution."

In *Warecki v. United States Fidelity and Guaranty Co.* (Mass.), 170 N.E. 49, the opinion of *Sanderson, J.*, states: "The policy required the assured to give notice to the insurer and to cooperate with it, but it also must have provided that a violation of its terms would not defeat the policy so as to bar recovery against it by a judgment creditor. (Citing statutory provisions) If it be assumed that the defendant did not receive the notice from the assured, for which the contract called, it would still be liable to the plaintiff because of the terms of its contract of insurance. *Vance v. Burke* (Mass.), 166 N.E. 761."

In *Kruger v. California Highway Indemnity Exchange* (Cal.), 258 P. 602, a similar question was raised with reference to the constitutionality of the "jitney bus ordinance" of the City and County of San Francisco. The defendant had issued its policy in compliance with the requirements of the ordinance. The opinion of *Curtis, J.*,

states: "The municipality undoubtedly has the right within reasonable limits to prescribe the nature of the security to be given by those operating vehicles for hire upon its public streets. There is nothing unreasonable in the provisions of the ordinance requiring the operator of such a vehicle to protect the public by the bond or policy of insurance required therein and in the manner as required. There was nothing obligatory upon the appellant requiring it to issue such a policy as it did. The policy was issued freely and voluntarily and without coercion on the part of any one. It can with perfect safety be assumed that appellant was familiar with the terms of said ordinance and expressly contracted in reference thereto and agreed to be bound by those provisions of the policy inserted therein in compliance with the requirements of the ordinance. It is not unreasonable to assume that the premium charged upon such a policy was fixed in reference to the extent of the liability incurred by appellant in issuing the same. To now hold that the ordinance is void and appellant released from its obligations under the policy of insurance would be to grant it immunity from its voluntary contracts entered into for an adequate and valuable consideration under the guise of protecting its constitutional rights. As already seen, the ordinance in no way invaded appellant's constitutional rights. On the other hand, the liability which respondent now seeks to enforce against appellant is one it voluntarily assumed."

When defendant voluntarily issued its policy to Owens, it did so with full knowledge that the provisions of G.S. 20-279.21(f)(1) became a part thereof as fully as if written therein; and, having voluntarily assumed the risk, it may not challenge the constitutionality of the statutory provisions.

In the factual situation here presented, applicable statutory provisions require that the judgment be affirmed.

Affirmed.

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## STATE v. ROBERT LEE CASE.

(Filed 12 October, 1960.)

**1. Criminal Law § 84—**

**Slight variances in corroborating testimony do not render such testimony inadmissible, it being for the determination of the jury whether or not the testimony of one witness does in fact corroborate that of another.**

**2. Criminal Law § 111—**

Where the court defines corroborating testimony and instructs the jury that certain testimony was admitted solely for the purpose of corroboration, the failure of the court to add that the jury should consider it only if the jury finds that the testimony does in fact corroborate the testimony of the prior witness, will not be held for prejudicial error, there being no expression of opinion by the court as to whether the testimony of the witness did or did not corroborate the previous testimony.

**3. Criminal Law § 72—**

The statement of one defendant in the presence of the other tending to implicate such other defendant in the commission of the crime is competent as an implied admission by such other defendant when the circumstances are such as to call for a reply and such other defendant remains silent.

**4. Criminal Law § 90—**

Where evidence is competent against one defendant but incompetent against another, such other defendant may not complain of its general admission when he fails to object or request that the admission of the evidence be limited.

**5. Criminal Law § 62—**

The testimony of witnesses, admitted to be experts, as to the mental capacity of defendant, based upon their examination of defendant pursuant to law to determine whether or not defendant was mentally competent to stand trial, is competent as substantive evidence.

**6. Criminal Law § 162—**

The admission of testimony cannot be held prejudicial when defendant thereafter makes admissions of the same import.

**7. Criminal Law § 77—**

Testimony of an expert who examined defendant as provided by law to determine whether or not he was mentally competent to stand trial is not privileged, and the defendant may not assert that the physician-patient relationship existed in regard thereto.

**8. Criminal Law §§ 107, 156—**

Inadvertence in stating the contentions or in recapitulating the evidence must be called to the attention of the court in time for correction.

**9. Criminal Law § 161—**

Defendant may not complain of the admission of testimony brought out by his counsel in the cross-examination of the State's witnesses.

**10. Criminal Law § 112—**

The charge of the court that the State contended that certain evidence tended to show and "does show" certain facts will not be held prejudicial when, construing the charge contextually, it is apparent that the court was merely giving the contentions of the State that the evidence tended to show and did show certain facts without expressing an opinion on the part of the court as to what the evidence showed.

**11. Criminal Law § 155—**

An assignment of error to the admission of evidence cannot be sustained when the defendant has failed to make any objection when the evidence was admitted.

APPEAL by defendant, Robert Lee Case, from *Hooks, Special Judge,* 4 April 1960 Special Criminal Term, of GASTON.

This is a criminal action in which Robert Lee Case and William Shedd, Jr., alias Willie Shedd, Jr., were jointly indicted in a bill of indictment charging that each of them did unlawfully, wilfully and feloniously rape, ravish and carnally know Janette Haynes Black, a female, forcibly and against her will.

The State's evidence tends to show the following facts:

That C. G. Black and his wife, Janette Haynes Black, and their two sons, Dennis Gray Black, age 13, and C. G. Black, Jr., age 10, live on Route 4, Lincolnton, North Carolina, in Lincoln County, about one-half mile from Crouse. That C. G. Black on 3 January 1960 and at the time of the trial was employed by Carolina Freight Carriers as a truck driver. On the above date, which was a Sunday, Mrs. Black and the boys came home from church around noon. Mr. Black did not accompany his family to church that Sunday because he was expecting his employer to call any moment instructing him to drive a truck on a trip. About 4:00 p.m., while Mr. and Mrs. Black and their sons were watching television in the den of their home, someone knocked at the front door. Dennis, the 13 year-old son, was sent to the door. The party at the door, according to Dennis' testimony, said "he wanted to speak to my daddy." When Mr. Black went to the door and opened it, the defendant pointed a gun at him and said, "Back up, buddy." There was no one with Case at the time Mr. Black went to the door. Case then said to Mr. Black, "I mean business, buddy," and entered the living room of the Black home. Mrs. Black came into the living room about that time to see what was happening. Case directed Mr. Black to lie down in his den which was off the living room. Case ordered Mrs. Black to lie down on the floor in the den and the boys to sit in chairs. Case then went to the front door and immediately thereafter the defendant Shedd came into the den. Case gave the gun to Shedd and said to him, "Hold it on them." Shedd held the gun on them while Case cut the cords from venetian blinds in the living room and used them to tie the hands and feet of Mr. Black and to tie the boys in the chairs. Then they robbed both Mr. and Mrs. Black of all the money they had in their respective pocketbooks. Mr.

Black testified that $43.00 or $44.00 was taken from his wallet. Mrs. Black testified that she had $23.00 or $24.00 in her pocketbook and the defendants took all of it. Case then said he was going to take Mrs. Black with him for protection. Mr. Black begged him to take him instead. Case then ordered Mrs. Black to get up. She got on her knees and said, "I don't believe I can get up," and Case said, "You better get up if you want to live." Then Case caught her by the arm and she got up while Case held the pistol in her side. Mrs. Black had on bedroom shoes at the time and she requested the defendants to let her put on some shoes. Case objected, but Shedd said, "She'll need a coat." Shedd accompanied her into the bedroom where she put on shoes and also obtained a coat. She was abducted from the home by the defendants at the point of a gun and was put in an automobile which had been parked near the house with the motor left running. Mr. Black testified: "If either one of them were drinking I didn't know it."

Before leaving the house with Mrs. Black, Case cut the wires to the telephone and cut the cord to the receiver and the mouthpiece. Before taking Mrs. Black from the house he said, "I'll put her out down here at the bottom of the hill."

Case drove the car; Mrs. Black was put in the middle of the front seat of the car between Case and Shedd. The car was driven for about an hour in and around Dallas, Lowell and Spencer Mountain. The car was then driven on a dirt road that ended near the river in the vicinity of Spencer Mountain, where Case had sexual intercourse with the prosecuting witness, then Shedd had sexual intercourse with her, after which Case again had sexual intercourse with her; and according to the evidence, each of these acts was accomplished by force and against her will. Each time Case had sexual intercourse with the prosecuting witness, Shedd was standing beside the car with the pistol in his hand, and Case stood in a similar position with the pistol while Shedd had sexual intercourse with her.

According to the evidence, before Case had sexual intercourse with the prosecuting witness he threatened her life unless she cooperated; she resisted to such extent that he hit her on the side of the head four or five times.

Mrs. Black, after these criminal assaults, was told that they were going to tie her up and leave her in the woods. The defendants went to the rear of the car and opened the trunk; they talked for a while in such low tones Mrs. Black could not hear what they were saying. Thereafter, she was required to go some 75 feet into the woods, about 12 feet from the bank of the river. Her mouth

was filled with rags, and a gag was tied over her mouth and she was tied to a tree. Case then told her if she didn't get loose in sixteen seconds he was going to shoot her. She got one hand loose. Shedd suggested that they take her and leave her tied up in a vacant farm house nearby. They drove her to the farm house and found it occupied. They then drove to Cramerton and around Spencer Mountain and back near the place where the original assaults occurred. Case again forced her to have sexual intercourse with him and so did Shedd, and thereafter Case forced her to have sexual intercourse with him a fourth time. Case tore the brassiere off Mrs. Black; it was later thrown from the car and was found the next day by the officers.

About 7:45 p.m. on 3 January 1960, the defendants let Mrs. Black out of the car somewhere on the road between Spencer Mountain and Lowell. She was picked up later by a Mr. Palmer and taken to the Lowell police station. Mrs. Black was immediately thereafter taken to the Gaston Memorial Hospital in Gastonia.

The defendant Shedd was arrested almost immediately thereafter. Case was arrested at 2:00 a.m. on the following Thursday in Cleveland County. The green 1953 Chevrolet, the automobile which Case and Shedd were using and which belonged to one Jean Griffin, one of Case's girl friends, was located by the officers, and two pieces of white cotton cloth were found in the trunk of this car. Evidence introduced in the trial below tended to show that the strips of cloth used in the gagging of Mrs. Black at the time Case tied her to the tree were torn from the cloth found in the car driven by Case on the afternoon of 3 January 1960.

H. J. Auten, a police officer, testified that while talking to Shedd and Case together, the defendant Shedd said he was with Case. This was four or five days after the alleged rape occurred. The officer further testified that he talked to Case the same day he was arrested; that Case stated to him that he did enter Mrs. Black's home and that he did at the point of a gun take her out; that he did tie up Mr. Black and the two boys. He stated that he went in Jean Griffin's car which he had borrowed; "that he did have intercourse with Mrs. Black four times and that he had gotten himself in a hell of a fix and in a lot of trouble."

Before Case was apprehended, this officer testified that Shedd identified the pistol which was used on this trip and said it was his gun. Shedd then stated in detail to this officer what occurred on the Sunday afternoon of 3 January 1960 and his statement was substantially in accord with that of the prosecuting witness with

respect to what they did at the Black home and where they went after leaving there, including the acts of sexual intercourse with Mrs. Black and her efforts to resist them. This evidence was offered against the defendant Shedd only.

The State offered other testimony, including numerous witnesses who testified to the good character of both Mr. and Mrs. Black.

The defendants did not testify in the trial below but offered evidence as to the low mentality of the defendant Shedd and testimony tending to show that the appellant Case consumed a pint of whiskey on Sunday morning, 3 January 1960.

The jury found William Shedd, Jr., guilty of rape, with recommendation for life imprisonment, and Robert Lee Case guilty of rape as charged in the bill of indictment.

The defendant Shedd was given a sentence of life in the State's Prison at Raleigh from which he did not appeal.

The defendant Case was given a sentence of death. He appeals, assigning error.

*Attorney General Bruton, Asst. Attorney General Glenn L. Hooper, Jr., for the State.*

*O. A. Warren for defendant Case.*

DENNY, J. The appellant's first assignment of error is to the admission of testimony of the State's witness Palmer as to what Mrs. Black told him after he picked her up and while they were on the way to the Lowell police station; and, that the court further erred in stating to the jury that, "Corroborate means to bolster up or to strengthen. It is not substantive testimony — that is, testimony proving any fact within itself."

Mr. Palmer testified that Mrs. Black stated to him "that she had been tied up to a tree, and had been given fifteen seconds to live or to get loose — if she didn't they'd come back and kill her."

Slight variances in corroborating testimony do not render such testimony inadmissible. *S. v. Walker,* 226 N.C. 458, 38 S.E. 2d 531; *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84. As to the meaning or effect of corroborating testimony, the definition of the word "corroborate" is given in Black's Law Dictionary, 3rd Edition, at page 444, as meaning "To strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence," citing *Lassiter v. R. R.,* 171 N.C. 283, 88 S.E. 335.

In the last cited case our Court said: "The approved definition of the verb 'corroborate' is '(1) To make strong or to give additional

strength to; to strengthen. (2) To make more certain; to confirm; to strengthen.' "

In the instant case, while the court did instruct the jury at the time the above evidence was admitted that this evidence was offered only as corroborating the testimony of Mrs. Black, the court did not add the usual instruction, to wit, "if it does so corroborate her testimony." On the other hand, there was no intimation by the court as to whether or not in its opinion the testimony of the witness did corroborate the testimony of Mrs. Black. It is always a question for the jury to determine whether or not the testimony of one witness does corroborate the testimony of another witness. *Lassiter v. R. R., supra.* This assignment of error is overruled.

Assignment of error No. 2 is based on exceptions Nos. 13 and 14. These exceptions are directed to the testimony of H. J. Auten as to the statements made by the defendant Shedd in the presence of the defendant, appellant, Robert Lee Case, without first determining whether the defendant Case had denied or admitted the statements of the defendant Shedd.

It appears from the record that the only statement Shedd made to Auten while Shedd and Case were together, was that "he (Shedd) was with Case."

In the case of *S. v. Bryant,* 235 N.C. 420, 70 S.E. 2d 186, this Court, speaking through *Winborne, J.,* now *C. J.,* said: " * * * statements made in the presence and hearing of the accused implicating him in the commission of a crime, to which he makes no reply, are competent against him as implied admissions. *S. v. Suggs,* 89 N.C. 527; *S. v. Wilson,* 205 N.C. 376, 171 S.E. 338; *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *S. v. Sawyer,* 230 N.C. 713, 55 S.E. 2d 464; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349." This assignment of error is overruled.

These defendants were sent to Dorothea Dix Hospital in Raleigh for examination, as provided by law, to determine whether or not they were mentally competent to stand trial upon the charge on which they had been indicted.

Assignment of error No. 3 is based on exception No. 28 which challenges the testimony of Dr. Andrew L. Laczko, a psychiatrist on the staff of the Dorothea Dix Hospital, on the ground that the testimony about to be offered would not be admissible as substantive evidence. Thereafter, Dr. Laczko, without further objection, testified that in the course of his examination of the defendant Shedd that Shedd told him, " 'I am being charged with rape, kidnapping and possibly highway robbery.' As for the events that took place, he stated that

on a Sunday — he did not specify the date — that he and his uncle, whose name was mentioned as Mr. Case — proceeded to a woman's house, claiming he did not know the location of the house as far as the postal address is concerned. He said without applying any force all three of them, he, Mr. Case, and this lady returned to the car; and Shedd stated to me that he had sexual intercourse with this lady without forcing her to do so."

The above statements appear to have been made voluntarily by Shedd, and no objection having been interposed to the admission thereof, when admitted they were competent as against him. Where testimony incompetent as to one defendant is admitted without objection and without request that its admission be limited, an exception thereto will not be sustained. *S. v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322; *S. v. Hendricks,* 207 N.C. 873, 178 S.E. 557; Rules of Practice in the Supreme Court, Rule 21, 221 N.C. at page 558.

No objection or exception was interposed to the admission of Dr. Laczko's testimony with respect to what Shedd told him, by either defendant; neither was there any request by the defendant Case that such evidence be admitted only as against Shedd. It would have been error to admit Shedd's statement or statements against Case, had he requested that they be limited as against Shedd only.

Dr. Laczko and Dr. Walter A. Sykes were offered as witnesses by the State with respect to the mental capacity of each of the defendants. It was stipulated by counsel for Shedd and counsel for the appellant Case that these physicians were experts in the field of psychiatry. Both of them testified that they examined the defendants and that Shedd was on the borderline of intelligence; that Case had an I. Q. of 82, "which is within the range of a dull, normal intelligence." Each of these doctors testified he had an opinion satisfactory to himself as to whether or not each of the defendants knows the difference between right and wrong, and that in his opinion each of the defendants knew the difference between right and wrong. Evidence with respect to the I. Q. of the appellant Case was brought out on cross-examination by the appellant's counsel. Certainly, the evidence of these experts with respect to the mentality of the defendants was admissible as substantive evidence. *S. v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387; *S. v. Litteral, supra.*

Even if the statements made by Shedd to Dr. Laczko, in which he referred to his codefendant Case, had been duly objected to by the defendants and an exception duly entered, in light of the admissions made by both defendants theretofore to Officer Auten, the

admission of such statement or statements would not in our opinion be sufficiently prejudicial to warrant a new trial. Furthermore, Case is in no position to challenge the admission of this testimony on the ground of the physician-patient relationship existing between the witness and Shedd. Exception No. 28 is overruled.

By exceptions Nos. 68, 69, 70, 71 and 74, the appellant attacks the court's review of the testimony of the psychiatrists. The evidence reviewed was evidence admitted without objection. Moreover, much of this evidence reviewed by the court below was brought out by the appellant's counsel on cross-examination of the psychiatrists. "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." *S. v. Holder*, 252 N.C. 121, 113 S.E. 2d 15; *S. v. Saunders*, 245 N.C. 338, 95 S.E. 2d 876; *S. v. Stone*, 241 N.C. 294, 84 S.E. 2d 923; *S. v. Ritter*, 239 N.C. 89, 79 S.E. 2d 164; *S. v. Lambe*, 232 N.C. 570, 61 S.E. 2d 608. There is no merit in these exceptions and they are overruled.

The appellant's ninth assignment of error is directed to exceptions Nos. 47, 49, 52, 53, 54, 55, 57, 58, 59 and 62, and each one of these exceptions is directed to the phrase used by the court in stating the contentions of the State, to wit, "The State has offered evidence in this case, from which it argues and contends that it tends to show (and does show)." After each of these portions of the charge, there followed a recapitulation of certain evidence, upon which the State relied and contended that such evidence tended to show and did show certain things.

While in our opinion it is preferable for the court in stating the contentions of the State or of a defendant to say that the State or the defendant argues and contends "that the evidence tends to show," without adding the words "and does show"; however, when the phrase used by the court, and to which the defendant objects, is read in context, it shows in our opinion that the court was merely giving the contentions of the State to the effect that the State contends the evidence does show thus and so and was not expressing an opinion on the part of the court as to what the evidence did show. Moreover, nothing appears in the appellant's brief or in the record to indicate that the trial judge emphasized the words "and does show" in any manner so as to disassociate them from the context of the "contention phrase," to wit, "that the State argues and contends that this evidence tends to show and does show." This assignment of error is overruled.

The tenth assignment of error is based on exceptions Nos. 50 and

51. These exceptions were taken to the court's review of the evidence of Mr. C. G. Black in which Mr. Black testified that Case had been to his home some twelve or eighteen months previously while Black was working near his garage; that Case asked him if he could get some water and Mr. Black replied, "Yes, Sir, help yourself, there is a spigot right there." Mr. Black further testified, "He (Case) was on the roads working as a trusty, I believe." Defendant's counsel, on cross-examination, examined Mr. Black at some length about Case having been on the chain gang. None of the evidence with respect to the previous service on the roads, reviewed by the court in recapitulating the evidence to the jury, was objected to by appellant when it was admitted; and, as pointed out above, much of the evidence to which the appellant now objects as having been inadmissible and prejudicial was brought out by his own counsel in cross-examining Mr. Black. This assignment of error is without merit and is overruled.

The record before us contains many additional assignments of error based on numerous exceptions which we have not discussed. However, we have carefully examined and considered these additional assignments of error and in our opinion they present no error sufficiently prejudicial to justify us in awarding a new trial.

The verdict and judgment of the court below will be upheld.

No error.

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ANNIE MAY BANKS ANDREWS v. NORMAN JOHN ANDREWS, JUDITH MAY ANDREWS AND ELIZABETH BANKS ANDREWS.

(Filed 12 October, 1960.)

1. **Appeal and Error § 1—**

The Supreme Court will not consider matters not raised and adjudicated in the court below.

2. **Wills § 31—**

A will, especially a holographic will, must be construed on the basis of the particular language of the instrument for the purpose of ascertaining the testator's intent, and in so doing the will should be examined as a whole with regard to the situation confronting the testator at the time of its execution and the natural objects of testator's bounty.

3. **Wills § 33a—**

The general rule that an unrestricted bequest or devise of property to a particular person will be construed to be absolute, and a subsequent

disposition of the same property at the death of the first taker will be rejected as repugnant to the absolute gift, G.S. 31-38, must yield to the paramount intent of the testator as gathered from the entire instrument.

**4. Same—**

Language of an item of a will, even though sufficient, standing alone, to pass an absolute gift to the first taker, will be construed to transmit only a life estate when the will directs a limitation over to another or others, and there is no absolute power of disposition, express or implied, to the first taker, and this result is consonant with the paramount intent of testator as gathered from the instrument as a whole.

**5. Same—**

A devise and bequest of the remainder of testatrix' real and personal properties to testatrix' daughter, with provision in the same sentence that at the death of the daughter all the property should be equally divided among the daughter's children, grandchildren of testatrix, *is held* to transmit only a life estate in the properties to the daughter, this being consonant with the intent of testatrix as gathered from the instrument as a whole.

**6. Same—**

Language of an item of a will to the effect that testatrix wanted her daughter to keep monies in a particular savings account for the daughter's old age, *is held* an absolute bequest of the savings account to the daughter, the provision that the money should be kept for the daughter's "old age" being a mere statement of the reason for making the gift, and the word "want" being used throughout the instrument as an imperative and not a precatory word, and this result being consonant with the intent of testatrix as gathered from the entire instrument.

**7. Wills § 31—**

In construing a will, the extent and character of the estate is often helpful in ascertaining the intent of the testator, and the court should have before it an inventory of the estate to aid it in ascertaining such intent.

**8. Same—**

In construing a will every clause will be given effect if possible and apparent conflicts reconciled; irreconcilable repugnances will be resolved by giving effect to the general prevailing purpose of testator and the last expression of such intent will prevail over a prior irreconcilable provision.

**9. Wills § 33a—**

By one item of the will in question testatrix devised and bequeathed a life estate in the remainder of her properties, real and personal, to her daughter for life, with limitation over to the daughter's children. By subsequent item testatrix bequeathed the daughter a stipulated savings account. *Held:* The apparent repugnancy will be reconciled on the basis that testatrix did not intend to include the savings account within

**the term "remainder of my real and personal properties," or the subsequent item be given effect as the later expression of testatrix' intent, made particularly clear by a still later item directing that income from other properties should be used for the purpose of educating the grandchildren.**

APPEAL by defendants from *Hobgood, J.*, June 1960 Civil Term, of WAKE.

This is a proceeding under the Declaratory Judgment Act (G.S. 1-253 *et seq.*) for construction of the will of Lizzie May Banks.

Defendants appealed.

*Paul C. West for plaintiff.*

*W. G. Mordecai, Guardian Ad Litem for the minor defendants, appellants.*

MOORE, J. Mrs. Lizzie May Banks, late of Wake County, died testate 11 February 1960. Her will was admitted to probate and the executrix qualified 16 February 1960.

The devisees and legatees named and referred to in the will are: plaintiff, Annie May Banks Andrews, daughter of testatrix, and defendants, Norman John Andrews, age 16, Judith May Andrews, age 12, and Elizabeth Banks Andrews, age 7, grandchildren of testatrix and children of plaintiff. A guardian *ad litem* was duly appointed for defendants and he filed answer.

The will is as follows:

"Raleigh, N. C., September 11-1958

(1) "It is my decision, that after my death my possessions and property be devided as follows:

(2) "1st three houses and lots located at 917 W South St. 622 W South St and 513 S-West St be maintained operated for the best interest of my grand children as determined by my daughter

(3) "When they become twenty one I want each to have a house but I want the rent from other properties to equlize the amount of rent each shall receive, not the up keep, each piece shall pay its own up keep

(4) "All the remainder of my real and personal properties goes to my daughter Annie May — at her death all property be devided equaly among the grand children

(5) "The money I have on savings account at 1st Federal Savings and loan bank, I want Annie May to keep there for her old age

(6) "I want her to use the income from other properties to educate the grand children

(7) "All my house hold furniture except what is in the kitchen be stored and kept for the grand children, especially my brass pictures potery and pichers, and all my chairs.

(8) "I appoint my daughter Annie May exzeitress with out bond" (The paragraphs are numbered by us.)

Plaintiff, who is also executrix, requests the court to construe paragraphs 4, 5 and 6, and to that end asks "Whether the remainder of the property real and personal conveyed to the daughter, Annie May Andrews, conveys a fee simple, or a life estate to be divided at the death of said daughter, Annie May Andrews, among the grand children."

The court below ruled "that Annie May Banks Andrews is the owner in fee simple of the property of the testatrix, Lizzie May Banks, except such property as is specifically devised by testatrix to her grandchildren . . ." We assume this holding to be that — exclusive of the three houses and lots and the charge for equalizing rents referred to and provided for in paragraphs 2 and 3, and certain furniture specified in paragraph 7 — plaintiff takes the property of testatrix absolutely and in fee simple.

The court is requested by the petition to interpret only paragraphs 4, 5 and 6. And since the other items of the will were not specifically construed by the court below, we refrain from a discussion of them here. *Anders v. Anderson,* 246 N.C. 53, 97 S.E. 2d 415. We consider them only in so far as they tend to throw light upon the general intent of the testatrix.

We are concerned here with what appears to be a holograph will. It is almost entirely devoid of technical words and expressions. As stated by *Higgins, J.,* in *Morris v. Morris,* 246 N.C. 314, 315, 98 S.E. 2d 298, "Holograph wills especially are like the men who make them — individual."

In ascertaining the intention of the testatrix with respect to the items of the will in controversy, it is beneficial, at the outset, to examine the will as a whole and determine the dominant purpose of the testatrix. *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578. Her general intention seems definite and clear. Her daughter and grandchildren are natural objects of her bounty. She desires to contribute to the support and security of her daughter, and especially to provide for her daughter's old age. To each grandchild she wishes to give a house, furniture and funds. She is concerned for their education. She was thinking in terms of her daughter's life-time welfare; for the grandchildren she had long term and lasting benefits in mind.

Paragraph 4 of the will provides: "All the remainder of my real and personal properties goes to my daughter Annie May — at her death all property be devided equaly among the grand children."

Plaintiff contends she takes under this item of the will the residue of the estate in fee simple and absolutely. Defendants maintain that she acquires only a life estate, with remainder to them in equal shares in fee.

Plaintiff asserts that G.S. 31-38 and the principles enunciated in *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368, are applicable and controlling.

G.S. 31-38 provides: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

In the *Taylor* case testatrix devised real estate to her brother and sister to do with as they liked, and she bequeathed all her personal property to a sister "for her to keep or dispose of as she sees best." In a subsequent paragraph the will provides: "I wish that after . . . the death of the brothers & sisters . . . *whatever property there is left* shall go to my niece, Geneva Taylor Lewis and her husband . . ." (Emphasis added.) In holding that the named niece and her husband take nothing under the will, the court says: " 'Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given.' . . . Indeed, it is a general rule of testamentary construction that an unrestricted devise of real estate carries the fee, and a subsequent clause in the will expressing a wish, desire or even direction for the disposition of what remains at the death of the devisee, is not allowed to defeat the devise, nor limit it to a life estate. . . . It is understood, of course, that this rule, as well as all rules of construction, must yield to the paramount intent of the testator as gathered from the four corners of the will." The quoted rule, sometimes referred to as the "rule of Kent," has, in appropriate cases, been consistently applied in this jurisdiction: *Walters v. Children's Home,* 251 N.C. 369, 111 S.E. 2d 707; *Heefner v. Thornton,* 216 N.C. 702, 6 S.E. 2d 506; *Barco v. Owens,* 212 N.C. 30, 192 S.E. 862; *Hambright v. Carroll,* 204 N.C. 496, 168 S.E. 817; *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626; *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; *Fellowes v. Durfey,* 163 N.C. 305, 79 S.E. 621. This rule prevails in most jurisdictions of this country and is con-

sistently adhered to in England. 17 A.L.R. 2d, Anno: Absolute Grant — Purported Limitations, pp. 7-227. "The general proposition . . . is that where the first taker is given either expressly or by implication, what is commonly designated as 'the absolute power of disposition,' and the terms of the devise, bequest, or conveyance to him are appropriate to carry the fee, or if personalty the analogous interest, he takes the property absolutely and an attempted limitation over of anything remaining undisposed of, or of the whole property if undisposed of, is void." *Ibid,* 36.

But it is our opinion that the instant case is distinguishable from the class of cases of which Taylor is representative. There are at least four distinguishing features: (1) Here the first taker is not given the absolute power of disposition, expressly or by implication; (2) there is no provision that the remaindermen take only what is undisposed of; (3) the gift over serves to define the estate of the first taker as a life estate; and (4) it seems plain that the will intends that the daughter take only a life estate.

Where the gift to the first taker is in language sufficient, standing alone, to pass a fee simple estate, but no absolute power of disposition is expressed or necessarily implied, the gift is a life estate, provided from other clauses of the will it appears that "at the death" of the first taker testator intends and directs a limitation over to another or others.

In *Hampton v. West,* 212 N.C. 315, 193 S.E. 290, testator devised and bequeathed the residue and remainder of his estate to his wife, and, in subsequent paragraphs, provided that upon the death of his wife one-half of the estate then remaining be given to Charlie Spear in fee, and, if his wife should not leave a will disposing of the other half, the remaining half to go to the children of Mrs. Matthew Legasse. The Court said: "If . . . he had merely added to the indefinite devise that after her death the land remaining (presumably meaning undisposed of) be given to another, and said no more, the rule laid down in *Hambright v. Carroll,* 204 N.C. 496, 168 S.E. 817, and *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892, would have controlled. . . . The language of the will, in effect, that one-half of his estate remaining after the death of his wife be given in fee simple to Charlie Spear, his adopted son, and that the other half, if undisposed of by the widow by will, be given to the Legasse children, indicates the definite intention of the testator that his widow should not have power to convey the entire estate by deed in fee simple."

*Shuford v. Brady,* 169 N.C. 224, 85 S.E. 303, is a case in point. Testator devised all of his real estate to his son. In a subsequent paragraph he provided a limitation over in the event the son died before his majority. Then he directed: "But . . . should he live and marry and have children, at his death this real property shall go to his oldest child living. But should my son die leaving no children, but a wife," then to the wife. The Court declared: "It is manifest that the testator did not intend, by the language in the first paragraph of his will, to give his son . . . a fee simple estate in the property devised, although the words used, standing alone, are sufficient for that purpose."

For other cases of similar purport see: *Alexander v. Alexander,* 210 N.C. 281, 186 S.E. 319; *Jolley v. Humphries,* 204 N.C. 672, 169 S.E. 417; *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451; *Rees v. Williams,* 165 N.C. 201, 81 S.E. 286.

The case of *Watts v. Finley,* (Ga. 1939) 1 S.E. 2d 723, is on all fours with the instant case. The will provided: "Item Three. All the residue of my property, both real and personal, I bequeath to my sister, Annie M. Finley . . . Item Four. At the death of my sister Annie M. Finley, I bequeath the residue of my property to the children of my nephews . . ." The Court held that Annie M. Finley took only a life estate and explained the holding as follows: ". . . under the terms of this item (three), if they be considered disassociated from the other provisions of the will, a fee-simple estate would pass, by virtue of the rule existing in this State . . . The question presented depends largely on the meaning that should be given to the words 'residue of my property' as used in the fourth item. When the entire will is read, and especially items 3 and 4 thereof, with a view of finding a consistent and harmonious testamentary scheme of disposition of the testatrix's property, it seems to us that the words 'residue of my property,' as used in the fourth item, refer to, and are descriptive of, the property devised to Annie M. Finley in item 3, and at least should not be construed to mean less than the whole of such property reduced by that which may be destroyed in the use. . . . It is true that where, in a will, property is devised in language sufficient to pass a free-simple estate, it should not be held to convey a lesser estate unless it is clear from a subsequent provision of the will that such was the intention of the testator (citing cases), yet where, as in the instant case, the devise apparently passes a fee-simple estate and does so merely because of the absence of an expressed intent as to what character of estate was actually intended to be devised, and in a subsequent provision the prop-

erty is devised to others at the death of the first devisee, such provisions should be held to grant a life-estate with remainder over, else such subsequent provision must be held to have no meaning . . . In the present case the testatrix makes use of the word 'at,' (in the phrase 'at the death'), which is an adverb of time, and not of contingency . . ." (Parentheses ours.)

In the case at bar, both the gift to the first taker and the limitation over are contained in one sentence. The first part of the sentence, "All the remainder of my real and personal properties goes to my daughter Annie May," is sufficient, taken alone, to pass a fee-simple title. G.S. 31-38. But it will be observed that it contains no words expressly authorizing unrestricted disposition, such as "to dispose of as she sees fit." There follows immediately, after the punctuation (dash), the words: "at her death all property be divided equaly among the grand children." The expression "all property" is inclusive and refers to the entire residue given to the daughter in the first instance. It has no such meaning as "all the property undisposed of." The word "at" in the expression "at her death," as in the *Watts* case, "is an adverb of time, and not of contingency." Here the gift over serves, among other things, to define the estate of the first taker as a life estate. We think it is clear that testatrix intended to devise and bequeath to her daughter a life estate in the residue of her property, with remainder in fee simple to the three grandchildren, share and share alike. This is the construction we place upon paragraph 4.

Paragraph 5 provides: "The money I have on savings account at 1st Federal Savings and loan bank, I want Annie May to keep there for her old age." Correct interpretation of this item would, perhaps, be easier had the record included an inventory of the estate assets. The Court is entitled to such information. "Often the knowledge of the extent and character of an estate is helpful in ascertaining the intent of the maker of a will." *Hubbard v. Wiggins,* 240 N.C. 197, 209, 81 S.E. 2d 630. There is a possibility that testatrix did not understand the expression "personal properties," as used in paragraph 4, to include money on deposit and did not intend paragraph 4 to embrace the savings account. This may indeed be true if this savings account was the only money or deposit left by her. On the other hand, if the savings account is sufficiently large that the interest income would suffice for the daughter's support in old age, this clause might be construed as a mere suggestion by testatrix that the income from the account be retained by the daughter for her support in old age and not a testamentary disposition. **But as the record stands, these**

are matters of pure conjecture and have no part in our construction of this clause of the will.

From a consideration of the will as a whole, we are of the opinion that the word "want" as used in this paragraph is imperative and not precatory. *Anders v. Anderson, supra; Laws v. Christmas,* 178 N.C. 359, 100 S.E. 587. The test is whether the testatrix intends, by her language, to control the disposition of the property or to leave to the legatee discretion to ignore the wish expressed. Testatrix uses the word "want" often in this will. It is used twice in creating the trust in paragraphs 2 and 3. It is used again in paragraph 6. In the manner of its use throughout the instrument it is synonymous in meaning with the expression "it is my will that." Testatrix intended to control thereby the disposition of her property.

In construing a will every word and clause will be given effect if possible, and apparent conflicts reconciled, and irreconcilable repugnancies resolved by giving effect to the general prevailing purpose of testator. *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777. In the expression, "I want Annie May to keep there for her old age," the word "keep" clearly means to retain, have, own and use. No quantitative limit is placed on her use of it. "(f)or her old age" is the reason given for making the gift. So it is our opinion that testatrix intended to give the savings account to her daughter absolutely.

This construction of paragraph 5 raises an apparent conflict between this clause and the disposition of the residue in paragraph 4, assuming that "personal properties" in paragraph 4 included the savings account. While this inconsistency admittedly exists, both constructions are harmonious with the general objectives of the testatrix — lifetime support for the daughter, provision for the future of the grandchildren. We must give effect to both clauses of the will if possible. *Bank v. Corl,* 225 N.C. 96, 101, 33 S.E. 2d 613. "A later clause in a will must be construed in harmony with an earlier clause, if such construction can be fairly given. . . . (w)here there is an irreconcilable difference between two clauses . . . the last will generally prevail as the latest expression of the testator's intention . . . The rule that the later prevails is operative only where both clauses or provisions refer to the same subject matter, are clearly inconsistent, the later clause is clear and unambiguous, and as plain and decisive as the earlier. . . . (t)he earlier clause or provision will be modified only as far as necessary to give effect to the subsequent clause or provision." 95 C.J.S., Wills, s. 621(b), pp. 868-870.

In so far as the absolute gift to the daughter in paragraph 5 may conflict with the provisions of paragraph 4, as construed by us, para-

graph 4 is modified thereby, and the savings account will be considered no part of the residue referred to in paragraph 4.

Paragraph 6 is as follows: "I want her (Annie May) to use the income from other properties to educate the grandchildren." (Parentheses ours.) This further emphasizes the intent of the testatrix that the gift of the savings account to the daughter is absolute. In the education of the children, the savings account is not to be used, but the expenditures for their education are to be made from the income of properties other than the savings account.

The judgment below is reversed in so far as it conflicts with constructions herein indicated, and the cause is remanded that judgment may be entered in accordance with this opinion.

Reversed and remanded.

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JAMES L. SUGGS, EMPLOYEE v. WILLIAMSON TRUCK LINES, EMPLOYER; BITUMINOUS CASUALTY CORP., CARRIER AND MERCURY MOTOR EXPRESS, INC., EMPLOYER; AMERICAN FIDELITY & CASUALTY CO., CARRIER.

(Filed 12 October, 1960.)

1. **Master and Servant § 93—**

Where on appeal to the Superior Court from Industrial Commission appellant concedes that the findings of the Commission are supported by evidence but contends that the conclusions of law are not supported by the findings, appellant's exceptions amount to no more than an exception to the judgment, presenting only whether the facts found support the judgment and whether error of law appears on the face of the record.

2. **Master and Servant § 83— Industrial Commission has no jurisdiction where employee is nonresident, or contract is not made here, or employer has no place of business here.**

Where the lease of a vehicle, with a driver to be furnished by lessor, for a trip in interstate commerce under lessee's franchise, is executed in another state and the lessee is a foreign corporation not employing as many as five employees in this State, the North Carolina Industrial Commission has no jurisdiction of a claim of the driver for compensation arising out of an accident occurring in another state, even though the driver be a resident of this State, since there must be a concurrence of all three of the requisites that the contract of employment be made in this State, that the employer maintain a place of business in this State, and that the residence of the employee be in this State, in order for the Industrial Commission to have jurisdiction. G.S. 97-36.

**3. Master and Servant § 47— Driver held employee of lessee and not lessor of vehicle for trip in interstate commerce.**

Where in a lease of a motor vehicle for a trip in interstate commerce under the lessee's franchise and license plates, the lessee assumes full responsibility for the operation of the vehicle and retains direction and control of the driver in regard to the route, time of departure from termini, etc., and the lessor retains no control over the driver during the trip, the driver is an employee of the lessee and not the lessor, and the lessor is not liable for compensation under the Workman's Compensation Act for injuries received by the driver in the course of his employment, notwithstanding that the lessor agreed to save lessee harmless from any loss resulting from the death or injury of the driver or his negligence or dishonesty, and agrees to pay all state and federal taxes and Workmen's Compensation insurance, and the fact that the Industrial Commission has no jurisdiction over lessee does not affect this result.

APPEAL by plaintiff from *Parker, J.*, June Civil Term, 1960, of WILSON.

Claim for compensation under the provisions of our Workmen's Compensation Act.

Mercury Motor Express, Inc., a Florida corporation at the time herein involved, was a common carrier operating under an Interstate Commerce Commission franchise. Williamson Truck Lines held no such franchise.

It was stipulated at the hearing before the deputy commissioner (1) that at the time of the alleged accident giving rise to this claim, Williamson Truck Lines was subject to and bound by the provisions of our Workman's Compensation Act. (2) That at such time, Bituminous Casualty Corporation was the compensation insurance carrier on the risk for Williamson Truck Lines. (3) That at such time, American Fidelity and Casualty Company was the compensation insurance carrier on the risk for Mercury Motor Express, Inc. (4) That the date of the alleged injury by accident giving rise to this claim was 21 September 1959.

The deputy commissioner found the following pertinent facts:

"1. In September 1959 Herbert Jones, hereinafter called Jones, was truck driver for Williamson Truck Lines, hereinafter called Williamson. Jones owned a tractor and trailer unit which he had leased to Williamson, and which he drove for Williamson.

"2. On 18 September 1959 Jones, as an agent for Williamson, entered into a trip lease agreement with Mercury Motor Express, Inc., hereinafter called Mercury, a Florida Corporation. Under the terms of the agreement Williamson leased to Mercury the tractor-trailer unit which Jones was driving. The unit was to be used in transport-

ing property from Elizabeth, New Jersey, to Orlando, Florida, via Goldsboro, North Carolina, and Columbia, South Carolina, where the load on the trailer was to be reworked.

"3. Under the terms of the agreement Mercury agreed, among other things, that the tractor-trailer unit would be used exclusively on routes over which it was authorized by law to operate, and between points that it was authorized by law to serve; that such tractor-trailer unit would be used exclusively to transport commodities which Mercury was authorized to transport; that during the term of the agreement Mercury would assume, as a common carrier, responsibility for loss or damage to the cargo transported; that during the term of the agreement Mercury would assume full responsibility for the operation of the motor vehicle; and that Mercury would pay a fixed sum as rental for the unit.

"4. Under the terms of the agreement Williamson agreed, among other things, to furnish employees who were properly qualified as drivers under I. C. C. rules, and to pay all State and Federal taxes and Workmen's Compensation Insurance, including proper licenses, assessments, fines, or taxes; to indemnify Mercury against loss resulting from the injury or death of the drivers and against loss resulting from the negligence, incompetence, or dishonesty of the employees; and to comply with all traffic laws and speed limits applicable while operating under the lease.

"5. After executing the trip lease agreement, Jones left Elizabeth, New Jersey, on 19 September 1959, driving the leased tractor-trailer unit. At approximately 2:30 a.m. on the following day Jones arrived at Wilson, North Carolina. Jones was not feeling well. He therefore called plaintiff and asked plaintiff to complete the trip for him which plaintiff agreed to do. Jones explained the lease and the trip to plaintiff and told plaintiff which route to take and to punch a Mercury time clock at Golsboro. Plaintiff thereafter left Wilson driving the Mercury leased tractor-trailer. Such tractor-trailer unit was being driven under the direction and control of Mercury, with Mercury I. C. C. plates attached to the rig. Williamson had no control or supervision over Jones or the plaintiff during the course of the lease trip from Elizabeth, New Jersey, to Orlando, Florida, other than in the lease agreement.

"6. Plaintiff drove the tractor-trailer unit to Columbia, South Carolina, via Goldsboro, North Carolina. At the Mercury terminal in Columbia, South Carolina, plaintiff signed the Mercury lease agreement, received $50.00 advance for expenses, and was held at Colum-

bia by Mercury until 5:30 p.m., at which time he left Columbia for Orlando, traveling on a route specified by Mercury. * * *

"7. * * *

"8. At approximately 1:15 a.m. on 21 September 1959 while driving the Mercury leased tractor-trailer unit between Columbia, South Carolina, and Orlando, Florida, and at a point approximately seventeen miles north of Darien, Georgia, plaintiff was involved in a motor vehicle collision with the tractor-trailer.

"9. Plaintiff sustained, as described above, an injury by accident arising out of and in the course of his employment with Mercury.

"10. Mercury did not regularly employ five or more persons in the same business or establishment in North Carolina at the time of the injury by accident giving rise hereto, and was not subject to or bound by the provisions of the North Carolina Workman's Act."

Based on the foregoing findings of fact, the deputy commissioner concluded as a matter of law (1) that at the time of the injury by accident giving rise to this claim the employer-employee relationship existed between the plaintiff and Mercury Motor Express, Inc.; that no such relationship existed at that time between plaintiff and Williamson Truck Lines. (2) That Mercury Motor Express, Inc., did not regularly employ five or more persons in the same business or establishment in North Carolina at the time of the injury by accident giving rise to the claim herein, and such employer was not subject to or bound by the provisions of the North Carolina Workman's Compensation Act; that the North Carolina Industrial Commission does not have jurisdiction over plaintiff's claim against Mercury Motor Express, Inc. G.S. 97-2(1), (2), (3). (3) That on 21 September 1959 plaintiff sustained an injury by accident in the State of Georgia, arising out of and in the course of his employment with defendant Mercury Motor Express, Inc.

The motion of Mercury Motor Express, Inc., that it be dismissed as a party defendant in this case, for lack of jurisdiction, was allowed; and the defendant insurance carrier for Mercury Motor Express, Inc., American Fidelity and Casualty Company, was also dismissed as a party defendant.

The deputy commissioner held the employer-employee relationship did not exist between plaintiff and Williamson Truck Lines at the time of the injury by accident giving rise to the plaintiff's claim against Williamson Truck Lines and Bituminous Casualty Corporation, and denied the plaintiff's right to recover pursuant to the provisions of the North Carolina Workmen's Compensation Act.

The plaintiff appealed to the Full Commission. The Full Commission heard the matter, overruled plaintiff's exceptions, and affirmed the findings of fact and conclusions of law of the hearing deputy commissioner.

Upon appeal to the Superior Court, the court overruled the plaintiff's assignments of error and affirmed the findings of fact, conclusions of law, the dismissal of Mercury Motor Express, Inc. and its insurance carrier for lack of jurisdiction, and further affirmed the award theretofore entered by the North Carolina Industrial Commission denying relief against the defendant Williamson Truck Lines.

The plaintiff appeals, assigning error.

*John Webb for plaintiff, appellant.*

*Uzzell & DuMont, J. William Russell for defendant appellees, Williamson Truck Lines and Bituminous Casualty Corporation.*

*Douglass & McMillan, Clyde A. Douglass, II, for defendant appelees, Mercury Motor Express, Inc., and Fidelity and Casualty Company.*

DENNY, J. In the hearing below the plaintiff excepted only to the findings of fact, conclusions of law, and the signing of the judgment, in his notice of appeal to this Court.

The plaintiff, however, concedes in his brief that the findings of fact are supported by the evidence. But he contends that the conclusions of law are not supported by the findings of fact. Therefore, we have before us nothing more than an exception to the judgment. Such an exception presents only these questions: (1) Do the facts found support the judgment and (2) does any error of law appear upon the face of the record? *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486; *Bailey v. Bailey*, 243 N.C. 412, 90 S.E. 2d 696; *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E. 2d 592; *Gibson v. Insurance Co.*, 232 N.C. 712, 62 S.E. 2d 320.

We think the plaintiff's assignment of error raises these questions only: (1) Did the North Carolina Industrial Commission have jurisdiction of the defendant Mercury Motor Express, Inc. and its insurance carrier, thereby giving it power to award compensation to the plaintiff against said defendants pursuant to the provisions of our Workmen's Compensation Act? (2) Did the relationship of employer-employee exist between the plaintiff and the Williamson Truck Lines at the time the plaintiff was injured?

In our opinion, both questions must be answered in the negative.

G.S. 97-36, in pertinent part, reads as follows: "Where an accident

happens while employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of employee is in this State * * *."

It is clearly apparent from the language of G.S. 97-36 that, before the jurisdiction of the North Carolina Industrial Commission attaches in a case where the accident occurs elsewhere than in this State, there must be a concurrence of all the above-mentioned prerequisites, and we so held in *Reaves v. Mill Co.*, 216 N.C. 462, 5 S.E. 2d 305, where *Seawell, J.*, speaking for the Court said: "In so far as it depends upon the statute (G.S. 97-36) alone, the jurisdiction of the Industrial Commission attaches only (a) if the contract of employment was made in this State; (b) if the employer's place of business is in this State; and (c) if the residence of the employee is in this State. All these circumstances must combine to give jurisdiction."

The contract involved herein between Mercury Motor Express, Inc. and the Williamson Truck Lines was executed in the City of Elizabeth, State of New Jersey; the Mercury Motor Express, Inc. is a Florida corporation, and there is no evidence tending to show that such corporation is domesticated in this State or that it maintains any terminal or place of business in North Carolina. Therefore, we hold that the court below was without error in affirming the action of the North Carolina Industrial Commission in its affirmance of the dismissal of Mercury Motor Express, Inc., and its insurance carrier, American Fidelity and Casualty Company, for lack of jurisdiction.

In answering the second question posed, we must determine whether the relationship of employer-employee existed between the plaintiff and Williamson Truck Lines at the time plaintiff was injured.

It was provided in the trip lease agreement that the "Lessee * * * agrees during the term of this agreement, to assume full responsibility for the operation of such motor vehicle(s)."

The deputy hearing commissioner found as a fact that at the time the plaintiff was injured the leased equipment was being driven by the plaintiff under the direction and control of Mercury Motor Express, Inc, with Mercury's I. C. C. plates attached thereto, and that Williamson Truck Lines had no control over Jones or the plaintiff during the course of the lease trip from Elizabeth, New Jersey, to Orlando, Florida.

We have held that when an interstate franchise carrier executes a lease or contract by which its equipment is augmented and used as one of its fleet of trucks under its franchise and with its license plates attached thereto, the holder of the franchise is responsible for the operation of the truck in so far as third parties are concerned. *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71; *Wood v. Miller,* 226 N.C. 567, 39 S.E. 2d 608.

We have likewise held that the franchise carrier in such cases is also liable to the driver of such truck for any injury that may arise out of and in the course of his employment within the purview of our Workman's Compensation Act, and that the driver of such leased vehicle is not bound by any provisions in the lease to the contrary. *Brown v. Truck Lines, supra; Roth v. McCord,* 232 N.C. 678, 62 S.E. 2d 64; *Newsome v. Surratt,* 237 N.C. 297 74 S.E. 2d 732; *McGill v. Freight, Inc.,* 245 N.C. 469, 96 S.E. 2d 438; *Peterson v. Trucking Co.,* 248 N.C. 439, 103 S.E. 2d 479.

The plaintiff contends that the opinion of this Court in *Roth v. McCord, supra,* recognized the fact that the plaintiffs were entitled to recover from either one or the other group of defendants.

In the *Roth* case, McCord & Dellinger, hereinafter referred to as McCord, owned a tractor which they leased to Central Motor Lines, hereinafter referred to as Motor Lines. The Motor Lines was, but McCord was not, a common carrier of freight under franchise from the Interstate Commerce Commission within the area involved. The McCord firm was subject to our Workmen's Compensation Act.

McCord leased the tractor to the Motor Lines and furnished Roth as driver. The tractor was attached to a trailer belonging to the Motor Lines and was being used on a trip from Charlotte, North Carolina, to Lodi, New Jersey, with a cargo of Cannon Mills products being transported by the Motor Lines under its Interstate Commerce Commission franchise. The Motor Lines' Interstate Commerce Commission identification plate was attached to the vehicle and Roth was operating the same. The truck and trailer ran off the side of a bridge near Clover, Virginia, and Roth was killed.

The North Carolina Industrial Commission found that Roth, at the time of his injury and death, was an employee of the Motor Lines within the meaning of our Workmen's Compensation Act and made an award against it and its insurance carrier. They appealed to the Superior Court. The court below affirmed and the Motor Lines and its insurance carrier appealed to this Court. The plaintiff also appealed. This Court, speaking through *Barnhill J.,* later *C. J.,*

said "There is no contest as to the right of plaintiffs to death benefit compensation under the Workmen's Compensation Act. G.S. 97-38, *et seq.* The controversy is as to which group of defendants is liable therefor. (The lessors, the lessee and its insurance carrier, were parties defendant.) As to this there is no valid ground for debate. The judgment entered must be affirmed for two reasons:

"(1) Roth, at the time of his injury and death, was operating a vehicle being used by the Motor Lines to haul freight in the course of its business as a common carrier under franchise from the Interstate Commerce Commission. The vehicle was being operated under its identification plate. 'The operation of the truck was in law under the supervision and control of the interstate franchise carrier and could be lawfully operated only by those standing in the relationship of employees to the authorized carrier.' *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71.

"(2) It is stipulated in the lease contract that while they are in the service of the Motor Lines, the vehicle and its driver shall be under the exclusive supervision, control, and direction of the lessee. The all-inclusive extent of this right of control is spelled out in the lease in detail. As the Motor Lines has contracted, so it is bound."

It is true that ordinarily Jones was the driver for Williamson Truck Lines and the plaintiff was used from time to time as a driver for this firm. But the test is this: For whom was the plaintiff working as an employee at the time of the accident? The Commission settled that question when it found as a fact that the plaintiff sustained an injury by accident arising out of and in the course of his employment with Mercury Motor Express, Inc.

In the *Roth* case, this Court further said: "The plaintiffs' appeal was precautionary. They are entitled to recover from either one or the other group of defendants. They wish to protect their rights in this respect in the event the Court concludes the Motor Lines and its insurance carrier are not liable. Their appeal is dismissed and they will be taxed with the costs of their brief.

"As to the Motor Lines and its insurance carrier, the judgment entered is affirmed."

We do not interpret the *Roth* case to hold, as the plaintiff contends, that under that decision the plaintiff has the right to elect and determine from which group of defendants recovery is to be had. Neither does the fact that our Industrial Commission did not have jurisdiction over the defendant Mercury Motor Express, Inc. and

its carrier or change in any respect the plaintiff's rights against Williamson Truck Lines.

Unless the lapse of time has barred the plaintiff's claim against Mercury Motor Express, Inc., we know of no reason why he may not press his claim against that corporation in the proper forum.

In view of the conclusions we have reached and the authorities cited herein, we are constrained to uphold the judgment entered in the court below.

Affirmed.

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LINWARD A. CLARKE, EXECUTOR OF THE ESTATE OF MAGGIE M. CLARKE, PETITIONER, v. RUDOLPH B. CLARKE; JAMES EDWARD CLARKE, GEORGE LEE CLARKE, LINWARD CLARKE, RUDOLPH CLARKE, JR., FLORINE CLARKE, AND DOROTHY JEAN CLARKE, MINOR CHILDREN OF RUDOLPH B. CLARKE, DEFENDING HEREIN BY THEIR GUARDIAN AD LITEM, J. S. LIVERMON; NORMAN M. CLARKE, MAGALINE CLARKE, NORMAN M. CLARKE, JR., LAWRENCE CLARK, BEUNA KELLY CLARKE, LOUIS McCOY CLARKE, AND MORRIS CLARKE, MINOR CHILDREN OF NORMAN M. CLARKE, DEFENDING HEREIN BY THEIR GUARDIAN AD LITEM, J. S. LIVERMON; NICHOLAS LONG, GUARDIAN AD LITEM FOR THE UNBORN CHILDREN OF RUDOLPH B .CLARKE AND NORMAN M. CLARKE; GEORGE A. HUX, ANCILLARY ADMINISTRATOR OF THE ESTATE OF CORNELIUS CLARKE, DECEASED, SON OF TESTATRIX WHO DIED SUBSEQUENT TO TESTATRIX, A RESIDENT OF THE STATE OF NEW YORK; PATSY McKAY, ROSANNA McKAY, CHARLES McKAY, JR. AND FREDDIE McKAY, CHILDREN OF A DECEASED CHILD OF CORNELIUS CLARKE, DECEASED SON OF TESTATRIX, DEFENDING HEREIN BY THEIR GUARDIAN AD LITEM, GEORGE A. HUX; MADELINE CLARKE BLOUNT; LINWARD A. CLARKE, INDIVIDUALLY; MASSENA J. CLARKE, ADMINISTRATRIX OF THE ESTATE OF CORNELIUS CLARKE, MASSENA J. CLARKE, INDIVIDUALLY; GEORGE CLARKE; MARY CLARKE DAVIS; MARION CLARKE MARTIN; AND CORNELIUS CLARKE, JR., RESPONDENTS.

(Filed 12 October, 1960.)

**1. Wills § 34c—**

A bequest of funds to the heirs of testatrix' living son to be used for educational purposes, with any money left over to be divided among testatrix' children, transmits the funds to the children of the son living at the time of the death of testatrix, and is not subject to be opened up to let in after-born children, it being apparent from the will that the word "heirs" was not used in its technical sense. G.S. 41-6. The distinction is pointed out where there is an intervening life estate, in which event the limitation over to children would be subject to be opened up to admit after-born children.

**2. Wills § 33h—**

The rule against perpetuities provides that 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.

**3. Same—**

A bequest of funds to the heirs of testatrix' living son to be used for their education does not violate the rule against perpetuities, the word "heirs" being construed to mean children, and the bequest being to the children living at the time of testatrix' death in accordance with the intent of testatrix as gathered from the entire instrument.

**4. Wills § 32—**

The presumption is that testatrix intended to make a legal and valid disposition of her property.

**5. Wills § 31—**

In construing a will, the court may not add to valid portions thereof provisions which are not therein expressed.

**6. Wills § 33d—**

A bequest of funds to the children of testatrix' son to be used for educational purposes, with provision that the executor should pay the funds to the father whenever the children qualified to receive them, with further limitation of any unused funds to testatrix' children, requires that the executor retain the funds and administer the trust by providing the father with funds to meet college expenses when each particular child enters college, and the time of the termination of the trust depends on many varying circumstances, although it can not extend beyond the time within which the funds may be used for the purposes of the trust. Further testamentary provision that the funds might be used by the parties in case of dire necessity is a subordinate feature which does not affect this result.

**7. Wills § 33g—**

Funds of the estate not impressed with a trust and undisposed of by will should first be resorted to for the payment of debts of the estate, funeral expenses and cost of the administration, and any funds remaining after such payment should be distributed according to the law of intestacy in effect at the time of testatrix' death.

**8. Wills §§ 32½, 33c—**

A gift of the residue of a trust fund, remaining after the administration of the trust, vests in the specified beneficiaries upon the death of testatrix, even though it is uncertain that there will be any residue, and the beneficiaries take a transmissible interest.

**9. Wills §§ 35, 33½—**

Where the gift of a share of the residue of a trust fund stipulates

that the share of one of the beneficiaries is to be used for designated purposes, the directions regulating the mode of enjoyment of the gift does not render the gift less than absolute, and such beneficiary takes a transmissible interest even though, if the gift is distributed during the lifetime of the beneficiary, it is the duty of the trustee to supervise its expenditure in accordance with testatrix' directions.

APPEAL from *Parker, J.*, December 1959 Term, of HALIFAX.

This proceeding was instituted pursuant to the Declaratory Judgment Act (G.S. 1-253 *et seq.*) for construction of the will of Maggie M. Clarke. The petitioner is Linward A. Clarke, executor. Maggie M. Clarke died 9 November 1958. The will, dated July 14, 1952. was admitted to probate 1 December 1958 and is as follows:

(1) "That I Maggie M. Clarke of Scotland Neck, Halifax County, North Carolina, a farmer, being in ill health and of sound and disposing mind and memory, do make and publish this, my last will and testament.

(2) "And as to my war bonds, I devise, bequeath and dispose thereof in the manner following, to wit:

(3) "First, my will is that all my just debts and funeral expenses shall, by my executors herein-after named, be paid out of ..... and as soon after my decease as shall by them be found convenient.

(4) "I give 50% of my War Bonds and their accumulation to the heirs of my son, Norman M. Clarke, to be used for College education only.

(5) "I give the remaining 50% of my War Bonds and their accumulation to the heirs of my adopted son, Rudolph B. Clarke, to be used for College education only.

(6) "The War bonds and their accumulation is to be issued by my executor to the fathers of the heirs when ever the heirs qualify to receive it. If the father becomes incapacitated, the money is to be drawn and payed to the institution by my executor.

(7) "In case of emergency or dire necessity, the amounts as above mentioned and the may be used for this purpose by the parties above stated. Should none of this money be used or if any of it is left after the College Education of these heirs has been paid for, the amount is to be equally divided between and among my children, Cornelius C. Clarke, Linward A. Clarke, Norman M. Clarke, Madelian L. Clarke Blount and Rudolph B. Clarke; Rudolph B. Clarke's amount is to be used for, business investment, home improvement, or illness or hospitalization.

(8) "And, lastly, I do nominate and appoint my son, Linward A Clarke to be the executor of this my last will and testament. And

should he become incapacitated, my daughter, Madelien L. Blount is to act in his stead." (The numbering of paragraphs is ours.)

The sole assets of the estate are: United States Government bonds, $11,504.40; savings accounts in banks, $6,053.03. These values are as of the date of testatrix's death.

Testatrix was survived by her five children; Linward A. Clarke, Cornelius C. Clarke, Madeline L. Clarke Blount, Norman M. Clarke and Rudolph B. Clarke (an adopted child).

Since the institution of this proceeding Cornelius C. Clarke died, leaving issue.

At the time of the death of testatrix Norman M. Clarke and Rudolph B. Clarke each had six living children, all minors. These children are represented herein by J. S. Livermon, guardian *ad litem*.

Nicholas Long is guardian *ad litem* for the unborn children of Norman M. Clarke and Rudolph B. Clarke. George A Hux is guardian *ad litem* for four minor grandchildren and heirs at law of Cornelius C. Clarke, deceased.

Petitioner executor propounds questions:

(1) Does the word "heirs," as used in paragraphs 4 and 5 of the will, mean "children"?

(2) If so, did testatrix intend that any and all children of Norman and Rudolph born after her death share in the benefits provided for in paragraphs 4 and 5?

(3) What time or age limit is placed upon the use of the bonds by the children for college education?

(4) Shall the executor retain and administer the fund for educational purposes or should it be divided and delivered to Norman and Rudolph?

(5) After termination of the trust for educational purposes, how should the residue be distributed? Should Rudolph's share be held in trust for the uses specified in paragraph 7?

(6) If there is a surplus in the savings accounts after payment of debts, funeral expenses and costs of administration, how should it be distributed?

The court below ordered and adjudged: (a) If debts, funeral expenses and administration costs exceed the savings accounts, resort shall be had to the bonds for payment of the balance; if there is a surplus in the savings accounts after payment of these items, it shall be distributed according to the law of intestacy applicable 9 November 1958. (b) The provisions of paragraphs 4 and 5 violate the rule against perpetuities, and the bonds shall be now distributed 1/5 each to Linward A. Clarke, Madeline L. Clarke Blount, Norman

M. Clarke, and the administrator of Cornelius C. Clarke, and 1/5 shall be held in trust for Rudolph B. Clarke for the uses specified in the will.

Livermon and Long, guardians *ad litem,* appealed on behalf of their respective wards.

*Nicholas Long, Guardian Ad Litem for the unborn children of Rudolph B. Clarke and Norman M. Clarke, appellant.*

*J. S. Livermon, Guardian Ad Litem for the living minor children of Rudolph B. Clarke and living minor children of Norman M. Clarke, appellant.*

*George A. Hux, Guardian Ad Litem for Patsy McKay, Rosanne McKay, Charles McKay, Jr., and Freddie McKay, minors, and ancillary administrator of the estate of Cornelius Clarke, appellees.*

MOORE, J. "A limitation by . . . will . . . to the heirs of a *living* person, shall be construed to be to the children of such person, unless a contrary intention appear by the . . . will." G.S. 41-6. (Emphasis added.) In paragraphs 4 and 5 of the will of Maggie M. Clarke provision is made for the college education of the "heirs" of testatrix's sons, Norman and Rudolph. These sons were living at the time of the execution of the will and survived the testatrix. There is nothing in the will which indicates that testatrix intended to use the word "heirs" in its technical sense. Indeed a contrary intent is shown. It is provided in paragraph 7 that Norman and Rudolph are to share in the residue of the bonds after termination of the trust. Therefore testatrix contemplated that they might outlive the trust. Obviously she did not intend by the word "heirs" to designate beneficiaries of the trust as of the date of the deaths of Norman and Rudolph. Our construction is that the word "heirs," as used in paragraphs 4 and 5, means "children." *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404.

As corrected, paragraph 4 reads: "I give 50% of my war bonds and their accumulation to the *children* of my son, Norman M. Clarke, to be used for college education only." This item must be construed to mean that testatrix gave the bonds, to be used for college education, to the children of Norman who were living at the death of the testatrix. ". . . (a) legacy given to a class immediately, vests absolutely in the 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,* 53 N.C. 421, 422. But where the gift is not immediate and there is an intervening life estate, the rule is otherwise. *Ibid,* 422. See also *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. The rule quoted above has been consistently adhered to in this jurisdiction. *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. Johnston,* 70 N.C. 576, 579.

What is ordinarily denominated "the rule against perpetuities" is as follows: 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. *Parker v. Parker,* 252 N.C. 399, 402-3, 113 S.E. 2d 899; *McPherson v. Bank,* 240 N.C. 1, 15, 81 S.E. 2d 386.

The beneficiaries under the provisions of paragraph 4 were designated and in being at the death of the testatrix. Since the benefits were for their personal enjoyment, their rights thereto must vest, if at all, during their lives. Therefore, the rule against perpetuities has no application here and paragraph 4 is a valid testamentary disposition. What is said here with respect to paragraph 4 is equally applicable to paragraph 5, and it is likewise valid. The beneficiaries in paragraph 5 are the children of Rudolph who were living at the death of testatrix. There is nothing in the will which shows an intention on the part of the testatrix to avoid the quoted rule in the *Mason* case. "In our opinion, the testatrix did not intend a disposition of her property which would violate the rule against perpetuities." *Elledge v. Parrish,* 224 N.C. 397, 400, 30 S.E. 2d 314. The presumption is that the testatrix intended to make a legal and valid disposition of her property. *Trust Co. v. Waddell,* 234 N.C. 454, 460, 67 S.E. 2d 651.

The factual situation in *Parker v. Parker, supra,* though somewhat similar to that in the instant case, is distinguishable. In item 6 of the Parker will there was a devise of land to Cheshire J. Parker for life with remainder over at his death to his children. This was a gift to a class, subject to a life estate. The gift vested in those children of Cheshire J. Parker who were living at the death of the testator, subject to open up and make room for his after-born chil-

dren. In item 7 of the Parker will land was devised to Cheshire J. Parker in trust, the income to be used for college education of children. In item 7, the only designation of beneficiaries is the words "the children." Without reference to item 6 there is no way to determine what children or whose children are intended. Therefore, the only permissible inference is that "the children" are those children referred to in the preceding paragraph. "The children" in the preceding paragraph included after-born children. This then is one of the differentiating features of the *Parker* case. It is true that there are also important considerations in Parker as to remoteness of vesting of title which do not arise here. The two cases are significantly different.

In the case at bar the will sets no time or age limitations on the use of the funds by the beneficiaries for college education. "The court cannot make a will for the testator nor add to the valid portions of his will provisions which are not therein expressed." *Hodges v. Stewart*, 218 N.C. 290, 292, 10 S.E. 2d 723. The time of termination of the trust, for college education, may depend on many varying circumstances which cannot now be foreseen. In apt time it may be determined by the beneficiaries themselves or by the court in an appropriate proceeding. The provision of the will that trust funds may "in case of emergency or dire necessity . . . be used . . . by the parties" is a subordinate feature of the trust and the time within which such use may be made of them will not extend beyond the termination of their use for college education.

It seems to us clear that it is the intention of the testatrix, as gathered from paragraph 6, that the executor retain the bonds and administer the trust. Direction is given that the fund is to be issued to the father whenever the children "qualify to receive it." This means that when a particular child enters college and pursues his or her studies there, the executor is to provide the father with funds to meet the expense. This is a matter of convenience in administration. It relieves the executor of much detail, to a large extent frees him of the responsibility for seeing that the individual expenditures are proper, and makes the fund more readily available to the child. The conclusion that the executor is charged with the duties as trustee of the fund is further borne out by the provision that, at the termination of the trust, the residue is to be divided among the five children of testatrix. This can be best achieved if the fund is retained and administered by one person.

Equity requires that resort, for the payment of decedent's debts, funeral expenses and the costs of administration, first be had to

the assets of the estate which have not been impressed with the trust — the savings accounts. If these prove insufficient, recourse must be had to the bonds as far as necessary. But, if after payment of these items, any sum remains from the savings accounts, it shall be distributed according to the law of intestacy in effect 9 November 1958.

The gift of the residue of the trust fund in equal shares to testatrix's five children, as set out in paragraph 7, vested in these legatees upon the death of testatrix, and the share of each then became descendible and bequeathable through and by them respectively. *Little v. Trust Co.*, 252 N.C. 229, 249-250, 113 S.E. 2d 689. After naming Rudolph as one of the residuary legatees and giving him one of the five shares, the will states: "Rudolph B. Clarke's amount is to be used for, business investment, home improvement, or illness or hospitalization." It is our opinion that this provision does not render the gift to him of less quality than absolute; it is descendible and bequeathable through and by him. "Directions regulating mode of enjoyment of an absolute gift will not cut it down." 96 C.J.S., Wills, s. 841, p. 269. *Louderbough v. Weart*, 25 N.J. Eq., 399; *Simmons v. Simmons*, (Conn. 1923) 121 A. 819, 821. The directions regulating the mode of enjoyment of the gift are intended to apply to Rudolph personally. If the residue of the trust fund is distributed during his lifetime, it is the duty of the executor-trustee to supervise the expenditure of Rudolph's share in accordance with the directions above quoted.

No specific directions for distribution of the shares of the residue of the trust fund are presently possible. What is said in the preceding paragraph will guide the ultimate distribution. No one can now know who will finally be entitled to answer roll call.

The judgment below is reversed in so far as it is in conflict herewith and the cause is remanded to the end that judgment be entered in conformity with this opinion.

Reversed and remanded.

## MARY S. MERCER v. GRADY MERCER.

(Filed 12 October, 1960.)

**1. Divorce and Alimony § 18—**

G.S. 50-16 provides not only for alimony without divorce but also for reasonable subsistence and counsel fees *pendente lite*, and in the wife's action under G.S. 50-16 in which the complaint sets forth grounds for divorce from bed and board under G.S. 50-7, the court has authority upon appropriate findings to grant her reasonable subsistence and counsel fees pending the action.

**2. Same: Appeal and Error § 41—**

In a hearing by the court upon the wife's application for alimony and subsistence *pendente lite*, the admission of incompetent evidence, adduced for the purpose of showing the husband's financial status, will not be held for prejudicial error when it is not made to appear that the court's allowance of subsistence was affected thereby, since it will be presumed, in the absence of a showing to the contrary, that the court disregarded incompetent evidence in making its decision.

**3. Divorce and Alimony § 18—**

Since the court has authority under G.S. 50-16 to require the husband to secure so much of his estate as may be proper to insure the payment of subsistence *pendente lite* ordered by the court, the court may properly consider transfers by the husband of property to his children, assertedly made by the husband to defeat the wife's rights to subsistence, as an aid to the court in determining whether or not it should require the husband to secure part of his property for the payment of the subsistence.

**4. Same—**

Where, upon the hearing of the wife's application for subsistence and attorney's fees *pendente lite* in her action for alimony without divorce, the court hears conflicting evidence in regard to the respective financial status of the parties, the crucial findings of fact of the court in favor of the wife are binding on appeal if supported by competent evidence, notwithstanding that the husband has offered evidence to the contrary.

**5. Same—**

Under G.S. 50-16, the court is authorized to allow the wife subsistence and counsel fees *pendente lite* as may be proper according to the husband's condition and circumstances, having regard also to the separate estate of the wife, and therefore, by express provision of the statute, the fact that she has a separate estate of her own does not necessarily defeat her right to such temporary allowances.

**6. Same—**

Where the court hears evidence as to the respective financial status of the parties and makes specific findings as to the financial condition of both the husband and wife, and fixes the amount of alimony in his discretion after due consideration of the circumstances of both parties, the amount of the allowances will not be disturbed on appeal unless they

are so excessive or unreasonable under the circumstances as to amount to an abuse of discretion.

**7. Injunctions § 3—**

Ordinarily, injunction will not lie where there is a full, adequate and complete remedy at law which is as practical and efficient as the equitable remedy.

**8. Divorce and Alimony § 18—**

It is error for the court in awarding subsistence and counsel fees *pendente lite* under G.S. 50-16 to enjoin the husband from disposing of his property to prevent him from defeating the court's order for subsistence, since the authority of the court under G.S. 50-16 to cause the husband to secure so much of his estate as may be proper to pay the allowances ordered, and the power of the court to enforce its order by punishment for contempt, provide legal remedies as practical and efficient as the remedy of injunction.

APPEAL by defendant from *Bundy, J.*, 3 June 1960, in chambers at Kenansville. DUPLIN.

Civil action for alimony without divorce, G.S. 50-16, heard upon an order issued by Bundy, J., holding the courts of the district, requiring the defendant to appear in the Superior Courtroom in Kenansville, Duplin County, at 10:30 a.m., 3 June 1960, and show cause, if any he can, why an order should not be issued directing him to pay an allowance to plaintiff, his wife, for her subsistence and counsel fees *pendente lite*, and why he should not be enjoined from disposing of any of his property pending the final determination of the action. Both parties appeared at the hearing, and offered evidence.

From an order allowing plaintiff for subsistence $1,000.00 to be paid on 15 June 1960, and $500.00 to be paid on the 15th day of each month thereafter and counsel fees of $3,500.00, until the final determination of the action, and enjoining defendant from disposing of or mortgaging any part of his property *pendente lite*, except that defendant is permitted to draw cheques on any bank account he may have, and with the consent of court may borrow funds to pay the allowances made by this order to plaintiff and to carry on his farming operations, defendant appeals.

*Hubert E. Phillips and Albion Dunn for plaintiff, appellee.*
*Russell Lanier and Jones, Reed & Griffin for defendant, appellant.*

PARKER, J. G.S. 50-16 under which plaintiff seeks relief provides two remedies — one, for alimony without divorce, and the other, for a reasonable subsistence and counsel fees pending the trial and

final disposition of the issues involved in such action. *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226, and cases there cited.

G.S. 50-16 provides, that "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, . . . , or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board," she may institute an action for reasonable subsistence and counsel fees.

G.S. 50-7 provides, "the superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases: 1. If either party abandons his or her family, . . . , 4. Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

Plaintiff in her complaint has alleged facts sufficient to constitute a good cause of action under the provisions of G.S. 50-16. *Ipock v. Ipock,* 233 N.C. 387, 64 S.E. 2d 283. There is no plea, or even any suggestion, of adultery on the part of the plaintiff.

Judge Bundy in his order found the facts in great detail. His crucial findings of fact are in substance: Plaintiff and defendant were married on 1 September 1934, and thereafter lived together as man and wife until 18 January 1959. Two children were born of the marriage: a daughter now 22 years of age, and a son now 19 years of age. Plaintiff has taught school for many years in Duplin County. She provided the funds for the maintenance and support of her husband so as to permit him to complete his law studies at the University of North Carolina. She further contributed to his support, when he opened a law office in Duplin County. From her salary as a school teacher and from the proceeds of a small amount of property she owned in South Carolina, she bought a home for her husband and children — her husband never provided a home for them —, and provided food for the family, and bought clothes for the children, and at times for defendant. After their marriage defendant accumulated a large estate. During the last several years he has manifested to his wife a harsh and dictatorial manner. Defendant owns and drives a Cadillac car, and refused to permit his wife to go with him, saying "I don't want to be seen in public with you." For the past several years he has had a cottage at Carolina Beach, where during the beach season he has spent his week-ends, and has refused to allow his wife to go there with him.

Judge Bundy found facts in great detail to this effect: On 18 January 1959 defendant wilfully abandoned his wife without any adequate cause or provocation on her part, and since that time has lived

separate and apart from her providing her with no support at all. Judge Bundy further found facts in great detail to the effect that defendant without any adequate cause or provocation on his wife's part offered such indignities to her person as to render her condition intolerable and life burdensome.

Judge Bundy's findings of fact as to the financial means of the parties are as follows: Plaintiff receives a salary as a school teacher, and has a small income from property in South Carolina. She owns a home in Beulaville from which she derives no income, and upon which she pays the taxes and upkeep. Defendant is a man of considerable wealth. He has real and personal property in Duplin County, which has a tax value of $26,737.00. This property is listed for taxes at one-third of its estimated worth. In 1959 and 1960 he had a tobacco allotment on his farms in Duplin County of over 29 acres for each year. The value of farm lands in Duplin County is based upon the tobacco allotment, and has a reasonable market value of $4,500.00 to $5,000.00 per acre of tobacco allotment. From this tobacco allotment defendant has a net minimum income of $300.00 per acre. He is the owner of notes secured by mortgages or deeds of trust in the sum of $16,461.86. In the names of his daughter and son, or in the name of one of them, he has loaned to various people $42,609.62, which amounts are secured by deeds of trust naming him as trustee. His children had no means to make such loans, and the money was supplied by defendant. Defendant has conveyed to his children real estate of considerable value. On 6 April 1960 for the nominal sum of $300.00 he sold to his brother 38 cows and 15 calves. He receives from the State of North Carolina an annual salary of $10,500.00 as a member of the North Carolina Industrial Commission.

Defendant assigns as error that the judge over his objection permitted plaintiff to introduce in evidence the following part of an annual report on tobacco statistics issued by the U. S. Department of Agriculture for the purpose of showing the average per acre production of tobacco in the Eastern North Carolina Bright Leaf Belt for 1959: "1550 pounds for the year 1959 at an average price of 59 cents plus per pound; for 1958, 1691 pounds and at 55.4 cents per pound." In *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668, it is said: "In Annotated Cases 1917C p. 660 *et seq.*, there is a note entitled 'Effect of Admission of Incompetent Evidence in Trial before Court without Jury,' where the cases are collected from a large number of states and from the Federal courts. In this note it is stated: 'The general rule deducible from the cases appears to be that where a case has been tried before the court without a jury the

admission of incompetent evidence is ordinarily deemed to have been harmless unless it affirmatively appears that the action of the court was influenced thereby. In other words it is presumed that incompetent evidence was disregarded by the court in making up its decision.' In support of the text decisions are cited from 23 States, the Federal courts, and the District of Columbia." Judge Bundy in his elaborate findings of fact has found no fact based on this report. It does not affirmatively appear that the order of the court was influenced thereby. Even if the admission in evidence of part of this report was error, such evidence was harmless, and did not prejudice defendant. The assignments of error as to this evidence are overruled.

Defendant assigns as error the admission in evidence over his objections of deeds of trust securing indebtedness payable to his children, and of deeds to them for real property. It appears from a study of the record — and plaintiff so states in her brief — that these instruments were offered for the purpose of showing that defendant was disposing of his property in order to defeat the payment of any allowance made to the wife for her reasonable subsistence. Defendant does not contend in his brief that the judge was influenced in his action in any way in fixing the amount of reasonable subsistence for his wife and the amount of her attorneys' fees *pendente lite* by such evidence. His sole contention as to this evidence is stated in his brief as follows: "The record evidence was therefore not competent as bearing upon any issue arising on the pleadings filed in the above-entitled action, and its admission, over defendant's objection, should be held for error."

Plaintiff in her complaint alleges in substance as a basis for an injunction restraining her husband from disposing of any part of his estate that he has threatened to dispose of his property, both real and personal, and to secrete the same for the purpose of defeating her rights under G.S. 50-16. G.S. 50-16 provides that the court in allowing reasonable subsistence and counsel fees to the wife *pendente lite* can cause the husband to secure so much of his estate or to pay so much of his earnings, or both, for such purposes, as may be proper. We consider the admission in evidence of the above instruments was not prejudicial to defendant, so far as the allowance of subsistence to plaintiff and counsel fees are concerned, and that such instruments were admissible for the purpose of the judge's consideration of the question as to whether or not he should cause defendant to secure the allowances made in the order on his estate, as he was disposing of a fair amount of his property. These assignments of error are overruled.

Defendant in his brief states: "*ASSIGNMENTS OF ERROR 4-20; 22-24* (R pp. 100-110), supported by EXCEPTIONS 42-58; 60-62 (R pp. 21-30; 97-99), challenge the Findings of Fact, Conclusions of Law and decree allowing alimony to the plaintiff *pendente lite,* and attorneys' fees."

The evidence offered by plaintiff and defendant was in sharp conflict. It was the trial judge's duty to pass upon the credibility of the evidence. He found the facts as shown by plaintiff's evidence, and not as shown by defendant's evidence. A study of the evidence shows that Judge Bundy's crucial findings of fact are supported by competent evidence, and such findings of fact are binding on appeal, notwithstanding the defendant has offered evidence to the contrary. *Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349; *Bryant v. Bryant,* 228 N.C. 287, 45 S.E. 2d 572; *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138. To this rule there is this exception, this Court has the right to review findings of fact with respect to interlocutory orders denying or granting injunctive relief. *Cauble v. Bell,* 249 N.C. 722, 107 S.E. 2d 557.

Defendant contends that no allowances of a reasonable subsistence and counsel fees should be made, for the reason that "having regard also to the separate estate of the wife," G.S. 50-16, it appears from Judge Bundy's findings of fact that plaintiff has sufficient means to cope with her husband in presenting her case to the court.

In *Bowling v. Bowling* 252 N.C. 527, 114 S.E. 2d 228, the Court quotes from 41 C.J.S., Husband and Wife, sec. 15, pp. 404 *et seq.,* as follows: "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."

In *Heflin v. Heflin,* 177 Va. 385, 14 S.E. 2d 317, 141 A.L.R. 391, the Court said: "The obligation of the husband to support his wife exists regardless of whether or not she is destitute and in necessitous circumstances."

This is said in 27 Am. Jur., Husband and Wife, p. 22: "There is disagreement as to the effect of a wife's separate property or

means on whether a temporary allowance of alimony, suit costs, and counsel fees will be allowed. According to one view, the fact that the wife has property and income of her own does not necessarily defeat her right to a temporary allowance, even though it may affect the amount of the allowance. According to a different view, where property and income of the wife are ample, there is no reason for allowing temporary alimony. There are some cases which go to the extent of denying any temporary allowance from the income of the husband while the wife has property remaining which she may subject to the payment of the expenses of the litigation and to her support. Temporary alimony, but not suit costs or attorneys' fees, has been allowed, where the wife had means to prosecute the suit without jeopardizing her rights."

G.S. 50-16 provides that the judge in a proper case can make an allowance for subsistence and counsel fees *pendente lite*, "as may be proper, according to his condition and circumstances, for the benefit of his said wife . . . , having regard also to the separate estate of the wife." Therefore, according to the express language of this statute a wife in a proper case may be allowed reasonable subsistence and counsel fees *pendente lite*, and the fact that she has a separate estate of her own does not necessarily defeat her right to such temporary allowances.

Judge Bundy states in his order: "And the foregoing allowances are made in the discretion of the court, and after due consideration of the circumstances of both plaintiff and defendant."

The Court said in *Fogartie v. Fogartie, supra:* "The amount of the allowances to plaintiff for her subsistence *pendente lite* and for her counsel fees is a matter for the trial judge. He has full power to act without the intervention of the jury (citing authority), and his discretion in this respect is not reviewable, except in case of an abuse of discretioin. Citing authorities."

The crucial facts found by Judge Bundy, supported by competent evidence, are amply sufficient to support his allowances to his wife for subsistence and counsel fees *pendente lite*, and it cannot be held upon the facts found by him that the allowances made to the wife *pendente lite* were so excessive or unreasonable considering the property and income of plaintiff and defendant as to amount to an abuse of discretion. Surely, it cannot be contended upon the facts found by the judge that plaintiff with the small amount of property she owns and her income as a teacher and a small amount of income from property owned by her in South Carolina had sufficient means, without embarrassing herself financially, to cope successfully with

her husband, a man of considerable means and large income, in presenting her case to the court.

All defendant's assignments of error in respect to the allowances of subsistence and counsel fees *pendente lite* are overruled.

Defendant assigns as error that part of the order enjoining him from disposing of or mortgaging any part of his property *pendente lite*, with the exceptions therein recited.

"Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy." *In re Davis*, 248 N.C. 423, 103 S.E. 2d 503, and cases there cited.

By virtue of G.S. 50-16 the trial judge could have caused the defendant to secure so much of his estate as proper to pay the allowances made in his order. For a wilful failure on defendant's part to pay the allowances here made, if this should occur, the court can enforce its order by punishment of the defendant for contempt. Such legal remedies are as practical and efficient under the facts found here as the equitable remedy of an injunction. This assignment of error is sustained.

The order entered by Judge Bundy below is affirmed, with this exception, the injunction issued in such order will be dissolved.

Modified and affirmed.

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W. T. WIGGINS v. GEORGE TRIPP, MAJOR TRIPP AND CRAVEN LUMBER COMPANY, A CORPORATION.

(Filed 12 October, 1960.)

**1. Appeal and Error §§ 29, 31—**

Even when appellee's exceptions to the appellant's statement of case on appeal are deemed allowed, or the counter-case served by appellee constitutes the case on appeal, by reason of appellant's failure to make apt request that the trial judge fix a time and place for settling the case on appeal, the duty remains on appellant to have the statement of case on appeal, as thus modified, redrafted and submitted to the judge for his signature, and when he fails to do so there is no case on appeal. G.S. 1-282 and G.S. 1-283.

**2. Same—**

Order of the Supreme Court granting time in which to serve statement of case on appeal and time in which to serve exceptions or counter-case, and providing that if the case should not be settled by agreement it

should be settled by the judge within a given time, does not relieve appellant of the duty to comply with the provisions of G.S. 1-282 and G.S. 1-283, including the duty to request the judge to settle the case.

**8. Appeal and Error § 28—**

Where there is no proper statement of case on appeal, the appeal will be dismissed in the absence of error appearing on the face of the record.

APPEAL by defendant George Tripp from *Bundy, J.*, at October 1959 Civil Term, of CRAVEN.

Civil action instituted 14 November 1953, to try title to certain lands described in the complaint and for damages for trespass thereon.

Defendant George Tripp, while admitting that plaintiff is the owner of and in possession of certain lands in No. 1 Township, Craven County, North Carolina, specifically denies that plaintiff is the owner of or in possession of the lands described in paragraph one of the complaint. And this defendant sets up claim of ownership to two tracts of land allegedly purchased from Mae Morris Wiggins and husband M. M. Wiggins specifically set forth in paragraph one of defendant's further defense — basing ownership by ripening of title by seven years adverse possession under color of title.

By leave first had plaintiff filed amendment to his complaint in lieu of paragraph one set out in the complaint, alleging ownership and possession of a more specifically described tract of land containing 38 acres.

On 20 February 1954, judgment by default, in absence of answers filed, was rendered against defendant Major Tripp and Craven Lumber Company, declaring plaintiff is the owner of the lands described in the complaint, and of the logs that have been cut or removed or are now lying upon the land as described in the complaint, and that said defendants are permanently restrained and enjoined from trespassing thereon, etc.

Thereafter on 29 November 1954, Parker, J., upon it appearing that this action should be referred for the reason that the case involves a complicated question of boundary, or one which requires a personal view of the premises, Sec. 1-189, subsection 3, of G.S., compiled in 1953, of his own motion ordered reference to D. C. McCotter, Jr.

To the foregoing order of compulsory reference both plaintiff and defendants object and each reserved constitutional right to a jury trial of the issues of fact arising on the pleadings.

On application dated 4 February 1957, Frizzelle, J., accepted the

resignation of McCotter as Referee, and appointed in his stead R. A. Nunn— with all the powers and duties imposed by statute upon referees, and directed him to hear the cause as expeditiously as possible.

To the foregoing order plaintiff and defendants except, and expressly reserve their right to trial by jury.

After hearing duly had, the referee made his report on 20 January 1959. To this report defendant filed several exceptions and amended exceptions.

Thereafter the cause coming on to be heard at October 1959 Civil Term of Superior Court of Craven County, and being heard by Bundy, J., who by consent retained same with agreement in open court that he might determine the matter upon the exceptions of defendants out of the county and out of term as though filed in term and in the county; and having made such determination, the court thereupon considered and adjudged: (1) That the exceptions are without merit and should be overruled and the Referee's Report confirmed both as to his findings of fact and conclusions of law which by reference are incorporated in and made a part of the judgment; (2) that plaintiff, W. T. Wiggins, is the owner of and entitled to the possession of the lands described in the complaint as amended— specifically described; (3) that defendants be permanently restrained and enjoined from trespassing upon said lands, etc., and the cause be retained for the assessment of damages by a jury as to the cutting of timber by defendants upon said lands; and (4) that a copy of the court map shall be filed with this judgment, and that the judgment with copy of map attached, shall be certified by the Clerk of the court to the Register of Deeds of Craven County for recordation in the office of the Register of Deeds of Craven County,— the plaintiff to recover of defendants cost of the action to be taxed by the Clerk.

The record shows this *Statement By The Court:* "An examination of the judgment in this cause hereto entered discloses that it contains no reference to the manner in which this said cause came on for disposition.

"In order to make the record speak the truth, the undersigned Judge who signed the judgment and heard the cause wishes the record to show that it came on before him at the November Civil Term of the Craven County Superior Court upon motion of the plaintiff, through his counsel, Mr. R. E. Whitehurst of New Bern. That said motion was an oral motion and that the cause was calendared for hearing upon such motion upon the Motion Calendar. That the said

motion was addressed to the alleged insufficiency of the exceptions and issues tendered by the defendants to preserve the defendants' right of appeal and a jury trial.

"That the defendants appeared with their counsel, Mr. H. P. Whitehurst of New Bern, and Wilkinson and Ward of Washington, and the matter was fully argued by both sides, and heard by the court, without objection on the part of the defendants.

"The facts as stated do not otherwise appear in the record.

"This the 6th day of January 1960.

(Signed) William J. Bundy."

On the 80th page of the record on appeal there appears the following: "The foregoing is tendered by the defendant appellant as his statement of the case on appeal. This the 28th day of April 1960. Wilkinson and Ward, Attorneys for Defendant. Service accepted, copy received, this 29th day of April 1960. R. E. Whitehurst. 29 Apr. Filed at 4:08 P. M., W. B. Flanner, Clerk Superior Court, by WBT."

Then beginning on page 81 and ending on page 93 of record appears what is captioned "Plaintiff Appellee's Exceptions to the Defendant Appellant's Statement of Case on Appeal to the Supreme Court, which was served on Appellee on April 29, 1960." Then there follows thirty-seven paragraphs of such exceptions comprising twelve pages of the record,— "Service accepted this ..... May 1960. H. P. Whitehurst, Attorney for Defendant. Filed May 24, 1960."

Further, the record on this appeal contains certificate of Clerk of Superior Court of Craven County, dated 15 August 1960, reading in pertinent part as follows: "I do hereby certify that there was filed with me on the 29th day of April 1960, at 4:08 P. M., a statement of case on appeal by the Appellant-Defendant, George Tripp, in the above matter, upon which service was accepted on the 29th day of April 1960; that on the 24th day of May, 1960, there was filed with me Exceptions to Appellant's Statement of case on appeal upon which service was accepted the same day; that the originals of both the Case on Appeal as prepared by the Appellant and the Exceptions as prepared by the Appellee, having been in my office since the dates named above; that no request has been made of me to make up the case on appeal by combining or inserting in the Appellant's Statement of Case on Appeal the exceptions and changes made by the appellee, and there appears no record of any request for Judge Bundy to settle the case on appeal * * * ."

Moreover there is in the record nothing to show a case on appeal.

And the record on this appeal shows that to the foregoing judgment defendants except, and appeal to Supreme Court.

*R. E. Whitehurst, LeRoy C. Scott, David S. Henderson for plaintiff. appellee.*

*Cecil May, H. P. Whitehurst, Wilkinson & Ward for defendant, appellant.*

WINBORNE, C. J. At the threshold of their appeal defendants are confronted with a motion to dismiss the appeal for that there is no case on appeal— and the record contains no request for the judge to settle a case on appeal.

The requirements are set forth in G.S. 1-282 and G.S. 1-283. The statute provides that the appellant shall cause to be prepared a concise statement of case on appeal and prescribes what it shall embody, and that a copy shall be served on respondent, appellee, within time given by statute or extended by order of court. It further provides that within time given in like manner respondent shall return the copy with his approval or with specific amendments endorsed or attached. If the case on appeal be returned by the respondent, with exceptions as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If, however, the appellant delays longer than fifteen days, unless time be enlarged by agreement after respondent serves his counter-case or exceptions, to make such request, or delays for such period to mail the case and counter-case or exceptions to the judge, the exceptions filed by the respondent shall be allowed, or the counter-case served by him shall constitute the case on appeal.

However it is the duty of the appellant to have the statement of case on appeal as thus modified, redrafted and submitted to the judge for his signature. *Gaither v. Carpenter,* 143 N.C. 240, 55 S.E. 625. *WNC Conference v. Tally,* 229 N.C. 1, 47 S.E. 2d 467. "Moreover, when he fails to do so there is no 'case on appeal.' *Mitchell v. Tedder,* 107 N.C. 358, 12 S.E. 193; *Waller v. Dudley,* 193 N.C. 749, 138 S.E. 128."

Let it be noted that while this Court in response to motion suggesting diminution of the record, entered an order (1) granting time in which to serve statement of case on appeal and time in which to serve exceptions or countercase, and (2) providing that if case on appeal should not be settled by agreement, same should be settled by Judge Bundy within given time, the order does not relieve appellant of duty of requesting the Judge to settle the case, and of

otherwise performing the duties imposed upon appellant by the statute. G.S. 1-282 and G.S. 1-283.

And where there is no proper statement of case on appeal, the Supreme Court can determine only whether there is error on the face of the record proper. *WNC Conference v. Tally, supra.*

Applying these provisions of the statutes interpreted by decisions of this Court, error is not made to appear upon the face of the record. Therefore the motion to dismiss is well taken, and should be granted.

Appeal dismissed.

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A. TURNER SHAW, JR., ADMINISTRATOR OF THE ESTATE OF HARRY K. MUSSELMAN, DECEASED v. PAUL G. SYLVESTER, ADMINISTRATOR OF THE ESTATE OF OTTO W. BECKER, DECEASED.

(Filed 12 October, 1960.)

**1. Automobiles § 38: Evidence § 48— Evidence of physical facts at the scene held insufficient predicate for expert testimony as to which of occupants was the driver.**

Evidence of physical facts at the scene permitting the inference that the vehicle in question, traveling at great speed, catapulted through the air, once for 37 feet and again for 55 feet, before it came to rest in a creek with its right door open and folded back into the fender and its left door torn off, that the body of one of the two occupants was found on the shoulder of the road and the body of the other occupant was found in the creek beyond the wrecked vehicle, without evidence as to whether the movement of the car in the air was end over end or otherwise, *is held* insufficient to qualify a traffic officer, notwithstanding his schooling and experience in regard to traffic accidents, to testify as to which of the occupants was driving at the time of the accident, since, even though the evidence may permit the inference as to which occupant was first thrown from the vehicle, it leaves in conjecture through which door each occupant was thrown or whether the driver or passenger was first thrown therefrom, the question being one of physics without evidence of the predicate facts upon which an expert conclusion may be drawn.

**2. Automobiles § 41p—**

Evidence of physical facts at the scene permitting the inference that the vehicle in question, traveling at great speed, catapulted through the air, once for 37 feet and again for 55 feet, before it came to rest in a creek, that the body of one of the two occupants was found on the shoulder of the road and the body of the other occupant was found in the creek beyond the wrecked vehicle, with evidence that the vehicle was

owned by one of the occupants, *is held* insufficient to be submitted to the jury on the question of which of the two occupants was the driver of the vehicle at the time of the accident.

APPEAL by plaintiff from *Parker, J.*, July 1960, Civil Term, ONSLOW Superior Court.

Civil action by the plaintiff, administrator, to recover for the alleged wrongful death of his intestate, Harry K. Musselman. The action is brought against the administrator of Otto W. Becker, the owner of a 1956 Ford coupe in which both Musselman and Becker were killed when the vehicle ran off the road on the night of November 15, 1958.

The evidence disclosed the Ford coupe with two men in it was traveling south on U. S. Highway 17 at about 1:15 a.m. After passing a highway patrol car the Ford, having increased its speed to about 80 miles per hour, failed to make a curve, ran off the road to the right, wrecked, and finally came to rest in Hicks Run Creek. Becker's dead body was on the shoulder about 6 or 8 feet from the surface a few feet beyond the point where the tracks left the shoulder and apparently plunged into the creek. Musselman's dead body was found in the creek beyond the wrecked vehicle.

Sgt. Etherage of the Traffic Division, Provost Marshal's Section of the Marine Corps, testified: "The marks left the righthand side of the road, onto the right shoulder, as tire prints, traveled a considerable distance and turned in a furrow type skid . . . similar to the furrow that a plow would throw up. . . . At the beginning, the furrows were really narrow . . . they increased in width and depth. These markings continued from where they left the highway (surface) until they stopped 187 feet. From the end of the marks . . . until there was another or more marks on the ground, was 37 feet; from that place to where there were some more marks, was 55 feet and then the car was a considerable distance from there on out in the water . . . The shoulder of Highway #17 is approximately 15 feet above the water level of the creek."

The vehicle, when taken from the creek, showed the following damage: The left side, left fenders and top were crumpled and pushed in. The left door was missing. The hood was damaged. The right front fender was "mangled." The right rear fender had some damage. The right door was opened and folded "forward against the right front fender and . . . mangled."

The plaintiff sought to qualify Sgt. Etherage as an "expert on traffic reconstruction so that he might testify, based on assuming cer-

tain facts which already are in evidence, as to which door the deceased Otto Becker was thrown from . . ." The witness gave the following testimony as to his qualifications:

"In my work with the traffic investigation division of the Marine Corps, I have investigated between 400 and 500 automobile accidents. I am a graduate of special schools in connection with this work. I graduated from N. C. Highway Patrol School last year, the Motor Vehicle Traffic Control School, Northwestern University, a month and a half or so ago. I studied traffic engineering, traffic safety and accident reconstruction at Northwestern University. At the N. C. Highway Patrol School, the majority of my instructions consisted of your N. C. Laws and liquor laws, laws of arrest, search and seizure, general laws that apply to law enforcement in this State, and there was one week of accident investigation."

The court made the following ruling to which the plaintiff excepted:

"I doubt that the opinion would be competent, under the evidence. The evidence is that the car left the highway traveling 187 feet; the last few feet looked like a plowed furrow; then there was a gap some 37 feet and then another gap of some 50 feet. As a matter of common knowledge, the inference would arise that that car would have turned in any direction. It could be going end over end or side to side. It would be more in the line of the study of physics. I think that the jury is in as good a position to draw their own opinion and conclusion from the evidence as an expert. I don't believe that this is a subject where an expert would be helpful to the jury."

The plaintiff then asked a hypothetical question including substantially all the facts in evidence, except that the right door of the vehicle was also open. The court sustained the defendant's objection. If permitted, the witness would have answered: "I have an opinion. The opinion is Becker came out the left door after the car had turned over."

The court sustained the defendant's motion for compulsory nonsuit and entered judgment dismissing the action. The plaintiff excepted and appealed.

*Charles F. Blanchard and Robert L. Farmer, for plaintiff, appellant.*
*Joseph C. Olschner, for defendant, appellee.*

HIGGINS, J. Plaintiff presents three assignments of error: (1) Failure to permit Sgt. Etherage to give his opinion that Becker was thrown from the left door of the Ford; (2) failure to hold Sgt. Ether-

age qualified as an expert "in the field of highway traffic reconstruction"; (3) failure to permit the plaintiff to go to the jury.

The evidence in the case was ample to show the defendant's intestate was the owner and one of the two occupants of the vehicle at the time of the wreck. It is ample to show that the driver was operating at approximately 80 miles per hour and that driver negligence proximately caused the death of both occupants.

Is there sufficient evidence to show defendant's intestate was the driver? This Court held in *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258, that ownership alone is not sufficient to permit a reasonable inference the owner, though in the vehicle, was the driver at the time of the wreck.

Plaintiff sought to qualify Sgt. Etherage as an expert in the reconstruction of automobile accidents and have him testify in answer to a hypothetical question that in his opinion Becker was thrown from the left door of the car and was, therefore, the driver. The facts upon the basis of which he formed the opinion were: The Ford coupe in which Becker and Musselman were riding left the hard surface of the road going south at a speed of 80 miles per hour. Tire marks and furrows plowed in the shoulders, increasing in width and depth, extended for 187 feet. At that point there was a break (indicating the vehicle left the ground) for 37 feet, at which point there were additional marks, and further on another break of 55 feet (indicating the vehicle again left the ground). A considerable distance beyond, the vehicle came to rest in the creek. The left door was gone. The right door was open and folded back into the fender. Both sides of the vehicle and the top were crumpled. The body of Becker was approximately 50 or 60 feet from the Ford. It was a little south of where the car stopped. This means the body was beyond the point where the vehicle came to rest.

The evidence permits the inference the vehicle, traveling at great speed, catapulted through the air twice, once for 37 feet and once for 55 feet, before it came to rest in the creek. Whether the movement in the air was end over end or otherwise is left to conjecture. From the position of the bodies it may be inferred that Becker was first thrown from the vehicle, but through which door is pure guesswork. The driver may or may not have been thrown from the vehicle before the passenger. That, too, is guesswork.

The known facts in this case leave too many unknowns and imponderables to permit any one to say with any degree of certainty who was the driver. This case furnishes a good illustration why "courts look with disfavor upon attempts to reconstruct traffic accidents by

means of expert testimony, owing to the impossibility of establishing with certainty the many factors that must be taken into consideration." *Conway v. Hudspeth,* (Ark.) 318 S.W. 2d 137. See also *Moniz v. Bettencourt,* 24 Cal. App. 2d 718, 76 P. 2d 535.

As a general rule, a witness must confine his evidence to the facts. In certain cases, however, an observer may testify as to the results of his observations and give a shorthand statement in the form of an opinion as to what he saw. For example, he may observe the movement of an automobile and give an opinion as to its speed in terms of miles per hour. However, one who does not see a vehicle in motion is not permitted to give an opinion as to its speed. A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require. *Tyndall v. Hines Co.,* 226 N.C. 620, 39 S.E. 2d 828.

The qualified expert, the nonobserver, may give an opinion in answer to a proper hypothetical question in matters involving science, art, skill and the like. The plaintiff contends Sgt. Etherage placed himself in this expert category by having investigated more than 400 wrecks. There is no evidence that wrecks follow any set or fixed pattern. An automobile, like any other moving object, follows the laws of physics; but which door came open first during the movement would depend upon the amount and direction of the physical forces applied, and the place of their application. There was no evidence the witness ever investigated an accident when both doors were open and both occupants thrown out. In this case neither the nonobserver nor the jury could tell who was the driver. *Tyndall v. Hines Co., supra; Everett v. Fischer,* 147 P. 189; *Burwell v. Sneed,* 104 N.C. 118, 10 S.E. 152.

The ruling of the trial court that Sgt. Etherage was not qualified to testify that Becker was thrown through the left door and, therefore, was the driver is in accordance with our decisions. The evidence at the trial was insufficient to raise a jury question. The judgment of nonsuit is

Affirmed.

BATTS *v.* GAYLORD.

REBECCA GAYLORD BATTS AND HUSBAND, LESLIE DAVIS BATTS, AND DIANE GAYLORD SOMERVILLE, A MINOR, AND HER HUSBAND, DON SOMERVILLE, AND JUDITH ANN GAYLORD, A MINOR, SAID MINORS APPEARING BY THEIR NEXT FRIEND ISA G. JOHNSTON v. BEULAH W. GAYLORD AND WILLIAM TIMOTHY GAYLORD, A MINOR, BY HIS GUARDIAN AD LITEM BEULAH W. GAYLORD.

(Filed 12 October, 1960.)

**1. Partition § 1—**

Tenants in common are entitled to partition as a matter of right, and if actual partition cannot be made without injury to some of the tenants, they are entitled to sale for partition as a matter of right, notwithstanding the claim of the widow to dower.

**2. Partition § 9—**

A widow's right to dower does not make her a tenant in common and she is not entitled to assert a claim for improvements to the land, since such claim arises only when one tenant in common makes improvements on the common property.

**3. Same: Betterments § 1—**

A claim for betterments is available only to one who makes permanent improvements while in possession of lands under color of title believed to be good, and therefore a widow may not assert a claim to betterments in a proceeding by the heirs for partition.

**4. Partition § 9—**

Separate claims of the widow against each of three children petitioning for partition for medical and educational expenses paid out of her own funds constitute a misjoinder by her in partition proceedings, since the claim against each child is independent of the claims against the others and each child has an independent right to contest the claim.

**5. Pleadings § 8—**

A cross action must have such relation to the plaintiff's claim that the adjustment of both is necessary to a final adjudication.

**6. Partition § 9—**

Ordinarily, taxes are a lien upon land and may be treated as any other docketed judgment in partition proceedings, while insurance premiums are not a lien, but where claimant alleges that she has on hand receipts from rents more than enough to pay both, she fails to state a cause of action therefor.

APPEAL by petitioners from *Morris, J.*, February 1960 Civil Term, WASHINGTON Superior Court.

Special proceeding instituted before the clerk superior court by the petitioners, children (and spouses) of W. V. Gaylord by a former marriage, against respondents, wife and minor child by second marriage, for the purpose of having real estate owned by W. V. Gaylord

sold for partition. The minor petitioners were represented by next friend, the minor respondent by *guardian ad litem.* The petition alleges: (1) W. V. Gaylord died intestate on April 30, 1953. Surviving were the respondent, Beulah W. Gaylord, widow, and William Timothy Gaylord, minor son. Surviving also were the following children by the first marriage: Rebecca Gaylord Batts (wife of Leslie Davis Batts), Diane Gaylord Somerville, minor, (wife of Don Somerville) and Judith Ann Gaylord, minor. (2) W. V. Gaylord at the time of his death was the owner in fee of certain lands described in the petition which descended to his above-named children as his heirs at law, subject to the dower right of Beulah W. Gaylord. (3) Each of the children owns an undivided one-fourth interest, subject to the widow's dower. (4) The lands are of such character as will not permit actual partition without damage to certain of the shares, and that sale for partition is necessary in order to make equitable division; that the value of the widow's dower be calculated and paid to her in cash from the proceeds of the sale.

The widow and the *guardian ad litem* for the minor defendant answered, admitting all allegations of the petition. The respondents, however, added the following: "And for further answer to the petition these respondents make the foregoing admissions subject to their claims against the fund arising from the sale of the property in the petition as follows:"

In substance, the allegations are: After the death of W. V. Gaylord the respondent Beulah W. Gaylord kept the three minor children by the former marriage and her own son in the home together and supported them as one family. She paid out of her own funds for the benefit of Rebecca Gaylord Batts for college expenses $1,250; for medical expenses, $144; for Diane Gaylord Somerville for college expenses, $325, and for medical expenses $41; for Judith Gaylord for medical expenses, $1,760.10. She paid taxes in the sum of $804.59, insurance in the sum of $804.59; repairs and improvements, $5,135.59, subject to a credit of $1,760 received for rents. The widow asked that she recover these amounts and the value of her dower from the fund arising from the sale, and that the amounts for college and medical expenses be charged to each child for whose benefit these expenses were incurred.

Petitioners demurred to respondent's claim upon four grounds: (1) The allegations do not contain facts sufficient to support a claim for betterments or improvements in that ownership under color of title believed to be good is not alleged, and neither tenancy in common nor permanent character of improvements is alleged. (2) Ad-

vancements to the children are not alleged to have been for necessities. (3) The claim shows on its face the expenditures were made for minor members of the family by the respondent widow who was in possession of all the real estate and stood *in loco parentis*. (4) The claim attempts to subject the respective shares of each petitioner to a charge for sums advanced in violation of homestead laws. The claim against each child is separate and distinct from the other, and lumping them together constitutes a misjoinder of parties and causes.

The court entered the following order:

"From an examination of the pleadings in this cause and after listening to oral arguments for the petitioners and for the respondent Beulah W. Gaylord, the Court is of the opinion that the demurrer filed herein by the petitioners should be overruled, and to that end IT IS HEREBY ORDERED AND DECREED AND ADJUDGED that the demurrer filed herein be, and the same is overruled. IT IS FURTHER ORDERED that the sale of the property described in the petition in this cause be, and the same is hereby ordered not to be held until such time as there shall be a final judicial determination of the rights of the parties with reference to the matters and things alleged in the further answer of Beulah W. Gaylord. The reason for this portion of this order restraining or enjoining the sale of the property is to the end that the rights of the minors under the Constitution may be fully and amply protected as regards their homestead exemption under the Constitution."

Petitioners excepted and appealed.

*Bailey & Bailey for petitioners, appellants.*
*Norman & Rodman for respondents, appellees.*

HIGGINS, J. This proceeding originated before the clerk superior court under the provision of Chapter 46 of the General Statutes. The petition alleges and the answer admits the four children of W. V. Gaylord are his heirs at law and that Beulah W. Gaylord is his widow, entitled to dower in the described lands. The children as tenants in common are entitled to have the lands partitioned; that actual partition cannot be had without injury to some of the shares and that a sale, therefore, should be made; the value of the widow's dower should be computed and paid to her. Under these allegations and admissions each child would be entitled to one-fourth the remainder.

Partition among tenants in common is a matter of right. *Seawell*

*v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369. If actual partition cannot be made without injury to some of the tenants, sale for partition then becomes a matter of right. *Richardson v. Barnes,* 238 N.C. 398, 77 S.E. 2d 925.

The respondent widow admits all allegations in the petition subject to her claims against the fund. It may be noted that her allegations show that she has on hand from rents $1,760 which is sufficient to discharge her claim for taxes and insurance. However, a claim for improvements to the land arises only when one tenant in common makes improvements on the common property. *Jenkins v. Strickland,* 214 N.C. 441, 199 S.E. 612; *Layton v. Byrd,* 198 N.C. 466, 152 S.E. 161. A widow's right to dower does not make her a tenant in common. *Sheppard v. Sykes,* 227 N.C. 606, 44 S.E. 2d 54. A claim for betterments is only available to one who makes permanent improvements while in possession of lands under color of title believed to be good. *Pamlico County v. Davis,* 249 N.C. 648, 107 S.E. 2d 306; *Pritchard v. Williams,* 176 N.C. 108, 96 S.E. 733; G.S. 1-340. Both improvements and betterments arise from equitable principles. The widow, therefore, cannot assert either claim in this proceeding. The widow's claim or cause of action against each of the three children for expenses is a separate, independent, and distinct claim from the others. Two of these children are still minors. The widow's attempt to combine the causes of action is a misjoinder. "The cross action must have such relation to the plaintiff's claim that the adjustment of both is necessary to the full and final determination of the controversy. *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555. This means that it must be so interwoven in plaintiff's cause of action that a full and complete story as to the one cannot be told without . . . the other." *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614. "Matters set up by the cross bill or cross complaint in an action for partition must relate to, and be connected with, the matters involved in the original bill or complaint, and to the relief sought in the original bill, and it cannot be used to seek relief as to matters not involved in the original bill." 68 C.J.S., Partition, § 95d.

Each child has an independent right to contest the claim of the widow. If the dispute involves issues of fact, either party is entitled to a jury trial.

We have discussed taxes and insurance as falling in the same category only for the purpose of showing that in this particular case the widow has not stated a cause of action for the payment of either due to her allegation she had on hand receipts from rents more than enough to pay both. Ordinarily taxes on hand are a lien

upon land and may be treated as any other docketed judgment. Insurance premiums are not a lien.

We conclude that the matters which the widow seeks to set up do not properly arise in this special proceeding. The Court should have sustained the demurrer to the counterclaims or cross action and should have remanded the proceeding to the clerk superior court for appropriate orders. Nothing said herein is intended to preclude the widow from asserting in a proper forum any claim she may have against any party hereto. The judgment overruling the demurrer is

Reversed.

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DOYLE REX HOWARD v. CONCETTA P. SASSO.

(Filed 12 October, 1960.)

1. **Process § 15—**

Upon the hearing of a motion to dismiss on the ground that the court acquired no jurisdiction over defendant by service of process under G.S. 1-105, the findings of fact of the court are conclusive if supported by competent evidence.

2. **Same: Automobile § 54f—**

The rule of evidence created by G.S. 20-71.1 that proof of ownership of a vehicle makes out a *prima facie* case of agency applies whenever a factual determination as to alleged agency is to be made, and therefore that statute is applicable in the determination by the court of the crucial question of agency on the hearing of a nonresident's motion to dismiss on the ground that service of process under the provisions of G.S. 1-105 was ineffectual, and the proof of ownership is sufficient to support, but not compel, a finding in plaintiff's favor as to the validity of the service.

APPEAL by defendant from *Bundy, J.*, August Civil Term, 1960, of NEW HANOVER.

Plaintiff's action is for damages allegedly caused by the negligent operation by James Joseph Coady of a 1957 Ford automobile owned by defendant and bearing 1960 N. Y. License (Registration) number IH-4024. Plaintiff alleged that Coady, on the occasion of the collision, "was acting as the agent, servant, and employee" of defendant, "in the furtherance of the business and interests" of defendant, and "in the course and scope" of his employment by defendant.

Service of process was made on defendant, a resident of the State of New York, in compliance with the procedural requirements prescribed by G.S. 1-105. Defendant, under special appearance, moved to dismiss "for that the Court has not in this action properly acquired jurisdiction over the person of this defendant," setting forth with particularity the grounds on which she based said motion.

At the hearing of said motion, plaintiff offered his verified complaint and defendant offered her affidavit and the affidavit of Corporal Samuel A. Sasso, defendant's son.

Defendant's evidence, in substance, was as follows: Defendant is the registered owner of the 1957 Ford operated by Coady on the occasion (March 4, 1960) of the collision. Defendant does not know Coady. Coady was not operating the 1957 Ford for or on behalf of defendant. Corporal Sasso, stationed with the United States Marine Corps at Camp Lejeune, North Carolina, had possession of the 1957 Ford. Corporal Sasso allowed Pfc. Gary K. Foster, also stationed at Camp Lejeune, to have possession of the 1957 Ford and to use it during Sasso's absence from said military base. In the absence of Corporal Sasso, and in violation of specific instructions that no one except Foster was to drive it in Sasso's absence, Foster permitted Coady to operate the 1957 Ford. While operated by Coady on March 4, 1960, the 1957 Ford was involved in the collision.

The court made findings of fact. Finding of fact #3, the only factual finding in controversy, is as follows:

"3. That the said James J. Coady was operating the automobile of the defendant, Concetta Phyllis Sasso, at the time and place of the collision giving rise to this action, for the said Concetta Phyllis Sasso, or under the control or direction, express or implied, of the defendant, Concetta Phyllis Sasso."

The court, based on said findings of fact, entered an order denying defendant's said motion. Defendant excepted and appealed.

*Poisson, Marshall, Barnhill & Williams for plaintiff, appellee.*
*Teague, Johnson & Patterson for defendant appellant.*

BOBBITT, J. Process may be served upon a nonresident in the manner prescribed by G.S. 1-105 in any action against him "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, or at any other place in this State."

Finding of fact #3 is conclusive on appeal if supported by compe-

tent evidence. *Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17, and cases cited; *Hart v. Coach Co.,* 241 N.C. 389, 85 S.E. 2d 319.

Since plaintiff relies solely on the (admitted) fact that defendant was the registered owner of the 1957 Ford, decision turns upon the answer to this question: Is G.S. 20-71.1 applicable in the determination by the court of the crucial question of fact, namely, whether the 1957 Ford at the time of the collision was operated for defendant or under her control or direction?

"The statute (G.S. 20-71.1) was designed to create a rule of evidence. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. It does not have, and was not intended to have, any other or further force or effect." *Hartley v. Smith,* 239 N.C. 170, 177, 79 S.E. 2d 767.

G.S. 20-71.1 applies when, as in this case, the plaintiff, upon sufficient allegations, seeks to hold the owner liable for the negligence of a nonowner operator under the doctrine of *respondeat superior. Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462, and cases cited. It is well settled that, upon the defendant's denial of such allegations, "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." *Lynn v. Clark,* 252 N.C. 289, 292, 113 S.E. 2d 427, and cases cited; *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295, and cases cited.

Defendant contends G.S. 20-71.1 applies only in the determination by a jury of an issue of agency raised by the pleadings in an action of which the court has jurisdiction. But nothing in the statute purports to so restrict the application of its provisions. The statute applies "(i)n all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or a collision involving a motor vehicle, . . ." We are of the opinion, and so hold, that the rule of evidence established thereby applies *whenever a factual determination as to alleged agency is to be made,* whether by the court to resolve a question of fact or by a jury to resolve an issue of fact.

To sustain service of process under G.S. 1-105, there must be a finding to the effect that the owner's motor vehicle, on the occasion of the collision, was being operated "for him, or under his control

or direction." Under G.S. 20-71.1, proof of ownership is *prima facie* evidence "that such motor vehicle was then being operated by and under the control of the person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment." *Hartley v. Smith, supra; Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644. Despite differences in the wording of the quoted provisions of the two statutes, the essential meaning is the same. G.S. 1-105 requires an affirmative finding as to agency and G.S. 20-71.1 establishes the rule that proof of ownership is *prima facie* evidence of such agency. While the plaintiff in *Pressley v. Turner,* 249 N.C. 102, 105 S.E. 2d 289, did not rely upon G.S. 20-71.1, it is noteworthy that service of process under G.S. 1-105 was sustained on findings of fact phrased in terms of alleged agency rather than in the language (quoted above) of G.S. 1-105.

In view of our conclusion that G.S. 20-71.1 is applicable in the determination by the court of the crucial question of fact, it follows that the (admitted) fact that defendant was the registered owner of the 1957 Ford was sufficient to support, but not to compel, a finding in plaintiff's favor as to the alleged agency. The credibility of the evidence (affidavits) offered by defendant was for consideration and determination by the court.

It is noted: The court's factual findings, made solely as the basis for decision as to the validity of service of process, are not for consideration in any manner in the determination by a jury at trial of issues raised by the pleadings. *Winborne v. Stokes,* 238 N.C. 414, 78 S.E. 2d 171.

Affirmed.

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HORACE T. KING, TRADING AND DOING BUSINESS AS HANOVER IRON WORKS v. R. H. LIBBEY AND WIFE, MRS. R. H. LIBBEY.

(Filed 12 October, 1960.)

**1. Pleadings § 18—**

A counterclaim alleging that because of negligence of plaintiff in installing a furnace pursuant to contract there was an accumulation of carbon deposits and noxious gases resulting in injury to defendants, husband and wife, and all members of their family, and damage to their home and furnishings, *is held* to state but a single cause of action for damage to the home and furnishings of defendants under the rule that where a pleading does not set forth separate statements of more than

one cause of action it will be assumed that but a single cause was intended to be alleged, and that intimations of other causes of action are mere embellishments and not germane to the cause stated.

**2. Same—**

Husband and wife may maintain a counterclaim for damage to their home and furnishings therein resulting from the negligence of plaintiff, since both have a common interest in the relief sought, and when they do not demand a separate recovery, demurrer to the counterclaim for misjoinder of parties should not be allowed.

**3. Pleadings § 8—**

In an action against husband and wife to recover the balance due on a heating system installed in their home, the husband and wife may properly set up a counterclaim for damages to their home and its furnishings resulting from plaintiff's negligence in the performance of the contract.

**4. Same—**

A cause of action *ex delicto* may be pleaded as a counterclaim to an action *ex contractu* provided the counterclaim arises out of the same transaction or is connected with the same subject of action. G.S. 1-137(1).

APPEAL by defendants from *Stevens, J.*, at May-June 1960 Civil Term, of NEW HANOVER.

Civil action to recover on contract.

Plaintiff alleges in its complaint that it and defendants did, on or about 30th day of August, 1957, enter into a contract whereby plaintiff was to complete the existing heating system in certain residence of defendants, and furnish the labor and material for the installation of a certain model, at and for the agreed price of $490; and plaintiff alleges in substance compliance by it, and payment by defendants of only $75.00, leaving a fixed balance due and owing by defendants to plaintiff.

Defendants, designated as husband and wife, answering the complaint of plaintiff, admit the contract and payment on contract price substantially as alleged, but deny all other allegations contained there.

And defendants, further answering the complaint, and for counterclaim aver in substance that plaintiff was negligent in installing the furnace, — resulting in damage to the defendants, all members of their family, their home and furnishings because of the accumulation of carbon deposits and noxious gases and soot, due in substance to plaintiff's failure to install an adequate return air system.

Plaintiff demurs to the counterclaim of defendant, hereinabove set forth in the answer.

The cause coming on to be heard, and being heard, and the court being of opinion that the demurrer should be allowed and sustained

for that, among other things, it appears upon the face of the counterclaim that several causes of action have been improperly united and there is a misjoinder of parties and causes. The demurrer is sustained and the counterclaim dismissed.

Defendants except thereto and appeal to Supreme Court, and assign error.

*Steven, Burgwin, McGhee & Ryals, Poisson, Marshal, Barnhill & Williams for plaintiff, appellee.*

*Aaron Goldberg, Rountree & Clark for defendants, appellants.*

WINBORNE, C. J. The sole assignment of error on this appeal is predicated upon exception to the ruling of the trial court, — sustaining the plaintiff's demurrer to defendants' counterclaim as set up in their answer.

This raises the question as to whether or not the counter-claim states two or more causes of action. Paraphrasing *Land Co. v. Beatty* (1873) 69 N.C. 329, opinion by *Rodman, J.*, quoted in *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104, on examining the counterclaim in the present action we find that it does not profess to state more than one cause of action. If in fact it states two it would be demurrable, because it compounds and does not state them separately. Then this Court in opinion by *Bobbitt, J.*, in the *Heath* case, *supra,* states in summary this rule: "Unless the contrary plainly appears, it will be assumed that a complaint that does not set forth separate statements of more than one cause of action, is intended to allege a single cause of action and that intimations of other causes of action are mere embellishments and not germane to the cause of action constituting the heart of the complaint."

In the case in hand it seems clear that the defendants' counterclaim states facts sufficient to constitute a cause of action for injuries to their home and to the furnishings therein. Applying the rules as stated in the *Heath* case, only one cause of action is alleged in the counterclaim— that stated above.

The question then arises as to whether the cause of action alleged affects all parties. The answer is in the affirmative. Both defendants have a common interest in the relief sought and do not demand a separate recovery therefor. See *Heath v. Kirkman, supra.*

Moreover it is provided by statute in this State, G.S. 1-137, that "the counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of

the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action * * *."

Indeed if it arises out of the same transaction or is connected with the subject of the action, a tort claim may be pleaded as a counterclaim against a contract claim, that is, under Section 1, above, a cause of action *ex delicto* may be pleaded as a counterclaim to an action *ex contractu* provided it arises out of the same transaction or is connected with the same subject of action. See *Hancammon v. Carr*, 229 N.C. 52, 47 S.E. 2d 614.

In the light of these principles, this Court is of opinion and holds that the trial court erred in sustaining the demurrer filed herein, and that the judgment below should be, and is

Reversed.

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C. T. GAINES AND J. C. KIRKMAN v. ATLAS PLYWOOD CORPORATION AND GEORGIA-PACIFIC CORPORATION.

(Filed 12 October, 1960.)

**1. Pleadings § 18—**

The joinder by plaintiffs of a cause of action against one defendant to remove cloud from title and against such defendant's grantor to recover for the wrongful cutting and removal of trees from the land some several years prior to the execution of the deed, constitutes a misjoinder of parties and causes of action, and in such instance the court has no authority to direct a severance of the respective causes of action, but is required to dismiss the action in its entirety upon demurrer. G.S. 1-132.

**2. Pleadings § 3—**

Statutory provisions as to what causes of action may be joined in the complaint are mandatory and not directory. G.S. 1-123.

APPEAL by defendants from *Morris, J.*, at February Civil Term, 1960, of WASHINGTON.

Civil action instituted in the Superior Court of Washington County by the plaintiffs, C. T. Gaines and J. C. Kirkman, against the defendants, Atlas Plywood Corporation and Georgia-Pacific Corporation.

Two causes of action are stated in the complaint as amended by leave of the Court.

The first cause of action is for the removal of a cloud upon the plaintiffs' alleged title to certain land. The complaint alleges that defendant Atlas Plywood Corporation conveyed the land to Georgia-Pacific Corporation in June of 1959, and that Georgia- Pacific Corporation now claims title to the land and that such claim is a cloud upon plaintiffs' title.

The second cause of action is to recover from Atlas Plywood Corporation alone $6,400 for the alleged wrongful cutting and removal of trees from the land in question in the summer of 1957, two years prior to the conveyance of the land from Atlas Plywood Corporation to Georgia-Pacific Corporation.

In apt time the defendants filed a joint demurrer to the complaint on the ground that there was a misjoinder of both parties and causes of action.

The court sustained the demurrer and dismissed the action as to the cause of action alleging trover and conversion. But the court overruled the demurrer as to the cause of action to remove cloud upon plaintiffs' title, and refused to dismiss same.

The defendants duly excepted to the overruling of the demurrer as to the cause of action for removal of cloud from title and gave notice of appeal, and appeals to Supreme Court, and assigns error.

*Norman & Rodman for plaintiff appellees.*

*Bailey & Bailey for Atlas Plywood Corporation, appellant.*

*Battle, Wislow, Merrell, Scott & Wiley for Georgia-Pacific Corporation, appellant.*

WINBORNE, C. J. The only assignment of error on this appeal is based upon an exception to the ruling of the trial judge in refusing to dismiss the action in its entirety. In the light of well established principle of law in this State, the challenge by the exception is well taken.

The defendants contend, and this Court holds properly so, that their demurrer should have been sustained and the action dismissed in its entirety on the ground that it appears upon the face of the complaint that there is a misjoinder both of parties and of causes of action. In support of this contention the defendants point out that Georgia-Pacific Corporation is in no way interested in the alleged cause of action for the conversion of the timber in 1957.

Indeed in *Teague v. Oil Co.*, 232 N.C. 65, 59 S.E. 2d 2, opinion by *Denny, J.*, this Court, in keeping with long line of decisions, reiterated that "A demurrer should be sustained where there is a mis-

joinder of parties and causes of action, and the Court is not authorized in such cases, to direct a severance of the respective causes of action for trial under the provisions of G.S. 1-132." See cases there cited.

Moreover, in *Bank v. Angelo*, 193 N.C. 576, 137 S.E. 705, this Court, in opinion by *Stacy, C. J.*, declared that "It is well settled that where there is a misjoinder, both of parties and causes of action, and a demurrer is interposed upon this ground, the demurrer should be sustained and the action dismissed." To like effect are these cases: *Thigpen v. Cotton Mills*, 151 N.C. 97, 65 S.E. 750; *Roberts v. Mfg. Co.*, 181 N.C. 204, 106 S.E. 664; *Shore v. Holt*, 185 N.C. 312, 117 S.E. 165; *Robinson v. Williams*, 189 N.C. 256, 126 S.E. 621; *Erickson v. Starling*, 233 N.C. 539, 64 S.E. 2d 832; *Sellers v. Ins. Co.*, 233 N.C. 590, 65 S.E. 2d 21.

Furthermore, this Court has held that the provisions of G.S. 1-123, as to what causes of action may be joined in the complaint, are mandatory and not directory. *Eller v. R. R.*, 140 N.C. 140, 52 S.E. 305.

For reason stated the action will be dismissed.

Action dismissed.

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GEORGE W. TALMAN v. JAMES D. DIXON AND ALICE F. DIXON.

(Filed 12 October, 1960.)

**1. Contracts § 25—**

Where, in an action on a contract, the complaint annexes the written agreement thereto, the written agreement fixes the rights and duties of the parties, and an allegation in the complaint as to the rights of the parties thereunder is a mere conclusion of law not admitted by demurrer.

**2. Vendor and Purchaser §§ 7½, 24—**

A contract by defendants to convey their right, title and interest to certain lands does not impose the duty upon defendants to convey a good title but only such title as defendants may have, and further provision that defendants should convey their interests free from claims against them does not enlarge the right or interest which they agree to convey, and, therefore, upon failure of title in defendants, plaintiff may not maintain an action to recover that part of the purchase price paid.

**3. Pleadings § 24—**

Where the court sustains the defendants' demurrer, plaintiff has a

right to move to be allowed to amend, but such motion is addressed to the discretion of the trial court, and the refusal of such motion will not be disturbed in the absence of abuse of discretion.

APPEAL by plaintiff from *Stevens, J.*, February 1960 Civil Term, of NEW HANOVER.

As his cause of action plaintiff alleged: A written contract, which is annexed to and made part of the complaint, between plaintiff and defendants by which defendants agreed to convey to plaintiff good title to a described tract of land for the sum of $3,040, $600 of which was paid when the contract was executed; the written contract obligates defendants (1) to convey to plaintiff "all of their right, title and interest to the lands hereinafter described," (2) "to convey said interest free from any judgments, or claims, or taxes, or liens against them." Plaintiff alleged that upon investigation he had discovered that defendants were not the owners of and could not convey good title to the lands described in the complaint. He demanded judgment for the $600 paid as part of the purchase price.

Defendants demurred for failure to state a cause of action for that it apeared from the complaint they had not contracted to convey good or perfect title but only such title or interest as they had. The demurrer was sustained. The court declined to allow plaintiff's motion to amend. Plaintiff, having excepted, appealed.

*Aaron Goldberg for plaintiff, appellant.*
*Isaac C. Wright for defendant appellees.*

RODMAN, J. The contract forming the basis of plaintiff's cause of action, being incorporated as a part of the complaint, fixed the rights and duties of the parties. Plaintiff's allegation that defendants had, pursuant to that contract, agreed to convey title to the land was a mere conclusion of law resulting from his interpretation of the contract. It is not an allegation of fact admitted by the demurrer. *Sossamon v. Cemetery, Inc.*, 212 N.C. 535, 193 S.E. 720; *Horney v. Mills*, 189 N.C. 724, 128 S.E. 324.

Looking at the contract, it is apparent that defendants did not agree to convey the land or a good title thereto. To the contrary they merely agreed to convey "their right, title and interest." This might in fact constitute a good title or no title whatever. The language chosen implied a doubt as to defendants' title. *Turpin v. Jackson County*, 225 N.C. 389, 35 S.E. 2d 180; *Abernathy v. R. R.*, 150 N.C. 97, 63 S.E. 180; *Bryan v. Eason*, 147 N.C. 284; *Lumber Co. v. Price*, 144 N.C. 50.

"A provision that the purchaser shall accept such title as the vendor has is valid, and if the contract is to convey by quitclaim deed, it obligates the vendor to convey only his interest in the premises, and does not impose a duty of giving a clear title." 55 Am. Jur. 629; *Twitty v. Lovelace,* 97 N.C. 54; 91 C.J.S. 900.

The agreement to convey grantors' interest free from claims against them did not enlarge the right or interest which they agreed to convey. *Coble v. Barringer,* 171 N.C. 445, 88 S.E. 518.

The court was correct in sustaining the demurrer for failure to state a cause of action.

When the court sustained the demurrer, plaintiff, as he had a right to do, moved to amend. The court was not compelled to allow the motion. Whether it would or would not permit the amendment was a matter resting in its discretion. *Burrell v. Transfer Co.,* 244 N.C. 662, 94 S.E. 2d 829. It is not suggested that the court abused its discretion.

Affirmed.

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## STATE v. EMANUEL "SHUG" BROWN.

(Filed 12 October, 1960.)

**1. Intoxicating Liquor § 17—**

Conspiracy to violate the liquor law is a misdemeanor punishable by fine or imprisonment, or both. G.S. 14-3.

**2. Criminal Law § 136—**

Where the court suspends execution of sentence on condition that defendant pay a fine and be of good behavior during the ensuing five years, the payment of the fine does not preclude the court from thereafter ordering the sentence put into effect upon the court's finding that defendant had breached the terms of suspension by violating the criminal law. G.S. 15-200.

**3. Same—**

In a hearing to determine whether defendant had violated the terms of a suspended sentence, the introduction in evidence of the minutes of a Recorder's Court to show that defendant had pleaded guilty to a criminal charge in that court, will not be held prejudicial, since rules of evidence are not so strictly enforced in a hearing by the judge as in a trial by jury.

APPEAL by defendant from *Hooks, J.,* July 1960 Criminal Term, of MECKLENBURG.

At the June 1956 Criminal Term of Superior Court of Mecklenburg County defendant, through counsel, pleaded guilty to a charge of "conspiracy to violate North Carolina liquor laws." The court imposed a prison sentence of two years and suspended execution of the sentence on conditions, among others, that defendant pay a fine of $1,000.00 and costs, "be of good behavior" and "violate none of the laws of the State" during the ensuing five years.

At the July 1960 term the State charged that defendant had violated the conditions and prayed that the prison sentence be put into effect.

". . . (A)fter hearing the evidence of the State and the defendant," the court found as a fact:

"2. That on May 19, 1960, the defendant was convicted in the Recorder's Court of Mecklenburg County upon a charge of receiving stolen goods or property well knowing the same to have been feloniously stolen, such offense having been committed on May 12, 1960, which said date was within five years from July 18, 1956 . . .

"3. . . . (T)hat the defendant has not been of good behavior and has violated the law . . .

"Therefore, the court finds that the terms and conditions of the sentence imposed . . . have been wilfully violated, and it is ordered and adjudged that the suspended sentence . . . be activated and placed into immediate effect . . ."

Defendant appealed and assigned errors.

*Attorney General Bruton and Assistant Attorney General McGalliard for the State.*

*Amon M. Butler and Elbert E. Foster for the defendant, appellant.*

PER CURIAM. The principles of law applied by this Court in *State v. Wilson,* 216 N.C. 130, 4 S.E. 2d 440, are controlling on this appeal. Payment of fine as a condition of suspension of sentence does not render void the subsequent activation of the prison term for breach of other conditions. Defendant is not twice punished for the same offense. Conspiracy to violate the liquor law is a misdemeanor and punishable as at common law, that is, by fine or imprisonment, or both. G.S. 14-3. *State v. Powell,* 94 N.C. 920, 923-4.

The conditions imposed in the judgment of June 1956 are not unreasonable. The period of suspension is within legal limits. G.S. 15-200. The breach of condition that defendant be law abiding and of good behavior has been held a sufficient predicate for putting prison sentence into effect. ***State v. Wilson, supra.***

The judgment of July 1960 recites that the court heard evidence "of the State and the defendant." The only evidence brought forward in the record is the minutes of the Recorder's Court of Mecklenburg County showing that in May 1960 defendant pleaded guilty to receiving stolen goods. Defendant objected to this evidence. The ground of objection does not appear in the record and does not clearly appear in the brief. The guilty plea is sufficient basis for a finding that the failure to be of good behavior was wilful. Rules of evidence are not so strictly enforced in a hearing by the judge as in a trial by jury.

The judgment below is

Affirmed.

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G. B. WESTMORELAND v. SOUTHERN RAILWAY COMPANY, A CORPORATION.

(Filed 12 October, 1960.)

**Appeal and Error § 41—**

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have testified had he been permitted to answer.

APPEAL by plaintiff from *Craven, S. J.*, May 1960 Special Term, McDOWELL Superior Court.

Civil action to recover damages by fire alleged to have been ignited on and spread from defendant's railway right of way to the plaintiff's property, causing its damage and destruction. The plaintiff alleged defendant's actionable negligence in the following particulars: (1) By permitting inflammable material to accumulate on its right of way; (2) by operating trains which permitted flakes of red hot metal to escape from the wheels and brakes of its trains and sparks to escape from its locomotives when it knew or should have known the danger of fire as a result of permitting these conditions to exist. The plaintiff further alleged that sparks from the locomotive and hot metal and sparks from the wheels and brakes set fire to the inflammable material on its right of way; that the fire spread to and damaged plaintiff's property in the sum of $22,000.

The defendant, by answer, denied all allegations of negligence. Both parties introduced evidence. The court submitted issues as to

defendant's negligence and plaintiff's damage. The jury answered the first issue, "No." The court entered judgment dismissing the action. The plaintiff appealed.

*Wm. D. Lonon, Paul J. Story for plaintiff, appellant.*
*W. T. Joyner, Proctor & Dameron for defendant, appellee.*

PER CURIAM. The court sustained the objections to two questions whether a fire will start along a railroad track (1) by reason of defective brakes and (2) by reason of friction between the wheels and the track. The plaintiff assigns the above as error No. 1. Failure to show what the witness would have answered renders the ruling nonprejudicial. Other objections need not be discussed.

The other seven assignments of error relate to the charge. Careful examination fails to show error in any of the particulars assigned.

The critical issue was one of fact which the jury answered against the plaintiff upon whom the law placed the burden of proof.

No error.

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H. PAUL STRICKLAND v. WOODROW HILL.

(Filed 19 October, 1960.)

**1. Elections § 14—**

G.S. 163-86, by its express terms, applies to primaries as well as to general elections,

**2. Same: Elections § 6—**

G.S. 163-143, to the extent of conflict therewith, was repealed or superseded by the provisions of the 1933 Act codified as G.S. 163-86.

**3. Same: Elections § 3— County Board of Elections has power to recount ballots upon suggestion of errors in tabulations prior to its canvass.**

Where a candidate in a primary election, prior to the time fixed for the County Board of Elections to canvass the returns, suggests errors in tabulating ballots in certain precincts because persons not legally qualified acted as counters and tabulators, but makes no assertion that any person voted who was not entitled to vote or that any qualified elector was prevented from voting, and files a written request for recount, the County Board has authority, in the exercise of its judgment and discretion in good faith, to order and conduct a recount of the ballots cast and to certify the candidate having the majority of the votes as ascertained by such recount as the nominee of the party, notwithstanding that the returns of the precinct officials are regular upon their face. The opinion of the Court by *Bobbitt, J.*, bases this

conclusion on G.S. 163-86 as modifying or superseding G.S. 163-143 to the extent of any conflict. The concurring opinion of *Rodman, J.*, concurred in by *Denny* and *Parker, J. J.*, bases this power on G.S. 163-143.

**4. Elections § 3—**

A rule of the State Board of Elections which is in conflict with statute is void to the extent of such conflict.

RODMAN, J., concurring.

DENNY and PARKER, J. J., join in concurring opinion.

MOORE, J., dissenting.

WINBORNE, C. J., joins in the dissent.

APPEAL by petitioner from *McKinnon, J.*, August Civil Term, 1960, of WAKE.

This cause was heard by Judge McKinnon upon the petition of H. Paul Strickland for a judicial review, in accordance with G.S. 143-306 *et seq.*, of an order entered August 1, 1960, by the State Board of Elections.

On July 6, 1960, the Harnett County Board of Elections had certified to the Clerk of the Superior Court the name of Woodrow Hill as the nominee of the Democratic party for the office of Judge of the Recorder's Court of Dunn by virtue of the second primary election held Saturday, June 25, 1960. The hearing before the State Board was on petitioner's appeal from said decision and action of the County Board.

The State Board denied petitioner's said appeal. It based its decision upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

"1. That in the second primary election held in Harnett County on June 25, 1960, H. Paul Strickland, Petitioner, and Woodrow Hill, Respondent, were the two Democratic candidates for the office of Judge of Recorders Court of Dunn, North Carolina, in Averasboro Township, which township is composed of precincts number 1, number 2, number 3, and number 4.

"2. That at the County canvass made by the Harnett County Board of Elections on June 28, 1960, said canvass by the County Board of Elections for Judge of Recorders Court of Dunn showed that H. Paul Strickland received 1,174 votes and Woodrow Hill received 1,166 votes for said office, thereby giving H. Paul Strickland, Petitioner, a majority of eight votes, but that no certification was made as to the nomination of the Democratic

candidate for Judge of Recorders Court of Dunn at this meeting because the respondent Woodrow Hill had written a letter dated June 27, 1960, to the Chairman of the Harnett County Board of Elections, requesting a recount of the votes cast for Judge of Recorders Court, accompanied by an affidavit of Woodrow Hill, which affidavit is as follows:

" 'NORTH CAROLINA *AFFIDAVIT*
HARNETT COUNTY

WOODROW HILL, first being duly sworn, deposes and says that he was a candidate for the office of Judge of the Recorder's Court of Dunn in the second primary election which was held on June 25, 1960; that upon the closing of the polls in the four precincts of Averasboro Township — they being Averasboro Township Nos. 1, 2, 3, and 4; that the ballot boxes were immediately opened and counting and tabulation of the ballots were begun; that no one who assisted or aided in the counting and tabulation of the ballots were sworn as required by G.S. 163-84; that in all of the precincts there were counters and tabulators who were not electors of said precinct and that the ones who assisted in the counting and tabulation of the ballots in each of the precincts were not instructed on how differently marked ballots should be counted and tabulated, and that the counting of the ballots in Averasboro No. 4 in some instances were not made in the presence of the election officials of the said precincts as is required by G.S. 163-84 and that your affiant verily believes that if the counting and tabulation of the votes in the four precincts of Averasboro Township had been done in accordance with the law in such cases made and provided that the result would have been materially different and that your affiant would have been high man in said second primary election for the office of Judge of the Recorder's Court of Dunn; that your affiant on information and belief states that there were various other irregularities in all four of the said precincts in the counting and tabulation of the said votes of the said precincts which would materially change the result of the tabulation.

This the 27th day of June, 1960.

/s/ WOODROW HILL

Subscribed and sworn to before me,
this 27th day of June, 1960.

/s/ WOODROW H. MYERS
(SEAL) Notary Public.

My Commission expires: December 16, 1960.'

"3. That the Harnett County Board of Elections at this meeting on June 28, 1960, took under consideration the affidavit and request of Woodrow Hill for a recount of the votes for Judge of Recorders Court in Averasboro Township and that the Harnett County Board, according to its minutes, 'reached the conclusion that there might be errors in counting the ballots by precinct officials and therefore decided to recount.' This decision was announced by the Chairman in the presence of both candidates Mr. H. Paul Strickland and Mr. Woodrow Hill, whereupon the Petitioner, H. Paul Strickland, protested and objected through his counsel to the granting of the request for a recount of the votes for Judge of the Recorders Court of Dunn in Averasboro Township upon the basis that the said County Board of Elections was without authority to grant such request upon the allegations contained in the affidavit of Woodrow Hill since they did not comply with the rules of the State Board of Elections relating to recounts and to the statutory provisions also relating thereto; that the County Board of Elections rejected the protest of the Petitioner H. Paul Strickland, whereupon the Petitioner H. Paul Strickland gave notice of appeal to the State Board of Elections. A recount was thereupon made by the County Board of Elections the same day of the votes cast in Averasboro Township for the Democratic nomination for Judge of Recorders Court of Dunn, N. C., which recount was made in the presence of both the petitioner and respondent and their attorneys, which recount resulted in the County Board finding that there were 1,172 ballots cast in said Averasboro Township for Woodrow Hill and 1,171 ballots cast for H. Paul Strickland, thereby giving Woodrow Hill a one-vote majority.

"4. That the petitioner H. Paul Strickland, after completion of the recount, requested the Board to count the ballots again and the Board recessed the meeting until Wednesday, June 29, 1960; that the County Board met on the next day, Wednesday, June 29, 1960, and decided to continue this proceeding until Wednesday, July 6, 1960, and notified both Mr. Strickland and Mr. Hill of its action; that on July 2, 1960, counsel for H. Paul Strickland, petitioner, wrote the Chairman of the Harnett County Board of Elections asking that they be given an opportunity to be heard by the Board and an affidavit and motion by Petitioner Strickland seeking a hearing on this matter was served on each of the three members of the Harnett County Board of Elections on the morning of July 6, 1960.

"5. That on July 6, 1960, the Harnett County Board of Elections met and again took under consideration Mr. Strickland's request that the Board recount the ballots again and denied the request and certified the respondent Woodrow Hill as the Democratic nominee by a majority of one vote for the office of Judge of Recorders Court of Dunn, North Carolina.

"6. That the State Board of Elections at its meeting on August 1, 1960, finds that the affidavit and letter filed by the respondent Woodrow Hill with the Harnett County Board of Elections demanding a recount of the votes cast in the second Democratic Primary in Averasboro Township did not comply with the rules and regulations of the State Board of Elections which were established by the State Board, as printed in the 1959 edition of the State Election Laws, in that the said affidavit of Woodrow Hill did not comply with the following Rule I of the State Board of Elections: 'If, after the canvass is completed by the County Board of Elections, any candidate or candidates, participating in such primary or election, demands a recount by the County Board of Elections in any one or more precincts in the county, and presents sufficient evidence by affidavit tending to show errors in the canvassing of said votes by the County Board of Elections, either because of an error in the tabulation thereof or because of the counting of alleged illegal ballots, in an amount alleged to be sufficient to change the results of the nomination or election of such candidate or candidates, then this demand for the recount must be made to the chairman or secretary of the County Board of Elections, in writing, by 6 o'clock P.M. on or before the second day following the completion of the original count by said County Board and the declaration by it of the results of said primary or election. The County Board of Elections shall thereupon, within the time prescribed, meet to consider this demand for a recount.'

"7. That the appeal of petitioner H. Paul Strickland from the decision of the Harnett County Board of Elections to the State Board of Elections was filed in proper time with the State Board of Elections, which appeal asked the State Board of Elections to order the Harnett County Board of Elections to rescind its action in recounting the votes cast in the second Democratic primary election for Judge of Recorders Court in Averasboro Township and to order the said Harnett County Board of Elections to certify the petitioner H. Paul Strickland as the Democratic nominee for the office from the official precinct returns sent in

by the precinct officials in the four precincts in Averasboro Township."

CONCLUSIONS OF LAW

"The State Board of Elections, after consultation with T. Wade Bruton, Attorney General, finds as its Conclusions of Law in this case as follows:

"That it is doubtful that the State Board of Elections has the authority to order the Harnett County Board of Elections to rescind its action in recounting said ballots in the Democratic primary for Judge of Recorders Court of Dunn in Averasboro Township in the Second Democratic Primary held on June 25, 1960, and is probably without legal authority to order the said county board of elections to certify the petitioner H. Paul Strickland as the Democratic Nominee for said office."

At the conclusion of the hearing in superior court, judgment was entered which, in pertinent part, provides:

"Upon a review of the record, argument of Counsel, consideration of the law and of the rules of the State Board of Elections and stipulations by Counsel at said hearing, the Court makes the following findings:

"That no exceptions have been taken to the Findings of Fact of the State Board of Elections but only to the Conclusions of Law thereon, and this Court, being of the opinion that paragraph 6 of the Findings of Fact is based on an erroneous interpretation of the law applicable to the facts and is itself a Conclusion of Law, and that it and the Conclusion of Law set forth by the State Board of Elections should be set aside and modified; upon the facts found by the State Board of Elections and the undisputed facts in the record and the stipulations of Counsel, the Court makes the following conclusions of law:

"(1) That there had been no canvass and judicial determination of the results of the voting within the meaning of G.S. 163-86, at the time of the consideration by the Harnett County Board of Elections on June 28, 1960, of the demand for recount and affidavit of the respondent Woodrow Hill; and the actions of said Board in considering such demand and affidavit and in proceeding to recount the votes cast in Averasboro Township for the Democratic nomination for Judge of the Dunn Recorder's Court, and thereafter, in certifying as a result of such recount

that the respondent Woodrow Hill was the Democratic nominee, were within the lawful powers of the Harnett County Board of Elections, particularly the powers conferred by G.S. 163-86 and G.S. 163-143, and are hereby affirmed.

"(2) That the order dismissing the appeal of H. Paul Strickland is affirmed.

"(3) That the petitioner is not entitled in this proceeding and upon the facts found and conclusions of law thereon to the writ of mandamus prayed.

"(4) That no substantial right of the petitioner H. Paul Strickland has been denied by the recount made by the Harnett County Board of Elections.

"IT IS ORDERED, ADJUDGED AND DECREED from Findings of Fact, Conclusions of Law and Stipulations, that the appeal of the petitioner H. Paul Strickland is hereby denied."

Petitioner excepted and objected to the conclusions of law therein made and to the signing and entry of said judgment and appealed.

*Levinson & Levinson for petitioner, appellant.*
*W. A. Taylor and J. W. Hoyle for respondent, appellee.*

BOBBITT, J. Presumably, the returns by the registrar and judges of each precinct to the County Board were made in the manner prescribed by statute (G.S. 163-85; G.S. 163-84, as amended by Chapter 891, Session Laws of 1955), and nothing on the face thereof indicated irregularity in the counting of ballots or in the tabulation of the votes cast for the respective candidates.

Petitioner, relying upon G.S. 163-143 and *Brown v. Costen,* 176 N.C. 63, 96 S.E. 659, and on a rule promulgated by the State Board of Elections, contended the County Board should declare and certify petitioner as the Democratic nominee on the basis of the returns of the precinct officials. The County Board refused to declare the result of the election on the basis of these returns. Instead, over petitioner's protest, it ordered a recount of the ballots in each of the four boxes; and, upon such recount, it determined that 1,172 votes had been cast for Hill and 1,171 for Strickland and thereupon declared and certified Hill as the Democratic nominee.

No question is presented as to the manner in which the recount was conducted or as to the accuracy thereof. Petitioner's contention is that the County Board had no authority to order and conduct such recount; that the recount so ordered and conducted by the

County Board has no legal significance; and that the County Board should be required to declare petitioner the successful candidate on the basis of the returns made by the precinct officials.

In view of the authority conferred upon the State Board of Elections by G.S. 163-10(10) and G.S. 163-183, petitioner appealed to the State Board. We pass, without decision, whether the State Board had authority, assuming petitioner was entitled thereto, to grant the relief sought, to wit, an order rescinding the decision and action of the County Board and directing the County Board to declare and certify petitioner as the Democratic nominee. Under the circumstances, we deem it appropriate to consider the merits of petitioner's alleged grievance.

In 1915, the General Assembly enacted a comprehensive statute providing for primary elections throughout the State. Public Laws of 1915, Chapter 101. The provisions of the 1915 Act, as amended, are now codified as G.S. 163-117 through G.S. 163-147, constituting Article 19, Subchapter II, of Chapter 163.

Section 27 of the 1915 Act (now codified as G.S. 163-143) provided: "That when, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and the State Board of Elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results which shall be done under such rules as the State Board of Elections shall establish to protect the integrity of the election and the rights of the voters."

Section 3 of the 1915 Act, now codified as G.S. 163-118, in pertinent part, provided: "That said primary elections shall be conducted, as far as practicable, in all things and in all details in accordance with the general election laws of this State, unless otherwise provided by this act, . . ."

In *Brown v. Costen, supra,* the plaintiff, a candidate for the Democratic nomination for the office of sheriff, sought to restrain the county board of elections from certifying his opponent as the Democratic nominee on the basis of the returns of the precinct officials on the ground said officials "had wrongfully and willfully refused to receive the votes of a good number of qualified voters, and whose purpose was to vote for plaintiff as the Democratic nominee." It is noted that the plaintiff alleged, *inter alia,* "that at the close of the election, the votes having been correctly tabulated were duly certified to the county board of elections, etc." After pointing out the insufficiency of plaintiff's allegations and affidavits, *Hoke, J*

(later *C. J.*), proceeded to consider at length the provisions of the 1915 Act. With reference to the 1915 Act, the precise question was whether, assuming the sufficiency of plaintiff's allegations and affidavits, a court of equity would intervene to review the decision of the registrar and judges of election as to whether the applicants were properly rejected on account of failure to affiliate with the Democratic party in the manner prescribed by statute.

Near the end of the opinion in *Brown v. Costen, supra, Hoke, J.* (later *C. J.*), said:

> "The ballots having been deposited in boxes prepared for the purpose, under the supervision and rulings of the registrar and judges at the different voting precincts, the law requires these officials at the close of the primary to count the same and certify a correct return of the vote to the county and State boards of elections, respectively, this according to the nature of the offices, and these boards are directed to tabulate and publish the results, which results when published shall ascertain and determine the regular party candidate. The only provision of the law which authorizes or permits an examination or correction of these returns appears in section 27 of the act as follows:
>
> " 'That when, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and the State board of elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results, which shall be done under such rules as the State board of elections shall establish to protect the integrity of the election and the rights of the voters.'
>
> "A power, it will be noted, that arises to these boards only 'when, on account of errors in tabulating returns or filling out blanks,' the result of the election cannot be accurately known, and confers no authority on the courts, assuredly, to investigate and pass upon the methods or manner in which the primary may have been conducted.
>
> "The suggestion that the act incorporates certain provisions of the general election law which might affect the interpretation is without significance, for in all cases where this occurs the statute itself contains provision that the reference shall only prevail when not inconsistent with the terms of the primary law, the controlling provisions of which are as heretofore shown."

The first and second quoted paragraphs are stressed by petitioner. It is noted that *Brown v. Costen, supra,* was decided at Fall Term, 1918.

Section 2694 of the Code of 1883, a provision of the general election laws, provided: "The board of county canvassers shall, at their said meeting, in the presence of the sheriff and of such electors as choose to attend, open and canvass and judicially determine the returns, and make abstracts, stating the number of legal ballots cast in each precinct for each office, the name of each person voted for, and the number of votes given to each person for each different office, and shall sign the same." Based thereon, it was held: "Power is thus conferred to 'canvass and judicially determine the returns'— that is, to examine, scrutinize and enquire about them— to ascertain and declare that what purports to be such returns are or are not such, whether they are defective, if at all, and what their meaning is, and from such as are accepted as true and proper ones, what number of votes was cast, for whom they were cast, and the result of the election in the county, as prescribed by the statute. Power, however, is not thus conferred to make, alter or amend returns. The board must accept and act upon them, if they are sufficient, as they come from the judges of the election at the voting places. It is the province of this board to ascertain the results of the election in the county from the returns and only from them, and to declare and proclaim that result." *Gatling v. Boone* (1887), 98 N.C. 573, citing decisions based on earlier provisions of the general election laws.

In 1901, the General Assembly enacted a comprehensive statute defining the general election laws. Public Laws of 1901, Chapter 89. Section 33 of the 1901 Act, codified as Section 4350 of the Revisal of 1905, and later as C.S. 5986, provided: "The Board of County Canvassers at their said meeting, in the presence of such electors as choose to attend, shall open and canvass and judicially determine the returns, stating the number of legal ballots cast in each precinct for each officer, the name of each person voted for, and the number of votes given to each person for each different office, and shall sign the same. *The said board shall have power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same. And they shall also have power and authority to send for papers and persons and examine the same.*" (Our italics.)

Referring to Revisal, Section 4350, *Allen, J.,* in *Britt v. Board of County Canvassers,* 172 N.C. 797, 90 S.E. 1005, states: "This sec-

tion clearly vests the board with discretionary power and imposes the duty of exercising its judgment, . . ."

In *Bell v. Board of Elections* (1924), 188 N.C. 311, 124 S.E. 311, involving a primary election, *Adams, J.*, called attention to the distinction between the statutes applicable to general elections and those applicable to primaries, stating: "In the primary there is no election to public office, the right to which may be put in issue and determined by *quo warranto*, and no provision for a board of canvassers clothed with power judicially to determine the precinct returns."

Thereafter, C.S. 5986 was amended by Section 8, Chapter 165, Public Laws of 1933, so as to read as follows: "*The County Board of Elections* at their said meeting required to be held on the second day *after every primary or election*, in the presence of such electors as choose to attend, shall open the returns and canvass and judicially determine the results of the voting in the respective counties, stating the number of legal ballots cast in each precinct for each candidate, the name of each person voted for and the political party with which he affiliated, and the number of votes given to each person for each different office, and shall sign the same. *The said County Board of Elections shall have the power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same. And they shall have power and authority to send for papers and persons and examine the same, and to pass upon the legality of any disputed ballots transmitted to them by any precinct officer.*" (Our italics.) This provision of the 1933 Act, now codified as G.S. 163-86, in express terms, applies to primaries as well as to general elections.

In a later case, *Ledwell v. Proctor* (1942), 221 N.C. 161, 19 S.E. 2d 234, C.S. 5986, as amended by the 1933 Act, was considered with reference to a general municipal election. In opinion by *Barnhill, J.* (later *C. J.*), it is stated: "The returns made by the registrars and judges of election merely constitute a preliminary step and such returns alone do not entitle the apparently successful candidate to the office. While the declaration of the board of elections of the result of an election as judicially determined and the certificate issued thereon are not conclusive, they must be taken as *prima facie* correct." It is here noted that the Harnett County Board of Elections judicially determined and certified Hill as the Democratic nominee.

In view of the foregoing, we reach the conclusion that G.S. 163-143, to the extent of conflict therewith, was repealed or superseded by the provision of the 1933 Act now codified as G.S. 163-86. See

*Board of Education v. Comrs. of Onslow,* 240 N.C. 118, 81 S.E. 2d 256.

There remains for consideration whether the County Board acted within the authority conferred by this portion of G.S. 163-86: "The said county board of elections shall have the power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same. And they shall have power and authority to send for papers and persons and examine the same, and to pass upon the legality of any disputed ballots transmitted to them by any precinct officer."

Petitioner asserts the affidavit of Hill, quoted in Finding of Fact #2, did not meet the requirements of the rule adopted by the State Board and quoted in Finding of Fact #6. As to this, the opinions of the State Board and of Judge McKinnon were in conflict. In our view, neither the validity of the rule nor the sufficiency of Hill's affidavit thereunder need be considered on this appeal.

Under the rule, when sufficient evidence is presented, in apt time, by affidavit "tending to show errors in the canvassing of said votes by the County Board of Elections, either because of an error in the tabulation thereof or because of the counting of alleged illegal ballots, in an amount alleged to be sufficient to change the results of the nomination or election," the county board "*shall* thereupon, within the time prescribed, meet *to consider* this demand for a recount." (Our italics.) The rule does not purport to provide that the county board *may not* meet and consider a demand for a recount in the absence of an affidavit in compliance therewith.

The gist of Hill's affidavit is that persons who were not legally qualified to do so acted as counters and tabulators in each of four precincts and that the returns made by precinct officials were based on the count and tabulation so made. The County Board, in the exercise of its judgment and discretion, "reached the conclusion that there might be errors in counting the ballots by precinct officials and therefore decided to recount." Petitioner expressly concedes the members of the County Board acted in good faith.

It is noted: If the said rule were interpreted so as to conflict with the powers conferred upon the County Board by G.S. 163-86, to the extent of such conflict the rule would be invalid. *States' Rights Democratic Party v. Board of Elections,* 229 N.C. 179, 186, 49 S.E. 2d 379.

True, the fact that persons not legally qualified to do so acted as counters and tabulators as set forth in Hill's affidavit would not invalidate the vote of any qualified elector. *Woodall v. Highway Commission,* 176 N.C. 377, 97 S.E. 226; *McPherson v. Burlington,* 249

N.C. 569, 107 S.E. 2d 147, and cases cited. However, there is no contention here that any person voted who was not entitled to vote or that any qualified elector was prevented from voting. The question is whether the affidavit alleging irregularities in connection with the counting and tabulation of the votes constituted a sufficient basis for the County Board, in the exercise of its judgment and discretion, to order and conduct a recount of the ballots cast.

Under the circumstances here considered, we are of opinion, and so hold, that the County Board, under G.S. 163-86, in the good faith exercise of its judgment and discretion, had authority to order and conduct a recount of the ballots and to declare and certify Hill as the Democratic nominee in accordance with such recount.

It is noted: It is the duty and responsibility of the precinct officials to put all ballots counted back into the box, to lock and seal the box; and thereafter the ballot box "shall remain in the safe custody of the registrar subject to any orders from the chairman of the county board of elections as to (its) disposition." Chapter 1203, Section 2, Session Laws of 1959. There is no suggestion that the precinct officials did not comply fully with their duties in these respects.

For the reasons stated, the judgment of Judge McKinnon is affirmed.

Affirmed.

RODMAN, J., Concurring: This case presents no question of a denial of the right to vote nor is there suggestion that illegal ballots were cast. The sole question for determination is the power of a County Board of Elections, upon suggestion of error in tabulating the vote at a primary election, to order a recount of the ballots before the canvass has been completed.

I think this power expressly given by statute, G.S. 163-143, which provides: "When, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and the State Board of Elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results, which shall be done under such rules as the State Board of Elections shall establish to protect the integrity of the election and the rights of the voters." This was a part of the original Act providing for primary elections. I find no statute limiting the power given, nor have I found any decision which in my opinion limits the power expressly conferred. To the contrary, prior decisions, when interpreted in the light of the questions which the court was called upon

to answer, seem to me to clearly recognize the right of a County Board to order a recount in primary elections to ascertain if an error was made in tabulating the vote. In *Brown v. Costen*, 176 N.C. 63, 96 S.E. 659, plaintiff, seeking to restrain the certification of his opponent, expressly alleged a correct tabulation of the ballots actually cast. He based his right to relief on the assertion that a number of qualified voters sufficient to affect the result had been denied the right to vote. Justice Hoke, in denying plaintiff's right to challenge and the power of the County Board to change the result because of an asserted denial of the right to vote, was careful to direct attention to the statute which gave to the County Boards the right to determine the accuracy of the tabulation. That is what the Harnett County Board did and all it did.

The conclusion reached in *Burgin v. Board of Elections*, 214 N.C. 140, 198 S.E. 592, with respect to the recount of the Union County ballots, I think supports the view here expressed.

I do not think we are now called upon to determine what additional power may have been given County Boards by subsequent legislation.

The right of County Boards to ascertain if error of tabulation exists must, by the terms of the statute, be exercised in conformity with rules promulgated by the State Board. The applicable rule reads:

"When any controversy shall arise with respect to the counting of the ballots, or the certification of the returns of the vote, in any primary or general election, in any precinct or precincts, any candidate or elector desiring to make any complaint or protest regarding same shall make such protest in writing to the County Board of Elections on or before the time fixed by the statutes for the canvassing of the votes for such primary or general election by the County Board of Elections, and said County Board of Elections may determine the controversy at said meeting or at any time hereinafter specified.

"If, after the canvass is completed by the County Board of Elections, any candidate or candidates, participating in such primary or election, demands a recount by the County Board of Elections in any one or more precincts in the county, and presents sufficient evidence by affidavit tending to show errors in the canvassing of said votes by the County Board of Elections, either because of an error in the tabulation thereof or because of the counting of alleged illegal ballots, in an amount alleged to be sufficient to change the results of the nomination or election of such candidate or candidates, then this demand for the recount must be made to the chairman

or secretary of the County Board of Elections, in writing, by 6 o'clock p.m. on or before the second day following the completion of the original count by said County Board and the declaration by it of the results of said primary or election. The County Board of Elections shall thereupon, within the time prescribed, meet to consider this demand for a recount."

Hill asserted errors in tabulating ballots and filed a written request for a recount with the County Board before the time fixed for the Board to canvass the returns. And the County Board, before canvassing the vote, considered the affidavit asserting errors of tabulation and "reached the conclusion that there might be errors in counting the ballots by precinct officials and therefore decided to recount." This decision was announced by the chairman in the presence of both candidates.

The quoted rule draws an appropriate distinction between a recount which may be ordered before and after the canvass is completed. In acting before the canvass was completed, the County Board was, by the first paragraph of the rule, authorized to recount. In so acting it was complying with its statutory duty "to protect the integrity of the election and the rights of the voters."

For these reasons my vote is to affirm.

DENNY and PARKER, J. J., join in concurring opinion.

MOORE, J., Dissenting. I do not agree that G.S. 163-86 (P.L. 1933, C. 165, s. 8) in any wise repealed or abrogated any of the provisions of G.S. 163-143 (P.L. 1915, C. 101, s. 27). The 1933 enactment restated the existing law (P.L. 1901, C. 89, s. 33) with only two material changes: (1) the county board of elections was substituted for the board of county canvassers, and (2) the board was given authority "to pass upon the legality of any disputed ballots transmitted to them by any precinct officer."

*Ledwell v. Proctor,* 221 N.C. 161, 19 S.E. 2d 234, cited by the majority opinion in support of the proposition that G.S. 163-143 has been repealed *pro tanto* by G.S. 163-86, does not involve a recount. It stands for the proposition that the declaration of the board of elections "must be taken as *prima facie* correct." But it further states: ". . . the declaration of the result and the issuance of a certificate by a board of elections is *prima facie* correct, it is not conclusive. Resort, in proper instance, may be had to the courts and the courts may examine and pass upon the correctness and sufficiency of the return and to settle and determine the true and law-

ful result of the election as it affects the rights of the parties before the court."

It is conceded that a county board of elections has judicial functions and may exercise broad discretion in canvassing election returns and declaring results of elections. This was just as true prior to our decision in *Brown v. Costen* (1918), 176 N.C. 63, 96 S.E. 659, as it is today. *Britt v. Board* (1916), 172 N.C. 797, 90 S.E. 1005. The 1933 enactment did not add one whit to the stature of the board as a judicial and discretionary body, save "to pass upon the legality of any disputed ballots transmitted to them by any precinct officer."

The minutes of the Harnett County Board of Elections show that, in ordering a recount, the Board acted solely upon the affidavit of Hill. This affidavit points out no "errors in tabulating returns and filling out blanks" such that the result of the election in any precinct could not be accurately known. It alleges no such errors. The existence of such errors must be alleged, or made to appear to the board, before a recount may be had. G.S. 163-143. *Brown v. Costen, supra,* at page 67.

A county board of elections does not have unlimited discretion. Its discretion does not supersede the law. The law applicable to the case at hand is G.S. 163-143, as interpreted by this Court in the *Brown* case. I am unwilling to recede from that interpretation.

The law amply provides for a correct, open and public count and tabulation of votes immediately upon the closing of the polls. G.S. 163-84 and 85. Ordinarily the first count is the more reliable count. The legislature has seen fit to limit recounts to those cases in which it is shown that errors have been made "in tabulating returns and filling out blanks."

The Harnett County Board of Elections was without authority to order a recount. In the absence of a proper showing to the Board by allegation and upon hearing that there were "errors in tabulating returns and filling out blanks," so that the result of the election in any one or more precincts could not be accurately known. Hill was not entitled to have the ballots recounted. The Board should have canvassed the votes without a recount and declared the results.

I vote to reverse the holding of the court below and remand the cause that an order be made directing the Election Board to canvass the returns and declare the results in accordance with the requirements of the pertinent rules and statutes as herein indicated.

WINBORNE, C. J., joins in this dissent.

GLENN W. BROOKS AND WIFE, DORIS S. BROOKS v. ERVIN CONSTRUCTION COMPANY, A CORPORATION.

(Filed 19 October, 1960.)

**1. Sales § 6: Vendor and Purchaser § 9—**

The maxim *caveat emptor* does not apply in cases of fraud.

**2. Fraud § 3: Vendor and Purchaser § 25—**

Where material facts are accessible to the vendor only, and he knows them not to be reasonably discoverable by a diligent purchaser, the vendor is bound to disclose such facts, and in such instance *suppressio veri* has the same legal effect as *suggestio falsi.*

**3. Election of Remedies § 1—**

Where the execution of a contract is procured by fraud, the party defrauded may either rescind the contract for the fraud or affirm the contract and sue for damages resulting from the fraud.

**4. Trial § 24a—**

On motion to nonsuit, plaintiffs' evidence is to be accepted as true and considered in the light most favorable to them.

**5. Vendor and Purchaser § 25—**

Allegation and evidence to the effect that defendant sold plaintiffs a house and lot, that the house was built over a large hole which had been filled with debris, composed in part of partially burned tree stumps, limbs, etc., that the debris had been covered over with clay by defendant so that the facts were not discoverable by plaintiffs in the exercise of due dilligence, that defendant failed to disclose the facts in regard to the condition of the lot, and that the house settled as a result of being constructed on the filled land, resulting in material damage, *is held* sufficient to make out a cause of action for fraud and deceit.

**6. Limitation of Actions § 7—**

The statute of limitations does not begin to run against a cause of action for fraud until the discovery of fraud or the time it should have been discovered in the exercise of reasonable diligence.

**7. Limitation of Actions § 18—**

Where defendant pleads the three year statute of limitations in plaintiffs' action for fraud, the introduction of evidence by plaintiffs tending to show that the action was instituted less than a year after the discovery of the fraud and that the fraud was not discoverable in the exercise of due diligence before that time, precludes nonsuit on the ground of the bar of the statute, plaintiffs having assumed and carried the burden of proof upon the issue. G.S. 1-52(9).

APPEAL by plaintiffs from *Crissman, J.,* 15 August 1960 Regular Civil Term, Schedule A, of MECKLENBURG.

Civil action to recover compensatory and punitive damages for fraud and deceit in the sale of a dwelling house and lot.

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

*Richard M. Welling for plaintiffs, appellants.*
*McDougle, Ervin, Horack & Snepp for defendant, appellee.*

PARKER, J. Plaintiffs' evidence tends to show the following facts: Defendant construction company purchased and developed that certain development known as Markham Village, and particularly Lot 3, Block 22 of Markham Village, a lot known as 2415 Amesbury Avenue. In the spring of 1955 plaintiffs, who are husband and wife and have three children, were anxious to buy a home for immediate occupancy, because the house they rented had been sold, and they had received notice to vacate. They began negotiations with defendant for the purchase of a house and lot in Markham Village. Defendant showed them several completed houses in Markham Village, which they did not like. Then defendant showed them a vacant lot at 2415 Amesbury Avenue. It was a smooth lot. There was a pile of dirt in the right front of the lot about the size of a house. It looked like solid clay. There were no stumps or roots or anything to be seen on it. Defendant told them in substance that plans for a house to be built on this lot had already been approved by the Veterans' Administration for a GI prospective purchaser, whose credit did not check out, and the prospective sale was not consummated. Plaintiffs learned later this prospective purchaser was Marvin Jerome Bryant. Marvin Jerome Bryant refused to buy this lot and a house to be constructed on it by defendant on account of a huge hole dug on the lot. Marvin Jerome Bryant was never refused credit so far as he knows. Defendant told plaintiffs, "we can fix up for you real fast because it has already been approved by the Veterans' Administration, and will save you a lot of time." Defendant's salesman assured plaintiffs that defendant had an excellent reputation, and would build them a fine house, and build it properly in a workmanlike manner. The male plaintiff saw this lot several times after this, and never saw anything there that would lead him to believe that anything was wrong with the lot. It looked like a fine lot. Defendant never said anything to plaintiffs about the soil on the lot, and plaintiffs asked no questions in respect thereto, or as to whether the lot had been filled in.

On 16 May 1955 plaintiffs contracted in writing to purchase and defendant to sell for the price of $12,400.00 the lot known as 2415 Amesbury Avenue in Markham Village and a house to be built

thereon known as the Pinecrest Model by defendant according to plans and specifications approved by the Veterans' Administration. Title and possession of this house and lot were transferred and delivered to plaintiffs by deed dated 23 September 1955, and duly recorded. At the same time defendant gave plaintiffs a one-year written warranty of completion of the contract in conformity with approved plans and specifications of the Veterans' Administration.

Plaintiffs moved into their house on 29 September 1955. Three months later three doors in the house were not closing, the doors were binding at the top against the frame. Male plaintiff reported this to defendant, and it sent several men there, who placed a large beam propped up on 2 x 4s resting on one or two bricks under the living room and kitchen near the wall where the doors were not closing, and jacked up the floor level about one-half an inch. Whereupon the doors closed properly. After this the house continued to settle, the plaster therein began to crack, the nails in the walls started popping out of the plastering, a bulge appeared in the living room in the hall, and the cornice molding came loose. The floors were not solid and squeaked.

In February or March plaintiffs made an addition to their house, and when this was being done the male plaintiff saw the builder dig up some little pieces of wood and limbs in excavating two or three feet for a cement foundation.

Some time in 1958 or 1959 two neighbors of plaintiffs were standing near the corner of their house, and the male plaintiff was fussing about all the boards, logs and parts of bricks he was digging up in working in his yard. Whereupon one of these neighbors, Harold Murr, told him to go under his house and he would find a whole lot more. Immediately thereafter the male plaintiff got a shovel, went under the house, and dug a hole about seven or eight feet long and about four or five feet deep. In so digging, he dug out sticks, charcoal and little pieces of pine and plastering. It had rained the day before, and water began seeping in the hole. In two hours the hole was about two feet deep in water, and he stopped digging because he could not dig in water. When he had dug as much as five feet deep, he had never reached solid earth.

In 1955 before defendant showed plaintiffs the vacant lot at 2415 Amesbury Avenue, it had dug a hole in this lot with a bulldozer at least fifteen feet deep and about the width of a house, some fifty feet. In its development of this part of Markham Village, defendant had gathered in the street near this lot a pile of trees, stumps, limbs

and debris about fifty feet long and twenty feet high. Defendant set fire to this pile, and afterwards pushed what was left from the fire into the hole it had dug on the lot at 2415 Amesbury Avenue, and covered it up. Defendant built the house it sold to plaintiff centered over this filled up hole.

C. A. Waters, who has been in the business of building dwelling houses in the Charlotte area for 25 or 30 years, testified that the concrete footing of plaintiffs' house was resting at the front on filled dirt, and this is not good building practice, because a house continues to go down if it is built on disturbed soil. In the building trade fill dirt is disturbed soil. To prevent further sinking of plaintiff's house, one would have to go down until he got firm clay and pillar the house up, or else move the house off and put in a new foundation. On cross-examination he said he did not know if it is not common practice in the building trade to fill in land tamped down with a certain machine and build on it.

Plaintiffs instituted this action on 6 May 1959.

The maxim *caveat emptor* does not apply in cases of fraud. *Guy v. Bank,* 205 N.C. 357, 171 S.E. 341; *Smathers v. Gilmer,* 126 N.C. 757, 36 S.E. 153; *Walsh v. Hall,* 66 N.C. 233.

One of the fundamental tenets of the Anglo-American law of fraud is that fraud may be committed by a *suppressio veri* as well as by a *suggestio falsi.* 23 Am. Jur., Fraud and Deceit, p. 850.

This Court said in *Manufacturing Co. v. Taylor,* 230 N.C. 680, 55 S.E. 2d 311: "It is a practically universal rule, and it is the law in this State, that under circumstances which make it the duty of the seller to apprise the buyer of defects in the subject matter of the sale known to the seller but not to the buyer, *suppressio veri* is as much fraud as *suggestio falsi.*"

Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts, and make them known to the purchaser. *Farrar v. Churchill,* 135 U.S. 609, 34 L. Ed. 246; *Clauser v. Taylor,* 44 Cal. App. 2d 453, 112 P. 2d 661; 55 Am. Jur., Vendor and Purchaser, p. 532.

A party has the right either to rescind what has been done as a result of fraud, or affirm what has been done, and sue for damages caused by the fraud. *Amusement Co. v. Tarkington,* 247 N.C. 444, 101 S.E. 2d 398.

*Clauser v. Taylor, supra,* is a case very similar to the instant case. Defendant owned two residential lots. These lots, as defendant knew, had been filled with debris in 1928, which had been covered,

and the fact that the lots had been filled did not appear from a casual examination of the property. Due to the fact that the lots had been filled, the cost of bulding on them was materially increased. In 1940 plaintiff bought the lots. Plaintiff saw the lots, but made no inquiry as to whether they were filled or not, and neither defendant nor her agent made any representation concerning the lots. Upon discovering that the lots had been filled, plaintiff tendered to defendant a deed for them, and endeavored to rescind the transaction. The Court in affirming a judgment for plaintiff said: "It is the law that, where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee, and upon his failure to do so, the vendee may rescind the transaction upon discovering the true state of facts."

*Rothstein v. Janss Inv. Corp.*, 45 Cal. App. 2d 64, 113 P. 2d 465, was an action to recover damages for fraud in the sale of a lot which was represented as a solid lot without a fill. Later plaintiff discovered the lot had a fill of some 19 feet. The Court said: "Certainly, it may not be successfully contended that a fill to the depth of 19 feet is not a material factor in considering the purchase of a piece of real property. In so far as the purchase of a building lot for residential purposes is concerned, such a fill represents the difference between a piece of real estate and a hole in the ground."

In *Tatham v. Pattison*, 112 Cal. App. 2d 18, 245 P. 2d 668, the Court said: "It must be held that there is in the record substantial evidence to support a finding that appellant was aware of the fact that a portion of the land upon which the house was constructed was filled ground, which filling materially affected its value. That under the circumstances here present, appellant was under a duty to disclose that information to respondents. That he failed to do so, and in fact represented to respondents that there was no fill under the house. Upon learning the true state of facts, respondents therefore were entitled to rescind the contract."

*Weikel v. Sterns*, 142 Ky. 513, 134 S.W. 908, was an action to recover damages for deceit in the sale of property. The Court held that where defendant connected the sewer from his building with a pit in the rear thereof, and then built a residence over the pit and covered it with clay, the pit at that time being full of sewage up to about a foot below the level of the cellar of the residence, and sold the residence to plaintiffs, telling them nothing about the pit or sewer pipe, and plaintiffs were unable to get tenants to move in the house because of the odor, defendant was liable in damages.

Applying the foregoing rules to the facts of the instant case, plaintiffs' evidence, accepting it as true and considering it in the light most favorable to them as we are required to do in passing on a motion for judgment of involuntary nonsuit, *Smith v. Rawlins*, 253 N.C. 67, ..... S.E. 2d ....., tends to show that defendant dug a large hole on the lot at 2415 Amesbury Avenue, filled it with debris from a pile of trees, stumps, limbs and other things about fifty feet long and twenty feet high which it had burned, and then covered it over, and defendant without disclosing such facts to plaintiffs sold this lot to plaintiffs, and sold and constructed for them a house centered over this covered up hole, which filled in lot materially affected the value of the house and lot. Since this defect in the lot and the house built centered over it was not apparent to plaintiffs and not within the reach of their diligent attention and observation, defendant was under a duty to disclose this information to plaintiffs. Plaintiffs' evidence makes out a case of actionable fraud sufficient to carry the case to the jury.

Construing the complaint liberally with a view to substantial justice between the parties, G.S. 1-151, it alleges sufficient facts to constitute a cause of action for fraud and deceit.

Defendant contends that plaintiffs' action is barred by the three-year statute of limitations, G.S. 1-52(9), which statute of limitations is pleaded by defendant as a bar to plaintiffs' action.

This Court said in *Wimberly v. Furniture Stores*, 216 N.C. 732, 6 S.E. 2d 512: "The authorities are to the effect that, in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence."

"Ordinarily, the bar of the statute of limitations is a mixed question of law and fact." *Currin v. Currin*, 219 N.C. 815, 15 S.E. 2d 279.

Tested by the above standard plaintiffs' evidence, accepting it as true and considering it in the light most favorable to them, tends to show that they did not discover the fraud until 1958 or the early part of 1959, and could not in the exercise of reasonable diligence have discovered it before that time, that they instituted this action on 6 May 1959, and that they have sustained the burden on them (*Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E. 2d 8), to show that the statute of limitations had not run against their cause of action. Therefore, it is not proper to grant a motion for judgment

of involuntary nonsuit on the ground that plaintiffs' action is barred by the three-year statute of limitations.

The motion for judgment of involuntary nonsuit was improvidently granted and is

Reversed.

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MATTIE ESTELLE HALL, ADMINISTRATRIX OF THE ESTATE OF LILLIE MAE HALL, PLAINTIFF V. HARRY CARROLL AND CHAMPION PAPER AND FIBRE COMPANY, DEFENDANTS; JOHN H. SINGLETON AND ULYSSES MOORE, ADDITIONAL DEFENDANTS.

AND

ROBERTA McMILLIAN MOORE, ADMINISTRATRIX OF THE ESTATE OF JAMES ARTHUR McMILLIAN, PLAINTIFF V. HARRY CARROLL AND CHAMPION PAPER AND FIBRE COMPANY, DEFENDANTS; JOHN H. SINGLETON AND ULYSSES MOORE, ADDITIONAL DEFENDANTS.

(Filed 19 October, 1960.)

**1. Automobiles § 48: Negligence § 19—**

Where a passenger in a car is killed in a collision, the passenger's administrator may sue either one or both of the drivers, and each driver is severally liable if his negligence was a proximate cause of the injury and death, and as to plaintiff his liability is not enlarged or diminished by the fact that the negligence of the other driver may or may not have been a contributing cause of the accident.

**2. Limitation of Actions § 12: Death § 4—**

Where an action for wrongful death is instituted against several defendants and nonsuited for variance, a second action instituted within one year of the nonsuit is a continuation of the original action in so far as a party who is a defendant in both actions, upon substantially similar allegations of negligence, is concerned, notwithstanding that some of the parties defendant in the first action were not joined in the second and the fact that parties were joined as defendants in the second action who were not defendants in the first. G.S. 1-53(4), G.S. 1-25.

**3. Judgments § 33—**

A plea of *res judicata* on the ground of a prior judgment of nonsuit can be sustained only if both the allegations and evidence in the actions are substantially the same, and it is error for the court to determine the plea on the pleadings alone prior to the introduction of evidence.

APPEALS by plaintiffs from *Froneberger, J.*, February 1960 Term, BUNCOMBE Superior Court.

These civil actions (consolidated for hearing) grew out of an auto-

mobile accident involving three vehicles. The accident occurred on November 17, 1956, near the town of Fletcher in Henderson County. Lillie Mae Hall was killed instantly and James Arthur McMillian died three weeks later from injuries received in the accident. Both were guest passengers in an automobile driven by Ulysses Moore.

On February 12, 1957, the plaintiffs' administrators each brought an action for wrongful death against John H. Singleton, driver, Arthur E. Cox, Sr., owner of a Chevrolet truck, and Harry Carroll, driver, and Florence Carroll, owner, of a Ford, alleging on the part of each driver separate acts of negligence which concurred in causing the accident and injury. Answers were filed denying negligence.

At the July Term, 1958, the cases were consolidated and tried together. Judgments of involuntary nonsuits were entered because of a variance between the allegations and the proof. This Court granted *certiorari*, reviewed the case, and on December 10, 1958, affirmed the judgment of the superior court. The case is reported in 249 N.C. 287, 106 S.E. 2d 214.

On February 2, 1959, the present actions were instituted by the same plaintiffs against Harry Carroll and Champion Fibre Company, alleging on the part of Carroll the same negligent acts alleged against him in the former actions. The new complaints further alleged that at the time of the accident Carroll was operating the Ford as agent and employee of Champion Fibre Company.

The defendant Carroll, upon motion, brought in John H. Singleton and Ulysses Moore (the other drivers involved in the accident) as additional defendants for purposes of contribution. On motion, the court by consent dismissed the action against Champion Fibre Company as not having been brought within two years. The defendant Carroll filed an answer denying negligence, and as a further defense alleged the deaths occurred on November 17, 1956, and December 9, 1956, more than two years prior to the institution of these actions on February 2, 1959, and pleaded the lapse of time (statute of limitations, G.S. 1-53) in bar of recovery.

As a fourth further defense, defendant Carroll alleged the acts of negligence charged against him in the present actions are substantially the same as those charged in the former actions and that evidence will be substantially the same as that offered in the prior hearing. He pled in bar the former judgments as final adjudications of the issues now raised.

The court found facts and entered the following Order: "Upon the foregoing findings of fact, the Court concludes, as a matter of law, that the present actions before the Court are not a continuation of

the former actions instituted on February 12, 1957, but that said actions are new actions between different parties for different causes of action, and founded upon a different state of facts; that the present actions were instituted more than two years after the death of plaintiffs' intestates and, therefore, are barred by North Carolina General Statutes 1-53."

The plaintiffs excepted and appealed.

*S. Thomas Walton for plaintiffs, appellants.*

*Van Winkle, Walton, Buck and Wall, By: Herbert L. Hyde for defendant Harry Carroll, appellee.*

HIGGINS, J. These actions were not brought within two years after the deaths of plaintiffs' intestates. G.S. 1-53(4). They are, therefore, barred unless kept alive as continuations of former actions. G.S. 1-25. The trial court made extensive findings of fact and concluded as a matter of law the present actions are new, and dismissed them.

The court properly found the plaintiffs are the same, but that John S. Singleton, Andrew E. Cox, Sr., and Florence Carroll, original defendants, were omitted, and Champion Fibre Company was added as party defendant. The prayers for recovery were $50,000 in each of the first, and $25,000 in each of the second actions.

In the original complaints specific acts of negligence on the part of Harry Carroll were alleged. Likewise, specific negligent acts were charged against John H. Singleton. The joint and concurrent acts and omissions on the part of the defendants "were and each of them was the proximate cause" of the collision and resulting injury. The plaintiffs' intestates were guest passengers in a vehicle driven by Moore. If the jury should find, therefore, that any negligent act or omission alleged against Carroll was one of the proximate causes of the accident and injury, then a recovery against Carroll would be warranted, even though negligent acts of others may have concurred as a proximate cause. "Accordingly, where several causes combined to produce injury a person is not relieved from liability because he is responsible for only one of them." *Price v. Gray*, 246 N.C. 162, 97 S.E. 2d 844.

As was said by the Supreme Court of Oklahoma in *Midland Valley R. Co. v. Townes*, 179 Okla. 136, 64 P. 2d 712, "The defendants in the former action were not sued jointly, but jointly and severally. Plaintiff could have dismissed as to either. The rule is that while the second suit must be for the same cause of action as the first

suit, it need not necessarily be against all of the defendants in the first suit unless all were necessary parties to the first suit." To the same effect is *Stevens v. Wood,* 17 Ga. App. 736, 88 S.E. 413: "Where the first suit was brought against two or more joint *tort feasors,* as in the instant case, each of whom was jointly suable but severally liable, all the defendants were not necessary parties to either the first or the second suit."

The rule is that a plaintiff may toll the running of the statute of limitations if within a year after nonsuit he brings another action on the same cause. The allegations constituting the cause must be in substance the same. The parties must be the same. In this case the plaintiffs are the same. The present defendant Carroll is the same defendant as in the first action. The allegations of negligence on his part are the same. They are sufficient to state a cause of action for individual liability on his part. In the original action John H. Singleton was charged with specific acts of negligence which would make him liable also. Consequently the allegations in the first action that the negligent acts of both joined and concurred in producing the injury cannot cancel out and eliminate the several separate acts charged against each.

The plaintiffs' intestates being guest passengers in another vehicle involved in the accident, their personal representatives may maintain an action against any one or more defendants whose negligent acts participated in and proximately caused the harmful result. Neither the elimination nor the addition of one or more of the defendants in the first, constituted the later a new or different action, unless their absence or presence is necessary to the determination of the issues between the plaintiff and the remaining defendant Carroll. However, neither by the elimination of original parties nor the addition of new ones can the liability of the defendant Carroll be enlarged. *Davis v. R. R.,* 200 N.C. 345, 157 S.E. 11; *Trull v. R. R.,* 151 N.C. 545, 66 S.E. 586.

The trial court apparently held the present is a new and different action upon the ground that Singleton, Cox, and Florence Carroll were eliminated from the first, and Champion Fibre Company was added in the second action. These facts, under the circumstances of this case, do not constitute the present a new action. The liability of Carroll is not enlarged.

As one of his further defenses the defendant Carroll has alleged the acts of negligence charged against him in the present action are substantially the same as those charged in the original action; that

the evidence will be the same, and that his plea of *res judicata* should be sustained. A plea of *res judicata* cannot be determined on the pleadings alone, but only after the evidence is presented. *Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123; *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Dix-Downing v. White,* 206 N.C. 567, 174 S.E. 451.

The issues between the plaintiffs and the defendant Carroll are now what they have always been. The plaintiffs preserve their right to try them by bringing the present actions within 12 months from the time the judgments of nonsuit were sustained. The defendant's plea of *res judicata,* however, remains in the case to be passed on after the evidence has been presented.

For the error in dismissing the action as to Carroll, the judgment of the superior court is

Reversed.

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STATE v. ROBERT DAVIS ALIAS POP DAVIS.

(Filed 19 October, 1960.)

**1. Criminal Law § 16—**

Where a statute (Ch. 509, Session Laws of 1945) provides that upon demand for a jury trial by either the defendant or the State the cause should be transferred to the Superior Court, such statute modifies G.S. 7-240 so that upon transfer of a cause to the Superior Court upon demand of the State for a jury trial, the Superior Court acquires concurrent original jurisdiction even though the offense be a petty misdemeanor and even though the county is exempt from the provisions of G.S. 7-64.

**2. Receiving Stolen Goods § 8—**

The value of the goods received by defendant with knowledge that the goods had been stolen relates only to the *quantum* of punishment.

**3. Receiving Stolen Goods § 6—**

In a prosecution for receiving stolen goods with knowledge that they had been stolen, the failure of the indictment to show that the company from which the goods were stolen is a corporation is not a fatal variance, there being no controversy as to the true owner of the property.

APPEAL by defendant from *Frizzelle, J.,* March 21, 1960 Term, of LENOIR.

STATE *v.* DAVIS.

On 4 January 1960 a warrant issued from the Municipal-County Court of Lenoir charging defendant with receiving, with knowledge that it had been stolen, a Zenith record player, the property of T. A. Turner & Co., Inc., of the value of $99.95. Upon motion of the State for a jury trial, the case was transferred to the Superior Court. At the January Term, 1960, of the Superior Court the grand jury returned a true bill charging defendant with receiving a record player valued at $150, with knowledge that it was the property of T. A. Turner Co., from which it had been stolen. The jury returned a verdict of guilty. Prison sentence of twelve months was imposed. Defendant appealed.

*Attorney General Bruton and Assistant Attorney General Hooper for the State.*

*J. Harvey Turner for defendant, appellant.*

RODMAN, J. Defendant contends his motion to nonsuit should have been allowed since the State offered no evidence tending to show the record player had a value in excess of $100. His argument is based on this reasoning: Knowingly receiving stolen property is a misdemeanor or a felony dependent on the value of the stolen property, G.S. 14-72; the Superior Court is given exclusive jurisdiction when the property has a value in excess of $100, G.S. 14-73; but the Municipal-County Courts created pursuant to G.S. 7-240 have exclusive jurisdiction of all misdemeanors except minor misdemeanors, with respect to which they have concurrent jurisdiction with justices of the peace, G.S. 7-222; this exclusive jurisdiction has not, as to Lenoir County, been modified by the provisions of G.S. 7-64; therefore the solicitor had to elect whether to put defendant on trial for a misdemeanor as charged in the warrant, in which case the value of the stolen property was immaterial, or, to put him on trial for a felony, in which event it was necessary to offer some evidence which in good faith would tend to support the allegation that the stolen property had a value in excess of $100, thereby investing the Superior Court with jurisdiction; and since the evidence for the State at the trial fixed a maximum value of $99.95, there was nothing which would tend to support the charge of a felony necessary to give the Superior Court jurisdiction.

The conclusive answer to the contention which the defendant makes is found in c. 509, S.L. 1945, making it mandatory for the judge of the Municipal-County Court of Lenoir County, upon demand by the State or defendant for a jury trial, to "immediately

transfer such case to the Superior Court of Lenoir County for trial. . . ." This statute is constitutional and in effect divested the Municipal-County Court of jurisdiction of criminal offenses otherwise committed to it when a demand was made for jury trial. *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602. When the jurisdiction of the Municipal-County Court was thus divested, the Superior Court acquired jurisdiction of the criminal charge of receiving, irrespective of whether the crime so charged was a felony or a misdemeanor. G.S. 7-63. The jurisdiction thus acquired was original and not derivative, and because original, defendant could not there be put on trial until the grand jury had returned a true bill. *S. v. Norman, supra.*

As the Superior Court had jurisdiction irrespective of value, the question of value related only to the *quantum* of punishment which could be imposed. *S. v. Talley,* 200 N.C. 46, 156 S.E. 142; *S. v. Dixon,* 149 N.C. 460. The punishment imposed is within permissive limits.

The fact that the property was stolen from T. A. Turner & Co., Inc. rather than from T. A. Turner Co., a corporation, as charged in the bill of indictment, is not a fatal variance. There was no controversy as to who was in fact the true owner of the property. *S. v. Whitley,* 208 N.C. 661, 182 S.E. 338.

The evidence was, we think, sufficient to require submission of defendant's guilt to the jury. Defendant's exceptions to the charge have been examined, but nothing prejudicial to defendant's rights or requiring discussion has been discovered.

No error.

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J. L. GRANT, t/a GRANT ELECTRIC COMPANY v. WALTER ARTIS AND HIS WIFE, GENEVA ARTIS.

(Filed 19 October, 1960.)

**1. Laborers' and Materialmen's Liens § 2—**

Plaintiff's evidence in this case is held sufficient to permit the inference that the contract for the furnishing and installation of electrical equipment in the dwelling owned by the defendants by the entireties, was made and entered into by and between plaintiff and both of the defendants.

**2. Trial § 22a—**

On motion to nonsuit, plaintiff's evidence is to be taken as true and

considered in the light most favorable to him, giving him the benefit of every reasonable intendment upon the evidence and every legitimate inference deducible therefrom.

**3. Trial § 49—**

A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the sound discretion of the trial court, and its ruling thereon is not reviewable on appeal in the absence of manifest abuse of discretion.

APPEAL by *feme* defendant Geneva Artis from *Frizzelle, J.*, March Civil Term, 1960, of WAYNE.

Action to recover the contract price of $282.46 for the furnishing and installation of certain electrical equipment in a dwelling house owned by the defendants, husband and wife, by the entireties, under an alleged contract between plaintiff and the defendants, and to enforce thereon a laborers' and materialmen's lien.

The following issues were submitted to the jury, and answered as appears:

"1. Did the plaintiff contract with both of the defendants as alleged in the complaint?

Answer: Yes.

"2. If not, did the plaintiff contract with the male defendant, Walter Artis?

Answer: . . . .

"3. What amount, if any, is the plaintiff entitled to recover in this matter?

Answer: $282.46."

From a judgment that plaintiff recover from the defendants, jointly and severally, the sum of $282.46, with interest, and declaring the judgment to be a lien for labor and material upon the property described in the complaint, the *feme* defendant Geneva Artis appeals.

*Braswell & Strickland for appellant, Geneva Artis.*
*No Counsel for appellee.*

PER CURIAM. The male defendant Walter Artis, individually, does not deny owing the amount plaintiff sues for. The *feme* defendant Geneva Artis contends that she and her husband made no contract with plaintiff, that the contract was entered into between plaintiff and her husband, and assigns as error the overruling of her motion for judgment of involuntary nonsuit renewed at the close of all the evidence. Accepting plaintiff's evidence as true, and considering his evidence in the light most favorable to him, and giving to him the

benefit of every reasonable intendment upon the evidence and every legitimate inference to be drawn therefrom, as we are required to do in passing on the *feme* defendant's motion for judgment of involuntary nonsuit, (*Smith v. Rawlins*, 253 N.C. 67, ..... S.E. 2d .....), it permits the reasonable inference that the contract for the furnishing and installation of the electrical equipment in the dwelling house owned by the defendants by the entireties was made and entered into by and between plaintiff and both of the defendants. The lower court properly overruled the *feme* defendant's motion for judgment of involuntary nonsuit renewed at the close of all the evidence.

There is no exception to the evidence. The *feme* defendant has one assignment of error to the charge. This is without merit, and is overruled.

The *feme* defendant assigns as error the refusal of the trial court to set aside the verdict, as being against the greater weight of the evidence, and contrary to law. *Feme* defendant's motion to set aside the verdict as being contrary to the greater weight of the evidence was addressed to the sound discretion of the court, *Wynne v. Allen*, 245 N.C. 421, 96 S.E. 2d 422, whose ruling, in the absence of manifest abuse of discretion is not reviewable on appeal, *Frye & Sons, Inc. v. Francis*, 242 N.C. 107, 86 S.E. 2d 790. No such abuse of discretion is shown. There is no merit in the contention that the verdict is contrary to law. This assignment of error is overruled.

The other assignment of error is formal. In the trial below we find

No error.

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BRENDA GUINN, BY HER NEXT FRIEND, FRED GUINN v. CLAUDE LAFAYETTE KINCAID, MARSHALL L. KINCAID AND BILLY JOE SINGLETON.

(Filed 19 October, 1960.)

**Appeal and Error § 3—**

An order overruling a demurrer for failure of the complaint to state a cause of action is not immediately appealable and may be reviewed prior to trial only by writ of *certiorari*. Rules of Practice in the Supreme Court 4(a).

APPEAL by defendants from *Nettles, Emergency Judge*, June Regular Civil Term, 1960, of BURKE.

GUINN *v.* KINCAID.

This is a civil action to recover damages for personal injuries allegedly sustained by the plaintiff while *en ventre sa mere*, as the result of a collision between the car owned and operated by the defendant Billy Joe Singleton and a car being driven by the defendant Claude Lafayette Kincaid, on 9 June 1959. At the time of the accident, Louella Guinn, mother of the plaintiff, was riding as a guest passenger in the automobile driven by the defendant Singleton and was violently thrown against the dashboard and windshield of the Singleton car with such force and impact that the plaintiff was seriously and permanently injured.

Each of the defendants filed a demurrer to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action for damages for personal injuries, for that: (1) It appears from the complaint that the minor plaintiff on 9 June 1959, the date of the alleged negligent injury giving rise to the cause of action, was *en ventre sa mere* and was not born until 10 June 1959, the day following the date of the alleged accident and resultant injuries giving rise to this cause of action. (2) That the minor plaintiff has no legal capacity to maintain this action since she was not born until 10 June 1959.

The court below overruled these demurrers. The defendants excepted and appealed.

*Byrd & Byrd for plaintiff.*

*James C. Smathers for defendant Singleton; Patton & Ervin for defendants Kincaid.*

PER CURIAM. In the case of *Boles v. Graham*, 249 N.C. 131, 105 S.E. 2d 296, this Court said: "Appeal does not lie from an order overruling a demurrer in any case except where it is interposed as a matter of right for misjoinder of parties and causes. Prior to trial on the merits, an order overruling a demurrer for failure to state a cause of action can be reviewed only by writ of *certiorari*. Rule 4(a), Rules of Practice in the Supreme Court, 242 N.C. 766. The defendants are here prematurely."

This appeal is likewise premature.

Appeal dismissed.

JETER RAMSEY, PETITIONER v. SOUTHERN RAILWAY COMPANY, RESPONDENT.

(Filed 19 October, 1960.)

**Courts § 6: Eminent Domain § 9—**

**Where order confirming the award of appraisers is entered by the clerk on petitioner's motion and only the respondent appeals, the court in its discretion may permit the respondent to withdraw the appeal, and petitioner may not thereafter contend that respondent's appeal entitled both parties to a trial *de novo* before a jury in the Superior Court.**

APPEAL from *Pless, J.*, August 1960 Regular Civil Term, MADISON Superior Court.

This special proceeding was instituted before the clerk superior court by the petitioner to recover compensation for the taking of an easement for railway purposes over petitioner's land. The respondent had the cause removed to the United States District Court. By consent it was remanded to the superior court. Appraisers were appointed, viewed the premises, and awarded the petitioner $3,000 as compensation.

The respondent filed exceptions to the award. The clerk overruled the exceptions and on September 30, 1958, rendered judgment affirming the award. The respondent excepted to the judgment and appealed to the superior court in term. On respondent's application the cause was again removed to the Federal court and on petitioner's motion again remanded to the Superior Court of Madison County. On August 12, 1960, the petitioner filed a demand for a jury trial.

In term, the respondent moved for permission to withdraw its appeal. The court, in its discretion, entered an order permitting the withdrawal, and ordered that the award "stand as entered." The petitioner excepted and appealed.

*Elmore & Martin, By: Harry C. Martin, Don C. Young, for petitioner, appellant.*

*W. T. Joyner, Jr., Ward & Bennett, for respondent, appellee.*

PER CURIAM. The petitioner now contends that the respondent's appeal from the clerk's order confirming the award entitled both parties to a trial *de novo* in the superior court, and that his demand for a jury trial entitles him to have the jury pass on the issues of compensation. The answer is, the clerk, on petitioner's motion, entered judgment confirming the award. Only the respondent appealed. When the court, in its discretion, permitted the appeal to be withdrawn, the clerk's judgment became the final adjudication.

Affirmed.

DANNY ROWLAND, BY HIS NEXT FRIEND, W. H. MESSER, *v.* DEWEY WILLIAM BEAUCHAMP.

(Filed 2 November, 1960.)

**1. Limitation of Actions § 11—**

In regard to the right of action of a minor to recover for personal injury negligently inflicted, the statute of limitations begins to run upon the appointment of a next friend for the special purpose of bringing such action. G.S. 1-52(5), G.S. 1-17, G.S. 1-64.

**2. Limitation of Actions § 1—**

Once the statute of limitations begins to run against an action, the statute continues to run against such action.

**3. Limitation of Actions § 12—**

Where an action instituted by a next friend to recover for the negligent injury of a minor is instituted within three years of the injury and is nonsuited, a new action may be instituted within one year of the judgment of nonsuit when the allegations in regard to the negligence are substantially the same in both actions, notwithstanding that the second action may be instituted by a different person acting as next friend, since under the provisions of G.S. 1-25 the second action is considered but a continuation of the first.

**4. Limitation of Actions § 16—**

Ordinarily the bar of a statute of limitations is a mixed question of law and fact, and may not be determined on motion to dismiss, but where all the facts with reference thereto are admitted, the question becomes a matter of law and can be raised by motion to dismiss.

**5. Courts § 7—**

The General County Court of Buncombe County has authority to dismiss an appeal from it to the Superior Court for failure on the part of appellant to perfect his appeal.

**6. Limitation of Actions § 12—**

Where appeal is taken from a county court to the Superior Court from judgment of involuntary nonsuit, but the appeal is not perfected, the judgment does not become final in the sense that it ends the action until judgment is entered dismissing the appeal, and a new action may be instituted within one year thereafter. G.S. 1-25.

**7. Same—**

G.S. 1-25 is an enabling statute extending the period of limitation, and should be liberally construed.

APPEAL by defendant from *Froneberger, J.*, June 1960 Civil Term, of BUNCOMBE.

Civil action to recover damages for personal injuries sustained on 18 February 1953 by plaintiff, Danny Rowland, who at that time was a child four years old and sues by his next friend, as a re-

sult of being struck by an automobile driven by defendant, heard on an appeal from a judgment of the General County Court of Buncombe County denying defendant's motion to dismiss plaintiff's action.

From a judgment of Judge Froneberger affirming the judgment of the General County Court of Buncombe County, and remanding the action to the General County Court of Buncombe County for further proceedings, defendant appeals to the Supreme Court.

*I. C. Crawford and Lawrence C. Stoker for plaintiff, appellee.*

*Van Winkle, Walton, Buck and Wall, By: Herbert L. Hyde for defendant, appellant.*

PARKER, J. Defendant's motion to dismiss plaintiff's action was heard on 14 August 1959 by Burgin Pennell, Presiding Judge of the General County Court of Buncombe County. The parties stipulated that this court was duly organized and constituted according to law, and had jurisdiction of the parties and of the action. Judge Pennell in his judgment made findings of fact from facts stipulated by the parties and from the pleadings. Defendant has no exception to any of these findings of fact. The facts so found, so far as relevent to a decision of this appeal, are in summary, except as quoted:

On 18 February 1953, plaintiff Danny Rowland, a child four years of age, sustained personal injuries as a result of being struck by an automobile driven by defendant. On 2 November 1953 plaintiff by his duly appointed next friend, Mrs. Edna Rowland, his mother, instituted an action against defendant in the General County Court of Buncombe County for the recovery of damages for personal injuries suffered as above set forth. On 1 December 1954 the General County Court of Buncombe County dismissed plaintiff's action by a judgment of involuntary nonsuit. From this judgment plaintiff appealed to the Superior Court of Buncombe County. On motion of defendant, the General County Court of Buncombe County dismissed this appeal to the Superior Court by judgment entered on 15 November 1956, which judgment, after reciting that this case came on to be heard on defendant's motion that the appeal by plaintiff from the judgment of involuntary nonsuit entered on 1 December 1954 be dismissed, contains the following findings of fact: "The Court allowed plaintiff sixty days in which to serve case on appeal and allowed defendant forty days thereafter in which to serve countercase, and adjudged appeal bond in the sum of $50.00 to be sufficient. Thereafter, plaintiff served case on appeal on defendant's counsel

on January 29, 1955, and thereafter defendant's counsel served exceptions on plaintiff's counsel on March 8, 1955. Appellee filed exceptions in the office of the Clerk of the General County Court on March 8, 1955, and appellant filed his case on appeal in the office of the General County Court on April 8, 1955. No further action was taken in said case with respect to said appeal, or otherwise, by either party until motion of the defendant for dismissal of the appeal, which was filed on the 19th day of September 1956." Whereupon, the court concluded as a matter of law that the appellant had failed to comply with the provisions of G.S. 7-295, as well as other applicable provisions of the statutory law of North Carolina with respect to said appeal, and entered judgment dismissing the appeal. Plaintiff did not except to this judgment.

On 13 November 1957, W. H. Messer, grandfather of plaintiff, was duly appointed his next friend, and instituted the present action in the General County Court of Buncombe County by the issuance of summons on the day of his appointment, which summons was served on defendant 14 November 1957. The allegations in each of plaintiff's complaints are substantially identical. In the instant action defendant filed a verified answer in which he pleads as a bar to plaintiff's action the three-year statute of limitations, G.S. 1-52(5), and the provisions of G.S. 1-25 — New action within one year after nonsuit, etc.

Judge Pennell in his judgment made the following conclusions of law:

"1. The present action was commenced more than three (3) years after the appointment of a next friend for plaintiff on November 2, 1953, and more than three (3) years after the institution of the original action by said next friend on November 2, 1953.

"2. That when the present action was instituted more than one year had elapsed since a judgment of involuntary nonsuit was entered by this Court on the 1st day of December, 1954.

"3. That when the present action was instituted less than one year had elapsed since the entry by this Court on November 15, 1956, of the judgment dismissing appeal from said judgment of involuntary nonsuit.

"4. That the language of G.S. 1-25 'The plaintiff is non-suited or judgment therein reversed on appeal, or is arrested.' includes within its meaning the judgment of dismissal of the appeal of the plaintiff, dated November 15th, 1956 from the judgment of nonsuit entered by this Court on the 1st day of December 1954."

Whereupon, Judge Pennell entered judgment denying defendant's motion to dismiss plaintiff's action.

From this judgment defendant appealed to the Superior Court of Buncombe County assigning as errors the court's conclusion of law number four, its refusal to sign the judgment tendered by defendant, and its signing of the judgment entered.

When this appeal came on to be heard by Judge Froneberger in the Superior Court, he entered judgment overruling all of defendant's assignments of error, affirming the judgment of the General County Court of Buncombe County, and remanding the case to that court for further proceedings.

Defendant appealed to the Supreme Court, and his assignments of error to this Court are the same as were his assignments of error to the Superior Court.

G.S. 1-52(5) provides that an action for personal injuries must be brought within three years. When plaintiff's cause of action accrued, he was under the disability of infancy.

G.S. 1-17 provides that a person entitled to commence an action, with exceptions not pertinent here, who is at the time the cause of action accrued an infant, "may bring his action within the times herein limited, after the disability is removed, . . . . when he must commence his action, . . . , within three years next after the removal of the disability, and at no time thereafter."

G.S. 1-64 states that an infant may sue by his general or testamentary guardian or by his next friend.

In North Carolina, contrary it seems to the general rule in most jurisdictions, the rule, except in suits for realty where the legal title is in the ward, is that the statute of limitations runs against an infant as to all rights of action, "which the guardian might bring and which it was incumbent on him to bring, in so far as may be consistent with the limitations of his office." *Johnson v. Insurance Co.*, 217 N.C. 139, 7 S.E. 2d 475, 128 A.L.R. 1375; Annos. 6 A.L.R. 1689 *et seq.*, and 128 A.L.R. 1379 *et seq.*

This Court said in *Johnston County v. Ellis,* 226 N.C. 268, 38 S.E. 2d 31: "In 27 Am. Jur., p. 839, sec. 118, is a summarized expression of the law as we conceive it to be here: 'The next friend has full power to act for the purpose of securing the infant's rights, and may do all things that are necessary to this end, although his power is strictly limited to the performance of the precise duty imposed upon him by law.' *Roberts v. Vaughn,* 142 Tenn., 316, 219 S.W., 1034, 9 A.L.R., 1528."

Plaintiff's next friend, his mother, was duly appointed on 2 No-

vember 1953 to bring an action for plaintiff for damages for personal injuries, and she instituted such an action against the defendant the same day. It would seem that under the rule adopted in this jurisdiction as to the running of the statute of limitations against an infant who has a general or testamentary guardian, the statute of limitations began to run against the infant here upon the appointment of his mother as next friend for the special purpose of bringing an action for him to recover damages for personal injuries. See also *Lineberry v. Mebane,* 219 N.C. 257, 13 S.E. 2d 429.

It is stated in *Mebane v. Patrick,* 46 N.C. 23: ". . . ; so that it has grown into a legal adage, 'When the statute begins to run, it continues to run.' " It is said in *Frederick v. Williams,* 103 N.C. 189, 9 S.E. 298: "It is well settled that, when the statute of limitations begins to run, nothing stops it." What was said in *Mebane v. Patrick* is quoted in *In re Will of Evans,* 209 N.C. 828, 184 S.E. 818.

The record does not disclose why another next friend was appointed for plaintiff. The present action was instituted after plaintiff's first action was nonsuited and more than three years after the appointment of plaintiff's mother as his next friend, and is barred by the three-year statute of limitations, unless it is saved by the provisions of G.S. 1-25, which reads as follows: "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in *forma pauperis.*" The original action was brought in *forma pauperis.*

This Court said in *Keener v. Goodson,* 89 N.C. 273: "The statute allowing actions to be brought within a year after judgment of nonsuit, was intended to extend the period of limitation, but not to abridge it."

"The time is extended because the new action is considered as a continuation of the former action and they must be substantially the same, involving the same parties, the same cause of action and the same right, and this must appear from the record in the case and cannot be shown by oral testimony." McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. 1, sec. 312. This is quoted in *Goodson v. Lehmon,* 225 N.C. 514, 35 S.E. 2d 623. The record here shows that plaintiff's second action is substantially the same as his first action was, involving the same parties, (*George v. High,* 85 N.C. 113), the

same cause of action, and the same right, and this appears from the record in the case.

In *Trull v. R. R.*, 151 N.C. 545, 66 S.E. 586, it is said: ". . . the time within which a new action may be commenced after a nonsuit, etc., is a statute of limitations."

"Ordinarily, the bar of the statute of limitations is a mixed question of law and fact." *Currin v. Currin*, 219 N.C. 815, 15 S.E. 2d 279. And ordinarily, the plea that plaintiff's action is barred by the statute of limitations will not be considered on a motion to dismiss. *Oldham v. Rieger*, 145 N.C. 254, 58 S.E. 1091; *Reid v. Holden*, 242 N.C. 408, 88 S.E. 2d 125. But where the statute of limitations is properly pleaded, as here, and all the facts with reference thereto are admitted, as here, the question of limitations becomes a matter of law and can be raised by a motion to dismiss. *Reid v. Holden, supra; Mobley v. Broome*, 248 N.C. 54, 102 S.E. 2d 407.

Appellant states in his brief, "the principal question to be decided by this Court, simply put, is whether the benefits of G.S. 1-25 should apply in this case."

The question to be decided is this: When all the relevant facts are admitted, did the judgment of involuntary nonsuit dismissing plaintiff's first action become final in the sense that it ends the action within the intent and meaning of G.S. 1-25 when it was entered in the General County Court of Buncombe County on 1 December 1954, or when plaintiff's appeal from such judgment to the Superior Court was dismissed by judgment of the General County Court of Buncombe County on 15 November 1956 on motion of defendant for plaintiff's failure to perfect his appeal, from which judgment plaintiff did not appeal?

The General County Court of Buncombe County had authority to dismiss plaintiff's appeal to the Superior Court for failure on plaintiff's part to perfect it. *Grogg v. Graybeal*, 209 N.C. 575, 184 S.E. 85; *West v. Woolworth Co.*, 214 N.C. 214, 198 S.E. 659; *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126. See G.S. 1-287.1, which was enacted by the 1959 General Assembly.

This Court in construing section 166 of the Code, (now G.S. 1-25), in *Webb v. Hicks*, 125 N.C. 201, 34 S.E. 395 (denying a rehearing of the case 123 N.C. 244, 31 S.E. 479) held that where a judgment of dismissal was affirmed on plaintiff's appeal (116 N.C. 598, 21 S.E. 672), and a new action was begun within one year after the final judgment of the lower court dismissing the prior action on a certified opinion of the Supreme Court, but more than one year after

such opinion was filed, the new action was not barred by section 166 of the Code, since the one year within which the action may be commenced should be computed from the date of the final judgment of dismissal in the Superior Court in accordance with the Supreme Court's certified opinion, rather than from the date such opinion was filed. In its opinion, the Court said: "This seems to be in harmony with the spirit of this enabling statute, which should receive a liberal construction." See also *Tussey v. Owen*, 147 N.C. 335, 61 S.E. 180.

In *Adams v. St. Louis-San Francisco R. R.*, 326 Mo. 1006, 33 S.W. 2d 944, 83 A.L.R. 474, the Court held as stated in the A.L.R. headnote: "One who has taken an appeal from a judgment of involuntary nonsuit does not, until such appeal has been determined, suffer a nonsuit within the meaning of a statute permitting the institution of a second action within one year after a nonsuit has been suffered, even though he did not give an appeal bond." The Court said: "When a judgment of nonsuit has been appealed from, the nonsuit does not become final, in the sense that it ends the lawsuit, until the appeal, taken with or without appeal bond, has been disposed of consistently with such judgment." See Annotation 83 A.L.R., p. 478 *et seq.*, where many cases are analyzed in respect to termination of prior action. See also Annos. 77 A.L.R. 496-7, 86 A.L.R. 1051-2; 34 Am. Jur., Limitation of Actions, sec. 282; 54 C.J.S., Limitations of Actions, p. 351. The cases in the various jurisdictions are not uniform.

Plaintiff suffered no final termination of his first action in the sense that it ended the action so long as his appeal from the judgment of involuntary nonsuit was pending, even though he failed to perfect it. When the time to perfect plaintiff's appeal had elapsed and he had not done so, defendant could have moved to dismiss it. But he chose not to do so until 19 September 1956. Following the statement in *Webb v. Hicks, supra*, that what is now G.S. 1-25 is an enabling statute and should be liberally construed, we are of the opinion, and so hold, that the judgment of involuntary nonsuit of plaintiff's first action became final in the sense that it ended the action, when the appeal was dismissed on 15 November 1956, and plaintiff had one year thereafter to commence a new action. His new action, the instant case, was instituted on 13 November 1957, and is saved by G.S. 1-25.

All defendant's assignments of error are overruled. The judgment below is

Affirmed.

VAN WATSON, JR., PLAINTIFF v. WATSON SEED FARMS, INC.; RUTH B. WATSON, DIRECTOR, GEORGE WATSON, DIRECTOR, GEORGE C. BENEDICT, DIRECTOR, RUTH B. WATSON, AS PRESIDENT, GEORGE WATSON, AS VICE PRESIDENT, SECRETARY-TREASURER, A. H. FITZGERALD, AS VICE PRESIDENT, T. A. MUSTAIN, AS VICE PRESIDENT, DEFENDANTS.

(Filed 2 November, 1960.)

**1. Corporations § 4½—**

Where a corporation has kept its books for a number of years according to an accepted method of accounting, which system is sufficient in computing its capital and surplus for franchise tax purposes and its income for income tax on a cash receipt basis, the Business Corporation Act, G.S. 55-37, does not make mandatory the abandonment of such system or the adoption of a new system of accounting by the corporation.

**2. Same—**

G.S. 37-2 does not necessarily require a corporation to assign some value to each article of property owned by it, and where a corporation's statement to its stockholders discloses the quantity and kind of seed held by it, without assigning any particular monetary value to such seed, a stockholder is not entitled to *mandamus* to compel the corporation to assign a value to such seed in preparing its financial reports.

**3. Mandamus § 1—**

*Mandamus* does not lie when plaintiff fails to establish the nonperformance of a duty by defendant.

APPEAL by plaintiff from *Bone, J.*, at Chambers in NASHVILLE on 15 August 1960.

Plaintiff, owning one-third of the stock of defendant corporation, instituted this action in July 1960 to compel defendants by *mandamus* to furnish him with accurate statements for each of the fiscal years 1956 through 1959, showing (a) annual income, (b) corporate assets including the value of inventories and amounts owing the corporation by its officers and directors, and (c) corporate liabilities; and, because of the failure of individual defendants to perform their duty and supply these statements, the statutory penalty provided by G.S. 55-38(d).

Defendants denied there was any indebtedness owing by the officers and directors to the corporation. They alleged: Annual corporate profit and loss statements with balance sheets showing the condition of the corporation had been prepared by a certified public accountant; the statements so prepared accurately disclose the corporation's assets and liabilities and dollar value assigned to all of the assets except seed held for sale; no value had been assigned to the

seed so held, but the quantity of each kind of seed was disclosed in the statements furnished plaintiff; copies of these statements had been given plaintiff; in addition to the information so provided, plaintiff had access to and made personal inspection of the books; the books were also made available to an auditor selected by plaintiff.

The parties did not demand a jury trial but submitted the question of plaintiff's right to *mandamus* to Judge Bone in chambers. He made no specific findings of fact. Apparently no request was made that he find facts. After reciting the evidence submitted and, "being of the opinion that the information furnished by defendants constitutes substantial compliance with the requirements of G.S. 55-37," he denied plaintiff's motion for the writ. Plaintiff excepted and appealed.

*Frank P. Meadows, Jr., and John Webb for plaintiff, appellant.*
*Battle, Winslow, Merrell, Scott & Wiley for defendant appellees.*

RODMAN, J. The question for determination is: Does the evidence submitted suffice to require the court to issue a writ commanding defendants to keep the corporate books in a manner and form different from that used by the corporation for many years?

The evidence other than facts alleged in the pleadings consists of reports made to the corporation by two certified public accountants, one, Mr. Shaw, employed by plaintiff, the other, Mr. Butler, for many years the corporation's accountant.

Mr. Shaw reported to the corporation by letter dated 28 November 1955. He accompanied his letter by statements purporting to show corporate income and expense for the year 1954 and a balance sheet at the end of that year. He concludes his letter: ". . . in my opinion, subject to the attached comments, the within statements present fairly the financial condition of Watson Farms, Inc. as of December 31, 1954, and the results of its operations for the period of five years then ended."

The Shaw balance sheet is set up in two columns, one headed "Book Values" and the other headed "Fair Market Values." Listed under current assets are "Other Inventories (See Schedule 2)." In the column headed "Book Values" these "Other Inventories" are shown to have a value of $155,790.74, and under Fair Market Values they are listed at $244,767.84.

The comment made a part of the statement reads: "The term 'Book Values' includes inventories at estimated cost values of $161,297.98 and accounts receivable of $2,386.86 not carried on the general ledger as assets because the system of accounting in use provides for the

reporting of income only as received. Accounts payable to corn growers in the amount of $26,362.52 were likewise not shown on the ledger as liabilities, so that the surplus of $172,293.34 shown herein was $137,322.32 more than the surplus of $34,971.02 shown on the books at December 31, 1954." Schedule 2, which lists the "Other Inventories," is composed, except for a small amount, of the dollar value (book or market) assigned to seed.

In 1956 Mr. Shaw, at the request of plaintiff, again examined the books of the corporation. He made a report to the officers and directors of Watson Farms, Inc. on 18 June 1956. Included in his report were (1) a statement of income and expenses for 1955 showing "Net Profit before Taxes and Life Insurance" of $7,883.17, and (2) a balance sheet for 31 December 1955 which included the item "Other Inventories" listed at estimated cost of $155,955.84, and fair market value of $223,316.39; and (3) "Other Inventories," assigning values to the articles there enumerated. The articles listed in this statement were seed, except for three items of small value.

Butler reported to the corporation on 7 February 1956: "I have examined the accounts and records of the Watson Farms, Incorporated, Whitakers, North Carolina, for the year ended December 31, 1955 for the purpose of preparing Federal and State Income Tax Returns, and as a result I have prepared the following statements reflecting the financial condition of the company as at December 31, 1955 and its operations for the year then ended:" The statements referred to consist of (a) statement of income and earned surplus showing in detail income, expenses, and operating income for the year of $21,092.70, and (b) balance sheet as of 31 December 1955 with an attached schedule of fixed assets and depreciation.

The balance sheets for the year 1955 are in agreement except for the fact that the Butler statement does not show "Other Inventories" shown on the Shaw balance sheet as having a cost value of $155,955.84 and a market value of $223,316.39.

In 1960 similar statements prepared by Butler, showing the results of the 1959 operations, were given plaintiff. These statements did not list "Other Inventories" and did not assign a specific value, either cost or market, to seed designated under the Shaw statements prepared for 1954 and 1955 as "Other Inventories."

In addition to the statements prepared by Butler, plaintiff was furnished a statement showing in detail the kind and quantities of seed held for sale. But the officers, in making this information available to plaintiff, refused to assign a value to the seed so held. They

responded to plaintiff's inquiries as to the value of the seed and gave him their ideas as to probable value but declined to assign any value in the balance sheet, asserting: "The value of such seed inventories depends entirely upon sales made due to the fact that the treated seed have virtually no value unless sold."

Plaintiff bases his asserted right to *mandamus* on the provisions of the Business Corporation Act, c. 55 of the General Statutes, which became effective 1 July 1957. Of course that Act can have no bearing on the manner in which corporations kept their books prior to its effective date. We are here concerned only with the question: Does the Act make mandatory the abandonment of a system in use for many years and the adoption of a new system of accounting?

Sec. 37 of the Act requires corporations to "(1) Keep correct and complete books and records of account." and "(4) Cause a true statement of its assets and liabilities as of the close of each fiscal year and of the results of its operations and of changes in surplus for such fiscal year. . .to be made and filed at its registered office. . .in this State. . ."

Sec. 49 of the Act provides: "Surplus is the excess of a corporation's net assets, as defined in this chapter, over its stated capital."

Assets are defined in sec. 2 as ". . .those properties and rights, other than treasury shares, which in accordance with generally accepted principles of sound accounting practice, are recognized as being properly entered upon the books and balance sheets of business enterprises in terms of a monetary value."

The phrase "in accordance with generally accepted principles of sound accounting practice" appears repeatedly in those sections of the Act relating to accounting and finance. Sec. 49(b), relating to the legality of dividends, adds to the quoted phrase "applicable to the kind of business conducted by the corporation." This addition is, we think, an inherent qualification when the statutory provisions are applied to a particular corporation. What is standard accounting practice for a corner grocery store may not be standard accounting practice for corporate giants such as General Motors, American Telephone & Telegraph, and similar corporations.

Income taxes are generally recognized as an important source of revenue for governmental operations. In North Carolina income taxes rank at or near the top. Because these taxes occupy this important position, there is statutory recognition that different methods of accounting may be used, when consistently followed, to determine tax liability. G.S. 105-142. A corporation may, pursuant to promulgated state and federal regulations, use either a cash receipt or an accrual

basis in computing its income taxes. These methods of accounting are not new. Each has been in general use for many years. It is not, we think, logical to conclude that the Legislature, in adopting the Business Corporation Act, intended to require a corporation to keep two sets of books, one for its stockholders, the other for the government, if it wished to compute its taxes on a cash receipt basis. It is even more illogical to assume that the Legislature intended by the Business Corporation Act to void regulations permitting computation of taxes on the cash receipt basis and thereby outlaw that method of accounting, or to invalidate an accepted method of determining capital and surplus for franchise tax returns required by G.S. 105-122.

The definition of assets does not require the assignment of a particular monetary value to each article of property. The fact that the property does in fact have a monetary value does not necessarily require that some value be assigned to it. This is well illustrated with respect to depreciated properties. The original cost may have been fully accounted for by depreciation. Notwithstanding this fact, the article may be in use and, in fact, have a substantial value.

It is not claimed that accurate information with respect to the quantity and quality of the seed has not been given. Plaintiff is as well qualified to assign a monetary value as defendants. Whether sound accounting principles applicable to defendant's business required a monetary assignment to the seed held for sale or an accrual system of accounting to obtain a true statement of the corporation's assets and liabilities were questions of fact. The challenged system has been in use for many years with at least the tacit approval of one certified public accountant. Under the facts presented, the court was justified in concluding that the accounting system used constituted a substantial compliance with statutory requirements.

*Mandamus* issues only to compel the performance of a duty. *Hinshaw v. McIver*, 244 N.C. 256, 93 S.E. 2d 90; *Nebel v. Nebel*, 241 N.C. 491, 85 S.E. 2d 876; *St. George v. Hanson*, 239 N.C. 259, 78 S.E. 2d 885. Plaintiff, having failed to establish nonperformance of a duty, was not entitled to the writ.

Judge Bone did not pass upon the allegation that defendants had misstated the assets by their failure to "disclose balances due from officers and directors of the corporation." We find no evidence in the record purporting to establish such indebtedness. The question was not debated on the appeal. The action was not dismissed. Plaintiff may proceed to trial upon his allegation of concealment of assets.

Affirmed.

NATIONWIDE MUTUAL INSURANCE COMPANY v. DON ALLEN CHEVROLET COMPANY.

(Filed 2 November, 1960.)

**1. Pleadings § 12—**

Upon demurrer for failure of the complaint to state a cause of action, the complaint will be liberally construed in plaintiff's favor.

**2. Insurance § 53—**

An insurer paying the loss to the insured owner of the chattel acquires only such rights by subrogation as the insured had.

**3. Sales § 14—**

Any affirmation by the seller which has a natural tendency to induce the buyer to purchase the goods, and which the buyer relies on in purchasing the goods, constitutes an express warranty.

**4. Sales § 24—**

Breach of express warranty entitles the buyer at his election to rescind the sale, but retention of the goods by the buyer after he discovers or has reasonable opportunity to discover the defects precludes the right of rescission.

**5. Sales § 26—**

Upon breach of warranty as to quality, the buyer, at his election, may retain the goods and sue for damages.

**6. Same—**

The measure of damages for breach of warranty as to quality is the difference between the reasonable market value of the article as warranted and as delivered, together with such special damages as were within the contemplation of the parties, but where there are no allegations as to the reasonable market value of the chattel as warranted or as delivered, the damages recoverable, if any, are restricted to special damages.

**7. Same: Automobiles § 5: Sales § 30— Buyer continuing to use chattel with knowledge of defects may not recover damages reasonably foreseeable from such use.**

A complaint alleging that the buyer purchased the automobile from defendant upon assurance of the defendant that any defects would be made good without cost to the buyer, that the buyer discovered that by reason of defects in the motor pump and improper adjustment of the carburetor, liquid gasoline escaped onto the motor in starting or attempting to start operation of the motor, that the buyer returned the car to defendant to remedy the defects, that the buyer discovered immediately thereafter that the defects had not been remedied, but that the buyer continued to use the automobile until it was destroyed by fire some six days thereafter, *is held* demurrable since it appears upon the face of the complaint that the damages resulted from the continued use of the automobile with knowledge of the defects under circumstances from which the hazard of fire was reasonably foreseeable, and

that therefore the damages resulted from the buyer's own negligence, thus precluding recovery either upon the theory of warranty or the theory of defendant's negligence.

**8. Pleadings § 19—**

Where facts constituting a defense precluding recovery appear upon the face of the complaint, such facts are properly considered upon demurrer, particularly when the demurrer is special and specifically points out such facts as a bar to plaintiff's action.

APPEAL by plaintiff from *Craven, Special Judge,* January 25 Special Civil Term, 1960, of MECKLENBURG.

The hearing below was on defendant's demurrer to the *modified amended complaint.*

The modified amended complaint contains, *inter alia,* these allegations: On January 15, 1957, Jo Ann Glenn purchased a new 1957 Chevrolet from defendant; and, on the same date, plaintiff issued to her its policy insuring the Chevrolet against loss by fire. On February 22, 1957, the Chevrolet was damaged by fire. Plaintiff paid to Jo Ann Glenn in settlement of its liability under said policy the sum of $2,384.03. Thereupon, Jo Ann Glenn assigned to plaintiff all claims and demands against any person, persons, firm or corporation arising from or connected with such fire loss or damage to the extent of the amount paid to her by plaintiff. Plaintiff's loss is $2,384.03 less the salvage value of the Chevrolet, to wit, $357.50.

Plaintiff, as subrogee, seeks to recover from defendant the sum of $2,026.53 with interest from February 22, 1957.

Proceedings prior to the hearing before Judge Craven were as follows: A demurrer by defendant to the original complaint, on the ground that plaintiff had not alleged facts sufficient to constitute a cause of action, was sustained by Judge Carr at December 8 Special Civil Term, 1958. Plaintiff did not except or appeal. Thereafter, as permitted by Judge Carr's order, plaintiff filed an amended complaint. Defendant then moved that designated portions of the amended complaint be stricken; and Judge Sharp, at December 7 Special Civil Term, 1959, entered an order allowing said motion and providing that defendant "answer, demur or otherwise plead to the amended complaint, as the said amended complaint is modified by this order."

The allegations of the modified amended complaint on which plaintiff bases its alleged right to recover from defendant are quoted below.

"5. (T)hat the defendant, through its duly authorized agents, assured the said Jo Ann Glenn that if any defects in materials or workmanship in said automobile should develop, or appear

within ninety (90) days after purchase or prior to the same having been driven four thousand (4,000) miles, that such defects would be made good by the defendant and without cost to the said Jo Ann Glenn; that the said Jo Ann Glenn purchased said automobile and paid the purchase price therefor, in cash, to the defendant and accepted delivery of said automobile on the 15th day of January 1957.

"6. That the plaintiff is informed and believes and so alleges, that immediately after purchasing said new automobile and receiving possession thereof, the said Jo Ann Glenn experienced serious difficulty in starting the motor of said automobile and immediately observed a strong odor of gasoline fumes in and about said automobile; that upon examining the motor and other parts of said automobile under the hood thereof, it was discovered that the motor and other areas of said automobile under the hood were saturated with gasoline; that the said Jo Ann Glenn experienced great difficulty in starting the motor of said automobile and operating the same continuously thereafter from the date of purchase until the same was destroyed by fire, as hereinafter alleged; that gasoline continued to escape from the fuel system of said automobile and to saturate the motor and other parts of said automobile and to cause excessive gasoline fumes to penetrate the passenger compartment of said automobile from the date of purchase until the same was destroyed, as hereinafter alleged; that the electric wiring system of said automobile was seriously defective in material and workmanship, that the fuel supply system of said automobile was seriously defective in material and workmanship in that the fuel pump pumped more gasoline than the carburetor could accommodate and the float on the carburetor of said automobile was defective and improperly adjusted, and as a result of said defective (and improper adjustment) said float failed to close or properly regulate the flow of gasoline being pumped into said carburetor thereby flooding the carburetor and saturating the motor and other parts of the automobile with gasoline escaping from the carburetor and ultimately resulted in the destruction of said automobile by fire, as hereinafter set forth.

"7. That the plaintiff is informed and believes and so alleges, that on the 16th day of February 1957, said automobile was returned to the place of business of the defendant in Charlotte, North Carolina, for the purpose of inspection and examination by the defendant or its employees and for correction of the de-

fects, above referred to; that the agents and employees of the defendant were notified of said defects in the electrical system of said automobile and the difficulty in starting the same and of the escaping gasoline and the saturation of the motor and other parts of said automobile by gasoline and the excessive fumes resulting from the escaping gasoline, and the agents and employees of the defendant were directed to examine the carburetor and other parts of the fuel system and the electric wiring system; that the agents and employees of the defendant did examine and inspect said automobile and experienced difficulty in starting the motor and observed the escaping gasoline and the saturation of the motor and other parts of the said automobile by gasoline.

"8. That the plaintiff is informed and believes and so alleges, that after the return of said automobile by the defendant to the said Jo Ann Glenn, as above set out, the said Jo Ann Glenn discovered that said defects had not been corrected; that the said Jo Ann Glenn continued to experience great difficulty in starting said automobile and gasoline continued to escape from the fuel system and to saturate the motor and other parts of said automobile; that the carburetor of said automobile was continuously saturated with gasoline and there was still a strong odor of gasoline fumes in and about said automobile.

"9. That the plaintiff is informed and believes and so alleges that on the 22nd day of February 1957, Mary Leah Glenn, a sister of Jo Ann Glenn, was driving said automobile with the consent and approval of said Jo Ann Glenn, on a public road in Union County; that as a result of the defective wiring and ignition system of said automobile the motor suddenly stopped while said automobile was being driven along said public road; that after considerable effort the motor was again started and said automobile was driven to the Roughedge Trading Store and Service Station; that upon leaving said store and service station, the said Mary Leah Glenn was unable to start the motor, and required assistance in starting said automobile; that immediately upon starting said automobile a large quantity of black smoke was discharged from the exhaust pipe, and there was a strong odor of gasoline fumes in and about said automobile; that after leaving said store and service station and while driving said automobile on a public highway of Union County said automobile ignited under the hood and continued to burn

from the front of said automobile to the rear until it was almost totally destroyed.

"10. That the plaintiff is informed and believes and so alleges that the destruction of said automobile by fire as above alleged was caused by and resulted directly from defects in material and workmanship in the electric wiring and ignition system and in defects in material and workmanship of the fuel supply system of said automobile in that, among other things, the fuel pump pumped more gasoline than the fuel system could accomodate and the float and valve seating mechanism in the carburetor was defective and out of adjustment and as a result of said defects and improper adjustment failed to close off the gasoline and control the flow of gasoline into the carburetor, thereby causing the carburetor to flood and to saturate the motor and other parts of said automobile including the exhaust manifold and other heated portions in motor with gasoline and thereby creating a dangerous fire hazard in and about said automobile."

In its demurrer to the modified amended complaint, defendant sets forth, as grounds of objection, that it does not state facts sufficient to constitute a cause of action against defendant in that it appears, *inter alia,* from the face thereof:

"(a) Jo Ann Glenn, the purchaser, owner and operator of the Chevrolet automobile referred to in the amended complaint, had full notice and knowledge of the alleged defect, or defects, if any, in said Chevrolet automobile from the date of the purchase thereof on or about January 15, 1957, until the date of the alleged fire, and alleged damage by fire, on the 22nd day of February 1957;

"(b) The said Jo Ann Glenn, the owner of the Chevrolet automobile referred to in the amended complaint, had full notice and knowledge of the alleged defective condition thereof, if any, from the 16th day of February 1957, the date upon which it is alleged that the said Chevrolet automobile was last delivered to the said Jo Ann Glenn, until the date of the alleged loss and damage by fire to the said Chevrolet automobile on the 22nd day of February 1957."

As further ground of objection, defendant asserts in its said demurrer that the modified amended complaint "does not allege any new or additional fact or facts in addition to those alleged in the original complaint, and . . . the order sustaining the demurrer of

the defendant to the original complaint constitutes *res judicata* of the matters and things alleged in the amended complaint, as modified by the order striking certain allegations therefrom, . . ."

After hearing, it was adjudged by Judge Craven "that the demurrer of the defendant to the amended complaint, as modified by the order striking certain allegations from the amended complaint be, and the same hereby is, sustained." Plaintiff appealed. Plaintiff's only exception and assignment of error is directed to the signing of said judgment by Judge Craven.

*Kennedy, Covington, Lobdell & Hickman and Mark R. Bernstein for plaintiff, appellant.*

*Helms, Mulliss, McMillan and Johnston and Larry J. Dagenhart for defendent, appellee.*

BOBBITT, J. The demurrer tests the sufficiency of the modified amended complaint. The rules applicable in a hearing on demurrer have been often stated and are well settled. *Pressly v. Walker,* 238 N.C. 732, 78 S.E. 2d 920; *Buchanan v. Smawley,* 246 N.C. 592, 595, 99 S.E. 2d 787. Our task is to determine whether the facts alleged, liberally construed in plaintiff's favor, state a cause of action.

Plaintiff, as subrogee, acquired only such rights against defendant as Jo Ann Glenn, its insured, possessed; and plaintiff's action is subject to all defenses defendant might have invoked if the action had been instituted by Jo Ann Glenn. 46 C.J.S., Insurance § 1211; 29A Am. Jur., Insurance § 1720; *Burgess v. Trevathan,* 236 N.C. 157, 160, 72 S.E. 2d 231, and cases cited.

Hereafter Jo Ann Glenn will be referred to as the buyer.

Plaintiff asserts the allegations of the modified amended complaint "state alternative causes of action against the defendant, any one of which will support a recovery." These alternative causes of action, so plaintiff contends, are (1) for breach of express warranty, (2) for breach of implied warranty, and (3) for negligence.

Our decisions are in accord with the provision of the Uniform Sales Act that "any affirmation of fact or any promise by the seller relating to the goods is *an express warranty* if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." (Our italics.) *Potter v. Supply Co.,* 230 N.C. 1, 7, 51 S.E. 2d 908, and cases cited; *Underwood v. Car Co.,* 166 N.C. 458, 82 S.E. 855.

Plaintiff's allegation is that the seller "assured" the buyer "that if any defects in materials or workmanship in said automobile should

develop, or appear within ninety (90) days after purchase or prior to the same having been driven four thousand (4,000) miles, that such defects would be made good" by the seller and "without cost" to the buyer. It is not alleged that the seller made any other affirmation or promise. Compare *Hill v. Parker,* 248 N.C. 662, 104 S.E. 2d 848. Moreover, there is *no allegation* as to *implied warranty.*

Plaintiff alleges that, when the car was delivered to the buyer on January 15, 1957, there were defects (1) in the electric wiring and ignition system and (2) in the fuel supply system; that the buyer took the car to defendant on February 16, 1957, for inspection and for correction of said defects; and that the buyer, after defendant returned the car to her, discovered said defects had not been corrected. The word "negligence" does not appear in plaintiff's allegations; and, unless implied from the allegations referred to above, there is no allegation that defendant failed to exercise due care to perform any legal duty it owed the buyer.

Upon breach of warranty as to quality, a buyer, at his election, may rescind unless he is barred by retention and use of the article of personal property after he discovers or has reasonable opportunity to discover the defect. *Hendrix v. Motors, Inc.,* 241 N.C. 644, 86 S.E. 2d 448. Here, it is alleged the buyer discovered said defects immediately after receiving the car on January 15, 1957, but retained possession and continued to use the car until the fire (caused by said defects) on February 22, 1957. These facts barred any right of the buyer to rescind. See *Hill v. Parker, supra,* p. 667, and cases cited. Moreover, the buyer did not at any time, either before or after the fire, purport to rescind the sale. Indeed, plaintiff's allegations do not disclose the purchase price paid by the buyer. They do disclose that, incident to the settlement with its insured, plaintiff acquired the damaged automobile.

A buyer's alternative remedy is to sue for damages; and, in such case, the measure of damages ordinarily recoverable for breach of warranty is the difference between the reasonable market value of the article as warranted and as delivered, with such special damages as were within the contemplation of the parties. *Hendrix v. Motors, Inc., supra,* and cases cited; *Underwood v. Car Co., supra,* and cases cited. Here, assuming plaintiff has sufficiently alleged warranty and breach thereof, there are no allegations as to the reasonable market value of the car as warranted or as delivered. Hence, under plaintiff's allegations, the damages recoverable, if any, must fall in the category of special (consequential) damages.

If it be conceded that plaintiff's allegations are otherwise sufficient to state a cause of action either for breach of warranty or for negligence, we are confronted by the fact plaintiff has affirmatively alleged that, immediately after the car was delivered to her on January 15, 1957, the buyer "experienced serious difficulty in starting the motor of said automobile and immediately observed a strong odor of gasoline fumes in and about said automobile," and "upon examining the motor and other parts of said automobile under the hood thereof, it was discovered that the motor and other areas of said automobile under the hood were saturated with gasoline," and that she operated the automobile continuously with knowledge of these conditions from January 15, 1957, until the fire on February 22, 1957. It is noted: Plaintiff did not allege that the buyer, apart from inspection made by defendant on February 16, 1957, made any effort whatever to have the defects corrected by defendant or otherwise.

As to warranty, it is our opinion, and we so hold, that damages caused by the buyer's continued use and operation of the automobile with knowledge that the ignition system was defective or maladjusted and that the motor and other parts under the hood were saturated with gasoline cannot be considered damages within the contemplation of defendant and the buyer. Indeed, it is inescapable that damages caused by the continued use and operation of the automobile under these circumstances must be attributed to negligence on the part of the buyer.

In 3 Williston on Sales, Revised Edition, § 614b, under the caption, "Consequential damages not contemplated are disallowed," it is stated: "If the buyer's own fault or negligence contributed to the injury, as by using the goods with knowledge of their defects, he cannot recover consequential damages, since such damages were under the circumstances not proximately due to the breach of warranty." Decisions are cited in support of the quoted statement.

In 46 Am. Jur., Sales § 801, it is stated: "It appears to be generally held however that a buyer whose negligence has contributed to the loss cannot recover for injuries sustained by reason of a breach of warranty."

In Sutherland on Damages, Fourth Edition, Vol. 1, p. 317, § 89, it is stated: "So where property is sold with a warranty of fitness for a particular purpose, if it be of such a nature that its defects can be readily, and in fact are, ascertained, yet the purchaser persists in using it, whereby losses and expenses are incurred, they come of his own wrong and he cannot recover damages for them as consequences of the breach of warranty."

In *Driver v. Snow,* 245 N.C. 223, 95 S.E. 2d 519, the plaintiff, based on alleged breach of implied warranty, sought to recover damages for personal injuries resulting from an explosion of a second-hand coal stove sold by defendant to plaintiff. In affirming judgment of involuntary nonsuit, *Higgins, J.,* quoted with approval this statement from the opinion of *Nash, J.,* in *Hudgins v. Perry,* 29 N.C. 102; "An implied warranty cannot extend to defects which are visible, and alike within the knowledge of the vendee and the vendor, or when the sources of information are alike open and accessible to each party." In distinguishing the cases relied upon by the plaintiff, *Higgins, J.,* said: "They deal with latent defects not discoverable by ordinary examination." Here, according to plaintiff's allegations, the buyer had actually discovered and was fully aware of the alleged defective condition of the automobile.

As to negligence, the applicable legal principles have been recently stated. *Kientz v. Carlton,* 245 N.C. 236, 96 S.E. 2d 14; *Tyson v. Manufacturing Co.,* 249 N.C. 557, 107 S.E. 2d 170; *Lemon v. Lumber Co.,* 251 N.C. 675, 111 S.E. 2d 868. Here, according to plaintiff's allegations, the alleged known defective condition was obvious, not latent; and such known defective condition was of such nature that the hazards reasonably foreseeable from the continued use and operation of the automobile were patent.

In *Gwyn v. Motors, Inc.,* 252 N.C. 123, 131, 113 S.E. 2d 302, the cause of the hazard was not obvious but concealed; and on this ground *Gwyn* was distinguished from *Harley v. General Motors, Corp.,* 103 S.E. 2d 191, a Georgia decision presently in point.

The facts that defeat plaintiff's alleged cause of action appear on the face of the modified amended complaint. Moreover, the demurrer is special, pointing out specifically these alleged facts as a bar to plaintiff's action. Hence, they are for consideration in passing upon the demurrer. *Harrell v. Powell,* 251 N.C. 636, 639, 112 S.E. 2d 81, and cases cited.

In *Aldridge Motors, Inc., v. Alexander,* 217 N.C. 750, 9 S.E. 2d 469, cited by plaintiff, the appeal was from an order denying defendant's motion to strike designated portions of the complaint. In this Court, the defendant demurred *ore tenus* to the complaint for failure to state facts sufficient to constitute a cause of action. This Court overruled the demurrer because the asserted ground of demurrer involved an affirmative defense defendant was required to allege and prove. Analysis of the record discloses a factual situation quite different from that here considered.

In *Aldridge*, both plaintiff and defendant were automobile dealers. Cars sold by Aldridge were purchased by Aldridge from defendant. A car sold by Aldridge to one Martin was delivered to Martin by defendant. In an action based on breach of implied warranty, Martin sued and obtained judgment against Aldridge. Thereafter, Aldridge instituted the action (involved in the appeal) to recover from the defendant the amount of Martin's judgment. The asserted ground of demurrer was that Aldridge, notwithstanding it had knowledge of the alleged defects soon after the car was delivered to Martin, failed to notify defendant thereof and thereby afford defendant an opportunity to correct such defects, and that by reason of such failure Aldridge was estopped to maintain the action. Suffice to say, the facts upon which the defendant relied as basis for the plea of estoppel interposed by demurrer were not alleged by Aldridge; and, since they did not appear on the face of the complaint, they were not for consideration in passing upon defendant's said demurrer.

Having reached the conclusion that the facts alleged in the modified amended complaint do not state a cause of action, it is unnecessary to consider whether Judge Carr's order sustaining defendant's demurrer to the original complaint constitutes *res judicata* as to the matters alleged in the modified amended complaint.

For the reasons stated, the order of Judge Craven sustaining the demurrer to the modified amended complaint is affirmed.

Affirmed.

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ISAAC AVERY CLONTZ v. N. B. KRIMMINGER TRADING AND DOING BUSINESS AS KRIMMINGER CANDY COMPANY, AND PAUL JUDSON SMITH, ORIGINAL DEFENDANTS, AND DAVID LEE STILWELL, ADDITIONAL DEFENDANT.

(Filed 2 November, 1960.)

**1. Trial § 22a—**

On motion to nonsuit, plaintiff's evidence will be considered in the light most favorable to him, giving him the benefit of every reasonable inference to be drawn therefrom.

**2. Automobile § 7—**

It is the duty of a motorist to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances, which requires him not merely to look, but to keep a lookout in his direction of travel, and he is held to the duty of seeing what he ought to have seen.

**3. Automobiles § 42d—**

Evidence tending to show that plaintiff was following defendant's vehicle upon a highway on a foggy morning while it was still dark, that plaintiff at all times could see the tail lights of the defendant's vehicle, that defendant stopped his vehicle without signal, and that plaintiff was within fifteen feet thereof before he realized the vehicle had stopped, and had insufficient time to either apply his brakes or to turn aside in order to avoid a collision, *is held* to disclose contributory negligence on the part of plaintiff as a matter of law, barring recovery even conceding there was sufficient evidence of negligence on the part of defendant.

**4. Negligence § 26—**

Where plaintiff's own evidence discloses contributory negligence constituting a proximate cause of the injury, nonsuit is proper since, in such instance, plaintiff proves himself out of court.

APPEAL by the original defendants from *Craven, Special J.*, at Special June 20, 1960 Civil Term, of MECKLENBURG.

Civil action to recover damages for personal injuries and property damage growing out of a motor vehicle collision which occurred in Mecklenburg County, North Carolina.

The record on this appeal shows that the plaintiff instituted this action against the original defendants, Paul Judson Smith and N. B. Krimminger, and that the original defendants had the additional defendant, David Lee Stilwell, made a party to the action in accordance with G.S. 1-240 providing for contribution among joint *tort-feasors.*

The evidence shows the following: On 14 January 1959, at approximately 6:30 A.M., the defendant Paul Judson Smith was driving a Chevrolet truck owned by his employer, the defendant N. B. Krimminger, in a westerly direction along the Albemarle Road toward the city of Charlotte, North Carolina. It was at this time still dark, and foggy, and the pavement was wet. The plaintiff, driving his Ford pick-up truck along the same road at the same time, was proceeding in the same direction as the defendant Smith and was traveling behind the truck operated by him. The additional defendant, David Lee Stilwell, was likewise traveling along the same road in his 1953 Ford automobile in a westerly direction, behind the plaintiff. After the three vehicles had been thus proceeding for a distance shown by conflicting evidence to be anywhere from a quarter of a mile to a mile, the defendant Smith stopped the truck he was driving, and the plaintiff ran into the rear end of the Smith truck, and shortly thereafter the Stilwell automobile collided with the plaintiff's pick-up truck.

Upon trial in Superior Court the plaintiff, as shown by the record, testified in pertinent part substantially as follows:

" * * * On or about January 14, 1959, I was driving from Midland, N. C., to Charlotte. I was driving a 1953 Ford pick-up truck, which I owned. I was traveling along Highway 27, which runs in a generally east-west direction. I was going west. This highway, in my opinion, is 20 to 25 feet wide. The time was approximately 6:30 A.M. It was dark. As to the weather conditions other than darkness, it was foggy. The road was damp, wet. There was a vehicle in front of me. I noticed it sometime prior to the accident—about a quarter of a mile down the road from where the accident happened, that is, east of the point of the accident. That vehicle was a Chevrolet panel truck. It had a sign on it which I later saw 'Krimminger Candy Company.' I later found out that the truck was being driven by Mr. Smith. The first time I saw the truck was when he pulled in front of me somewhere down the road. I don't exactly know where it was; I came up behind him. I followed him along the highway, and I reached an intersection. At the intersection I slowed down because there was a ditch across the road where they were putting in pipe lines. I would say it was about four inches deep."

And to the question "Did you ever see the truck again from that point until the time you had the collision?" the plaintiff answered: "That truck pulled on up from crossing there and the next time I saw him was when I hit him. The point of impact was approximately 300 feet from the crossing. As I approached the point of impact, I was travelling between 20 and 30 miles an hour. I was alone. From the intersection to the point where the collision took place, is three to four hundred feet, somewhere. At the particular spot where the collision took place, you couldn't see too far ahead because the fog had closed in between the trees on each side all the way down the highway. On each side of the highway there are these heavy oak trees and the fog settled in the road right along those trees.

"As to what happened as I traveled along the road after leaving the intersection, the first thing I saw was the truck sitting in the middle of the road and I didn't see any signs of his stopping, no hand signal, no stop lights or anything. Immediately upon seeing the vehicle stopped in the road, I raised my foot to put on my brakes to stop, but I didn't make any skid marks on the road. I did not get a chance to apply my brakes before the collision. As to how far I was from the stopped truck that was there in the road when I first saw it, I was approximately 100 feet, — no, I wasn't that far

from it when I came up to the back of the truck. In the fog, I was right on it, within 15 feet. I am talking about the Krimminger Candy Company truck. With reference to the road there, it is a straight road, level and at that point was wet. * * * I didn't notice any cars coming from the opposite direction at the time of the collision. * * * Assuming an imaginary line running in the center of the road, the Krimminger vehicle was sitting on the right-hand side of the line. It would be on the right-hand side, in the right lane. No part of the Krimminger truck was off of the road at the time of the collision."

And on cross-examination the plaintiff testified in pertinent part as follows: " * * * I had followed along behind Mr. Smith's panel truck approximately a quarter of a mile before the wreck. I had been behind him about a quarter of a mile. I had never caught up with him. When I first saw him, he was going up the highway. As to how close I caught up with him, it was approximately a hundred feet. I saw his tail lights when I first got behind him."

And in answer to the question: "Now, then, as you came down to the scene of the accident, did you lose sight of Mr. Krimminger's truck?" the plaintiff said: "I didn't lose sight of the truck at all; I never did see the truck. I seen the truck's lights all the way up the road, but in the fog his truck still looked to me like it was going up the highway. I could still see his tail lights. The fog interfered with my vision as I came in there. I saw no brake light come on, no flashing brake light come on, none whatever. The headlights on my car were burning all right. * * * The greatest distance that the Krimminger vehicle got in front of me, after I left the intersection was approximately 100 feet. I do not think he ever got more than about 100 feet in front of me. As I went on down there after I left the intersection, I was traveling between 20 and 30 miles an hour. When I saw the Krimminger vehicle in front of me, I didn't have time to do nothing. I was already pulled over to pass this other car when I saw him stopped in the road. I didn't have a chance to turn to my left to try to avoid the Krimminger truck. Where the wreck happened, the fog was heavier than further back down the road. I could see the car on ahead of me as I approached it."

From verdict and judgment in favor of the plaintiff against the original defendants, Paul Judson Smith and N. B. Krimminger, and denying any right to contribution from the additional defendant, David Lee Stilwell, the original defendants appeal to Supreme Court and assign error.

*Sedberry, Sanders & Walker for plaintiff, appellee.*

*R. Cartwright Carmichael, Jr., Kennedy, Covington, Lobdell & Hickman for original defendants, appellants.*

*Carpenter & Webb for additional defendant, appellee.*

WINBORNE, C. J. Of the many assignments of error set forth in the record of case on appeal, the determinative question is predicated upon exceptions to the trial court's denial of defendants' motion for judgment as of nonsuit first made at the close of plaintiff's evidence, and aptly renewed at the close of all the evidence.

Taking the evidence offered upon the trial in the light most favorable to plaintiff and giving to him the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as is done when considering motion for judgment of nonsuit, this Court is of opinion that the error assigned is well taken.

Indeed it may be conceded for the purposes of considering this question that there is sufficient evidence of negligence on the part of defendant Smith to repel the motion. Thus the inquiry is narrowed to the issue of contributory negligence. In this respect it appears from the testimony of the plaintiff that he was negligent, as a matter of law, and that his negligence contributed to his injury and damage.

"The mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely." 10 Blashfield's Cyc. of Automobile Law and Practice, Per. Ed., Vol. 10 p. 600. And in *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 333, the Court laid down the following rule: "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."

It is also a general rule of law in North Carolina "that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway." *Smith v. Rawlins, ante*, 67.

It would seem, therefore, that when the testimony of the plaintiff is applied to the rules laid down by this Court that the defendants' motion for nonsuit should have been granted. The plaintiff's own evidence shows that he could at all times see the tail lights

of the defendant's truck; that he was within 15 feet of the defendant's truck before he realized that it had stopped, and that by this time it was too late for him to either apply his brake or to turn aside in order to avoid a collision. This evidence when viewed in the light most favorable to the plaintiff compels the conclusion that plaintiff did not act as a reasonably prudent man under the circumstances and contributed to his own injury and damage.

As *Chief Justice Stacy* wrote in *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137: "It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them. The plaintiff thus proves himself out of court. It need not appear that his negligence was the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of the defendant. It is enough if it contribute to the injury. The very term 'contributory negligence' *ex vi termini* implies that it need not be the sole cause of the injury. The plaintiff may not recover, in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the injury."

To the same effect are the following cases: *Austin v. Overton*, 222 N.C. 89, 21 S.E. 2d 887; *Fawley v. Bobo*, 231 N.C. 203, 56 S.E. 2d 419; *Moore v. Boone*, 231 N.C. 494, 57 S.E. 2d 783.

Having so decided, other questions presented on this appeal need not be considered.

The judgment below is

Reversed.

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WAYNE H. BREWER v. CAROLINA COACH COMPANY, W. K. RICHARDS, O. O. BARNES, AND AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, LOCAL DIVISION 1437, AND G. N. GREEN.

(Filed 2 November, 1960.)

**1. Pleadings § 34—**

Allegations setting forth matters irrelevant to the controversy and allegations containing wholly evidential matter are properly stricken upon motion aptly made. G.S. 1-153.

**2. Perjury § 6—**

Demurrer is properly sustained to a complaint alleging that defendant

**procured false testimony in an arbitration proceeding which resulted in an award sustaining the action of the defendant employer in discharging plaintiff, since, apart from defamation and malicious prosecution, no right to maintain a civil action for perjury or subornation of perjury exists.**

APPEAL by plaintiff from *Craven, Special Judge,* 14 March 1960 Special Civil Term, of MECKLENBURG.

This is a civil action brought by the plaintiff to compel the defendant Carolina Coach Company, hereinafter referred to as Coach Company, to reinstate him to his former position as one of its drivers, to award him a sum of money equal to the salary he would have received had he not been dismissed, and for personal damages in the sum of $25,000, allegedly resulting from the giving of false and perjured testimony which the defendants conspired to procure and allegedly did procure by the intimidation of material witnesses by the defendants.

On 19 January 1955, the plaintiff was involved in a highway accident while driving a bus of the defendant Coach Company. The accident involved the bus driven by the plaintiff and another bus of the defendant Coach Company while being driven in an opposite direction by Arthur Gammon, another one of the defendant Coach Company's drivers. After an investigation, the Coach Company on 8 February 1955 discharged the plaintiff from employment on the ground that he had acted negligently and in serious dereliction of duties prescribed by its Rule Book for Bus Operators, including failure to stop after an accident. Plaintiff contested his discharge and the matter proceeded to arbitration in accordance with the terms and provisions of the collective bargaining agreement existing between the Coach Company and the defendant Union, of which the plaintiff was a member.

At the arbitration hearing on 29 June 1955, the plaintiff was represented by experienced attorneys. The plaintiff testified at the hearing, which consumed a full day, presented evidence in his own behalf, and through his counsel cross-examined the witnesses for the Coach Company. Thereafter, briefs were submitted by counsel for the respective parties to the chairman of the arbitration panel, and on 9 July 1955 a formal award was issued which sustained the action of the Coach Company in discharging the plaintiff. It does not appear from the record that any motion was made by the plaintiff to vacate, modify or correct the award within the time provided in G.S. 1-561 on the grounds set forth in G.S. 1-559.

On 6 February 1958, just two days prior to the expiration of three

years from the date of his discharge, the plaintiff instituted this action and applied for a twenty-day extension of time to file a complaint. On 24 February 1958, the plaintiff filed his complaint. Prior to the expiration of time to file answer, the defendant Coach Company and the defendant Union moved in separate motions to strike a substantial number of paragraphs from the complaint. Pursuant to these motions, Sharp, J., heard the matter and allowed the motions striking out each of the following paragraphs of the complaint: 3-A, 4, 5, 6, 8, 11, 12, 13, 14, 16, 18, 19, 20, 22, 26 and 27. The court further struck out portions of paragraphs 7, 9, 10, 17, 21, 23, 25 and 28. The plaintiff made no motion to amend his complaint and excepted only to the order striking the paragraphs or portions thereof referred to above.

The defendants Coach Company and Richard Barnes filed answer and the defendant Union and G. N. Green filed a separate answer. Both answers were to the complaint as stricken.

When the matter came on for hearing at the 14 March 1960 Special Civil Term of Mecklenburg County, the defendants demurred *ore tenus* to the complaint on the ground that no cause of action was stated. The demurrer was sustained and the action dismissed. The plaintiff appeals, assigning error.

*Brock Barkley for plaintiff.*

*James K. Dorsett, Jr., and Armistead J. Maupin for defendants Coach Company, W. K. Richards and O. O. Barnes.*

*William Joslin for defendants Union and G. N. Green.*

DENNY, J. A careful examination and consideration of the appellant's assignments of error based on exceptions to the orders of the court below, striking the paragraphs of the complaint and portions of other paragraphs thereof referred to hereinabove, leads us to the conclusion that these orders should be sustained.

The complaint as originally drafted and filed contains 48 paragraphs, including sub-paragraphs, and covers 16 pages of the record. The portions of the complaint which were stricken contain numerous allegations which set forth matters foreign and immaterial to the controversy, or are wholly evidentual — allegations which are not essential to a statement of the plaintiff's cause of action, if indeed he has one. Furthermore, the original complaint filed in this action does not meet the requirements of good pleading within the purview of G.S. 1-122, as interpreted and applied by the decisions of this Court. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d

660; *Council v. Dickerson's Inc.*, 233 N.C. 472, 64 S.E. 2d 551; *Hawkins v. Moss*, 222 N.C. 95, 21 S.E. 2d 873. Moreover, the motions to strike were made in apt time as required by G.S. 1-153.

In fairness to the appellant's present counsel, it appears from the record that he did not draft the original complaint or appear for the appellant in the proceedings before the Board of Arbitration. These assignments of error, however, are overruled.

As we construe the complaint in this action, it purports to be an action for damages, allegedly resulting from the giving of false and perjured testimony, which testimony it is alleged was procured by the intimidation of material witnesses by the defendants.

The gravamen of the plaintiff's complaint is that "the Board of Arbitration was completely persuaded by the Gammon report (the report of the driver of the defendant Coach Company's other bus that was involved in the accident), which report definitely declared the * * * accident to have happened on the straightway and not on the curve (as this plaintiff stated in his report)."

In paragraph 24 of the plaintiff's complaint he alleges that "the defendant company through its Supervisor Richards and its safety inspector Barnes called in Gammon to further confirm the false report by having Gammon pin-point the point of impact * * * as having happened on the straightway and not on the curve and other false details of the accident conforming to their scheme; that it was upon these facts synthetically created and nurtured by Barnes, Richards and Green, with the cooperation of Gammon, that the Board of Arbitration found in favor of the defendant company and upheld the defendant company's action in its dismissal of this plaintiff."

We note, however, in the opinion and award of the Board of Arbitration, which the plaintiff included in his case on appeal, the opinion states: "On cross-examination Brewer said also that the accident occurred at a place where the road was straight and level. Earlier he had stated that it occurred on a curve in the road. Brewer was unable to remember some of the things he had made (stated) in signed accident reports made for his Company. He said they had been dictated by him and not read before signed."

Perjury and subornation of perjury are criminal offenses, subject to punishment prescribed by G.S. 14-209 and G.S. 14-210. However, it seems to be the general rule that a civil action in tort cannot be maintained upon the ground that a defendant gave false testimony or procured other persons to give false or perjured testimony.

In 12 A.L.R., Anno: — Testimony — Civil Action for Damages,

at page 1264, cases from eleven states are collected, including North Carolina, in support of the following statement. "Aside from defamation and malicious prosecution, the courts refuse to recognize any injury from false testimony, on which a civil action for damages can be maintained. * * * no action for damages lies for false testimony in a civil suit, whereby the plaintiff fails to recover a judgment, or a judgment is rendered against him."

The North Carolina case cited above in A.L.R. is *Godette v. Gaskill,* 151 N.C. 52, 65 S.E. 612, 24 L.R.A. (N.S.) 265, 134 Am. St. Rep. 964. This was an action against the defendant for wilful and false testimony as a witness in an action formerly tried, which had been brought by the plaintiff against one Bowen, alleging that by reason of such false testimony of the defendant the plaintiff had lost his suit against Bowen. This Court, speaking through *Clark, C. J.,* said: "There is no precedent in this State, but an action on this ground has been brought in other jurisdictions, which have uniformly held that such actions cannot be maintained. * * *

"The authorities * * * rest upon two grounds: (1) There was no precedent for such action * * *. (2) It 'would overhale' as Chancellor Kent says, in (*Smith v. Lewis*) 3 Johns. (N.Y.), 166, the decision of the former case, to which the plaintiff in the new action had been a party. We think there is a third reason, in that it would multiply and extend litigation if the matter could be re-examined by a new action between a party to the action and a witness therein; and, more than that, witnesses would be intimidated if their testimony is given under liability of themselves being subjected to the expense and annoyance of being sued by any party to the action to whom their testimony might not be agreeable. It would give a great leverage to litigants to intimidate witnesses.

" * * * Such action did not lie at common law, and we have no statute authorizing it."

It is said in 41 Am. Jur., Perjury, section 81, page 44: "Ordinarily, aside from defamation and malicious prosecution, the courts will not recognize any injury from false testimony upon which a civil action for damages can be maintained. * * *" And in Section 82 of this same authority, at page 45, it is said: "Ordinarily, the fact that a defendant has suborned a witness to give false testimony in a civil suit, whereby the plaintiff has failed to recover a judgment, or a judgment has been rendered against him, does not constitute ground for the recovery of damages. * * * The rule, however, appears to be otherwise with respect to an action for subornation of a

witness to defame the character of one not a party to the action and the latter has been held to be entitled to recovery for such subornation."

In 70 C.J.S., Perjury, section 92, page 559, we find this statement: "The general rule, in the absence of statute, is that no action lies to recover damages caused by perjury, false swearing, subornation of perjury, or an attempt to suborn perjury, whether committed in the course of, or in connection with, a civil action or suit, criminal prosecution or other proceeding, and whether the perjurer was a party to, or a witness in, the action or proceeding." For additional authorities see 54 A.L.R. 2d, Anno: — Testimony — Civil Action for Damages, at page 1317.

The judgment of the court below in sustaining the demurrer *ore tenus* and dismissing this action will be upheld.

Affirmed.

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CLIFTON D. MOSS, A CITIZEN AND TAXPAYER OF HALIFAX COUNTY FOR AND ON BEHALF OF HALIFAX COUNTY v. C. S. ALEXANDER, J. R. WRENN, T. W. MYRICK, M. H. MITCHELL, AND H. A. BRANCH, BOARD OF COMMISSIONERS OF HALIFAX COUNTY, NORTH CAROLINA, AND M. G. SATTERWHITE.

(Filed 2 November, 1960.)

**Sheriffs § 2—**

The Board of Commissioners of Halifax County has the power to authorize the appointment of more than one salaried deputy sheriff for the County. Chapter 287, Public-Local Laws of 1913; Chapter 519, Public-Local Laws of 1921; Chapter 152, Public-Local Laws of 1939.

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

APPEAL by plaintiff from *Mintz, J.*, March 1960 Term, HALIFAX Superior Court.

Civil action by the plaintiff, a taxpayer, to restrain the payment of the salary and expense allowance of M. G. Satterwhite, on the alleged ground the Board of Commissions is not vested with legal authority to employ the defendant Satterwhite as a salaried deputy sheriff or to pay his salary out of public funds. At the hearing the parties stipulated:

"1. That the defendant M. G. Satterwhite, a resident of Hali-

fax County, North Carolina, was appointed as a salaried Deputy Sheriff of Halifax County by the Sheriff of said County, and at the institution of this suit and for several years prior thereto has been serving as a full-time deputy at a salary of $272.00 per month, with an expense account of $75.00 per month fixed by the Board of Commissioners of Halifax County, which is being paid and has been paid from the General Fund of said County, as authorized by said Board. Said Satterwhite, when this action was commenced and for several years prior thereto, has been one of eleven salaried deputies sheriff of Halifax County.

"2. That since the enactment of Chapter 152, Public-Local Laws of 1939, the Board of Commissioners from time to time has undertaken to make, in good faith and in the exercise of its discretion, such adjustments in the number of deputies sheriff appointed by the Sheriff, at salaries fixed by the Board, as are required for effective law enforcement.

"3. That since the enactment of Chapter 152, Public-Local Laws of 1939, the Board of Commissioners has undertaken, in good faith and in the exercise of its discretion, from fiscal year to fiscal year, including the current fiscal year, to fix the salaries paid to salaried deputies appointed by the Sheriff.

"4. That the Board of Commissioners of Halifax County undertook, in good faith and in the exercise of its discretion, to determine that the services of the defendant Satterwhite, as a deputy sheriff, were required for effective law enforcement in said County.

"5. If the Board of Commissioners of Halifax County had legal authority to fix and authorize the payment to Deputy Sheriff Satterwhite of said salary and expense account, the Board has acted in good faith and has done all that is required of the Board by law in fixing and authorizing the payment of said salary and expense account of defendant Satterwhite.

"6. If the Board of Commissioners of Halifax County has authority to fix and authorize the payment of a salary to only one deputy sheriff such deputy is not Deputy Sheriff M. G. Satterwhite."

The parties waived a jury trial. Judge Mintz made findings of fact and upon them entered judgment denying the restraining order and dismissing the action at the cost of the plaintiff, who appealed.

*Jones, Reed & Griffin for plaintiff, appellant.*

*Banzet & Banzet, Branch & Hux, Crew & House, Gay, Midyette & Turner, Rom B. Parker, for defendants, appellees.*

HIGGINS, J. Involved here is the question of law whether the Board of Commissioners of Halifax County has power to authorize the appointment of more than one deputy sheriff to serve on salary to be paid out of public funds. Divergent views as to the legal effect of three Acts of the General Assembly give rise to this dispute.

Chapter 287, Public-Local Laws, Session 1913, provided:

"Section 1. The Sheriff of Halifax County may appoint one or more deputies in each township in the county and may allow such deputies the fees made and collected by them in serving summons, subpoenas, notices," etc.

"Sec. 4. The Sheriff shall receive a salary of fifteen hundred dollars per annum, in lieu of all other compensation whatsoever, and may appoint one deputy at a salary to be fixed by the Board of Commissioners: Provided, that said salary shall not be less than six hundred dollars per annum . . ."

Chapter 519, Public-Local Laws, Session 1921, provided:

"Section 1. . . . the salary of the sheriff of Halifax County shall be three thousand dollars ($3,000) per annum . . .

"Sec. 2. That beginning with the taxes for one thousand nine hundred and twenty-one, and thereafter, all taxes . . . shall . . . be collected by the sheriff of said county . . .

"Sec. 3. . . . The Board of County Commissioners shall authorize the appointment by the sheriff of such number of deputies as may be necessary for the prompt and thorough collection of said taxes, and said board shall fix their salaries."

Chapter 152, Public-Local Laws, Session 1939, provided:

"Section 1. (Created the office of tax collector for Halifax County.)

"Sec. 2. The Board of County Commissioners shall fix the compensation of such Tax Collector and are directed to make such adjustments in the number of deputy sheriffs as are required for effective law enforcement and is also directed to provide field deputy tax collectors in season . . .

"Sec. 3. (Invested the tax collector with all the duties and powers formerly exercised by the Sheriff in the collection of taxes.)

"Sec. 11. The Board of County Commissioners is hereby authorized and directed to adjust the surety bonds of the County Accountant, the Sheriff, *the Deputy Sheriffs* (emphasis added) and the Clerk to the Board of County Commissioners so that the amounts thereof

shall be sufficient but not excessive, after this Act has been put into effect."

The plaintiff contends the three Acts, when construed together, have withdrawn from the Board of Commissioners of Halifax County the authority to appoint and to pay from public funds the salary of more than one deputy sheriff. The defendants, on the other hand, contend (1) when properly interpreted, the three Acts of the General Assembly above referred to give full power to the Board, both to authorize the appointment and to pay the salaries of a sufficient number of deputies to enforce the law; and (2) apart from the three Public-Local Acts, the Board of Commissioners, as the governing body of the county, is charged with the duty of authorizing the appointment of sufficient deputies to enable the sheriff to enforce the law and to pay their salaries from public funds.

The stipulations of the parties settle all other questions except the power of the board to authorize the appointment of more than one salaried deputy.

In addition to the fee deputies, the sheriff was authorized by the Act of 1913 to appoint one deputy to serve on a salary to be fixed by the Board of Commissioners. Thereafter, by the Act of 1921, the sheriff became the tax collector and Section 3, among other things, provided "the board of county commissioners shall authorize the appointment by the sheriff of such number of deputies as may be necessary for the prompt collection of taxes, and said board shall fix their salaries." It may be noted nothing in the Act specifically limits the duties of the deputies of the sheriff to the collection of taxes. Obviously the number of salaried deputies was increased in order to enable the sheriff to carry out the additional duty to collect taxes. The Act of 1939 created the office of tax collector and authorized the appointment of "field deputy tax collectors in season." Obviously it was intended that the deputy tax collectors were part-time employees and, like the tax collector, were without law enforcement duties. The Act required the commissioners "to make such adjustments in the number of deputy sheriffs as are required for effective law enforcement." The provision clearly contemplates the adjustment as to the number should take into account the fact that the tax collecting duties had been removed from the sheriff's office and that thereafter only such number should be retained as effective law enforcement required.

There is nothing to indicate it was the legislative intent that the county should be limited to the one salaried deputy. On the contrary, it is clearly implied that the commissioners should authorize

the sheriff to retain such number of salaried deputies as may be needed for effective law enforcement. This construction is borne out by § 11 of the Act: "The Board of County Commissioners is hereby authorized and directed to adjust the surety bonds of the County Accountant, the Sheriff, and *the Deputy Sheriffs* . . . so that the amounts shall be sufficient but not excessive, after this Act has been put into effect." (emphasis added.) The section clearly contemplates a reduction in the amount of the surety bond of the Sheriff and the Deputies Sheriff in view of the fact their tax collecting duties had been taken away. The Act clearly contemplates more than one salaried deputy.

In view of the stipulations, this holding disposes of the case. It is not necessary for us to pass on the question whether under the common law, the Constitution, or the General Statutes, the Board of Commissioners of Halifax County had authority to authorize the Sheriff to appoint sufficient deputies to enforce the law and preserve order, and to pay salaries from public funds. It is sufficient to hold, as we do, that such authority exists under the Public-Local Laws applicable to Halifax County. Hence, the decision of the superior court is

Affirmed.

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

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MRS. ISAIAH CARSWELL, ADMINISTRATRIX OF THE ESTATE OF WILLIAM CONLEY CARSWELL, DECEASED v. DENNIS L. GREENE, MINOR, BY HIS GUARDIAN AD LITEM VERNE S. GREENE, AND VERNE S. GREENE, IDIVIDUALLY.

(Filed 2 November, 1960.)

**1. Appeal and Error § 20—**

Any error relating to an issue answered in favor of appellant cannot be prejudicial to him.

**2. Evidence § 11—**

In an action to establish a claim either in contract or in tort against the estate of a deceased person, the surviving party, or one in privity with him, is precluded by G.S. 8-51 from testifying in his own behalf with respect to personal transactions and communications between him and the deceased.

3. Same—

G.S. 8-51 does not preclude a party from testifying as to substantive facts about which he has independent knowledge not acquired in a communication or transaction with a deceased person, and therefore an occupant in one car may testify as to what he saw with respect to the operation of another vehicle in an action against the estate of the driver of such other vehicle.

4. Same—

Where, in an action against the estate of a deceased person to recover for negligent injury, the defendant introduces testimony of the acts of both drivers before and at the time of the collision, the defendant may not complain of testimony by plaintiff as to plaintiff's version of the transaction.

APPEAL by plaintiff from *Nettles, E. J.*, March 1960 Term, BURKE Superior Court.

Civil action to recover for the wrongful death of William Conley Carswell and damage to his Ford automobile alleged to have been caused by the actionable negligence in the operation of a Dodge truck owned by Verne S. Greene and driven by Dennis L. Greene. A sideswiping collision occurred between the two vehicles at about 7:00 p.m., November 20, 1958, on the Enola Road in Burke County. William Conley Carswell was killed in the accident.

The plaintiff's intestate, William Conley Carswell, approached the point of collision driving west, meeting Dennis L. Greene driving east, downgrade, after passing a curve.

In the pleadings, consisting of complaint, answer, counterclaim, and reply, each party alleged the accident was caused entirely by the negligent acts of the other driver; and each party offered evidence tending to support the allegations of his pleading. The court submitted the following issues raised by the pleadings:

"1. Was the death of William Conley Carswell caused by the negligence of Dennis L. Greene, as alleged in the Complaint?

"2. Was the personal property of the deceased William Conley Carswell damaged by the negligence of the defendant Dennis L. Greene, as alleged in the Complaint?

"3. Did plaintiff's intestate by his own negligence contribute to his death and damage, as alleged in the Answer?

"4. What amount, if any, is the plaintiff entitled to recover of the defendants for her intestate's wrongful death?

"5. What amount, if any, is the plaintiff entitled to recover of the defendants for damages to her intestate's car?

"6. Was the defendant Verne S. Greene's truck damaged by

the negligence of plaintiff's intestate, William Conley Carswell, as alleged in the Counterclaim?

"7. Did the defendant Verne S. Greene, by the negligence of Dennis L. Greene, contribute to his damages?

"8. What amount, if any, is the defendant Verne S. Greene entitled to recover of the plaintiff's intestate?"

The jury found the defendant driver negligent and the plaintiff's intestate contributorily negligent. From the court's judgment that neither recover and that the plaintiff be taxed with the costs, she appealed.

*C. D. Swift, Byrd & Byrd, By Robert B. Byrd, for plaintiff, appellant.*

*Patton & Ervin, By Sam J. Ervin, III, for defendants, appellees.*

HIGGINS, J. The evidence offered by the parties was sufficient to require the court to submit to the jury issues of negligence, contributory negligence, and damages for wrongful death and for damages to the two vehicles involved.

The plaintiff assigns as Error No. 3 the court's refusal to nonsuit Verne S. Greene's counterclaim; and as Error No. 9 its refusal to set aside the verdict; and No. 10 to the signing of the judgment. Neither of these assignments can be sustained.

Plaintiff's assignment No. 5 relates to the charge on the issue of contributory negligence. Assignment No. 6 involved the court's instruction as to how and under what circumstances the jury should arrive at its answer to each of the issues, to be considered in numerical order. The instructions are in accordance with the holdings of this Court and are free from error. To repeat the charge and to discuss the sustaining cases would add nothing new to a subject which this Court has heretofore fully explored.

Assignments 7 and 8 relate to the court's further instructions given to the jury after it had returned to the courtroom and inquired of the court: "Can we answer the sixth and seventh both? . . . What we are trying to say, if we find both of them negligent — negligence on both sides?" The court repeated the substance of the instructions previously given and, as already stated, error with respect thereto does not appear.

Plaintiff's Assignment No. 4 challenges the charge on the first issue — negligence of defendant Dennis L. Greene. If it be conceded, as plaintiff contends, the charge placed upon her a burden some-

what heavier than properly required (see *Price v. Gray,* 246 N.C. 162, 97 S.E. 2d 844) nevertheless the error is not prejudicial. The jury answered the issue in her favor.

Left for consideration are plaintiff's Assignments 1 and 2. These relate to the same subject and may be treated together. The first assignment is based on the exception to the refusal of the court to exclude the testimony of the defendant Dennis L. Greene with reference to the speed, position, and the manner in which the intestate's Ford was being operated just prior to and at the time of the collision. Assignment No. 2 is to the refusal of the court, upon motion subsequently made, to strike the testimony of Dennis L. Greene. The plaintiff objected to the testimony upon three grounds: (1) The witness is a party to the action; (2) he testified in his own behalf against the personal representative of the deceased; (3) the testimony concerned a personal transaction between the witness and a deceased person.

The plaintiff, in support of her assignments of error principally relied on, cited the following authorities: G.S. 8-51; *Lamm v. Gardner,* 250 N.C. 540, 108 S.E. 2d 847; *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115; *Hardison v. Gregory,* 242 N.C. 324, 88 S.E. 2d 96; *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542; *Davis v. Pearson,* 220 N.C. 163, 16 S.E. 2d 655; *Boyd v. Williams,* 207 N.C. 30, 175 S.E. 832; *Sherrill v. Wilhelm,* 182 N.C. 673, 110 S.E. 95; and *Brown v. Adams,* 174 N.C. 490, 93 S.E. 989.

The reasoning behind G.S. 8-51 and the decided cases thereunder, is succinctly stated by *Stacy, J.,* later *C. J.,* in *Sherrill v. Wilhelm, supra:* "Death having closed the mouth of one of the parties, (with respect to a personal transaction or communication) it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the Legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence."

The statute and the cases cited prohibit the surviving party from testifying in his own behalf with respect to personal transactions and communications between him and a deceased person in an action in which the survivor seeks to establish a claim either in contract or in tort against the estate of the deceased. The exclusion extends to privies as well as to parties. *Loftin v. Loftin,* 96 N.C. 94, 1 S.E. 837.

The decisions of this Court have gone a long way in excluding evidence of a surviving passenger in his action against the estate of

the deceased driver based on driver negligence. Our cases, however, have never gone so far as to exclude the evidence of a survivor as to what he saw with respect to the operation of a separate vehicle with which he had a collision. A party may testify to substantive facts about which he has independent knowledge not acquired in a communication from nor a transaction with the deceased. *Hardison v. Gregory, supra; Sutton v. Wells,* 175 N.C. 1, 94 S.E. 688; *McCall v. Wilson,* 101 N.C. 598, 8 S.E. 225.

The law that an interested survivor to a personal transaction or communication cannot testify with respect thereto against the dead man's estate is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack the survivor. In this case Howard Carswell, nephew of the intestate, was a passenger in the Ford driven by the deceased. He was examined as a witness for the plaintiff. Among other things, he testified, "We saw this Greene boy coming towards us . . . Conley, (the deceased) cut the car to the right of the road. When this wreck occurred, the car in which I was riding was on the right. I saw the lights coming. . . . The lights of the truck just before the wreck, it was coming down the hill; just before the wreck it was on the right, too. . . . It was on our side of the road. At the time of the wreck, when this truck and car hit each other, the car in which I was riding was on the right side. The truck was on the right when the two vehicles ran together." On our right.

The personal representative of the deceased, in order to establish her claim for damages, offered the evidence of the deceased's nephew as to the acts of both drivers before and at the time of the wreck. She cannot thereafter offer legal objection to the testimony of one of the defendants as to his version of the accident. As stated by *Justice Stacy* in *Sherrill v. Wilhelm, supra,* "an *ex parte* statement of such matters shall not be received in evidence." The term *"ex parte* means by one party, or by one side." After the administratrix offered the evidence of Howard Carswell the dispute then became a two-sided affair and not an *ex parte* one, and Dennis Greene had the right to present his side. In offering the evidence of Howard Carswell and objecting to the evidence of Dennis Greene, the plaintiff sought to pick up the shield, having first used the sword. This the law does not permit.

There was evidence, both oral and physical, indicating the vehicles collided about the middle of the road. The jury found both drivers at fault. We have examined all assignments of error and all the North Carolina cases cited in support thereof. In the trial below, we find

No error.

CHARLES M. HERNDON, PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL INSURANCE COMPANIES, AND NATIONWIDE INSURANCE COMPANY v. ALEX ALLEN AND MARGARET DAVIS ALLEN, JANIE DAVIS GRIFFIN AND R. L. DAVIS, III, HEIRS OF F. M. DAVIS, SR., T/A A PARTNERSHIP.

(Filed 2 November, 1960.)

1. **Animals § 3—**

It is the legal duty of a person having charge of an animal to exercise ordinary care and the foresight of a reasonably prudent person in keeping the animal in restraint.

2. **Same— Evidence held insufficient to show negligence in failing to keep mule confined.**

Evidence tending to show that defendants' mule became sick, that the person in charge of the mule put a bridle on the mule and held the mule for some four hours, that at about nine o'clock that night the mule broke the throat-latch of the bridle and ran off, that the person in charge of the mule thereafter vainly attempted to catch him, then went to supper and did not try to get anyone to aid him in catching the mule that night, and that early the following morning the mule suddenly appeared on the highway in front of plaintiff's vehicle, resulting in collision and damage, is held insufficient to be submitted to the jury on the question of negligence in failing to exercise due care to keep the animal in restraint.

APPEAL by plaintiffs from *Paul, J.*, March 1960 Term, of PITT.

Civil action brought by Charles M. Herndon against the original defendant, Alex Allen, to recover for damages sustained as the result of a collision between a tractor-trailer owned and operated by the plaintiff Charles M. Herndon and a mule alleged to have been owned by Alex Allen.

Upon subsequent motions made in the cause, the court ordered that the Pennsylvania Threshermen & Farmers' Mutual Insurance Companies and Nationwide Insurance Company be made parties plaintiff, and Margaret Davis Allen, Janie Davis Griffin, and R. L. Davis, III, heirs of F. M. Davis, Sr., trading as a partnership, parties defendant.

The collision occurred at approximately 3 A.M., on 24 January 1958 on U. S. Highway 258 about one mile south of the town limits of Farmville, North Carolina. Plaintiff Herndon was driving northward en route to Norfolk, Virginia, at a speed approximating 42 miles per hour. The highway was paved and the pavement was dry. There were shoulders on each side of the highway, and there was evidence that cars were parked on the shoulders on both sides of the highway near a house in which there had been a death, — unconnected with incident here involved.

When plaintiff Herndon was near the parked cars a mule "popped out of nowhere." The tractor-trailer struck the mule, went across to the left side of the highway, and struck the corner of a barn which was approximately 60 or 70 feet away from the point of the mule impact. After striking the barn the tractor-trailer turned over on its right side off the highway.

Upon trial in Superior Court plaintiffs offered the testimony of Theodore Underhill in pertinent part substantially as follows: " * * * When I went on the farm I took care of that mule, and fed him. I worked that mule, kept him in a stable, or in the mule pen, the one down there, on the land of the Davis heirs. * * * On the 23rd day of January, as near as I can tell, on that particular date I was working on the plant beds and I had broke the bed and put the fertilizer out on it and had smoothed it off and took the mule out and tied him to the wagon. When my boy came from school, I told him to take him away and put him in the stable, and that was around 4:30, when I told him to put him in the stable. They came back to the bed around five o'clock and told me the mule was fighting the horse. I go up there to see about the mule and see that he was sick and fighting the horse. I first caught the horse and taken him out of the pen and then I hemmed the mule up in there and the best I could I put the bridle on him and put the horse back in the stable and I sent the little boy to tell Mr. Baldree to get the doctor. I took the mule out of the pen. I held him * * * I sent the boy up to Mr. Baldree's and he came down there. There was nothing we could do but hold him, and trotting him up and down the road, and he kept getting worse. Mr. Baldree went after the doctor again. The doctor did not come. I held on to the mule and held on to the line. Later on in the night it got cold and he still got worser. I got on the inside of the barn whenever he come to fighting and cracked the door and held him. I had the mule outside the barn until the mule slung the bridle off. He ran and was swinging his head when the throat-latch broke. He threw off the bridle; then he ran out there under the tobacco barn shelter about ten o'clock * * * When this mule broke away, I had to go to the house from the tobacco barn. Really, I tried to catch the mule under the tobacco barn shelter and he run after me, so I left him alone. I went in the house and had supper. As to anything keeping me from going back out and finding that mule after supper, I had a dead grandbaby, that was the only thing. I went to see about her. I came two miles of Greenville here. That mule was in my care and keeping

the whole time I have been there on that place. Hard to say how old that mule was; I can't say actually. I worked him for seven years. * * * I tried to catch that mule, but not at that time of night did I try to get anyone else to catch that mule, no, sir."

Plaintiffs also offered testimony of Guy Baldree, who testified in pertinent part substantially as follows: " * * * On the 23rd day of January 1958, I sent one of the boys down there to see if he could get a doctor for the mule. I saw the mule. I went to Marlboro, and got another fellow to call the doctor. * * * Just a short while I went back to where Theodore was. The mule kept getting worse and Theodore asked me to go to get somebody else to see if he could get the doctor. I went."

And on cross-examination Mr. Baldree testified as follows: " * * * When I went down there, I saw the mule. Theodore was holding him to a line to keep him from getting hurt. The mule was out there in the lot, down in the lot a-rolling, and Theodore was holding on to that mule while that mule was rolling. The mule just kept a-rolling, and getting up and going again. That mule was getting up, getting down and rolling some more. This went on and I stayed there until between about 8:30 and 9 o'clock, and he was doing it all the time. I went down there just about dark and up as late as 8:30 or 9 o'clock, Theodore was still holding on to that mule. The mule was still getting up and going down and rolling. * * * The ground out there, which was normally fresh ground, looked like somebody had taken and dug it all to pieces. * * * The mule would get up, go three or four steps, roll over some more. I saw it when it got down on its hind legs and stood up. It would grunt whenever it looked like he was going to lay down, and it hurt him so bad he couldn't lay down. I cannot describe the way the mule looked, but I just noticed him. I have never seen a mule act like that before. * * * This all started just before dark or right at dark. When I left at 8:30 or 9 o'clock, Theodore still had hold of the briddle and still holding on to that mule. It was a cold night, almost below freezing. The mule was perspiring, just as wet as if it had been raining; just as wet as if water had been poured all over him."

No further attempt was made to capture the mule that night, but the search was resumed around 4 o'clock the following morning.

There was no evidence that the mule had ever escaped before the time in question, or that he had ever acted in such a strange manner.

At the conclusion of all the evidence, the attorneys representing the defendants moved for a judgment as of nonsuit. The motion

was allowed, and to judgment in accordance therewith the plaintiffs except and appeal to Supreme Court, and assign error.

*Robert M. Harcourt, James & Speight, W. H. Watson for plaintiff appellants.*

*Lewis & Rouse for defendant appellees.*

WINBORNE, C. J. In this State "the liability of the owner of animals for permitting them to escape upon public highways, in case they do damage to travelers or others lawfully thereon, rests upon the question whether the keeper is guilty of negligence in permitting them to escape. In such case the same rule in regard to what is and what is not negligence obtains as ordinarily in other situations. It is the legal duty of a person having charge of the animals to exercise ordinary care and the foresight of a prudent person in keeping them in restraint." *Gardner v. Black,* 217 N.C. 573, 9 S.E. 2d 10.

Indeed the measure of defendant's duty as owner of the mule to prevent it from roaming on the highway is repeated in *Shaw v. Joyce,* 249 N.C. 415, 106 S.E. 2d 459, as applied in *Gardner v. Black, supra.* See also *Lloyd v. Bowen,* 170 N.C. 216, 86 S.E. 797, and *Bethune v. Bridges,* 228 N.C. 623, 46 S.E. 2d 711.

Applying these principles of law to the evidence as shown in the record on this appeal, taken in the light most favorable to plaintiffs, giving to them the benefit of reasonable inferences arising thereon, this Court is constrained to hold that the evidence is insufficient to make out a case for the jury. Hence the judgment from which this appeal is taken is

Affirmed.

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WILLIAM HENRY JOHNSON v. GUY FRYE & SONS, INC., HICKORY, NORTH CAROLINA, A CORPORATION.

(Filed 2 November, 1960.)

**1. Master and Servant § 18—**

Where the main contractor undertakes to provide a hoist for the use of a subcontractor in the performance of the work under the subcontract, the main contractor is under duty to exercise the care of a reasonably prudent person to provide the employees of the subcontractor with a hoist reasonably suitable for the intended uses when properly operated.

**2. Same— Evidence held insufficient to show that main contractor failed to provide employees of subcontractor with a hoist reasonably suitable for intended uses when properly operated.**

The evidence tended to show that employees of the subcontractor came to work before those of the main contractor, and that an employee of the subcontractor, in the absence of the employee of the main contractor in charge of the hoist, ran the hoist, with a loaded wheelbarrow thereon, to the third floor. The evidence further tended to show that an employee of the subcontractor, in attempting to roll a loaded wheelbarrow off of the hoist at the third floor, attempted to "bump" the wheelbarrow off because the hoist had not been elevated high enough to be even with the floor, that this resulted in vibration causing the "dog," which locked the elevator in position, to fly out and the elevator to fall, there being no one at the engine to apply the brake, resulting in injury to the employee on the hoist. There was no evidence of any defect in the elevator mechanism or its locking or braking devices. *Held:* The evidence is insufficient to be submitted to the jury on the issue of the main contractor's negligence in failing to exercise due care to provide a hoist reasonably suitable for the intended uses when properly operated.

APPEAL by plaintiff from *Campbell, J.*, May 2, 1960 Regular "B" Civil Term, of MECKLENBURG.

Defendant had a contract for the alteration of the Harper Building at State Hospital in Morganton. It sublet to Atlantic Marble and Tile Company (hereafter called Tile Co.) that part of the contract which called for the installation of tile. Plaintiff, an employee of Tile Co., was injured in the fall of a hoist installed by defendant to facilitate the modernization of the building.

This action was begun to recover compensation for the injuries plaintiff sustained when the hoist fell. He alleges it fell because (a) negligently constructed of materials of insufficient strength to support the weight for which it might reasonably be expected to be used, (b) constructed in a negligent manner without safety device or adequate brakes. He also alleges the defects in the hoist could have been discovered by reasonable inspection.

Defendant denied those allegations of the complaint on which plaintiff based his claim for damages. At the conclusion of plaintiff's evidence, defendant's motion for nonsuit was allowed. Plaintiff appealed.

*Myles Haynes, Henry L. Strickland, Kennedy, Covington, Lobdell & Hickman for plaintiff, appellant.*

*Helms, Mulliss, McMillan & Johnston, James B. McMillan, and Larry J. Dagenhart for defendant, appellee.*

RODMAN, J. Plaintiff's evidence is sufficient to permit a jury to

find these facts: Defendant was, by contract with Tile Co., obligated to provide "hoist facilities" for elevating materials, the hoist to be used only in elevating materials, not persons. It was to be operated by regular employees of defendant. Tile Co.'s employees were not to operate it.

The hoist consisted of a wooden platform closed on two sides with the other two sides open. The building being repaired was three stories. A wire rope was fastened to the hoist. This rope led to a pulley above the building and then down to a drum around which the rope was wound. By use of a clutch a gas engine engaged the drum to elevate the hoist. A foot brake was used to stop the hoist or to lower it in an orderly manner. When stopped at the desired height, the hoist could be held in that position by means of a "dog" which fitted into a slot about 1 inch by ¾ inch. The dog, when properly seated, locked and held the hoist. In addition to the braking system, the hoist had a safety device to prevent too rapid a descent.

The employees of Tile Co. went to work at 7:00 a.m., the employees of defendant, at 8:00 a.m. Plaintiff, a helper to a tile setter, was responsible for keeping the tile setter supplied with materials. On 1 August, the date plaintiff was injured, tile was to be set on the third floor of the building. Between 7 and 8 a.m. an employee of Tile Co. started the gas engine, running the hoist up and down two or three times to test it. He then loaded a wheelbarrow of "mud" (a mixture of sand and cement used as a bonding agent to set the tile) on the hoist. The handles of the wheelbarrow were turned away from the building. This employee then ran the hoist to or nearly to the third floor. He set the dog, locking the hoist in position. A few minutes before 8:00 a.m., plaintiff undertook to move the wheelbarrow of mud from the hoist. Because the handles of the wheelbarrow were away from rather than next to the building, it became necessary for him to go on the hoist to push the mud off. The floor of the hoist was slightly below the floor of the building. Plaintiff could not push the wheelbarrow off. He sought to get it off by bumping. This set the hoist vibrating. The dog flew out of the slot which locked the elevator in position. There was no one attending the hoist to apply the foot brake. The safety device designed to prevent excessive speed operated, checking the speed of the elevator, causing plaintiff to be thrown to the ground at or near the second floor. He sustained serious injuries.

John Craig, foreman for Tile Co., examined as a witness for plaintiff, testified the safety mechanism was working properly. "The ele-

vator was greased regularly and checked regularly, I would say twice a week, by a Frye Construction Company employee. One of Mr. Frye's men greased it, the operator of the elevator. His operator checked it and I have checked it myself. . .At the moment it fell there was nobody attending the brakes or anything, the control of it. The motor was running. . .I don't know how to explain what happened to the end of the cable that was fastened to the drum, except that when that elevator came down the drum brake was not on and there was nobody to put the brakes on and the drum was loose and when it went to the end of the cable it revolved back and sheared the bolt out. This occurred right after the platform hit the ground. . .There were no defects about the brakes or clutch or the safety governor that I know of. . .At the time the elevator fell there was not any employee of the Guy Frye & Sons close to the elevator or doing anything about the elevator. The last person who worked the controls on it was an employee of Atlantic Marble & Tile Company who had run it up to the third floor with this wheelbarrow on it."

Walter Harrison, plaintiff's witness, testified: ". . .the whole entire elevator was shaking and he tried to push the wheelbarrow off and I heard the noise. I mean the wheelbarrow on, yes, and it was shaking and vibrating and I stopped and heard the noise and I seen it leave and jumped back. I seen the locking device, the lever that fits in the cog. It flew backward from it. When it flew back, she tumbled down, she came tumbling and hit the second floor and it seems like it hung or something and then it started running down again and that is when he fell off when he was leaving the second floor. . .I saw Henry Johnson get on the platform to move this wheelbarrow of cement. Regarding how soon after he got on there the elevator fell, I would say a minute and a half or something like that. During that time, he was trying to push the wheelbarrow off and the elevator was moving back and forth. Regarding what was moving back and forward, the whole entire elevator, the platform and the whole elevator entirely, shaking back and forward, the platform and the whole entire elevator, cables."

The testimony furnished plaintiff a sound foundation for the assertion that defendant's contract to provide a hoist for use by the subcontractor imposed on defendant the duty of exercising the care of a reasonably prudent person to provide the employees of the subcontractor with a hoist reasonably suitable for intended uses when properly operated. *Bemont v. Isenhour*, 249 N.C. 106, 105 S.E. 2d 431; *Cathy v. Construction Co.*, 218 N.C. 525, 11 S.E. 2d 571.

Defendant does not controvert this assertion. It says the nonsuit was allowed not because of the absence of a duty but for lack of evidence to support the asserted breach of duty.

Considering all of the evidence, as we do, in the most favorable aspect for plaintiff, we fail to find any which would justify a finding that defendant failed to perform its duty in any of the particulars alleged.

The doctrine of *res ipsa loquitur* is not here applicable. *Lea v. Light Co.*, 246 N.C. 287, 98 S.E. 2d 9; *Johnson v. Meyer's Co.*, 246 N.C. 310, 98 S.E. 2d 315; *Hopkins v. Comer*, 240 N.C. 143, 81 S.E. 2d 368; *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251.

Affirmed.

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HARVEY LEE LEONARD v. HERMAN GARNER AND WILLIAM PHILO ELLIOTT.

(Filed 2 November, 1960.)

1. **Negligence § 26—**

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

2. **Trial § 22c—**

Contradictions and discrepancies, even in plaintiff's own evidence, are for the jury to resolve and do not warrant nonsuit.

3. **Automobiles § 42g—**

Evidence tending to show that plaintiff, traveling along the servient highway, stopped before entering intersection, saw no traffic approaching, and was over half way across the intersection when struck by defendant's truck traveling at excessive speed, *is held* insufficient to establish contributory negligence on the part of plaintiff as a matter of law, since whether plaintiff had reasonable ground for belief that he could cross in safety, and whether he could have seen and apprehended in time to have avoided the collision that defendant's vehicle was not going to stop, are questions for the jury upon the evidence.

APPEAL by plaintiff from *Johnston, J.*, April Civil Term, 1960, of DAVIDSON.

Plaintiff's action is to recover damages for personal injuries and property damage resulting from a collision that occurred October 3, 1959, about 9:00 a.m., at the intersection of North Salisbury and

East Fourth Streets in Lexington, North Carolina, between a 1948 Chevrolet automobile owned and operated by plaintiff and a 1958 Chevrolet truck owned by Herman Garner and operated by William Philo Elliott.

Plaintiff alleged the collision was caused by the negligence of Elliott while operating the truck as agent for Garner. Defendants, in a joint answer, admitted that Garner's truck, while operated by Elliott, collided with plaintiff's Chevrolet at said intersection, but denied the collision was caused by the negligence of Elliott and denied that Elliott was operating the truck as agent for Garner. For a further defense, defendants pleaded the contributory negligence of plaintiff in bar of his right to recover.

At the conclusion of plaintiff's evidence, judgment of involuntary nonsuit, dismissing the action and taxing plaintiff with the costs, was entered. Plaintiff excepted and appealed.

*Stoner & Wilson and Robert L. Grubb for plaintiff, appellant.*
*Walser & Brinkley for defendants, appellees.*

BOBBITT, J. Whether the evidence, when considered in the light most favorable to plaintiff, was sufficient to require submission of the case to the jury, is the only question for decision.

It was stipulated that the collision "occurred within the residential area of the city of Lexington."

There was evidence tending to show: In approaching and entering the intersection, defendants' truck traveled north on Salisbury Street and plaintiff's car traveled east on Fourth Street. A stop sign was located on the south side of Fourth Street, sixteen feet and six inches back (west) from the intersection. Plaintiff stopped "just past the Stop sign," between the stop sign and the intersection, "about 5 or 6 feet from the intersection." He could then see "around 400 feet of North Salisbury Street to the south and to the north . . . about 300 to 400 feet." He looked both ways, saw that Salisbury Street was clear of traffic, then started and was proceeding slowly across Salisbury Street "at about 8 or 10 miles an hour." The front of defendants' truck struck the right side of plaintiff's car. The front of plaintiff's car was then in the "east third of the east side of Salisbury Street."

As to the alleged negligence of defendants, there was evidence tending to show: Elliott, the driver of the truck, first saw plaintiff's car when it had reached *the center* of Salisbury Street. He then applied his brakes and "slid" into plaintiff's car. The truck, after skid-

ding 42 feet, struck plaintiff's car with sufficient force to knock it some 20 to 25 feet through the air. During the 50-60 feet before the impact, the speed of the truck was "40 to 45 miles per hour."

There was ample evidence to support a finding as to defendants' alleged negligence. Even so, defendants insist plaintiff's testimony discloses contributory negligence as a matter of law.

Judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, but only when, the evidence taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Discrepancies and contradictions in the evidence, even though such occur in the evidence offered in behalf of plaintiff, are to be resolved by the jury, not by the court. *Stathopoulos v. Shook*, 251 N.C. 33, 36, 110 S.E. 2d 452, and cases cited.

Tested by these well established rules, we are of opinion, and so hold, that the issue of contributory negligence, upon the evidence presented, was for determination by the jury. The factual situation in *Matheny v. Motor Lines*, 233 N.C. 673, 65 S.E. 2d 361, cited and stressed by defendants, is materially different from that here considered. Applying the rules stated in *Matheny*, and considering the evidence in the light most favorable to plaintiff, whether plaintiff, when he started his car and proceeded into said intersection, had reasonable ground for the belief that he could cross in safety, was for jury determination. Also, whether plaintiff thereafter, by the exercise of due care, should have seen the approach of defendants' truck *and* that it was not going to slow down to permit him to complete the crossing at a time when plaintiff, by the exercise of due care, could have avoided the collision, was for jury determination. *Stathopoulos v. Shook, supra*, p. 37, and cases there cited.

Having reached the conclusion that the judgment of involuntary nonsuit should be reversed, we deem it appropriate to refrain from further discussion of the evidence presently before us. *Tucker v. Moorefield*, 250 N.C. 340, 342, 108 S.E. 2d 637, and cases cited.

Reversed.

ISOBEL C. YOUNG, INDIVIDUALLY AND AS EXECUTRIX OF BAXTER CLAY YOUNG v. CHARLES E. WILLIAMS, JR., GUARDIAN AD LITEM OF BAXTER CRAVEN YOUNG, MINOR; AND ROBERT L. GRUBB, GUARDIAN AD LITEM OF MARY LARAINE YOUNG, MINOR.

(Filed 2 November, 1960.)

**Wills §§ 31½, 41— A codicil operates as a republication of the will.**

A child was born to the marriage after the execution of the will leaving all of testator's estate to his wife. Thereafter testator and his wife executed a joint codicil reaffirming their prior wills and providing that in the event of their deaths in a common disaster a named person should be executor and guardian of their children. *Held:* The codicil operates as a republication of the original will and makes it speak as of the date of the execution of the codicil in so far as it is not altered or revoked by the codicil, and therefore the after born child is not entitled to such share in the estate as though testator had died intestate, it being apparent that testator intentionally did not make specific provision for the child. G.S. 31-5.5.

APPEAL by defendants from *Olive, J.*, at Chambers in Lexington, North Carolina, 16 August 1960. From DAVIDSON.

This is a civil action instituted pursuant to the terms and provisions of our Uniform Declaratory Judgment Act, G.S. 1-253, *et seq.*, in the Superior Court of Davidson County, and heard by consent of all the parties before his Honor, Hubert E. Olive, Resident Judge of the Twenty-second Judicial District of North Carolina, on 16 August 1960.

On 3 March 1941, Baxter Clay Young, Jr., executed a will, making his wife, the plaintiff Isobel C. Young, the sole devisee. On said date, Baxter Clay Young, Jr., and his wife, Isobel C. Young, had only one child, Baxter Craven Young, born on 28 March 1940. Subsequently, on 21 April 1946, another child, Mary Laraine Young, was born to Baxter Clay Young, Jr., and his wife, Isobel C. Young. On 9 November 1949, the testator and the plaintiff executed a joint codicil, the text of which is as follows: "Re-affirming each of our wills heretofore made, we do hereby make, publish and declare this codicil to each of our wills: I. That in event of our joint deaths in a common disaster, so that neither of us survive from said disaster, then each of us nominate and appoint John B. Craven of Lexington, North Carolina, as Executor of each of our estates and as Guardian of our two children."

The codicil was signed by both Baxter Clay Young, Jr., and the plaintiff and attested by two subscribing witnesses.

Baxter Clay Young, Jr., died on 28 June 1960, leaving surviving

his wife, the plaintiff, and two children, the defendants Baxter Craven Young and Mary Laraine Young.

The court below held that the codicil dated 9 November 1949 republished the will of Baxter Clay Young, Jr., dated 3 March 1941 and made the effective date of both said will and codicil as of 9 November 1949.

From the judgment entered to the effect that Isobel C. Young, the plaintiff herein, is the sole devisee and owner of all the property, both real and personal, which Baxter Clay Young, Jr., owned and was seized at the time of his death, the duly appointed guardians of the defendant minor children of the testator appeal and assign error.

*Walser & Brinkley for plaintiff.*

*Robert L. Grubb, guardian of defendant Mary Laraine Young.*

*Charles E. Williams, Jr., guardian of defendant Baxter Craven Young.*

DENNY, J. The question posed for determination is, where a testator makes a will, making his wife the sole beneficiary, and then subsequently has a child born, does a codicil executed by the testator subsequent to the birth of the child constitute a republication of his will?

The overwhelming weight of authority is that a duly executed codicil operates as a republication of the original will and makes it speak from the date of the execution of the codicil insofar as it is not altered or revoked by the codicil. 57 Am. Jur., Wills, Section 626, page 428; 95 C.J.S., Wills, Section 303, subsections d(1) and e(1), page 99, *et seq.*

The testator herein was certainly advertent to the existence of both his minor children at the time of the execution of the codicil. It is evident that the sole purpose of the codicil was to provide that, in the event of the joint deaths of himself and his wife in a common disaster, John B. Craven was to be the executor of their respective estates and the guardian of their two children, the minor defendants herein.

In *Gooch v. Gooch,* 134 Va. 21, 113 S.E. 873, the testator executed a will in 1909, leaving all his property to his wife. At the time he executed his will he had no children, but two children were subsequently born to him and his wife, the first one in 1911 and the second in 1916. The testator executed a codicil to his will in 1919. The Court quoted with approval from one of its earlier decisions, *Hatcher*

*v. Hatcher,* 80 Va. 169, the following: "The codicil * * * operates as a republication of the will, and the effect of the republication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time."

In the case of *In re Will of Coffield,* 216 N.C. 285, 4 S.E. 2d 870, the testator, Gus Coffield, executed a will on 17 May 1938. On 18 May 1938 he married Fannie Coffield. On 20 February 1939 he executed a codicil to his prior will, ratifying and confirming his will dated 17 May 1938 as changed by the codicil. In the codicil he devised certain realty to his wife. It was contended that the original will was revoked by the marriage of the testator after its execution and that there had been no valid re-execution thereof and, therefore, the paper writing purporting to be a will was null and void. This Court said: "We cannot so hold under the authorities in this State, which we think are borne out by reason and logic." The Court further quoted with approval the statement from *Murray v. Oliver,* 41 N.C. 55: "Whatever doubt was once entertained, it is now unquestionably settled, that adding a codicil is a republication, and the codicil brings the will to it, and makes it a will from the date of the codicil."

However, under the provisions of G.S. 31-5.5, a will in this jurisdiction is not revoked by the birth of a child to or the adoption of a child by the testator after the execution of the will, but any such after-born or after-adopted child shall be entitled to such share in the testator's estate as it would be entitled to if the testator had died intestate, unless: "(1) The testator made some provision in the will for the child, whether adequate or not, or (2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child."

We hold that the execution of the codicil involved in this action constituted a republication of the testator's will as of 9 November 1949, and the judgment entered below was correct and will be upheld.

Affirmed.

ROSCOE A. BURKETTE v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION.

(Filed 2 November, 1960.)

**Insurance § 61—**

Conflicting evidence as to whether insured paid to insurer's agent before the accident and within the time allowed the premium for a renewal period extending the policy under its terms beyond the date of the accident, *held* to raise the issue for the determination of the jury.

APPEAL by plaintiff from *Frizzelle, J.*, February 1960 Civil Term, LENOIR Superior Court.

Civil action to recover from the defendant under its "National Standard Automobile Policy" in which it agreed to indemnify its insured, Joseph P. Edwards, for damages by accident arising out of his ownership or use of a 1955 four-door Chevrolet automobile.

The plaintiff, Roscoe A. Burkette, obtained a judgment in the Superior Court of Lenoir County for $7,823 damages against the insured, Joseph P. Edwards, for injuries received in an accident which occurred on October 9, 1957, while plaintiff was riding as a passenger in the above-described Chevrolet driven by the insured. The defendant denied liability on the ground the policy of insurance issued on that vehicle had expired on May 2, 1957, and, at the time of the accident, was not in force. At the close of all the evidence the court entered judgment of compulsory nonsuit from which the plaintiff appealed.

*White & Aycock for plaintiff, appellant.*

*James & Speight, W. W. Speight, William C. Brewer, Jr., for defendant, appellee.*

HIGGINS, J. The plaintiff introduced in evidence the policy issued to Joseph P. Edwards in which the defendant contracted "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, . . . caused by accident and arising out of the ownership, . . . or use of the automobile." The policy showed the premium was paid on January 3, 1957, to and including May 2, 1957. The policy provided for renewal periods of six months each after May 2, 1957, upon the payment of the required premium.

The insured, Joseph P. Edwards, and his wife testified the insurance premium was paid to A. L. Burcham, defendant's authorized representative, on January 3, 1957, for the period ending May 2,

1957; that the payment was made at the home of the insured. The defendant's agent admitted the payment on January 3, 1957, but testified the transaction took place at Troy Moore's store and not at the home of the insured. The insured further testified he received notice of the next premium due and that within four or five days after receipt of the notice he saw Mr. Burcham at Troy Moore's store and there borrowed $20.00 from Mr. Moore and paid the premium. The custom of the defendant was to send out notices 20 to 30 days in advance of the due date of premiums.

Troy Moore testified that he made a loan of $20.00 to the insured who paid the money to Mr. Burcham; that this transaction took place prior to the accident.

Urban Padgett testified he went with the insured to Troy Moore's store. Mr. Burcham came in and the insured borrowed $20.00 from Mr. Moore and paid it to Mr. Burcham. "I believe Mr. Burcham had on a short-sleeved shirt. It was not cold weather. It was in 1957, but I do not recall the month."

The plaintiff's evidence was sufficient to raise an issue whether the policy involved was continued in force for an additional period after May 2, 1957, by the payment of the required premium. The evidence was conflicting. The issue is one of fact to be resolved by the jury and not one of law to be decided by the court. *Walker v. Randolph County,* 251 N.C. 805, 112 S.E. 2d 551.

The judgment of nonsuit is set aside and the case is remanded for jury trial.

Reversed.

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HAROLD MAXTON SMITH, BY HIS NEXT FRIEND, HAROLD D. SMITH, PLAINTIFF v. GORDON PRICE, CARROLL CLARK PRICE, MAY M. ROUSE, AND DARLENE HILL, DEFENDANTS.

(Filed 2 November, 1960.)

**Attorney and Client § 5—**

Where, in an action, brought by a passenger against the respective drivers and owners of the two cars involved in a collision, to obtain judicial approval of a settlement with the respective liability insurers, the same attorney represents the conflicting interests of defendants, and the claim of the minor driver for personal injuries is not brought to the attention of the court, the judgment is irregular and motion in the cause is the proper remedy of the minor driver to have the judgment set aside.

SMITH *v.* PRICE.

APPEAL by defendants May M. Rouse and Darlene Hill from *Bone, J.*, May Civil Term, 1960, of WAYNE.

May M. Rouse died pending a hearing on her appeal. This fact is brought to our attention by motion of Branch Banking & Trust Co., duly qualified as executor of her will, that it be made a party appellant. The motion is allowed.

On 4 January 1958 a collision occurred between an automobile owned by defendant Gordon Price and an automobile owned by defendant May M. Rouse. The Rouse automobile was operated by defendant Darlene Hill as agent for the owner. Gordon Price's automobile, a family purpose car, was operated by defendant Carroll Clark Price, minor son of, and with the consent of, the owner. Harold Maxton Smith was a guest passenger in the Price car. He received injuries as a result of the collision.

On 30 September 1958 the minor, Harold Maxton Smith, acting through his next friend, instituted suit in the Superior Court of Wayne County against the owners and drivers of the two automobiles. This was done to obtain judicial approval of a settlement agreed upon by plaintiff with the insurance companies carrying liability insurance on the two automobiles. The complaint alleged the collision resulting in injuries to plaintiff was caused by the joint and concurrent negligence of the drivers. Damages were sought against them because of such negligence and against the owners as *respondeat superiors.*

Pursuant to the agreement to settle, the insurance companies employed counsel to represent them. This attorney prepared and filed an answer for the owner and the operator of the Hill car. He likewise prepared and filed an answer for the owner, the minor operator of the Price car, and his guardian *ad litem.* Each answer denied that the driver was in any way negligent, asserting that the collision was proximately caused by the driver of the other vehicle. No references was made in the answer to the injuries sustained by the infant, Carroll Clark Price.

By consent the matter was heard by Judge Paul, presiding over the Eighth Judicial District, on 16 October 1958. He heard evidence with respect to plaintiff's injuries. Based on the evidence presented, he concluded the amount agreed upon, $2,500, was fair compensation for plaintiff's injuries. He approved the settlement, adjudging plaintiff recover of defendants the sum of $2,500 with costs. The fact that Carroll Clark Price sustained injuries in the collision for which he was asserting a claim against the defendants Rouse and Hill was not called to the attention of Judge Paul.

Carroll Clark Price instituted an action against defendants Rouse and Hill to recover compensation for the injuries which he sustained in the collision. As a bar to such recovery, defendants in that action pleaded the judgment rendered by Judge Paul awarding compensation to plaintiff in this action. Carroll Clark Price thereupon moved to vacate and set aside the judgment rendered by Judge Paul insofar as said judgment affected him. Judge Bone found the facts as summarized above and further found "that it was not to the best interest of the said Carroll Clark Price that said judgment be entered and there was no finding by the Court that said judgment was not injurious to the rights of the infant defendant, Carroll Clark Price," vacated the said judgment as to the infant Carroll Clark Price. Defendants Rouse and Hill excepted and appealed.

*Whitaker and Jeffress and Marion A. Parrott for defendant appellants.*

*White & Aycock for defendant, appellee.*

PER CURIAM. The only question for determination is the method which the infant must use to obtain the desired relief. May he proceed by motion in the cause, or must he proceed by independent action?

Price's injuries were unknown to the court, and for that reason were not considered by it. It appears of record that notwithstanding the conflict of interest among the defendants, all were represented by the same attorney. The judgment was irregular. A motion in the cause was proper. *Menzel v. Menzel*, 250 N.C. 649, 110 S.E. 2d 333; *Hall v. Shippers Express*, 234 N.C. 38, 65 S.E. 2d 333.

Affirmed.

MELBA SUE FULLER, BY HER NEXT FRIEND, J. D. ALFORD v. LUCY W. FULLER, ADMINISTRATRIX OF THE ESTATE OF GURNEY RYLAND FULLER, DECEASED, AND J. R. FULLER;

AND

JIMMY ALLEN FULLER, BY HIS NEXT FRIEND, J. D. ALFORD, v. LUCY W. FULLER, ADMINISTRATRIX OF THE ESTATE OF GURNEY RYLAND FULLER, DECEASED, AND J. R. FULLER.

(Filed 2 November, 1960.)

**Automobiles §§ 36, 39, 41a— Negligence is not presumed from the mere happening of an accident.**

Evidence tending only to show that the driver of a truck veered gradually to the left and ran off the hard surface at a point where the highway was straight and that the truck continued on until it struck a tree some 150 feet after it had left the highway, resulting in the death of the driver and injury to the two passengers, with further evidence that the day was clear and the road dry and that there was no other traffic at this point, is insufficient to show that the injury to the passengers was the result of the negligence of the driver, since negligence will not be presumed from the mere happening of an accident, but, in the absence of evidence on the question, freedom from negligence will be presumed.

APPEAL by plaintiffs from *McKinnon, J.*, February-March 1960 Civil Term, of FRANKLIN.

These actions were consolidated for trial. Plaintiffs seek to recover damages for personal injuries received by them in an automobile accident which occurred 27 May 1958, about 2:30 P.M.

Plaintiffs, Melba Sue Fuller and Jimmy Allen Fuller, were riding in a pickup truck operated by their brother, Ryland Fuller. All three were minors. Jimmy was sitting on the right side, Melba in the middle. The pickup was proceeding southwardly on N. C. Highway No. 39, about 7 miles south of Louisburg in a rural area of Franklin County. There was no other traffic. The weather was clear and the road dry. At this point the highway is straight. About 300 feet north of this point is a slight curve to the west for southbound traffic. The pickup was carrying a tobacco setter. The truck veered gradually to the left, ran off the hardsurface and onto the shoulder with a bumping sound, continued on the shoulder at a slight angle to the highway for about 75 feet, proceeded into a field about two feet below the level of the highway, and continued in a straight line about 150 feet until it struck a cedar tree. The tree is 15 to 20 feet from the center of the highway and is 18 to 20 inches in diameter.

Eyewitnesses estimated the speed of the truck at 35 to 40 miles per hour. No one saw the truck before it reached the shoulder of

the road. Jimmy was asleep and did not awake until after the accident. Melba was asleep but awoke as the truck crossed a driveway just before hitting the tree. She testified that the speedometer reading was 43 miles per hour and Ryland was trying to push her "off from his elbow."

The truck was almost demolished. Ryland received injuries from which he died. He did not regain consciousness after the accident. Melba and Jimmy were injured. The truck was the property of plaintiffs' uncle, J. R. Fuller.

On motion of defendants the court entered judgments of nonsuit at the close of plaintiffs' evidence. Plaintiffs appealed and assigned errors.

*Yarborough, Yarborough & Paschal for plaintiffs, appellants.*
*Smith, Leach, Anderson & Dorsett for defendants, appellees.*

PER CURIAM. The cause of the accident rests in the realm of speculation and conjecture. Negligence will not be presumed from the mere happening of an accident. In the absence of evidence on the question, freedom from negligence will be presumed. *Ivey v. Rollins*, 251 N.C. 345, 111 S.E. 2d 194, and 250 N.C. 89, 108 S.E. 2d 63.

The judgments below are

Affirmed.

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STATE v. JOHNNY SMITH.

(Filed 2 November, 1960.)

APPEAL by defendant from *Huskins, J.*, May-June Criminal Term, 1960, of CALDWELL.

Criminal prosecution on warrant charging that defendant on April 9, 1960, in Lenoir Township, unlawfully, wilfully and maliciously damaged a store building belonging to Nellie Small by firing a gun into said building, thereby breaking out window glass and damaging the ceiling and walls, a violation of G.S. 14-127.

Upon trial *de novo* in superior court, on appeal by defendant from conviction and judgment in the Recorder's Court of Caldwell County, the jury returned a verdict of guilty as charged in the warrant. Judgment, imposing a prison sentence, was pronounced. Defendant excepted and appealed.

*Attorney General Bruton and Assistant Attorney General Rountree for the State.*

*Fate J. Beal for defendant, appellant.*

PER CURIAM. Defendant's motion for judgment of nonsuit was properly overruled. The only evidence was that offered by the State. It was sufficient, if accepted by the jury, to support findings as to all essential matters alleged in the warrant. Assignments of error relating to rulings on evidence and portions of the charge do not disclose prejudicial error. Discussion of these assignments in detail is deemed unnecessary. The verdict and judgment will not be disturbed.

No error.

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A. L. BERRIER v. ROY M. HILTON, ADMR. OF M. M. MURPHY
AND
PEARL M. BERRIER v. ROY M. HILTON, ADMR. OF M. M. MURPHY.

(Filed 2 November, 1960.)

APPEAL by defendants from *Johnston, J.*, at June 1960 Civil Term, of DAVIDSON.

Civil action instituted by plaintiffs against defendants to recover for certain personal services alleged to have been performed by them for the benefit of M. M. Murphy, *non compos mentis,* under guardianship, the defendant's intestate.

The cases were consolidated for trial, and submitted to and answered by the jury upon these two issues: "What amount, if any, is the plaintiff A. L. Berrier entitled to recover of the defendant? Answer: $3,500.

"What amount, if any, is the plaintiff Pearl Berrier entitled to recover of the defendant? Answer: $11,000."

To judgments entered in favor of the respective plaintiffs in accordance therewith the defendant in each case excepted and appeals to Supreme Court, and assigns error.

*Walser & Brinkley for plaintiff appellees.*

*Wilson & Saintsing for defendant, appellant.*

PER CURIAM. Careful consideration of the record of the case on

appeal here under review fails to disclose error for which the judgments entered in Superior Court should be disturbed. Hence in the said judgments there is

No error.

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CARL C. JACKSON, ADMINISTRATOR OF THE ESTATE OF JOSEPH E. TAYLOR, DECEASED v. THOMAS E. STANCIL, JR., D/B/A STANCIL FLYING SERVICE, AND JOSEPH MORENA RIVERA

AND

DEWARD SMITH v. THOMAS E. STANCIL, JR., D/B/A STANCIL FLYING SERVICE, AND JOSEPH MORENA RIVERA.

(Filed 9 November, 1960.)

**1. Aviation § 3—**

Evidence tending to show that the pilot of a plane, notwithstanding written warning that the auxiliary tank was to be used in level flight only, was using the auxiliary tank while reducing altitude and going into a bank preparatory to landing, that he failed to observe that the auxiliary tank indicator was standing on empty, that when the power failed he became excited and used the available seconds in attemping to switch tanks instead of giving attention to making a "dead stick" landing, etc., *is held* sufficient to be submitted to the jury on the question of his negligence.

**2. Same—**

While a carrier is not liable for error of judgment of the pilot which does not constitute positive negligence in exercising such judgment, the carrier is liable if the pilot, by his negligent conduct, creates a situation requiring the formation of a judgment and then errs in the exercise thereof.

**3. Same—**

The State Court has jurisdiction of an action between residents to recover for negligent injury and death in an airplane crash occurring in another state while the plane was on a trip under contract made in this State. G.S. 63-16, G.S. 63-24.

**4. Same—**

The liability of an owner or pilot of an aircraft for injury or death of a passenger must be based on negligence which is the proximate cause of the injury or death, determined by the rules applicable to negligence in general, and such carrier is not an insurer of the safety of his passengers.

**5. Same—**

The doctrine of *res ipsa loquitur* does not apply to an airplane crash,

it being common knowledge that airplanes sometimes fall without fault of the pilot.

**6. Carriers § 18—**

A private or contract carrier of passengers for hire owes them the duty to exercise ordinary care for their safe transportation; a common carrier owes them the duty of exercising the highest degree of care consistent with the practical operation of its business.

**7. Negligence § 1—**

Ordinary negligence is the failure to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances; the standard of care is unvarying, but the degree of care varies with the circumstances. The rule of utmost care imposed on common carriers, while largely a difference in degree, is also a difference in standards.

**8. Carriers § 1—**

A common carrier of passengers is one which holds itself out to the public as willing to carry at a fixed rate all persons applying for transportation within the limits of its facilities; a private or contract carrier is one which contracts separately with each individual desiring transportation.

**9. Same—**

Whether a carrier is acting as a common carrier or contract carrier is a question of fact, but where the facts are not controverted, whether the evidence is sufficient to show that the carrier is a common carrier is a question of law for the court.

**10. Same: Aviation § 3—**

The evidence in this case is held to show that defendant carrier did not hold himself out to the public, but contracted separately with all persons requesting air transportation, and therefore the evidence disclosed that defendant was a private or contract carrier, notwithstanding that he had an established place of business, operated his air service regularly as a business, and had a fixed schedule of charges.

**11. Carrier § 18: Aviation § 3—**

In an action against a pilot and his employer to recover for injury to one passenger and death of another from the negligence of the pilot, upon evidence disclosing that defendant flying service was a contract and not a common carrier, it is prejudicial error for the court to apply the standard of care required of a common rather than a contract carrier, and to charge the jury that the standard of care required of the carrier is the highest degree of care consistent with the practical operation and conduct of the business.

**12. Evidence § 51—**

A hypothetical question to an expert should be predicated upon a finding by the jury of the existence of the facts assumed in the question, and no facts should be included in the question which have not

been shown in evidence or which are not justifiably inferable from the facts in evidence.

HIGGINS, J., concurs in result.

PARKER, J., concurring in result.

BOBBITT, J., dissenting.

APPEAL by defendant Stancil from *Bone, J.*, February 1960 Term, of BEAUFORT.

The actions, consolidated for trial, grew out of an airplane crash which occurred 16 September 1957. Deward Smith and Joseph E. Taylor were passengers. Taylor was killed in the crash and Smith suffered injuries. Taylor's administrator seeks damages for wrongful death of his decedent; Smith sues to recover for his injuries. The defendants are Thomas E. Stancil, Jr., doing business as Stancil Flying Service, owner of the plane, and Joseph Morena Rivera, pilot at the time of the crash and employee of Stancil.

The complaint alleges in material part: Smith and Taylor were passengers for hire for a trip from Washington, N. C., to Teterboro, N. J., and return. Stancil is a common carrier of passengers. Defendants were negligent, in that (a) the airplane was defective and, to the knowledge of defendants, had a leak in the right wing fuel tank, (b) the plane was operated with insufficient supply of gasoline, which fact was called to the attention of and ignored by the pilot, (c) the pilot operated the plane while suffering from a severe headache which affected his efficiency in operation, (d) the pilot was not familiar with the plane he was operating; (e) the pilot was not familiar with the area over which he was flying, and (f) the pilot reduced altitude and attempted to land at the airport at Washington, N. C., after "he had switched the fuel selector valve to the auxiliary (fuel) tank, with full knowledge that the auxiliary tank would operate only in level flight and was not to be used for landings and take-offs" and, when the engines stopped for want of fuel, he became excited, lost control and crashed while attempting to "cut on the left wing tank." The crash and resulting injuries were proximately caused by these acts of negligence.

The evidence with respect to the flight and crash is briefly summarized as follows: Smith and Taylor were business partners. They arranged with Stancil for a flight to New York and return for a charge of $135.00. The trip was for business purposes. Rivera, Stancil's employee, was the pilot. He used a Bellanca plane. He made a few trial landings with the plane the afternoon before. Before taking

off it was discovered that there was a small leak in the right wing fuel tank but Stancil told them it was safe. The plane had three fuel tanks — right wing, left wing and auxiliary. At the auxiliary tank valve there is a placard that reads: "Use in level flight only." They took off at 7:10 A.M., and arrived at the Teterboro, N. J., airport, opposite New York City, at 9:30 A.M. The return trip began about 3:45 P.M. Before reaching Norfolk, Va., the right wing tank was empty and they had been flying on the left wing tank for some time. Taylor was nauseated. Smith observed that the left wing tank was less than half full, requested Rivera to land at Norfolk, refuel and permit Taylor to recover from air sickness. Smith explained they were in no hurry and would spend the night if necessary. Rivera refused to stop, said that he had plenty of fuel, was suffering from a severe headache and they would be home in 35 minutes. About 24 miles south of Norfolk the left wing tank was only one-eighth full; Rivera switched to the auxiliary tank which was then three-fourths full. He refused Smith's request that they turn back. He lost his bearings, got off his course and finally discovered they were east of Belhaven about 30 miles from Washington. They followed the River to Washington so the plane could be "ditched" if a forced landing was necessary. It was dark as they came over Washington. They fastened their safety belts. Smith testified: ". . . as we let down, letting down to get lower to the ground . . . at that time the plane was still on the auxiliary tank . . . He was letting down, he . . . put down and he began a slight right bank and as he began the bank the engine quit. . . . It was a complete cut off. It did not pop or snap, it just completely quit. At that moment we were over the airport approximately 600 feet high in the air. . . . at that point he yelled to me to turn on the panel light. . . . I turned on the panel light. He was leaning to the left to get to the gas valve. . . . I saw him take a hold to the valve and realizing you don't need any light when you are in the air and coming in for a landing, I turned it right off the split second he took hold to the valve . . . that is the last thing I did. We hit the ground at that moment. . . . When I turned the light out he had his hand on the gas valve, trying to switch the tank." Rivera appeared excited. As the pilot leaned over to switch the gasoline valve he leaned a little on the stick (wheel). The auxiliary tank showed empty. The left wing tank was then about one-eighth full. The plane crashed between the runways at the airport. Smith was rendered unconscious. Taylor died almost immediately.

The jury answered the negligence issues in favor of plaintiffs and

assessed damages. Judgment was entered accordingly. Defendant Rivera did not appeal.

Defendant Stancil appealed and assigned errors.

*Eugene Forrest Gordman, LeRoy Scott and McMullan & McMullan for plaintiffs.*

*Rodman & Rodman and Wilkinson & Ward for defendant Stancil.*

MOORE, J. Defendant Stancil assigns as error the refusal of the court to allow his motion for compulsory nonsuit. G.S. 1-183. It is our opinion that the evidence, when considered in the light most favorable to plaintiffs, is sufficient to take the case to the jury.

We refrain from a detailed discussion and analysis of the evidence. Suffice it to say that it is sufficient to justify the jury in concluding: Plaintiffs were passengers for hire. Rivera neglected to switch from the auxiliary fuel tank to the left wing tank before reducing altitude and going into a bank preparatory to landing. He knew or should have known by reason of a warning placard in plain view at the auxiliary tank that this tank was for "use in level flight only." Furthermore, he should have observed that the auxiliary tank indicator was standing on empty. When the power failed because of such neglect at an altitude of 600 feet, he became excited and used the few available seconds in attempting to switch tanks instead of giving attention to making a "dead stick" landing. This conduct on the part of the pilot was the proximate cause of the crash and resulting injuries to plaintiffs. Rivera was the agent, servant and employee of defendant appellant and at the time was about the business of his employment.

Of course a carrier would not be liable for an error of judgment of the pilot, not constituting positive negligence on his part in exercising such judgment; but liability is incurred if the pilot, by his negligent and careless conduct, has created a situation requiring the formation of a judgment and then errs in the exercise thereof. 38 Am. Jur., Negligence, s. 33, p. 579. *Conklin v. Flying Service* (1930), U.S. Av. R. 188.

While the testimony of appellant's expert witness, Henry C. Harding, was not essential in making out a *prima facie* case of actionable negligence for plaintiffs, sentences from his testimony succinctly summarize the situation here discussed: "At 600 feet I do not think a pilot would have time to switch gas tanks. If he spent the little time he did have left in getting the panel light turned on and switching the gas tank instead of looking out and getting the plane

in position to land I would say he committed error. . . . You only have one chance in making a safe landing when the motor dies out on you. A great deal depends on whether you are in the right position or not when it dies out. If you are not in the right position it is a hazardous piece of work."

As stated above we make no exhaustive discussion of the evidence. We express no opinion as to whether or not there were other acts or omissions from which the jury might legitimately infer that defendant was guilty of actionable negligence.

The court had jurisdiction of the cause of action. G.S. 63-16 and 24. The trial court correctly overruled the motion to dismiss.

Appellant excepts to the following portion of the judge's charge to the jury: "I charge you that where the relation of carrier and passenger exists, as it did in this case, the plaintiff Smith being a passenger and the deceased, Joseph E. Taylor, being a passenger and Stancil and the other defendant being carriers that the carrier owes to the passengers the highest degree of care for their safety, insofar as it is consistent with the practical operation and conduct of its business, but the liability of the carrier for injuries to a passenger is based on negligence. The carrier is not an insurer of the safety of the passengers. Now, that is the duty which the defendants owed to the plaintiffs in the case." More specifically, appellant insists that it was error to instruct the jury that defendant owed Smith and Taylor "the *highest degree of care* for their safety, insofar as it is consistent with the practical operation and conduct of its (his) business." (Emphasis ours)

G.S. 63-15 provides: "The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land." *Bruce v. Flying Service*, 231 N.C. 181, 56 S.E. 2d 560, involves an injury from an airplane crash. The Court cited and applied a number of negligence cases involving automobiles and said (p. 185): "The above citations are concerned with automobile law but agency, the *measure of negligence*, and other principles discussed are equally applicable to the law of aviation." (Emphasis added.) The weight of authority in the United States is that the liability of the owner or pilot of an aircraft carrying passengers for the injury or death of such passengers is to be determined by the rules of law applicable to torts on the lands and waters of the state arising out of similar relationships. 6 Am. Jur., Aviation, s. 45, p. 29. Anno-

tations: 12 A.L.R. 2d 656, 660-2; 69 A.L.R. 316, 328. *Wilson v. Air Transport,* (Mass. 1932) 180 N.E. 212, 83 A.L.R. 329; *Greunke v. Airways Company,* (Wis. 1930) 230 N.W. 618, 69 A.L.R. 295.

Liability of a carrier of passengers by aircraft must be based on negligence. Such carrier is not an insurer of the safety of its passengers. *Crowell v. Air Lines,* 240 N.C. 20, 31, 81 S.E. 2d 178. In a case involving an airplane crash the doctrine of *res ipsa loquitur* does not apply, "it being common knowledge that aeroplanes do fall without fault of the pilot." Furthermore, there must be a causal connection between the negligence complained of and the injury inflicted. *Smith v. Whitley,* 223 N.C. 534, 27 S.E. 2d 442.

Plaintiffs allege that defendant is a common carrier, and so acted in transporting Smith and Taylor on the trip in question. ". . . (a) distinction is made in many jurisdictions, either judicially or by statute, between common carriers and private carriers; in such jurisdictions the degree of care imposed upon a common carrier by airplane for hire is measurably greater than that imposed upon a private carrier for hire." 6 Am. Jur., Aviation, s. 52, p. 33.

In North Carolina a distinction is made between the duties owed to passengers for hire by common carriers and private or contract carriers. It has been uniformly held by us that a common carrier owes its passengers the highest degree of care for their safety so far as is consistent with the practical operation and conduct of its business. *Harris v. Greyhound Corporation,* 243 N.C. 346, 349, 90 S.E. 2d 710; *White v. Chappell,* 219 N.C. 652, 14 S.E. 2d 843; *Briggs v. Traction Co.,* 147 N.C. 389, 61 S.E. 373. A private or contract carrier of passengers for hire owes them the duty to exercise ordinary care for their safe transportation. *Pemberton v. Lewis,* 235 N.C. 188, 191, 69 S.E. 2d 512. We are committed to this distinction. Statute and decision require that we apply it in aircraft cases. We note in passing that some jurisdictions make no distinction in aircraft cases and apply the rule of highest degree of care in both situations. *Insurance Co. v. Pitts,* (Ala. 1925) 104 S. 21; 6 Am. Jur., Aviation, s. 52, p. 33.

The difference between ordinary care and the highest degree of care as these terms are applied in carrier cases is, in final analysis, largely a difference in the degree of duty, but it also involves a difference in standards.

Ordinary care is that degree of care which an ordinarily prudent person would exercise under like circumstances when charged with a like duty. Ordinary negligence is a want of due care; and due care means commensurate care, under the circumstances, tested by

the standard of reasonable prudence and foresight. "(a) prudent man increases his watchfulness as the possibility of danger mounts. So then the degree of care required of one whose breach of duty is very likely to result in serious harm is greater than where the effect of such breach is not nearly so great. . . . In short, the standard of care is a part of the law of the case for the court to explain and apply. The degree of care required, under the particular circumstances, to measure up to the standard is for the jury to decide." *Rea v. Simowitz*, 225 N.C. 575, 579, 580, 35 S.E. 2d 871. The care exercised or which should be exercised by an ordinarily prudent man is the standard of ordinary care, while the degree of care which such person exercises varies with the exigencies of the occasion. *Bemont v. Isenhour*, 249 N.C. 106, 105 S.E. 2d 431.

The "highest degree of care" imposed on common carriers is something different and more exacting. "This Court has quoted with approval Lord Mansfield's definition of the carrier's legal duty to its passengers, *viz.*: 'As far as human care and foresight could go, he must provide for their safe conveyance.' (Citing cases) . . . The definition adopted by this Court and stated repeatedly is that a carrier owes its passengers 'the highest degree of care for their safety so far as is consistent with the practical operation and conduct of its business.' (Citing authorities) . . . We perceive no inconsistency in these definitions." *Harris v. Greyhound Corporation, supra.*

In Shearman and Redfield on Negligence, Vol. 1, s. 1, pp. 6, 7, the matter is explained as follows:

"Ordinary care is such as an ordinarily prudent person would exercise under similar circumstances. That *standard* of care is unvarying, but the *degree* of care varies with the circumstances. The care required shall be commensurate with the danger.

"As a general rule, the concept of negligence as the failure to exercise 'ordinary' or 'due' or 'reasonable' care under the circumstances seemingly presents a close approach to satisfactory generality of expression. Even in jurisdictions holding to that view, however, a rule of 'utmost care so far as human skill and foresight can provide' is made applicable to railroad corporations with relation to roadbed, construction of cars, and the like.

"The rule of 'utmost care' does not merely require the degree of care usual among ordinarily prudent and competent carriers. It requires the degree of care to be expected of an unusually prudent and competent carrier. It is then something more stringent than the rule of 'ordinary' care under all the circumstances."

The question presented is whether or not, on this record, defend-

ant was on 16 September 1957 a common carrier and owed Smith and Taylor the highest degree of care for their safety, insofar as was consistent with the practical operation and conduct of his business. The evidence on this point is as follows:

Testimony of plaintiff Smith: "When I wanted to go some place by air I would call him. He was in the air transportation business. He had more than one plane out at the airport. He was operating from the Warren airport, that was his headquarters. . . . I asked him about taking us . . . to New York — Teterboro, New Jersey. That is where he said that they would land. Teterboro is just across the river from New York City. That is the airport Mr. Stancil said that he used when he made trips to New York. . . . I asked him what he would charge and he said $135.00 for both of us."

Jack Brant Armstrong testified: "I live at New Bern, N. C. I am a commercial pilot, airport operator, airport manager. . . . Yes, I know Mr. Stancil is engaged in the business of carrying passengers for hire, as a carrier for compensation. He was so engaged on September 16, 1957 in the business of a common carrier, carrying passengers for hire for compensation. . . . Yes, I know Mr. Tom Stancil who is sitting to your left. We are in the same kind of business. Both of us have aviation services, mine in New Bern and his here in Washington. He is in the air taxi or air charter business. I am not a common carrier of passengers. The airlines like Piedmont or National that run into New Bern are common carriers. Mr. Stancil and I would be charter or contract carriers. When I said in response to Mr. Gordman's question that Mr. Stancil was engaged as a common carrier I did not mean that. He is not a common carrier."

Defendant Stancil testified: "In 1952 I operated the flying service at Asheboro, also at White Lake in a passenger riding manner and did airplane advertising with a loud speaker for the Johnson Cotton Company in North Carolina and South Carolina and continued dusting and spraying in 1952 and we are continuing that right on now and in 1953 the summer of 1953 we took the Piper dealership at White Lake for Pipers. I moved to Washington in March 1955. We moved the majority of our operation from White Lake to here, which was a small operation but most of it we moved here to Washington. I leased the airport from the Airport Commission. . . . From 1954 up until September 1957 we had airplanes for rent and airplane passenger service on a charter or air taxi or a contract — so much for the trip or so much per hour — and dusting and spraying, banner towing . . . and in late 1956 and 1957 we operated a regular daily flight to Ocracoke Island and Portsmouth Island. . . .

I hold commercial pilot and air taxi certificates. . . . I would estimate that Mr. Rivera had flown Mr. Smith more than ten times different flights. I have flown him, I would estimate, over ten times. . . . He was a paying passenger and a prospect to buy an airplane."

Our Court in a well considered opinion delivered by *Parker, J.*, has defined "common carrier" and "private carrier." *Utilities Commission v. Towing Corp.*, 251 N.C. 105, 109, 110, 110 S.E. 2d 886. This case deals with carriers of freight, but the definitions are equally applicable to carriers of passengers. Omitting the references to carrier of goods and commodities, the language is as follows:

"A common carrier is one who holds himself out to the public as engaged in the public business of transporting persons . . . for compensation from place to place, offering his services to such of the public generally as choose to employ him and pay his charges. The distinctive characteristic of a common carrier is that he undertakes as a business to carry for all people indifferently . . .

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

"A private carrier . . . (sometimes called a contract carrier) is one who makes an individual contract in a particular instance for the carriage . . . to a certain destination. The private carrier . . . does not hold himself out to the public as ready to accept and carry . . . all who offer. . . . Each act of transportation is a separate and individual act. It is not for the public convenience and necessity, but is a private transaction. The private or contract carrier may refuse . . . to contract for carriage."

Making specific reference to aircraft carriers, it has been said: "The chief test applied to determine whether a carrier is a 'common carrier' is whether or not the operator of the aircraft either by express written or oral statements, or by his course of conduct, holds himself out to the public as willing to carry at a fixed rate all persons applying for air transportation . . . so long as his plane or planes will carry them." Rhyne: Aviation Accident Law, p. 45.

"What constitutes a common carrier, and what constitutes a contract carrier, are questions of law, but whether the carrier is acting as a common carrier or as a contract carrier is a question of fact." *Utilities Commission v. Towing Corp., supra.* Where the facts are in conflict, it is a question for the jury. *Aviation Inc. v. Moore,*

(USCA, 8C, 1959) 266 F. 2d 488. But where the facts are uncontradicted, as in this case, whether the evidence is sufficient to show that the air service is a common carrier is a question of law for the court. The carrier's descriptive label is not determinative; it is not what the carrier declares himself to be but is what the facts and circumstances show him to be. *Transport, Inc. v. Charter Company,* (D.C. 1D, Alaska 1947) 72 F. Supp. 609; *Cushing v. White,* (Wash. 1918) 172 P. 229.

For a transporter of passengers or goods by plane to be a common carrier it is not necessary that it have: A regular schedule of flights. *Transport, Inc. v. Charter Company, supra.* A fixed route. *Cushing v. White, supra.* A relatively unlimited carrying capacity. *Transport, Inc. v. Charter Co., supra.*

A carrier may limit its operations solely to charter flights and still be a common carrier. *Transport, Inc. v. Charter Co., supra.*

But the following are generally considered important factors in the operation of common carriers: An established place of business. *Smith v. O'Donnell,* (Cal. 1931) 5 P. 2d 690; 12 P. 2d 933 (1932). Engaging in the operation as a regular business and not merely as a casual or occasional undertaking. *Vincent v. United States,* (D.C. 1948) 58 A. 2d 829; *Fish v. Chapman,* (Ga.) 46 Am. Dec. 393. Regular schedule of charges. Fixel: Aviation, 3d Ed., (1948) s. 372, p. 361.

In the instant case it seems clear that defendant had an established place of business and operated his air service regularly as a business. He stated that his charges were "so much for the trip or so much per hour." From this it may be reasonably inferred that he had a fixed schedule of charges.

Appellant stated that he leased the airport from the Airport Commission. There is no explanation as to whether the Commission was a public or private body. The name of the Commission is undisclosed. The evidence does not show by what authority the Commission acted. The bare statement of appellant hardly justifies the assumption that the lease was made pursuant to G.S. 63-53, so as to impose upon defendant observance of the public rights and privileges provided for in that statute. In any event it does not now appear that the character of the lease would be controlling in this inquiry.

The fact that appellant holds commercial pilot and air taxi certificates is not decisive of the question as to whether or not he operated as a common carrier. Air taxi operators are not required to, and are not prohibited from, engaging in business as common carriers, but are temporarily exempted from certain rules and require-

ments imposed on larger operators and commercial airlines. Code of Federal Regulations, Title 14, ss. 298.3 and 298.7. The Civil Aeronautics Board recognizes that air taxi operators may under certain circumstances serve as common carriers, and it considers that "in the absence of a showing that stricter economic controls should be imposed on operators of small aircraft, such operators should be given an opportunity to develop their potential in relative freedom." Federal Register (1955) Vol. 20, No. 733, p. 4887.

The crucial test as to "whether one is a common carrier is whether he holds himself out as such, either expressly or by a course of conduct, that he will carry for hire on a uniform tariff all persons applying . . . so long as he has room." Fixel: Aviation, 3d Ed. (1948) s. 372, p. 261. "The holding out is not a formal matter, but consists of conduct naturally inducing a belief in the minds of the public." 1 J. Air L. 34 (1930). In *Vincent v. United States, supra,* at page 831, quoting from Northeastern Lines, Inc., Common Carrier Application, 11 M.C.C. 179 (1939), it is said:

"Question arises as to the meaning of the words 'holds itself out,' as applied to a common carrier. They clearly imply, we believe, that the carrier *in some way* makes known to its prospective patrons the fact that its services are available. This may be done in various ways, as by advertising, solicitation, or the establishment in a community of a known place of business where requests for service will be received. However the result may be accomplished, the essential thing is that there shall be a public offering of the service, or, in other words, *a communication of the fact that service is available to those who may wish to use it . . .*"

It is the matter of determining whether there was a "holding out" to the public that gives difficulty in this case. Appellant has an established place of business and conducted his aircraft operations as a regular business. He had three planes and carried passengers for hire. He had served plaintiff Smith many times on charter trips. His planes had made other trips to New York. For nearly a year he had "operated a regular daily flight to Ocracoke Island and Portsmouth Island." He also sold planes and was in the "dusting and spraying, (and) banner towing" business.

If appellant advertised his business in any way the record is silent with respect thereto. There is no showing that his business is listed in the Classified section of the telephone directory or similar media; the evidence discloses no newspaper, radio, television or billboard advertising. *Aviation, Inc. v. Moore, supra; Transport, Inc. v.*

*Charter Co., supra; McCusker v. Flying Service, Inc.*, 269 Ill. App. 502 (1933). Did he offer his services to the public generally or did he limit them to special clientele? What and whom did he carry on the flights to Ocracoke and Portsmouth Island? It appears that he operated three planes, but the capacity of the planes is not shown. The one used on the flight to New York was a two-seater. It could not carry in excess of three passengers, perhaps not more than two. The evidence fails to show that appellant held himself out as "in the public business of transporting persons . . . from place to place, offering his services to such of the public generally as chose to employ him," so long as he had room. Indeed, it may be that the passenger service was only occasional when planes were not in use for banner towing, dusting and spraying.

He and Smith were well acquainted. It was Smith who approached him for carriage to New York. He had been teaching Smith to fly and was trying to sell him an airplane. It is conceivable that these considerations induced appellant to undertake this particular trip.

Under the facts and circumstances of this case, it is our opinion, and we so hold, that the court erred in instructing the jury that defendants owed Smith and Taylor the duty to exercise the highest degree of care for their safety. The error is prejudicial. *Greunke v. Airways Co., supra.* There must be a new trial.

Appellant excepts to a number of hypothetical questions propounded by plaintiffs to expert witnesses and the responses. Since there must be a retrial, no good purpose would be served by *seriatim* discussion of these exceptions. But we think it well to call attention once more to general rules applicable to this class of testimony.

The cautions to be observed in framing hypothetical questions are clearly set out and discussed in Stansbury: North Carolina Evidence, s. 137, pp. 270-273. There are abundant citations of authority.

In the case at bar plaintiffs, in several instances, included in the hypothetical questions facts which were not in evidence and could not be justifiably inferred from the evidence. *Dameron v. Lumber Co.*, 161 N.C. 495, 77 S.E. 694; *State v. Holly*, 155 N.C. 485, 71 S.E. 450. Almost all the questions propounded to the expert witnesses began with the expression "assume that." This expression was followed by a recital of facts supposedly gleaned from the testimony of other witnesses. Example: "Mr. Armstrong, assume that a Bellanca . . . Cruisemaster, was in a fairly deep dive; assume that its air speed was approximately 100 miles per hour; assume that that plane continued in its dive down past the top level; assume that the control wheel or stick was suddenly pulled back . . ." (It is noted parenthetically

that several of the facts assumed in this question were not in evidence and not justifiably inferable therefrom.) "The opinion of an expert cannot be based upon an assumption of the truth of facts related to him either by a witness or any third party. The expert opinion must be based upon the assumption that the fact submitted to the expert has been established by the verdict of the jury." *Plummer v. Railway Co.*, 176 N.C. 279, 96 S.E. 1032. In *State v. Bowman*, 78 N.C. 513, quoting from *Woodbury v. Obear*, 7 Gray (Mass.) 467, it is said: ". . . (t)he proper way to interrogate the expert is, *'If certain facts assumed by the question to be established* by the evidence should be found true by the jury, *what would be his opinion* upon the facts thus found true . . .' " There is no hard and fast rule for framing the question and no exact combination of words is required, but it is the best practice to use an expression such as, "If the jury should find by the greater weight of the evidence that . . ." *Dempster v. Fite*, 203 N.C. 697, 167 S.E. 33. The scope and nature of the admissible testimony of expert witnesses in aircraft cases is discussed in *Bruce v. Flying Service*, 234 N.C. 79, 66 S.E. 2d 212.

Other assignments of error are not discussed. If errors there be, they will likely not recur upon a retrial.

New trial.

HIGGINS, J., concurs in result.

PARKER, J., concurring in result.

A study of the uncontradicted facts in this case leads me to the conclusion that Stancil is a common carrier, and that there is no error in that part of the charge that Stancil owed to Smith and Taylor the duty of exercising the highest degree of care for their safety, consistent with the practical operation of his business, for which a new trial is awarded.

However, in my opinion, a new trial should be allowed because of the hypothetical questions and the answers thereto mentioned in the majority opinion.

Therefore, I concur in the result.

BOBBITT, J., dissenting. If a contract carrier by air does not owe a fare-paying passenger the highest degree of care consistent with the practical operation and conduct of its business, I agree the quoted instruction was erroneous and a new trial should be awarded. Assuming the evidence sufficient to support a finding that defendant

was a common carrier, the issue of common carrier *vel non* was not submitted. The evidence did not establish defendant's status as a common carrier as a matter of law.

Even so, I perceive no sound reason for drawing a distinction between the legal duty owing by a common carrier to a fare-paying passenger and the legal duty owing by a contract carrier to such passenger. Whether the carrier is a common carrier or a contract carrier in no way affects the hazards inherent in air travel. In respect of air travel, ordinary or due care, namely, care commensurate with the known or foreseeable dangers, is no less than the highest degree of care consistent with the practical operation and conduct of the business.

G.S. 63-15 relates to collisions between aircraft, on land or in the air. In my view, it has no bearing upon whether common carriers and contract carriers owe different legal duties to fare-paying passengers.

In *Bruce v. Flying Service*, 231 N.C. 181, 56 S.E. 2d 560, plaintiff's intestate was a gratuitous passenger in a plane engaged in special maneuvers as a feature of an air show. In my view, the quoted sentence, when considered in context, has no bearing upon whether a common carrier owes a higher degree of care to a fare-paying passenger than a contract carrier owes to such passenger. Moreover, it is *obiter dicta* except as it relates to a factual situation such as then considered.

While there are many cases relating to what constitutes a common carrier, and to the legal duty of a common carrier to fare-paying passengers, Annotation: 73 A.L.R. 2d 346, decisions relating to the duty of a contract carrier to its fare-paying passengers are few and conflicting. 73 A.L.R. 2d 369-371. I share the view that no distinction, "based on whether the airplane company or operator is a common or private carrier as to the duty owed to passengers for hire," should be made.

In my opinion, the errors with reference to the hypothetical questions and answers thereto were not sufficiently prejudicial to justify the award of a new trial on that ground.

For the reasons stated, I vote to sustain the verdict and judgment.

A. J. OVERTON, JACK JOHNSON, PAUL PERRY, C. F. JERVIS, MRS. W. P. CHANEY, MISS MYRTLE BENNETT, MISS AUDREY SAUNDERS, LUTHER TWEED AND GLENN MORGAN, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND QUALIFIED VOTERS OF THE CITY OF HENDERSONVILLE v. THE MAYOR AND CITY COMMISSIONERS OF THE CITY OF HENDERSONVILLE, TO WIT, MAYOR A. V. EDWARDS, I. E. JOHNSON, TOM CLARKE, BEN FOSTER, AND ROY WILLIAMS, COMMISSIONERS; RAYMOND P. ENGLISH, REGISTRAR; FRANK WALDROP AND I. B. HUGHES, JUDGES; AND I. T. OLSON, JOHN F. McLEOD, JR., AND MELVIN S. HATCH, COMMISSION; AND M. J. WORLEY, R. B. SHEALEY AND HUGH WHISNANT, CONSTITUTING THE BOARD OF ELECTIONS OF THE CITY OF HENDERSONVILLE.

(Filed 9 November, 1960.)

**1. Elections § 4—**

The determination of the qualification of a voter is addressed to the election officials, and a watcher has the right only to challenge a voter and, in the event the voter is permitted to vote, to have such voter write his name on the ballot for identification if there is a later inquiry as to the validity of the election, but a watcher is not entitled to conduct an examination of each of the voters he challenges, and when a watcher seeks to take charge of the inquiry the election officials may request him to cease impeding the progress of the election and to leave the polling place.

**2. Elections § 7—**

Where challenged voters have been required to sign their names on the ballots pursuant to G.S. 163-168, and an order is issued impounding all papers, books, ballots and reports relative to the election, movants, having been given the right to inspect the impounded documents, should check the poll books against the registration books to ascertain whether any unqualified persons were allowed to vote if they seek to obtain evidence upon which to challenge the election.

**3. Elections § 4—**

It is a violation of G.S. 163-172 for a judge of elections to mark the ballots for voters without any request for assistance by the voters, or, in the event of a request for assistance, to fail to return the marked ballot to the voter in order that the voter may see how it was marked before putting it in the ballot box.

**4. Same—**

The ignorance, neglect or misconduct of an election official, in the absence of actual fraud participated in by the voter, cannot deprive such voter, if he is otherwise entitled to vote, of his right to cast his ballot, or render his vote invalid.

**5. Elections § 2—**

The failure of a registrar to administer the oath prescribed by law to an elector before registering him, and the registration of voters by persons other than the registrar, does not deprive the elector of his right to vote or render his vote void after it has been cast.

**6. Elections § 10—**

In an action to restrain municipal officials from proceeding pursuant to an election approving the sale of wine and beer within the city, evidence tending to show only irregularities on the part of election officials not vitiating the ballots cast, together with evidence tending to show the casting of ballots by unqualified voters in a number insufficient to affect the result of the election, is insufficient to vitiate the election, and nonsuit is correctly entered.

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

APPEAL by plaintiffs from *Fountain, Special Judge,* 27 June 1960 Special Civil Term, of HENDERSON.

This is an action instituted by the individual plaintiffs, alleged citizens, residents and electors of the City of Hendersonville, North Carolina, to restrain the defendant city officials from putting into effect a system for the sale of beer and wine in the City of Hendersonville, and to have the special election held in said city on 2 March 1960 declared null and void. In said election 1,038 votes were cast for the sale of beer and 682 votes were cast against the sale of beer; 1,017 votes were cast for the sale of wine and 694 votes were cast against the sale of wine.

The amended complaint, hereinafter referred to as complaint, alleges the names and offices of the defendants as follows: A. V. Edwards, I. E. Johnson, Tom Clark, Ben Foster, and Roy Williams are the Mayor and City Commissioners of the City of Hendersonville. Raymond P. English is a citizen and resident of Hendersonville and was appointed registrar of the special election called by the governing body of said city to be held on 2 March 1960. Frank Waldrop and I. B. Hughes were appointed judges for said special election by the aforesaid governing body. I. T. Olsen, John F. McLeod, Jr., and Melvin S. Hatch constitute the commission designated by the governing body of the City of Hendersonville to regulate and supervise the legal sale of beer and wine in said city.

In paragraph 12 of the complaint it is alleged that between seven and eight hundred names were entered upon the registration books of the City of Hendersonville as new voters during the period of time from the fourth Saturday preceding the special election and the date of the election, 2 March 1960.

It is alleged in paragraph 13 of the complaint, upon information and belief, that more than 350 of the persons whose names were listed in the registration books during the period referred to above, were not administered oaths as required by law and that a large number, and specifically more than two hundred persons whose names

were entered on the books during said period of time, were not residents of the City of Hendersonville and were not qualified by reason of nonresidence and otherwise to vote in said special election.

In paragraph 14 of the complaint and the subsections thereof, it is alleged that the Mayor and City Commissioners of the City of Hendersonville were without authority to call the election, in that the petitions required by law were defective in numerous respects and did not bear the names of fifteen per cent of the registered voters who voted for the governing body of said municipality in the last election in said municipality. It is further alleged that the resolution passed by the Mayor and City Commissioners calling the election did not comply with certain statutory requirements.

In paragraph 15 of the complaint and subsections thereof, it is alleged, among other things, that 150 names placed on the registration books were entered thereon by persons other than Raymond P. English, the registrar; that a large number of the names were entered on the registration books after said books were required by law to be closed. It is further alleged that hundreds of persons were registered who did not possess the necessary educational qualifications to vote or were otherwise disqualified to vote.

In paragraph 16 of the complaint it is alleged upon information and belief that on election day the election officials designated to conduct the special election entered into a plan and conspiracy with James A Stutts, a resident of the City of Raleigh and an employee of the Beer Association of North Carolina, and with one Ben Israel, a resident of Hendersonville, pursuant to which scheme, plan and conspiracy the said James A. Stutts and Ben Israel brought to the polling place in the City of Hendersonville on election day hundreds of persons who were not qualified to vote, many of whom were nonresidents of the City of Hendersonville and many of whom were not registered for said special election. In subparagraph (a) of paragraph 16 it is alleged that James A. Stutts, a nonresident of the City of Hendersonville, entered within the polling place and enclosure thereof on numerous occasions and there talked to voters singly and in groups attempting to influence them to vote in favor of the sale of beer and wine in the City of Hendersonville. It is further alleged in subparagraph (b) of paragraph 16 that James A. Stutts paid money to numerous voters after they had allowed Frank Waldrop to mark their ballots without requesting him to do so. In paragraph (c) of this same paragraph of the complaint it is alleged that Ben Israel went out and about the outskirts of the City of Hendersonville and brought to the polling place a large number of persons,

as the plaintiffs are advised, informed and believe, more than one hundred in number, whom he knew to be nonresidents of the City of Hendersonville and not qualified to vote; that he promised to said persons that if they would go to the polling place, take a ballot from the election officials and hand it to Frank Waldrop without asking any questions, that he, the said Ben Israel, and the said James A. Stutts, would pay to said persons money, give them whiskey, or give them orders for chickens or other produce. In subparagraph (e) of the aforesaid paragraph it is alleged that James A. Stutts and Ben Israel did issue and deliver to more than 150 persons who came to said polling place slips of paper authorizing the bearer thereof to pick up a chicken or procure whiskey at Israel's store, known as the Greasy Pig, and that Ben Israel did honor the said certificates and did give to said persons chickens and other produce or whiskey as consideration for said persons forfeiting their right to vote and permitting the said Frank Waldrop to mark the ballots issued to them.

Paragraph 21 of the complaint alleges that the registrar and judges of said special election never met as a Board of Canvassers to determine the result of said election as prescribed by G.S. 160-48 and G.S. 160-49.

It is likewise alleged in paragraph 22 of the complaint that the election returns were never canvassed as required by law.

In paragraph 24 of the complaint it is alleged that a fair and impartial conduct of said election, free from the fraud and corruption and unlawful acts of the defendants would have produced a different result from that wrongfully announced by the defendants.

It is alleged in paragraph 25 of the complaint that a majority of the qualified voters of the City of Hendersonville voting in said special election were against the sale of beer and wine in the City of Hendersonville and that their ballots so indicated, but because of the unlawful and fraudulent conduct of the defendants acting in concert and the furtherance of their criminal violation of the election laws, the will of the people of Hendersonville was defeated.

The evidence bearing on these allegation will be set out in the opinion.

During the course of the trial, Ben Israel, William B. Powers, Mrs. Raymond P. English, and James A. Stutts, who were original defendants, moved for a dismissal of this action as to them. The motion was allowed. This appeal does not challenge the correctness of this ruling.

At the close of plaintiffs' evidence the defendants moved for judgment as of nonsuit. The motion was granted. The plaintiffs appeal and assign error.

*Don C. Young and Lamar Gudger for plaintiffs.*
*Arthur B. Shepherd, R. L. Whitmire, L. B. Prince for defendants.*

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

The evidence tends to show that approximately eight hundred additional persons were registered while the registration books were open, for the special election held on 2 March 1960. The regular registration books of the City of Hendersonville were used and a new registration for the special election was not ordered.

The evidence offered below in support of the allegations in paragraph 13 of the complaint, to the effect that more than 350 of the persons registered for the special election were not administered oaths as required by law and that more than 200 of these persons were nonresidents of the City of Hendersonville, is in substance as follows: Paul Perry, one of the plaintiffs herein and one of the duly appointed and sworn watchers for the dry forces, testified that he challenged 176 voters, practically all of whom were Negroes. Of this 176, he named 41 who were challenged on the sole ground that the oath was not administered to them by the registrar at the time they were registered. Four were challenged but no reason given. One voter was challenged on the ground that he did not have an oath administered to him at the time he registered and that he stated he could not read or write, another on the ground that he did not know who registered him and that he was not administered the oath at the time he registered. Twenty-one others were challenged on the ground that they were registered by Ben Israel or some person other than Raymond P. English, the registrar, and on the further ground that the oath was not administered to them at the time they were registered. This accounts for 68 of the 176 challenged voters by Paul Perry for the dry forces. There is no evidence tending to show on what ground the remaining 108 voters were challenged. Furthermore, there is no evidence tending to show that any person was challenged on the ground that he was not a resident of the City of Hendersonville or on the ground that such challenged voter was not registered.

M. F. Toms testified that on 1 March 1960, Raymond P. English, the registrar, came by his office; that upon inquiry Mr. Eng-

lish informed him that he had registered about 800 new people for this special election and that he administered the oath to about one-half of them at the time of their registration; that he had registered all of them except about thirty, and these were registered by Chief Powers and his (the registrar's) wife at his request. Chief Powers is a brother-in-law of English. The witness further testified that he got the impression that the thirty persons were registered by Powers and Mrs. English at times when Mr. English was at lunch.

No evidence whatever was offered in support of the allegation contained in paragraph 14 of the complaint with respect to the lack of authority of the Mayor and City Commissioners to call the election on account of the defective petitions or otherwise. Neither does the record disclose any evidence tending to support the allegation in said paragraph to the effect that the resolution passed by the Mayor and the City Commissioners calling the election did not comply with certain statutory requirements.

The evidence does not support the allegation of paragraph 15 of the complaint to the effect that 150 names were placed on the registration books by persons other than Raymond P. English, the registrar. The evidence tends to show that at most not more than thirty persons were registered by persons other than the registrar. Moreover, there is no evidence to support the further allegations in said paragraph to the effect that hundreds of persons were registered who did not possess the necessary educational qualifications to vote or who were also otherwise disqualified to vote.

The evidence adduced in the trial below does not tend to support the allegations in paragraph 16 of the complaint, to the effect that the election officials entered into a plan and conspiracy with James A. Stutts and Ben Israel pursuant to which scheme the said James A. Stutts and Ben Israel brought to the polling place in the City of Hendersonville on election day hundreds of persons who were not qualified to vote, many of whom were nonresidents of the City of Hendersonville, and many of whom were not registered for said special election. Neither does the evidence tend to support the allegations in subparagraph (a) of paragraph 16 to the effect that James A. Stutts, a nonresident, entered within the polling place and enclosure thereof on numerous occasions and there talked with voters singly and in groups, attempting to influence them to vote for the sale of beer and wine.

In the hearing below, A. B. Rhoads, the first witness for the

plaintiffs, testified that he spent practically the whole day at the voting place on the day of this special election. "I saw Mr. Waldrop (one of the judges) pick up a voter and go with him into the booth as many as a dozen times or more. I was there practically the whole day. * * * That was the day of the big snow, one of the heaviest snows we've ever had here and it snowed all day long. I never saw Mr. Stutts on the inside of the voting enclosure at all. I never saw Mr. Israel on the inside of the voting enclosure."

The evidence in support of subparagraph (b) of paragraph 16, to the effect that James A. Stutts paid money to numerous voters after they had allowed Frank Waldrop to mark their ballots, tends to show that on some three or four occasions Stutts did give money to prospective voters. He was seen to drop a fifty-cent piece on the floor and a colored man to whom he was talking picked it up and put it in his pocket. On another occasion he was observed giving a colored man what looked to be a dollar bill. At another time he was observed giving coins to three colored men. On still another occasion Stutts was told by a colored boy that certain folks were out in his car but refused to vote until they were paid what they were promised; that Stutts gave him some bills and said: "Now, if that's not enough to take care of you, see Mr. Ben Israel."

The allegation in subparagraph (c) of paragraph 16, to the effect that Ben Israel brought to the polling place more than one hundred persons whom he knew to be nonresidents of the City of Hendersonville and not qualified to vote, is not supported by the evidence. Further allegations in subparagraph (c), to the effect that if the more than one hundred persons which Israel brought to the polling place would take a ballot from the elections officials and hand it to Frank Waldrop without asking any questions, the said Ben Israel and the said James A. Stutts would pay to said persons money, give them whiskey, or give them orders for chickens or other produce, are not supported by the evidence. The evidence does disclose that many persons were brought to the polling place by Ben Israel, and that after Stutts talked to them outside the polling enclosure he would place them in the voting line and give a signal to Mr. Waldrop by a nod or wink and Waldrop would go into the booth with the voter after he had been given a ballot, and that Waldrop would mark the ballot, and on many occasions the voter would not accompany him into the booth. Part of the time Waldrop would return the marked ballot to the voter and the voter would put it in the ballot box. But in many instances Mr. Waldrop would deposit the ballot himself. Grover Redden, one of the sworn watch-

ers for the dry forces, testified that Mr. Waldrop assisted at least a hundred voters in this way. The evidence further tends to show that these voters did not request Mr. Waldrop to assist them in marking their ballots.

The evidence with respect to the allegation in subparagraph (e) of paragraph 16, to the effect that Stutts and Israel issued and delivered to more than 150 persons who came to the polling place, slips of paper authorizing the bearer thereof to pick up a chicken or procure whiskey at Israel's store and that Israel honored the certificates, does not support the allegation. There was evidence, however, tending to show that three certificates were given to two voters; that each certificate called for the delivery of a chicken by presenting the same at Ben Israel's place of business, but the record does not reveal any evidence that the slips or orders entitled the bearer thereof to any whiskey or that any whiskey was delivered to anyone by Israel or anyone else in exchange for these orders for chickens.

M. A. Butler testified that he had previously lived in Hendersonville and had registered for a previous election in Hendersonville, but that he was not a resident of the City of Hendersonville at the time of the special election; that he voted therein as a consequence of a conversation with Ben Israel. This witness further testified that about two hours after he voted, Ben Israel gave him two slips of paper, each one for a chicken, signed "Ben J. Israel, 244 Third Avenue East, * * *." This witness also testified that Ben Israel "did say he would see that I got paid for having voted." The evidence does not disclose whether Butler voted for or against the sale of beer and wine.

There is no evidence tending to support the allegation in paragraph 21, to the effect that the registrar and judges did not comply with the provisions of G.S. 160-48 and G.S. 160-49. Neither is there any evidence in the record to support the allegation in paragraph 22 of the complaint, that the election returns were never canvassed as required by law. The allegations in paragraphs 24 and 25 of the complaint as set out hereinabove, are not supported by the evidence.

James A. Davis, a minister, who had lived in Hendersonville since 1 January 1960, did not register while the registration books were open, thinking that he had to be a resident for ninety days before he could register. The registrar, Mr. English, informed him that he was eligible after thirty days and offered to register him on election day and did so. This witness voted against the sale of beer and wine.

Davis was a sworn watcher for the dry forces and testified that he had theretofore stated, " * * * that the people who had worked at the polls * * *, including both the dry and wet people, * * * were very courteous and cooperative. * * * I was there all day as a watcher and went there for that purpose. To the best of my ability I was on the alert and kept my eyes open all day long. At the time I made the observation concerning the election officials being courteous, I did not make any comment or observation about anything being wrong there." This witness also testified that he helped count the ballots.

The appellants complain about one of the sworn watchers, Jack Johnson, being told that he must leave because he was impeding the progress of the election. Johnson, according to his version of the matter, apparently felt that he had the right to conduct an examination of each of the voters he challenged rather than have the challenge noted and the voter sign his name on the ballot, as required by G.S. 163-168. The registrar permitted the challenged voter to vote after he had written his name on the back of the ballot. Johnson testified that his challenge of the voter was based solely on the ground that the voter had not been administered an oath when he registered.

The law does not contemplate that a watcher or any other person may take charge when he challenges a voter at the polls and conduct a hearing with respect to the voter's right to vote. The inquiry with respect to the voter's qualifications to vote rests with the election officials, and when such challenged voter is permitted to vote, before voting he must write his name on his ballot for identification "in the event any action should be taken later in regard to the voter's right to vote." G.S. 163-168.

It might be noted that no voters were challenged on challenge day, as provided in G.S. 163-78.

It appears from the evidence that 140 voters signed their ballots pursuant to the provisions of G.S. 163-168; that of these 140 voters, 129 signed their ballots pursuant to the challenges made by Paul Perry, one of the watchers for the dry forces, and that all 129 persons voted for the sale of beer and wine. Jack Johnson and Paul Perry were the only persons who challenged any voters at the polling place during this special election.

On 28 March 1960, an order was entered pursuant to a motion interposed by plaintiffs in the office of the Clerk of the Superior Court of Henderson County, impounding all paper writings pur-

porting to be a petition or petitions for an election on 2 March 1960 on the question of the sale of beer and wine in Hendersonville, together with all the registration books, poll books, ballots, marked and unmarked, reports and records of the Board of Elections, etc. Such order gave the respective attorneys the right to inspect the impounded documents in the presence of the Clerk, his deputy, or such other person appointed by him for such purpose. Even so, it does not appear that the poll books were checked against the registration books to ascertain whether or not the persons challenged, or any other persons, voted without having been registered, as alleged, and if registered whether or not such voters lived within or without the City of Hendersonville.

We think the evidence is sufficient to support the conclusion that Waldrop, one of the judges, and Stutts did have an understanding that Waldrop was to take the ballots of those voters identified by Stutts and to mark them for the sale of beer and wine. Unquestionably, Waldrop was guilty of violating both the letter and the spirit of G.S. 163-172, in that the evidence tends to show that without any request for assistance by the voter, Waldrop volunteered his services at least a hundred times and marked the ballot for the voter, and on many occasions deposited the ballot in the ballot box without offering to return the marked ballot to the voter so he could see how it was marked before putting it in the ballot box.

Irregularities are revealed by the evidence on this record on the part of the election officials, as follows: (1) The failure to administer the oath to many persons who registered for this special election. (2) The conduct of Waldrop in marking the ballots of voters without being requested to do so. (3) The registration of voters by persons other than by the registrar.

The questions raised on this record are not new. It is regrettable that all too often election officials are careless and indifferent with respect to the proper discharge of their legal duties. On the other hand, in the absence of actual fraud participated in by an election official or officials and the voter, voters are not to be denied the right to vote by reason of ignorance, negligence or misconduct of the election officials.

It is the duty of a registrar to administer the oath prescribed by law to electors before registering them, but his failure to perform his duty in this respect will not deprive the elector of his right to vote or render his vote void after it has been cast. *McPherson v. Burlington*, 249 N.C. 569, 107 S.E. 2d 147. *Quinn v. Lattimore*, 120 N.C. 426, 26 S.E. 638, 58 Am. St. Rep. 797; *Gibson v. Commis-*

*sioners,* 163 N.C. 510, 79 S.E. 976; *Woodall v. Highway Commission,* 176 N.C. 377, 97 S.E. 226; *Davis v. Bd. of Education,* 186 N.C. 227, 119 S.E. 372; *Plott v. Commissioners,* 187 N.C. 125, 121 S.E. 190; *Glenn v. Culbreth,* 197 N.C. 675, 150 S.E. 332.

In *Gibson v. Commissioners, supra,* it is said: "* * * a statute prescribing the powers and duties of registration officers should not be so construed as to make the right to vote by registered voters depend upon a strict observance of the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of suffrage liable to be defeated, without the fault of the elector, by fraud, caprice, ignorance, or negligence of the registrars * * *. A constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the Constitution of the State and that of the United States is directed to registrars, and to them alone; and if they through inadvertence register a qualified voter, who is entitled to register and vote without administering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers."

In the case of *Quinn v. Lattimore, supra,* the Court said: "It appears that a number of persons were registered by other persons than the regularly appointed registrars; in one instance, by the son of the registrar in the absence of his father; and in another case by Williams, the register of deeds, with whom the registrar had left the registration books. These registrations were irregularly made and might have been rejected and erased by the registrars. But it would not have been fair for them to have done this without notifying the parties, so registered, in time for them to have registered again. But instead of their doing this, they retained these names on their books, which they and the judges of election used on the day of election, thereby ratifying and approving these registrations. And it would now be a fraud on the electors, as well as on the parties for whom they voted and also upon the State, to reject these votes for this irregularity. These votes cannot be rejected for this reason. * * *

"A vote received and deposited by the judges of election is presumed to be a legal vote, although the voter may not have complied with the requirements of the registration law; and it then devolves upon the party contesting to show that it was an illegal vote, and this cannot be shown by showing that the registration law had not been complied with. Pain on Elections, sec. 360. A party offering to vote without registration may be refused this right by

the judges for not complying with the registration law. But, if the party is allowed to vote and his vote is received and deposited, the vote will not afterwards be held to be illegal, if he is otherwise qualified to vote. * * *"

In the case of *Woodall v. Highway Commission, supra,* this Court quoted from McCrary on Elections, 3rd Edition, section 216, page 143, as follows: "The doctrine that whole communities of electors may be disfranchised * * * because one or more of the judges of election have not been duly sworn, or were not duly chosen, or do not possess all the qualifications requisite for the office, finds no support in the decisions of our judicial tribunals."

With respect to Waldrop's misconduct, there is no evidence tending to show that a single ballot was cast contrary to the wishes of the voter casting such ballot. Furthermore, with the exception of M. A. Butler, referred to hereinabove, there is no evidence of any probative value tending to show that any other nonresident of the City of Hendersonville voted in said special election or that any person who was not registered voted therein. The record, therefore, discloses that only one nonresident voted in the special election and only one voter was challenged on the ground that he could not read or write.

We hold that the misconduct complained of with respect to the election officials, falls within the category of irregularities and is insufficient to upset the result of the special election held on 2 March 1960. *Hendersonville v. Jordan,* 150 N.C. 35, 63 S.E. 167; *Casey v. Dare County,* 168 N.C. 285, 84 S.E. 268; *Davis v. Bd. of Education, supra; Glenn v. Culbreth, supra; Forester v. N. Wilkesboro,* 206 N.C. 347, 174 S.E. 112; *Phillips v. Slaughter,* 209 N.C. 543, 183 S.E. 897.

There are some irregularities in many elections — as much as they are to be deplored — but, as a general rule, the misconduct of election officials will not vitiate an election unless it is shown that the result was affected thereby. *Plott v. Commissioners, supra.*

The evidence before us in this action is insufficient to sustain the view that the result of the election would have been changed had it not been for the irregularities pointed out herein. Even so, we do not approve of the conduct of Waldrop, Stutts, or Israel. The conduct of Stutts and Israel in giving money and orders for chickens was reprehensible and indefensible. The evidence tends to show that they violated the provisions of G.S. 163-197, which makes it a felony for any person to give or promise or request or accept at any time, before or after any election, any money, property or other thing

of value whatsoever in return for the vote of any elector.

Fraudulent conduct of third parties, in the absence of evidence to the effect that the election officials participated therein, will not vitiate an election unless the evidence shows that as a result of such fraudulent conduct a sufficient number of illegal votes was cast to change the result of the election.

A careful consideration of the record before us leads us to the conclusion that the judgment as of nonsuit entered below was proper and must be upheld.

Affirmed.

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

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STATE v. FRED BASS, JR.

(Filed 9 November, 1960.)

**1. Criminal Law § 101—**

In order to convict a defendant of a criminal offense, the State must prove first that the offense charged had been committed, that is proof of the *corpus delicti*, and second that the offense was committed by the defendant.

**2. Same—**

The extra-judicial confession of guilt by a defendant charged with a crime is insufficient to support a conviction without evidence *aliunde* the confession tending to establish the fact that the crime charged had been committed.

**3. Criminal Law § 60—**

In order for shoeprints found at the scene of the crime to have any probative force in connecting defendant with the commission of the crime, it must be shown that the shoeprints were made at the time of the crime and that the shoeprints correspond to shoes worn by the accused at that time, and evidence that shoeprints of a peculiar kind were found at the scene, without any evidence comparing such shoeprints with the shoes of defendant, has no tendency to identify defendant as the perpetrator of the offense.

**4. Obscenity—**

Evidence tending to show that shoeprints were found six or eight feet from the window of a house in which a woman lived alone and that shoeprints were also found in the edge of a field nearby, that bloodhounds were put on the trail at the edge of the field and followed the scent to defendant's house, without evidence as to when or by whom

the tracks were made, is insufficient evidence of the *corpus delicti aliunde* the confession of the defendant to be submitted to the jury in a prosecution under G.S. 14-202.

**5. Criminal Law § 101—**

When the State relies upon circumstantial evidence, the incriminating facts must be of such nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis.

**6. Same—**

There must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it.

PARKER, J., dissents.

APPEAL by defendant from *Frizzelle, J.*, at March 1960 Term, of LENOIR.

Criminal prosecution upon a warrant issued out of the Municipal-County Court of the City of Kinston and County of Lenoir, North Carolina, charging that on or about the 19th day of January, 1960, Fred Bass, Jr., violated the following law, to-wit: General Statutes of North Carolina, Section 14-202, as amended, in that he did unlawfully and wilfully peep secretly into a room in a private residence, occupied by a woman in the nighttime, to-wit: the room of Mrs. Bessie Hardy, contrary to said law, etc., returnable before said court, etc.

In the Municipal-County Court the defendant entered a plea of not guilty. It was adjudged by that court that defendant was guilty as charged, and he was sentenced to two (2) years in jail to be assigned to work the State roads.

Defendant appealed therefrom to the Superior Court, and again pleaded not guilty.

The evidence offered upon the trial in the Superior Court by the State, as set out in the record on this appeal, tends to show this narrative of events and circumstances at and about the date of, and in connection with the alleged crime, with which defendant, Fred Bass, Jr., is charged.

About 10 P.M., on 19 January 1960, one Arnold Albert, who lives about five-tenths of a mile from Mrs. Hardy, passed her home "and saw a man standing on a public road at the edge of the field off the highway. The road was between him and Mrs. Hardy's house, and he was not in the yard. He saw 'a fellow' standing on the edge of the road next to the field; didn't know what 'fellow,' but a colored man was standing out there."

Knowing that Mrs. Hardy was at home alone at this time, Arnold Albert contacted the sheriff's department. Deputy Sheriff Kirby Hardy, the son of Mrs. Hardy, answered the call and went to his mother's house to investigate. He testified that " * * * when he got there he found some tracks going to and leaving the window which he followed across the road and around the edge of the field that had been broken up. He followed the tracks around the woods and found a track with a half-soled heel that led from the window." The tracks were within about six or eight feet of the Hardy house.

Deputy Sheriff Hardy thereupon called Deputy Sheriff George Hill to bring the blood hound there. And while Hardy testified they started the dog at the window, the keeper testified that the blood hound was put on the track at the edge of the field across the highway from the Hardy house where the man was seen standing. Ralph Johnson, testifying for the State, said that he was in charge of the dog, and that " * * * we started the tracks the first time at the edge of the field where the man was seen across the highway; started the tracks across the highway from the house * * *."

The dog went around the field and surrounding woods, crossed another road to a highway, came to a pasture, went through the pasture to a barn, around a fence, and into and up a dirt road toward where the defendant lived. When the dog got to the defendant's house, he went into a back porch, then around to the front porch and stood there.

Testimony of the State's witnesses tends to show that the defendant's house was about one and one-tenth miles from the Hardy house. The State's evidence further tends to show that the defendant made a confession to the charge. Defendant denies that he made the confession voluntarily, alleging that he was threatened and beaten by the deputies.

The defendant moved for judgment as of nonsuit at the conclusion of the State's evidence, and aptly renewed the motion at the conclusion of all the evidence.

Verdict: Guilty as charged.

Judgment: Confinement in Lenoir County jail for a period of twelve months to be assigned to work under direction of the prison department.

To the judgment entered, and to its rendition, defendant in apt time objects and excepts and appeals to Supreme Court and assigns error.

*Attorney General Bruton, Assistant Attorney General Harry W. McGalliard for the State.*

*H. E. Beech, W. G. Pearson, II, for defendant, appellant.*

WINBORNE, C. J. At the outset of this appeal counsel for the accused, conceding for sake of argument that the defendant's confession was voluntary, contends that "a naked extra-judicial confession uncorroborated by independent evidence and proof of *corpus delicti*, is insufficient to sustain a conviction of the crime charged." In other words, the defendant contends the case should have been nonsuited because, even if the confession were admissible, there was not, as a matter of law, sufficient evidence *aliunde* the confession to carry the case to the jury. G.S. 15-173.

In Wharton's Criminal Evidence (12th Ed.), Vol. 2, Sec. 393, p. 130, it is said: "The proof of every crime consists of: (1) Proof that the crime charged has been committed by someone; and (2) proof that the defendant is the perpetrator of the crime. The first element is the body of the crime, or *corpus delicti*; the second is the proof of the defendant's connection with the crime, i.e., his guilty participation.

"It is practically universally held that the *corpus delicti* of a crime cannot be proved by an extra-judicial confession standing alone. Thus a verdict of guilty and a subsequent conviction cannot be sustained upon an extra-judicial confession only. Stated conversely, the rule is that an extra-judicial confession of the accused must be corroborated by independent proof of the *corpus delicti* of the crime."

This states succinctly the law of this State. See the following cases: (a) *S. v. Norggins*, 215 N.C. 220, 1 S.E. 2d 533, where the Court held that: "It is fundamental law that proof of a charge in criminal cases involves the proof of two distinct propositions: (1) That the act itself was done, and (2) that it was done by the person or persons charged. The proof of the *corpus delicti* is just as essential as is the proof of the identity of the person committing the offense, and proof thereof is a prerequisite to a conviction."

(b) *S. v. Edwards*, 224 N.C. 577, 31 S.E. 2d 762, where it is held that: "Proof of a charge, in a criminal cause, involves the proof of two distinct propositions; first, that the act itself was done, and secondly, that it was done by the person charged and none other— in other words, proof of the *corpus delicti*— and of the identity of the prisoner. Hence, before there can be a lawful conviction of a crime, the *corpus delicti*— that is, that the crime charged has

been committed by someone— must be proved. Unless such a fact exists there is nothing to investigate."

Moreover, in *S. v. Cope*, 240 N.C. 244, 81 S.E. 2d 773, in opinion by *Denny, J.*, it is said: "In our opinion, none of the above cases authoritatively holds that a naked extra-judicial confession, uncorroborated by any other evidence, is sufficient to sustain the conviction of a defendant charged with the commission of a felony * * * Therefore, it is our considered judgment that in such cases there must be evidence *aliunde* the confession of sufficient probative value to establish the fact that a crime of the character charged has been committed."

Indeed, in *S. v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300, in opinion by *Parker, J.*, the Court states: " * * * The general rule is well settled that a naked extra-judicial confession of guilt by a defendant charged with a crime, uncorroborated by any other evidence, is not sufficient to sustain a conviction."

Therefore, the question to be decided now is whether there is evidence of sufficient probative value *aliunde* the confession to establish the fact that the crime charged has been committed. And in this regard, the State relies solely on the fact that tracks allegedly made by the accused were found at the scene of the alleged crime. In *S. v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908, *Ervin, J.*, said: "In the nature of things evidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) That the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime (citations omitted). * * * Moreover, the bare opinion of a witness that a particular shoeprint is the track of a specified person is without probative force on the question of identification * * *." *S. v. Reitz*, 83 N.C. 634.

"The great master, Dean Wigmore, had this to say on this phase of the law of evidence: 'No doubt a witness to the identity of footmarks should be required to specify the features on which he bases his judgment of identity; and then the strength of the inference should depend on the degree of accurate detail to be ascribed to each feature and the unique distinctiveness to be predicated of the total combination. Testimony not based on such data of appreciable significance should be given no weight.' Wigmore on Evidence (3rd Ed.), Sec. 415."

In applying the rules as laid down in the *Palmer* case, *supra*, to the present case, we find that there was evidence of some footprints within six or eight feet of the window of the Hardy house. Just when and by whom the tracks were made is not made to appear. In the language of State's witness, Deputy Sheriff Hardy, "He didn't observe the shoe track at the house, but before he picked defendant up, observed defendant's shoes he was wearing when he went to the house. From observation the track at the window and the shoes the defendant was wearing were the same size track. There was a half sole about the instep, kind of raised up, the land was sandy and the imprint could be seen on the ground. *It was the same size and mark or similar to the same mark.*"

Deputy Sheriff Hardy further testified that there was a tack on the shoe, where the shoe was half-soled. Did the impression in the footprint compare with the shoe of the defendant? There is no evidence in the record that it did. Deputy Sheriff Hardy specifically testified out of the jury's hearing that " * * * at no time did he try to measure the track outside with that of the defendant and defendant did not ask him to do it * * * ." To put it another way, no effort was made on the part of the State to check defendant's shoe as against the footprints found in the yard.

Neither does the State's evidence show that the tracks found in the field and woods were the same as those within six or eight feet of the Hardy house. The evidence does not show that the bloodhound tracked the footprints around the house, but on the contrary, specifically shows that the tracking was started at the edge of the field across the road from the Hardy house.

A careful consideration of the evidence in the record of case on appeal, narrated above, taken in the light most favorable to the State, leads to the conclusion that the evidence is insufficient to support a verdict of guilty on the charge against the defendant as set out in the warrant. There is no direct evidence to connect defendant with the commission of the crime. The evidence offered is circumstantial, conjectural, and speculative. All that is shown may be true, and defendant be innocent of the crime. Therefore, the motions of defendant for judgment of nonsuit should have been sustained.

When the State relies upon circumstantial evidence for a conviction, " * * * 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 exclude any other reasonable hypothesis * * * ," *Stacy, C. J.*, in *S. v. Harvey*, 228 N.C. 62, 44 S.E. 2d 472.

And as *Chief Justice Merrimon* stated in *S. v. Goodson,* 107 N.C. 798, 12 S.E. 329, "This full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party * * * ."

It then comes to this, there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it.

Hence the judgment from which appeal is taken must be, and it is Reversed.

PARKER, J., dissents.

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UNION CARBIDE CORPORATION v. JOHN T. DAVIS, INDIVIDUALLY, AND TRADING AS D. & J. MARKET.

(Filed 9 November, 1960.)

**1. Constitutional Law § 4—**

The courts will pass on constitutional questions only when they are squarely presented and necessary to the disposition of a matter then pending and at issue.

**2. Appeal and Error § 1—**

The Supreme Court has jurisdiction to pass upon questions of law or legal inference only upon appeal from an adjudication thereon by the lower court, and if the lower court has no jurisdiction, the Supreme Court acquires none by appeal.

**3. Injunctions § 13—**

Upon motion to show cause why a temporary restraining order issued in the cause should not be continued to the hearing, the merits of the controversy are not before the court, and the court has jurisdiction to determine only whether or not there has been a showing of equitable grounds for continuing the order.

**4. Same—**

In an action to restrain the violation of the North Carolina Fair Trade Act, it is error for the court upon the hearing of an order to show cause why the temporary restraining order theretofore issued should not be continued to the hearing, to dissolve the temporary order on the ground of the unconstitutionality of the statute, since constitutional questions were not before the court on the hearing and could be concluded only by a final judgment on the merits allowing or denying a permanent injunction.

CARBIDE CORP. *v.* DAVIS.

APPEAL by plaintiff from *Johnston, J.*, in Chambers, April 2, 1960, FORSYTH Superior Court.

The plaintiff instituted this civil action to restrain the defendant as an individual and as D & J Market from advertising, offering for sale, and selling plaintiff's product, "Prestone" antifreeze, in defendant's trade area at prices below the minimum established by the plaintiff in its fair trade agreements with its distributors. Among other things, the plaintiff alleged that its commodity, Prestone, has been in free and open competition with products of the same general class produced by others and sold in the same territory. Plaintiff has expended great effort and large sums of money in developing Prestone antifreeze and in advertising and promoting its sale in North Carolina and elsewhere. As a result, the plaintiff has established a valuable reputation and good will for itself and its commodities, in its trademarks and names. In order to protect its business reputation, good will, trademark and brand name against unethical and uneconomical practices in the sale and distribution of its product, Prestone, the plaintiff has entered into fair trade agreements with various retail dealers in the State of North Carolina, stipulating minimum retail sales prices of Prestone at $2.39 per gallon and sixty-nine cents per quart. The plaintiff gave the defendant due notice of the prices so fixed in the agreements with its distributors in the territory in which the defendant did business. The defendant has offered for sale and sold, and is offering for sale and selling Prestone at prices substantially below that fixed by the plaintiff in its fair trade contracts. The Prestone so offered for sale and sold does not fall within any exemption in the Fair Trade Act. The plaintiff asked for temporary and permanent restraining orders against the defendant for the violation of the minimum retail sales price of Prestone and for damages suffered by reason of past violations.

The defendant answered, alleging among other things: "That the defendant has purchased from the plaintiff's distributor from time to time various quantities of a product contained in a metal container for use in automobile cooling systems, which container bears the trademark or trade name of 'Prestone'; that the defendant has either purchased and paid the plaintiff for said quantities of Prestone or has made such sales arrangements with the plaintiff that the title to all quantities of Prestone handled by the defendant pass to the defendant and said products were at all times and are now the exclusive property of the defendant without any contingencies, conditions or restrictions, and the defendant alleges that the quantities of Prestone purchased by him for retail sale had all the attributes

and legal privileges which inhere in property belonging to the defendant, and the defendant at all times had and now has the right to enjoy, use, utilize and dispose of said quantities of Prestone, so belonging to him, upon such conditions and upon such prices as fixed by the defendant to even give the product away if he desired to do so; . . ."

" . . . All sales of said product (Prestone) made by him were sales of his own property to which he had full title and at prices he had a right to fix himself without any intervention, intermeddling, or restrictions on the part of the plaintiff . . . to prohibit or enjoin . . ."

The defendant further alleged he is not a party to any contract in which prices of Prestone are fixed; that such contracts are void for the reason they are in restraint of trade. The defendant further alleged the North Carolina Fair Trade Act, Article 10, Ch. 66, General Statutes, in its entirety is invalid and void, and in violation of Article I, §§ 1, 7, 17, and 31, and Article II, § 29 of the State Constitution.

Upon plaintiff's application, the court issued the temporary restraining order as prayed for in the complaint. Upon the motion to show cause why the restraining order should not be continued to the hearing, the court, on March 5, 1960, in chambers, heard counsel for both parties, at which hearing the court announced: "The only thing before me is whether the temporary restraining order should be continued to a final hearing." Counsel for both parties agreed. At the conclusion of the hearing the court announced: "I am going to dissolve the restraining order, gentlemen, put it on the constitutional basis entirely. You can draw an order to that effect."

The court entered judgment dissolving the temporary restraining order upon the ground that Article 10, Ch. 66, General Statutes, is void, invalid, and unconstitutional, in that the same offends against Article I, Sections 1, 7, 17 and 31, and Article II, Section 1, Constitution of the State of North Carolina.

The plaintiff excepted and appealed.

*Blackwell, Blackwell & Canady, Winfield Blackwell, Jack F. Canady, for plaintiff, appellant.*

*Buford T. Henderson, Abner Alexander for defendant, appellee.*

*T. W. Bruton, Attorney General, Ralph Moody, Assistant Attorney General for the State, amicus curiae.*

HIGGINS, J. The North Carolina Fair Trade Act, Chapter 66,

Article 10, was enacted as Chapter 350, Public Laws of 1937. In *Lilly & Co. v. Saunders,* 216 N.C. 163, 4 S.E. 2d 528, this Court analyzed the purposes and effect of the Act. Controversy has existed over its constitutional validity. Arguments and authorities for and against are exhaustively treated in the opinion and in the dissent.

Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue. *Assurance Co. v. Gold,* 249 N.C. 461, 106 S.E. 2d 875; *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413; *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851. The jurisdiction of this Court is derivitive. Questions of law or legal inference come to it for purposes of review. If the lower court has no jurisdiction, the Supreme Court cannot acquire jurisdiction by appeal. *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757; *Gill v. McLean,* 227 N.C. 201, 41 S.E. 2d 514.

The only question presented before the superior court was whether the temporary restraining order should be continued to the hearing. Judge Johnston acted, not upon a showing or failure to show equitable grounds for continuing the order, but dissolved it solely upon the ground the General Assembly acted in violation of the State Constitution in passing the Fair Trade Act. "The constitutionality of a statute will not be determined on the question being raised in a collateral proceeding, or on preliminary motions, or interlocutory order . . . " 16 C.J.S., Constitutional Law, § 95. "We think the court committed serious error in thus dealing with the case upon motion for temporary injunction. The question was not whether the Act was constitutional or unconstitutional; was not whether the Commission had complied with the requirements of the act, if valid, but was whether the showing made raised serious questions, under federal Constitution and state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants." *Mayo v. Canning Co.,* 309 U.S. 310, 84 L.ed. 774.

"The judge hearing the order to show cause why the injunction should not be continued to the hearing had no jurisdiction to hear and determine the controversy on the merits, and his findings of fact and conclusions of law were but instruments of decision in the matter before him." *Patterson v. Hosiery Mills,* 214 N.C. 806, 200 S.E. 906.

"When the judge below grants or refuses an injunction, he does so upon the evidence presented, and the only question is whether the order should be made, dissolved, or continued; he cannot go further and determine the final rights of the parties, which must

be reserved for the final trial of the action. N. C. Prac. & Proc. (McIntosh), Par. 876, p. 994, and cases there cited." *MacRae & Co. v. Shew*, 220 N.C. 516, 17 S.E. 2d 664; *Lawhon v. McArthur*, 213 N.C. 260, 195 S.E. 786; *Sims v. Building & Loan Asso.*, 207 N.C. 809, 178 S.E. 568; *Grantham v. Nunn*, 188 N.C. 239, 124 S.E. 309; *Hamilton v. Icard*, 112 N.C. 589, 17 S.E. 519.

Only a final judgment can become the law of the case. In the absence of agreement to the contrary, such a judgment can only be entered in term. *Moore v. Monument Co.*, 166 N.C. 211, 81 S.E. 170. "A permanent or perpetual injunction issues as a final judgment which settles the rights of the parties, after the determination of all issues raised." *Galloway v. Stone*, 208 N.C. 739, 182 S.E. 333.

Judge Johnston, in ordering the dissolution of the restraining order, acted under the mistaken belief the constitutionality of the Fair Trade Act was then involved. The order is set aside. The cause is remanded to the Superior Court of Forsyth County for hearing on the question whether the temporary order should be continued to the final hearing.

Reversed.

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LAURICE M. ROWLAND v. BENNETT A. ROWLAND.

(Filed 9 November, 1960.)

**1. Appeal and Error § 1—**

Where the complaint alleges facts sufficient to constitute a cause of action for alimony without divorce under G.S. 50-16, and the hearing in the lower court is upon the theory that the action was one for alimony without divorce, the cause will be so treated on appeal since an appeal must follow the theory of trial in the lower court.

**2. Appeal and Error § 21—**

A sole exception to the order of the lower court allowing alimony and subsistence *pendente lite* presents only the questions whether the facts found support the order and whether error of law appears upon the face of the record.

**3. Divorce and Alimony § 18—**

The court has authority to order alimony and subsistence *pendente lite* in an action under G.S. 50-16 as may be proper according to the husband's condition and circumstances and with regard also to the separate estate of the wife, and therefore the fact that the wife has a separate estate does not necessarily defeat her right to subsistence and counsel fees *pendente lite*.

**4. Divorce and Alimony § 16—**

The affidavits required by G.S. 50-8 in action for divorce are not required in actions for alimony without divorce under G.S. 50-16, and in actions under the latter statute verification may be made as in ordinary civil actions.

**5. Same—**

The complaint in this action, liberally construed, *is held* to state facts sufficient to constitute a cause of action under G.S. 50-16.

**6. Divorce and Alimony § 18—**

The amount of subsistence *pendente lite* allowed by the court in its discretion is not reviewable on appeal in the absence of abuse of discretion.

APPEAL by defendant from *Hobgood, J.*, 9 May 1960 Civil Term, of WAKE.

Civil action for alimony without divorce, heard upon plaintiff's motion for an allowance for subsistence for herself and the two minor children born of their marriage and for counsel fees *pendente lite.*

From an order allowing plaintiff to continue to live in the residence now occupied by her until the further order of the court, and commanding that defendant shall continue to make payments of $125.00 per month on the mortgage on the residence, and shall pay all electric, water and telephone bills, and awarding subsistence of $100.00 a month for his wife and two minor children and counsel fees of $150.00 *pendente lite,* and ordering defendant to refrain from assaulting plaintiff, his wife, defendant appeals.

*Robert A. Cotten for plaintiff, appellee.*
*Charles W. Daniel for defendant, appellant.*

PARKER, J. The complaint appears to be drafted under the provisions of G.S. 50-16 — Alimony without divorce —, although the prayer is only for subsistence and counsel fees *pendente lite.* However, this stipulation appears in the statement of the case on appeal: "That the said action purports to be in the nature of prayer for divorce from bed and board and for alimony to plaintiff and support for the children of the marriage between plaintiff and defendant." There is nothing in the record to indicate such a stipulation was made in the hearing below. Plaintiff in her brief states the action was brought under the provisions of G.S. 50-16. In the complaint there is no reference to a divorce *a mensa et thoro* (G.S. 50-7), and no prayer for such a divorce. In our opinion, a reading of the com-

plaint shows that this is an action for alimony without divorce brought under G.S. 50-16. It seems that this case was heard below on the theory that it was a proceeding for alimony without divorce, and an appeal must follow the theory of the trial in the lower court. *Lyda v. Marion,* 239 N.C. 265, 79 S.E. 2d 726.

The record contains only the complaint and order for subsistence and counsel fees *pendente lite,* and stipulation of case on appeal, and appeal entries. The record has no assignment of error. In the appeal entries it has one exception that defendant excepts to the order, "for that the complaint and summons show on the faces thereof that plaintiff has sufficient means for the prosecution of her suit for divorce *a mensa et thoro,* and for the further reason that the complaint fails to state a cause of action therefor."

Defendant's exception is to the order. That presents for decision only two questions: (1) Do the facts found support the order, and (2) does any error of law appear upon the face of the record? *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53.

The court in its order found as a fact that the defendant is a healthy, able-bodied man gainfully employed, and has an income of $410.00 a month, and that plaintiff is without any property of her own except her wearing apparel and a small amount of household and kitchen furniture, that she has no independent income of her own, and is solely dependent upon her husband for her entire livlihood. Defendant contends that plaintiff gave a cost bond for $400.00, wherein she stated that she was worth $400.00 above all her debts and personal property exemptions, and, therefore, the court could not allow her subsistence and counsel fees *pendente lite,* for the reason that she had sufficient means to cope with her husband in presenting her case to the court. G.S. 50-16 provides that the judge in a proper case can make an allowance for subsistence and counsel fees *pendente lite,* "as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife." Therefore, the fact that the wife has a separate estate of her own does not necessarily defeat her right to the allowance of subsistence and counsel fees *pendente lite. Mercer v. Mercer,* 253 N.C. 164, ..... S.E. 2d ..... This contention of defendant is without merit.

Defendant contends that these errors of law appear on the face of the complaint: (1) The complaint does not allege that plaintiff has resided in the State of North Carolina for at least six months next preceding the filing of her complaint, and (2) that the com-

plaint has no allegation that the facts set forth in the complaint as grounds for divorce have existed to her knowledge for at least six months prior to the filing of her complaint, as required by G.S. 50-8. The complaint has no such allegations. This contention of defendant is not tenable.

G.S. 50-8 — Contents of complaint; verification — applies to all actions for divorce. G.S. 50-16 — Alimony without divorce — states: "In actions brought under this section, the wife shall not be required to file the affidavit provided in G.S. 50-8, but shall verify her complaint as prescribed in the case of ordinary civil actions." *Cunningham v. Cunningham,* 234 N.C. 1, 65 S.E. 2d 375.

Defendant states in his brief that he here demurs to the complaint on the ground that it fails to state a cause of action because the complaint does not comply with the provisions of G.S. 50-8, as above set forth. His demurrer for the reasons set forth above is overruled.

Construing the allegations of the complaint liberally for the purpose of determining its effect with a view to substantial justice between the parties, G.S. 1-151, it states facts sufficient to constitute a cause of action under G.S. 50-16. The unchallenged findings of fact support the court's conclusion and order.

The amount of the allowance to plaintiff for subsistence for herself and for the two minor children born of the marriage and of counsel fees was a matter for the trial judge. His discretion in this respect is not reviewable, except in case of an abuse of discretion. *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226. Defendant does not contend the trial judge abused his discretion.

The order below is

Affirmed.

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STATE v. ROY PETERS.

(Filed 9 November, 1960.)

**1. Burglary § 4: Larceny § 7—**

The evidence in this case of defendant's guilt of breaking and entering and larceny *held* sufficient to be submitted to the jury.

**2. Criminal Law § 94—**

The interrogation of witnesses by the court in this case *held* to ex-

ceed mere clarification of their testimony and to constitute an expression of opinion by the court on the facts in evidence, necessitating a new trial.

APPEAL by defendant from *Hooks, Special Judge,* April Criminal Term, 1960, of WAKE.

This is a criminal action, tried upon a bill of indictment charging that the defendant did on 20 February 1960 break and enter into a building occupied by Henry V. Dick & Company, Inc., wherein merchandise, chattels, money, and various securities were being kept, and that the defendant on the above date did steal, take and carry away (certain merchandise itemized in the bill of indictment) goods, chattels and money of Henry V. Dick & Company, Inc., of the value of $493.50.

The State offered evidence tending to show that the place of business of Henry V. Dick & Company, Inc., in Raleigh, North Carolina, was broken into on Saturday night, 20 February 1960, and that certain merchandise, goods and chattels and money were taken therefrom of the value of $563.00.

Bob Alexander, a taxi driver, testified that he had known the defendant for nine months and that on 20 February 1960 had him as a fare-paying passenger in his taxi; that he picked him up around 9:50 p.m. at 551 E. Edenton Street; he said he wanted to go to West Lane Street but after reaching the Capitol he said he wanted to go to East Lane Street and when he got there he didn't seem to know where he wanted to go and requested the witness to drive around the block. Later, he got out of his cab near the place of business of the McAllister Supply Company; the taxi fare was $1.15, he paid in change and said, "I ain't got no money now but when I call you back I will have some money." When he got out of the cab he had a crowbar and a flashlight and had on cotton gloves. The witness further testified that the defendant said he was going to call him back and that he wanted him to be ready to come after him, but that he (the witness) decided to have no part "of it" and "checked off." On the following Friday the defendant got in his taxi and asked him where he was on last Saturday night when he (the defendant) called him back, and that he (the witness) said he had other business.

At this point in the examination of this witness, the court took over and aided the State substantially in the development of its case. Some fifteen or more questions were propounded by the court. The questions asked by the court and answered by this witness

cover approximately two pages of the record; in fact, the court examined at length the two principal State's witnesses.

The jury returned a verdict of guilty of breaking and entering and larceny of property not exceeding $100.00 in value. From the sentences imposed, the defendant appeals and assigns error.

*Attorney General Bruton, Asst. Attorney General Hooper for the State.*

*Charles F. Blanchard, Robert L. Farmer for defendant.*

PER CURIAM. The appellant assigns as error the refusal of the court below to grant his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. The State offered ample evidence to take the case to the jury, and this assignment of error is overruled.

The defendant also assigns as error the court's examination of the State's witness Bob Alexander.

In our opinion, the questions asked by the court went far beyond an effort to obtain a proper understanding and clarification of the witness' testimony. The questions propounded by the court would have been entirely proper if they had been asked by the solicitor. However, we fear that the jury may have gotten the impression that the court had an opinion on the facts in evidence adverse to the defendant.

Certainly the able and conscientious judge who tried this case below did not intend to do anything to prejudice the rights of the defendant, but it is the probable effect or influence upon the jury as a result of what a judge does, and not his motive, that determines whether the right of the defendant to a fair trial has been impaired to such an extent as to entitle him to a new trial. *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263.

There are numerous other assignments of error brought forward in the defendant's brief, but in view of the conclusion we have reached we deem it unnecessary to discuss them since they may not recur on another hearing.

The defendant is granted a new trial on authority of *S. v. McRae,* 240 N.C. 334, 82 S.E. 2d 67.

New trial.

STATE v. JOSEPH SAMUEL MILLER AND LATTA SMITH.

(Filed 9 November, 1960.)

**Criminal Law § 107—**

Where defendants are not charged with conspiracy, an instruction to the effect that if the State had satisfied the jury beyond a reasonable doubt that the defendants, or either of them, committed the offense, it would be the duty of the jury to return a verdict of guilty against the defendants, must be held for prejudicial error.

APPEAL by defendant Smith from *Hooks, Special Judge,* April Criminal Term, 1960, of WAKE.

This is a criminal action, tried upon a bill of indictment charging that the defendant Joseph Samuel Miller and Latta Smith did feloniously break and enter a building of Armour & Company (a corporation) with intent to steal, and further charging the aforesaid defendants with the larceny of $1,540.20 in checks and money of Armour & Company.

Both defendants pleaded not guilty. A verdict of guilty as charged was returned by the jury.

From the judgments pronounced on the verdict, Miller did not appeal; Smith did appeal and assigns error.

*Attorney General Bruton, Asst. Attorney General H. Horton Rountree for the State.*

*Herman L. Taylor for defendant, appellant.*

PER CURIAM. The appellant's first assignment of error is to the refusal of the court below to grant his motion for judgment as of nonsuit made at the close of the State's evidence and renewed after the defendants rested without offering any evidence.

The State's evidence is sufficient, in our opinion, to take the case to the jury. Therefore, this assignment of error is overruled.

However, the State confesses error in that the defendants not having been charged with a conspiracy to commit the offenses charged in the bill of indictment, nevertheless the court below charged the jury on the first count in the bill of indictment as follows: "So I charge you, gentlemen of the jury, that if the State has satisfied you by the evidence in this case, and beyond a reasonable doubt, the burden being upon the State to so satisfy you that the defendants, or either of them or both of them, entered the building and storehouse of Armour & Company and entered such building and storehouse with the felonious intent to take, steal and carry

away goods and chattels of Armour & Company, of the value in excess of $100.00, it would be your duty to return a verdict upon the first count of guilty against the defendants in this case."

The above instruction is erroneous in that the jury was instructed to bring in a verdict of guilty as to both defendants if the State had satisfied the jury by the evidence and beyond a reasonable doubt that either one of the defendants entered the storehouse of Armour & Company with the intent to steal and carry away the goods and chattels of Armour & Company of the value in excess of $100.00.

This same error also appears in the charge on the larceny count.

The appellant is entitled to a new trial, and it is so ordered.

New trial.

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STATE v. JARVIS MILLS.

(Filed 9 November, 1960.)

**Criminal Law § 118: Intoxicating Liquor § 16—**

Where the warrant charges unlawful transportation and possession of nontaxpaid whiskey for the purpose of sale, a verdict of guilty of transporting nontaxpaid whiskey supports judgment and sentence, since the verdict spells out an offense contained in the warrant, it being permissible to treat the words "for the purpose of sale" as surplusage.

APPEAL by defendant from *Johnston, J.*, May 9, 1960 Criminal Term, of WAKE.

Criminal prosecution on warrant charging that defendant on March 14, 1960, "did unlawfully and wilfully transport and have in his possession a quantity of whiskey on which the tax imposed by the U. S. Government had not been paid, to wit: ½ gallon, for the purpose of sale," against the form of the statute, etc.

Upon trial *de novo* in superior court, on appeal by defendant from conviction and judgment in the Recorder's Court of Garner, the jury returned a verdict of "guilty of Transporting Non-Tax Paid Whiskey." From judgment, imposing a prison sentence, defendant appealed.

*Attorney General Bruton and Assistant Attorney General McGalliard for the State.*

*W. H. Yarborough for defendant, appellant.*

PER CURIAM. The record contains no case on appeal. Neither the

evidence nor the judge's charge is before us. It is stated that defendant excepted to the denial of his motion of nonsuit and to the judgment. These exceptions are not numbered. There are no assignments of error.

In this Court defendant moved in arrest of judgment for that (1) the warrant upon which he was tried is fatally defective, and (2) the verdict is not sufficient to support the judgment.

The warrant sufficiently charges all elements of the criminal offense of which defendant was convicted, namely, the unlawful transportation of nontaxpaid whiskey. It seems probable that the trial judge treated the words, "for the purpose of sale," as surplusage and submitted the case only in relation to the transportation charge.

Unlike *S. v. Lassiter*, 208 N.C. 251, 179 S.E. 891, cited by defendant, the jury spelled out its verdict in words sufficient to show it found defendant guilty of the transportation charge contained in the warrant. Perhaps the trial judge, advertent to surplus allegations in the warrant, instructed the jury, if they found the defendant guilty of the transportation charge, to render their verdict in the words they used.

The fragmentary record before us discloses no ground for disturbing the verdict and judgment.

No error.

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DOROTHY WILLIAMS LAMSON v. HERBERT LAMSON, JR.

(Filed 9 November, 1960.)

APPEAL by defendant from *Hobgood, J.*, June 1960 Civil Term, WAKE Superior Court.

Civil action for alimony without divorce. The plaintiff filed a verified complaint in which she alleged the marriage; the birth of a child, Daniel Lamson, now 11; wrongful separation and abandonment of the plaintiff and child by the defendant who has failed to provide them with necessary subsistence according to his means and condition in life; that the defendant owns property and is gainfully employed; that the plaintiff has no income or estate, and is without sufficient means to support and provide for herself and the child and to prosecute this action.

She further alleged "by cruel and barbarous treatment contin-

uing over a period of several months, defendant has endangered the life of the plaintiff," specifying details. She alleged also she is a suitable and proper person to have the custody of Daniel Lamson.

The defendant made a motion to strike certain parts of the complaint. The motion was allowed in part and denied in part. The defendant filed a demurrer to the complaint which was overruled. He then filed an affidavit showing his contributions and moved the claim for alimony be denied.

The court entered findings of fact and ordered the defendant to pay certain sums for the benefit of the wife and child and her counsel. Defendant excepted and appealed.

*Vaughn S. Winborne, Samuel Pretlow Winborne, By: Vaughn S. Winborne for defendant, appellant.*

*Ellis Nassif, Taylor and Ellis for plaintiff, appellee.*

PER CURIAM. The plaintiff sought relief under G.S. 50-16. Her complaint states a cause of action for abandonment and failure to support under that section. Rule 4(a), Rules of Practice in the Supreme Court (242 N.C. 766) permits appeal neither from an order on a motion to strike nor from an order overruling a demurrer, unless for misjoinder of parties and causes. However, the defendant had the right to prosecute his appeal from the order allowing alimony. The record fails to show merit in the appeal.

Affirmed.

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STATE v. LOUISE B. WILLIAMS.

(Filed 23 November, 1960.)

**1. Schools § 4a—**

The State Board of Education is given the power to supervise and administer the public school system of the State, Constitution of North Carolina, Art. IX, sections 1 and 9, but it has only that authority over private schools as may be conferred by statute in the valid exercise of the police power.

**2. Schools § 1—**

Private schools have vested property and occupational rights which may not be arbitrarily denied or infringed, and the State may regulate private schools only to the extent that the interest of the health, morals or safety of the public generally manifestly require. Such regulations

may not be arbitrary, discriminatory, oppressive or unreasonable, and the statute delegating the regulatory power must provide adequate legislative standards to guide the administrative body.

**3. Same: Constitutional Law § 20—**

Regulations governing the operation of private schools must apply equally to those within and those outside the State.

**4. Constitutional Law §§ 12, 17—**

The term "liberty" as used in the Fourteenth Amendment to the Constitution of the United States embraces not only freedom from unlawful restraint, but protects, among other liberties, the right to engage in the common occupations of life subject only to those controls which appear compellingly necessary in the interest of the public health, safety or morals.

**5. Constitutional Law § 7—**

While the General Assembly may delegate the power to find facts upon which the operation of a law is made to depend, it may not delegate to an agency or administrative board the power to apply or withhold the application of the law in its absolute or unguided discretion.

**6. Same: Constitutional Law § 24: Schools § 1—**

G.S. 115-253 requiring persons soliciting students for private schools to obtain a license from the State Board of Education so that the State Board may control and supervise the equipment, curricula and instructional personnel of such schools, is unconstitutional as an unwarranted delegation of the law making power, since the statute prescribes no standards to guide the administrative board in granting or withholding the prescribed license. The conviction of a person under the Act must be set aside as a violation of the "Law of the land" clause of the Constitution of North Carolina, Art I, § 17.

**7. Criminal Law § 121—**

A motion in arrest of judgment may be allowed only for defects which appear upon the face of the record proper, and defects which appear only by aid of evidence cannot be the subject of a motion in arrest of judgment.

**8. Same: Constitutional Law § 27—**

In this prosecution for soliciting students for a private school without a license, G.S. 115-253, the fact that defendant was soliciting students for an out of state school appeared only upon the evidence, and therefore the question whether the statute violates the commerce clause of the Federal Constitution is not presented by a motion in arrest of judgment, but it would seem that the statute, insofar as it attempts to regulate solicitors for out of state schools, is a burden on interstate commerce and is unconstitutional.

APPEAL from *Paul J.*, June 1960 Term, of CRAVEN.

This is a criminal action. The bill of indictment charges that Louise B. Williams on 16 January 1960 unlawfully and wilfully

did solicit students, to wit, Allegro Bryant and others, for a correspondence school, without a license.

Plea: not guilty. Verdict: guilty. Judgment: fine and costs. Defendant appeals.

*Attorney General Bruton and Assistant Attorney General Hooper for the State.*

*A. D. Ward for defendant, appellant.*

MOORE, J. Defendant is indicted pursuant to the provisions of G.S. 115-253. This section is a part of Article 31, Chapter 115, of the General Statutes of North Carolina, which provides for the regulation of business, trade and correspondence schools — private schools. The first seven sections of the Article deal, almost entirely, with the regulation of such schools located in North Carolina. G.S. 115-253 requires persons soliciting students within the State for schools "located within or without the State" to secure a license annually from the State Board of Education. The license fee is $5.00. When application is made for a license by a solicitor certain information must be furnished with the application. If the Board approves the instructional program and the solicitor, license will be issued. If license is issued to a solicitor for an out-of-state school, the solicitor shall execute and file a bond in each county in which students are solicited. Nonresident schools employing solicitors shall be responsible for the acts, representations and contracts made by their solicitors. "Any person soliciting students for any such school without first having secured a license from the State Board of Education and without having executed the bond . . . shall be guilty of a misdemeanor . . ." G.S. 115-252 imposes the duty on out-of-state schools to see that their solicitors are licensed and bonded. G.S. 115-254 provides that contracts, notes and evidences of debt obtained by unlicensed solicitors shall be null and void.

Allegro Bryant, a high school teacher, resident of Craven County, received through the mail a card addressed to box holder. The card had been placed in the mail by Citizens Training Service, Inc., a Virginia corporation, having its principle office and place of business in Danville, Virginia. It conducts a correspondence school for preparation for civil service careers — federal, state and municipal. Bryant mailed the card to the school indicating an interest in certain courses. She promptly received certain forms to be held by her until a canvasser called. On 16 January 1960 defendant contacted her and, as a consequence, she signed a contract for instruction de-

signed to prepare her to take examinations for civil service employment as teacher, social worker and junior professional assistant. The fee for the course was $135.00. Bryant paid $20.00 in cash and signed a promissory note for $115.00, to be due 25 February 1960. The contract, according to its terms, was not to be complete until accepted at the business office in Danville. Bryant testified that defendant represented to her that a job was guaranteed. The written contract is to the contrary. Bryant received by mail a book containing 25 or more lessons. She completed and sent in only one assignment. She made no payment on the note. Defendant was not licensed or bonded under the provisions of G.S. 115-253.

Defendant's testimony clearly states her position in this case: "My plea of not guilty and my defense in this prosecution is based solely on the grounds that the provisions of G.S. 115-253 are unconstitutional. If the provisions of this statute are constitutional, I am guilty of violating such provisions of the statute. Otherwise I am not."

Defendant moved to set aside the verdict and for arrest of judgment on the ground that G.S. 115-253 violates Article I, sections 1, 17 and 31 of the Constitution of North Carolina and Article I, section 8, clause 3 of the Constitution of the United States.

The primary purpose of Article 31, of which the challenged section is a part, is to control and regulate certain private schools — specifically business, trade and correspondence schools. The article is entitled, "Business, Trade and Correspondence Schools." As an incident to such control, G.S. 115-253 undertakes to regulate solicitors and canvassers for such schools. It seems clear that the provision for regulation of solicitors is to enable the State Board of Education to indirectly extend its control and supervision to correspondence schools located beyond the borders of the state that solicit and instruct students in North Carolina.

Article 31 assigns the following reasons for imposing regulations on the specified schools: ". . . to protect the public welfare by having the licensed business, trade, or correspondence schools maintain proper school quarters, equipment, and teaching staff and to have the school carry out its advertised promises and contracts made with its students and patrons." G.S. 115-249. In short, it is the intent of the enactment that the State Board of Education pass upon the adequacy of the equipment, curricula and instructional personnel of the schools and protect students from fraud and breach of contract on the part of the schools and their agents and representatives.

The Constitution of North Carolina provides that "schools and

means of education shall forever be encouraged." Art. IX, s. 1. Further, the State Board of Education shall have the power and duty "generally to supervise and administer the free *public* school system of the State and make all needful rules and regulations in relation thereto." (Emphasis added.) Art. IX, s. 9. The constitutional authority of the State Board of Education to make regulations for and supervise and administer schools is confined to *public* schools and activities substantially affecting public schools and the public school system. It may have and exert only such authority in the supervision and control of private schools and their agents and representatives as is conferred by the General Assembly in the proper exercise of the police power of the State.

"While the Legislature, under the police power, may regulate education in many respects in private schools, the exercise of such power of regulation must not be arbitrary, and must be limited to the preservation of the public safety, the public health, or the public morals." 47 Am. Jur., Schools, s. 221, p. 459. *Trust Co. v. Lincoln Institute,* (Ky. 1910) 129 S.W. 113, 29 L.R.A. (N.S.) 53, deals with a state statute making the right to establish a private industrial school in a county depend upon a vote of the electors of the county. There it is said: ". . . (U)nless it can be shown that the establishment of such an institution as the one under consideration is in some way inimical to the public safety, the public health, or the public morals, the act which forbids its operation is an exercise of arbitrary power. In other words, the act in question must find its justification in the police power of the state, or it must be declared invalid." In another case it has been declared: "The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by government — certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety." *Farrington v. Tokushige,* (CCA9C 1926) 11 F. 2d 710, 713, quoting *Harlan, J.,* in *Berea College v. Kentucky,* 211 U.S. 45. Private schools have vested property and occupational rights which may not be arbitrarily infringed. *Pierce v. Society of Sisters,* 268 U.S. 510, 39 A.L.R. 468; *Farrington v. Tokushige, supra.*

The State has the power and authority to establish minimum standards for, and to regulate in a reasonable manner, private schools giving instruction to children of compulsory school age. This is necessarily true because such schools affect the public school system. In this connection it has authority, among others, "to inspect, supervise, and examine them, their teachers, and pupils; to require that

all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught that is manifestly inimical to the public welfare." *Pierce v. Society of Sisters, supra.*

The courts stress the proposition that the regulation of private schools under the police power of the state must be reasonable and in response to a manifest present public need or emergency.

The Court of Appeals of Maryland, in *Schneider v. Pullen* (1951) 81 A. 2d 226, upheld the constitutionality of a statute providing for the regulation of certain private schools, including trade schools. The case involved a barber school. It is suggested that the regulatory act was necessary "because many mushroom schools of various characters sprang up in order to take advantage of government subsidies given to veterans of World War II." The New York Supreme Court held constitutional a statute which provided that private schools be licensed, and that no license should issue if it appeared that the instruction to be given included the doctrine that organized government should be overthrown by force, violence or unlawful means. *People v. Socialist Society,* (1922) 195 N.Y.S. 801. The Court declared: "There can be little question but that it is within the power of the Legislature to enact statutes for the self-preservation of the state, and to prevent the teaching of doctrine advocating the destruction of the state by force . . . (I)t seems to us that the act in question is well within the proper exercise of the police power of the state, and that for the purpose of protecting the peace, public safety, and security of the citizens of the state the Legislature had the right to enact the statute."

On the other hand, the courts have stricken down as unconstitutional many legislative enactments affecting, or seeking to restrict or regulate, private schools, for want of any manifest need therefor by reason of the public morals, health, peace, safety or security, or because of the arbitrary and unreasonable character of the regulation. Instances are: Provision that certain trade schools may not be established in a county without a favorable vote of the electors. *Trust Co. v. Lincoln Institute, supra.* Requirement that all children of specified ages attend public schools. *Pierce v. Society of Sisters, supra.* Prohibition against teaching other than the English language to children below the ninth grade. *Meyer v. Nebraska,* 262 U.S. 390, 29 A.L.R. 1446. Requisite for issuance of license to trade school that its tuition charge be approved by Commissioner of Education. *Grow System School v. Regents,* 98 N.Y.S. 2d 834. Compre-

hensive regulation of private foreign language schools and, among other things, limiting school session to one hour per day. *Farrington v. Tokushige, supra.*

A New York statute provided that no private nursery, kindergarten or elementary schools should be established or maintained unless registered under regulations prescribed by the Board of Regents of the University of the State. The act was declared unconstitutional. *Packer Collegiate Institute v. University,* (1948) 81 N.E. 2d 80. The Court explained the holding: "Private schools have a constitutional right to exist, and parents have a constitutional right to send their children to such schools. (Citing *Pierce v. Society of Sisters, supra.*) The Legislature, under the police power, has a limited right to regulate such schools in the public interest. (Citing authorities.) Such being the fundamental law of the subject, it would be intolerable for the Legislature to hand over to any official or group of officials, an unlimited, unrestrained, undefined power to make such regulations as he or they shall desire, and to grant or refuse licenses to such schools, depending on their compliance with such regulations."

The term "liberty" as used in the Fourteenth Amendment to the Constitution of the United States "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men. (Authorities cited.) The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." *Meyer v. Nebraska, supra.*

The statute specifically challenged on this appeal involves the regulation of solicitors for private schools. As already stated, it is our opinion that the legislation (Article 31, Chapter 115) is primarily directed to the schools themselves, and the regulation of their agents and representatives is for the purpose of indirectly supervising out-of-state schools. Hence, we have deemed it proper to discuss at length the principles to be applied in determining whether or not legislative regulation of private schools is within proper limits. These principles in general application apply with equal force and substantially in

like manner to regulation of ordinary occupations — including that of solicitors and salesmen.

"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 power 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." *State v. Warren,* 252 N.C. 690, 693, 114 S.E. 2d 660.

Beyond all question the State may exercise its police power to regulate salesmen in the public interest. But the regulations must be clearly necessary to protect a substantial public interest and must be reasonable and nondiscriminatory.

The class of salesmen most often regulated is peddlers. Statutes and ordinances requiring those who hawk and peddle from door to door to be licensed have been held constitutional. *People v. Russell,* 14 N.W. 568. "From early times, in England and America, there have been statutes regulating the occupation of itinerant peddlers, requiring them to obtain licenses to practice their trade." *Emert v. Missouri,* 156 U.S. 296. Licensing requirements for clock peddlers have been upheld. *Commonwealth v. Harmel,* (Penn. 1895) 30 A. 1036. In upholding such regulations the courts are careful to explain the need for the legislation. It is stated that peddlers often have no fixed places of abode and no established business site. They are here today and gone tomorrow. The regulations seek to protect the public against cheats, frauds and even thievery which often attends the activities of peddlers. Though there are significant exceptions, their goods are generally inferior in quality and exorbitant in price. Peddlers are generally strangers to their customers. Thus, the courts emphasize need for regulation. The regulatory statutes usually contain, in preamble, a full statement of the purpose and necessity for regulation.

It is impossible to catalog here all types of salesmen whose activities have been constitutionally regulated. A few will suffice. Salesmen of securities have been required to obtain licenses and give bond. *State v. Minge,* (Fla. 1935) 160 S. 670. Licenses have been required of those who sell farm produce on commission, except sales to ultimate consumer. *State v. Mohler,* (Kan. 1916) 158 P. 408. In New York, merchants have been required to obtain license before con-

ducting "going out of business" sales. *Windsor Madison Corp. v. O'Connell,* (1958) 172 N.Y.S. 2d 198. But the regulations for salesmen must be no more drastic than is reasonable to accomplish the end for which the law was adopted. *People v. Windsor Madison Corp.,* (1958) 173 N.Y.S. 2d 964.

In summary, the state has a limited right, under the police power, to regulate private schools and their agents and solicitors, provided: (1) there is a manifest present need which affects the health, morals, or safety of the public generally, (2) the regulations are not arbitrary, discriminatory, oppressive or otherwise unreasonable, and (3) adequate legislative standards are established. *State v. Warren, supra; State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854.

The showing of need, in the instant case, is meager at best. In G.S. 115-249 it is declared, with reference to the supervision of the specified schools by the State Board of Education: ". . . (T)he object of said supervision being to protect the public welfare by having the licensed business, trade, or correspondence schools maintain proper school quarters, equipment, and teaching staff and to have the school carry out its advertised promises and contracts made with its students and patrons." This is the only statement of purpose or need which appears. The need is not declared but, if any exists, must be inferred. For the most part the curricula of the schools sought to be regulated are outside the scope and purpose of instruction given in public schools, colleges and universities. It does not appear, nor is there any publicly accepted thesis known to us, that the instruction by such schools is inadequate in the areas of learning in which they profess to teach. The law proposes to protect students from fraudulent practices and breaches of contract. If fraud exists in this field, it does not appear that it is widespread and affects a large segment of the population. Besides, no special legislation is necessary for this purpose. The courts of this State are open at all times to redress such wrongs, under laws and procedures long established. However, our decision does not rest upon the lack of public need for the regulation. "The Legislative Department is the judge, within reasonable limits, of what the public welfare requires. . . ." *State v. Warren,* 252 N.C. 690, 696, 114 S.E. 2d 660. But it should be remembered that, though the schools involved are not of equal dignity with many old and revered private institutions of learning in our State, the same law applies to all. The principles the Legislature may follow in regulating one, it may apply to all. Standardization and regimentation in the field of learning is contrary to the American concept of individual liberty. It would be difficult to over-estimate

the contribution of private institutions of learning to the initiative, progress and individualism of our people. Regulation should never be resorted to unless the need is compellingly apparent.

G.S. 115-253 contains the following provisions: "When application is made for such license by a solicitor he shall submit to said Board (State Board of Education) for its approval a copy of each type of contract offered prospective students and used by his said school, together with such advertising material and other representations as are made by said school to its students or prospective students, and such instructional material as requested by the Board to enable it to evaluate the instructional program, as well as the sales methods. If the Board approves the instructional program and the solicitor, it shall issue to the solicitor a license . . ." The Legislature has set no standards for evaluating the contract, advertising material or instructional program. Furthermore, no test or rule of any kind has been established for determining the fitness of the solicitor. All of these matters are left to the unlimited discretion of the administrative body — a body which, most likely, has little familiarity with the operation of schools of this type. Such unlimited delegation of authority is beyond the bounds of valid legislation.

*Harvell v. Scheidt*, 249 N.C. 699, 107 S.E. 2d 549, is concerned with the matter of delegation of legislative authority. The Legislature had undertaken to delegate to the Department of Motor Vehicles the authority to suspend the license of an operator or chauffeur without preliminary hearing upon evidence that the licensee was an habitual violator of the traffic laws. The statute did not define the term "habitual violator," set no standards for making the determination, and left the matter to the unlimited discretion of the Department. *Denny, J.*, in delivering the opinion reviewed the holdings of this Court in former cases, cited authorities from other jurisdictions, and concluded: " . . . '(W)hile the Legislature 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 the law is made to depend . . . , it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion, . . .' . . . G.S. 20-16(a)(5) does not contain any fixed standard or guide to which the Department must conform in order to determine whether or not a driver is an habitual violator of the traffic laws. But, on the contrary, the statute leaves it to the sole discretion of the Commissioner of the Department to determine when a driver is an habitual violator of such laws. This we hold to be an unconstitutional grant of legislative power."

*Packer Collegiate Institute v. University, supra,* deals with a statute of the State of New York providing that no private nursery, kindergarten or elementary school might be established or maintained without a certificate of registration under regulations prescribed by the Board of Regents of the University. On the question of legislative standards, the Court concluded: "The quoted statute is, we think, patently unconstitutional as being an attempted delegation of legislative power. . . . The statute before us is nothing less than an attempt to empower an administrative officer . . . to register and license, or refuse to register and license, private schools, under regulations to be adopted by him, with no standards or limitations of any sort. . . . (T)here must be a clearly delimited field of action and, also, standards for action therein. . . . This is not really a question of what powers of control over private schools may validly be delegated by the Legislature. It is here impossible to discover what authority was intended to be turned over. . . . (T)he statute's validity must be judged not by what has been done under it but by what is possible under it." These quotations from the *Packer* case aptly state the principles applicable to the case at bar.

G.S. 115-253 is clearly an unwarranted delegation of legislative power, and defendant's conviction and punishment under the criminal provisions thereof violate the "law of the land" section of the Constitution of North Carolina. Art. I, s. 17.

This appeal does not properly raise the question as to whether or not the statute violates the Commerce clause of the Constitution of the United States. Art. I, s. 8, cl. 5. The bill of indictment does not disclose that defendant was solicitor for an out-of-state school; this fact appears only from the evidence: "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper. . . . The evidence in a case is no part of the record proper." *State v. Gaston,* 236 N.C. 499, 501, 73 S.E. 2d 311. "For the motion to be sustained it must appear that the Court is without jurisdiction, or that the record is in some respect fatally defective and insufficient to support a judgment." *State v. Doughtie,* 238 N.C. 228, 231, 77 S.E. 2d 642. Defects which appear only by aid of evidence cannot be the subject of a motion in arrest of judgment; such defects are brought into question only by motion for nonsuit or motion for directed verdict. *State v. Gaston, supra.*

However, it might be well to point out that it appears settled that statutes such as G.S. 115-253, insofar as they attempt to regulate solicitors for nonresident schools, burden interstate commerce

and are unconstitutional. *State v. Mobley,* 234 N.C. 55, 66 S.E. 2d 12; *Cleaner, Inc. v. Stone,* 342 U.S. 389; *Nippert v. City of Richmond,* 327 U.S. 416; *Text-Book Co. v. Pigg,* 217 U.S. 91, 27 L.R.A. (N.S.) 403; *Robbins v. Taxing District,* 120 U.S. 489; *School of Commerce v. Gross,* 47 N.Y.S. 2d 521, aff'd. by Ct. of App., 55 N.E. 2d 372; *Sackman v. Iosue,* 36 N.Y.S. 2d 625; *Merriman v. Harter,* 280 P. 2d 1045; Anno. 26 A.L.R. 360-1; 11 Am. Jur., Commerce, ss. 45, 46, pp. 44-5.

Reversed.

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STATE v. PERCELLE DOWNEY

(Filed 23 November, 1960.)

**1. Homicide § 1—**

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation; manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

**2. Homicide § 13—**

Admission and proof tending to show an intentional killing of a human being with a deadly weapon raise the presumption of malice, constituting the offense of murder in the second degree and placing the burden upon defendant to show to the satisfaction of the jury matters in mitigation or excuse.

**3. Homicide § 20—**

Admission and proof tending to show that defendant intentionally shot deceased, inflicting fatal injury, precludes nonsuit.

**4. Criminal Law § 46—**

Flight by defendant after the crime had been committed is competent to be considered in connection with other circumstances upon the question of guilt.

**5. Criminal Law § 99—**

Upon motion to nonsuit, the evidence is to be considered in the light most favorable to the State. G.S. 15-173.

**6. Criminal Law § 85—**

Where the State introduces in evidence testimony of a statement by defendant, the statement is presented as worthy of belief, and warrants nonsuit if the statement is not contradicted and is wholly exculpatory,

but the State, by introducing such statement, is not precluded from showing that the facts were otherwise.

**7. Homicide § 20—**

The introduction in evidence by the State of a statement of defendant that he shot deceased in self-defense as deceased was coming on him with a pocket knife, does not warrant nonsuit when the State also introduces other evidence, including evidence of the absence of powder burns on the body of deceased, that the knife found at the scene was unopened, etc., tending to show that the killing was not in self-defense, since in such instance the State's evidence does not establish self-defense as a matter of law.

**8. Criminal Law § 126—**

A motion to set aside the verdict as contrary to the weight of the evidence is addressed to the sound discretion of the trial court, and the refusal of the motion is not subject to review on appeal.

**9. Criminal Law § 131—**

A sentence within the limitations prescribed by statute cannot be held cruel or unusual in the constitutional sense. Art. I, § 14, of the State Constitution.

**10. Criminal Law § 160—**

The burden is upon appellant to show error amounting to a denial of some substantial right in order to entitle him to a new trial.

APPEAL by defendant from *McKinnon, J.*, at June 1960 Term, of WARREN.

Criminal prosecution upon a bill of indictment in which the defendant is charged with the offense of murder in the first degree of one John Edward Ball. At the outset of the trial the Solicitor for the State announced that it would not seek a conviction upon that charge, but would seek a conviction upon the charge of murder in the second degree or manslaughter as the evidence might warrant.

To the bill of indictment defendant pleaded not guilty.

And it was stipulated and agreed by the defendant through his counsel and the Solicitor for the State that John Edward Ball came to his death as a result of a .22 bullet wound in the head inflicted on or about the 19th day of December, 1959.

Upon trial in Superior Court the State offered evidence tending to show the factual situation surrounding and relating to death of John Edward Ball.

From the stipulation hereinabove related and the testimony offered upon the trial in Superior Court by the State, it is undisputed that one John Edward Ball came to his death as the result of a

.22 bullet wound in the head inflicted upon him on or about the 19th day of December, 1959.

In this respect Sheriff James H. Hundley of Warren County testified in pertinent part substantially as follows: " * * * In response to a call I received from the Oine Community, about 11:30 on the night of December 19, 1959, I went to the Norlina-Oine public road * * * I saw a man laying in the road. His head was just across the center line and his feet back up on the left side of the center line * * * flat on his back * * * The first thing I did * * * was to call an ambulance * * * While I was waiting for the ambulance the father of the deceased, John Ball, and his wife came up to where the deceased was * * * Mr. Paynter, who runs a store nearby, and Freeman Cleaton were also there * * * Upon arrival the operators of the ambulance picked up the man * * * and carried him to the Warren Hospital * * * I did not see the defendant that night, but I saw him the next morning at his home. * * * I had with me one of my deputies, Mr. Stevenson. At that time I arrested the defendant and his brother. The defendant told me that it wasn't necessary to take his brother in because he (defendant) was the one that did the shooting. The defendant told me that he used a sawed-off .22 rifle and that he gave the rifle to a boy, called him 'Peanut' and that they threw it from the bridge over Smith's Creek, that they stopped there on the bridge and threw it in the creek. As a result of that information, I went back to this particular bridge several times and searched for the rifle * * * I found the rifle almost in the exact spot the defendant pointed out to me when he stood on the bridge * * * There was one empty cartridge in it * * * This is the cartridge." (The gun and cartridge were offered in evidence by the State.)

And the Sheriff continued: "At the time I examined the body of the deceased I did not observe any powder burns around the site of the wound."

Upon cross-examination the Sheriff further testified in pertinent part: " * * * One of his (John Edward Ball's) hands was stretched out and the other one was laying down. The right * * * close to his body. In his right hand I found a pocket knife * * * At the time I found the knife it was closed * * * ." And the Sheriff continued: "At the time of the arrest of the defendant, the defendant told me that he and the deceased, John Edward Ball, had had some argument, that John wanted the defendant to take him home right at the turn going to John's house, and they got in an argument because he wouldn't take him all the way to his house. The defendant later told me that the deceased, John Edward Ball, had the rifle

out at the rear of the car in which they were riding and that the deceased shot it up in the air * * * ."

And the Sheriff further testified: "At the time of my first conversation with the defendant, he told me that he shot the deceased in self-defense as the deceased was coming on him with a pocket knife. I found a knife in deceased's hand or thereabouts. His hand was not closed tight. The defendant told me that the deceased got the rifle and wanted to shoot it, said he wanted to shoot toward's Mr. Rooker's house, but he did not tell me that at the time I picked him up. It was probably an hour or so later * * * ."

On recall the Sheriff testified briefly as follows: " * * * I asked him (the defendant) why he shot him and left there, and he told me that he just got scared and got in the car and drove back to Norlina, went on to Wise, came back and threw his gun in the creek and went home * * * ." And in response to the question "How far, in your opinion, was the body of the deceased from the defendant's home?" the Sheriff replied: "It was probably a mile or a mile and a half, I would say. I would say that the distance of the route traveled by the defendant following the shooting to his home would be probably ten miles, eight to ten miles * * * ." And the Sheriff concluded his testimony by saying: "At the time this statement of the defendant was made to me * * * I had with me one of my deputies * * * also present was a brother of the defendant * * * At the time the defendant was in my car, we were taking him back to jail. * * * I asked him where the gun was. He did not hesitate to tell me, nor did he hesitate to tell me where he went after the shooting."

The State offered as witnesses John Ball and Hattie Ball, father and mother of Ed Ball, deceased. John Ball testified: " * * * John Ed Ball * * * at the time of his death, was twenty years old. He lived in my home. I have never seen this knife that the Sheriff testified he found in the hand of my son. I do not know whether he owned a knife or not, but I have never seen him with one. I went to the place where the body of my son was found on the night of December 19th. When I arrived at the scene * * * in an effort to ascertain whether or not the deceased was hurt, I only looked at his head, he was bleeding, up there was a hole in his head, blood was running * * * back * * * . I did not know whether he was dead or not. He was unconscious, and said nothing. My wife was with me at the time * * * The ambulance took my son to Warrenton to the hospital and he stayed there until Sunday night around 8 o'clock. He was shot on Saturday night * * * My son was taken to Duke Hospital. I was not with him at the time of his death. On

the following morning I went back to the scene of the shooting, walking around looking. From my turn going on the highway I tracked some blood on the edge of the highway * * * about 20 feet from where he was laying, some drops of blood right on the edge of the highway * * * My house is about * * * 500 feet or less from the place on the road where I saw the body of my son."

Hattie Ball, mother of deceased, testifying as witness for the State, said: " * * * When I got to where my son was laying, he was laying with his hand close down beside him and the left hand in his pocket. I didn't see any knife * * * I saw he was not dead * * * I have never seen this knife before, because he didn't even carry any knife. He lived in my home * * * ."

The State also offered testimony of Allen Curry in pertinent part as follows: "I am twenty years old * * * I remember the night that John Edward Ball was shot. Neither I nor John Edward Ball nor Percelle Downey did anything just before the shooting. I do not know what they did. I was with them. I do not know how long I had been with them before the shot was fired. We were going home and we had been to the Wayside Inn at Wise. That is not on the same road that John Edward Ball lived on. I was not present when the shot was fired. I left the car when they started arguing * * * I left * * * right there at John Edward Ball's turn. I got out because I thought they were going to have some argument there and somebody might call the law. I do not know what they were arguing about. I did not see any gun in the car anywhere. I have seen this gun * * * I saw it in the home of Percelle Downey * * * After I got out of the car, I came on down the road when I got out * * * there was someone else in the car * * * John Edward Ball was * * * standing on the ground. I think Percelle Downey got out * * * Roy Lee Downey was driving * * * After I left the car I did not hear anything * * * I did not say anything when I left the car * * * I came on down the new road. A shot was fired, or I heard something * * * When I heard the noise I reckon the car was up there at the turn * * * I trotted on down the road * * * A car came on down the road. I took it to be it. It came on down the road behind me * * * I never looked back any more * * *."

And Manson Green, funeral director, testified: "On the night of December 19, 1959, I visited the spot on the Norlina-Oine Road where the body of John Edward Ball was located. I saw the body—lying across the road. His head was on the center line. We didn't examine it so much, but he had a hole right up here * * * After that at the hospital I examined him again under the lights. It look-

ed like he had a gash up here like he had been stabbed. That is the way it looked to me. * * * I observed no powder burns on the face of the deceased. Later we took him to Duke Hospital. John Edward Ball died and my funeral home handled the body."

Defendant offered no evidence and moved for judgment as of nonsuit when the State rested. The motion was denied, and the case was submitted to the jury upon the evidence offered and the stipulation above recited, and under the charge of the court.

The jury returned a verdict of guilty of murder in the second degree. Whereupon the court rendered judgment that the defendant be confined in the State Prison for not less than fifteen nor more than twenty years.

Defendant excepts thereto and appeals to Supreme Court, and assigns error.

*Attorney General Bruton, Assistant Attorneys General H. Horton Rountree and Glenn L. Hooper, Jr., for the State.*

*John Kerr, Jr., for defendant, appellant.*

WINBORNE, C. J. The first question presented by the defendant as the main question is whether or not the trial court erred in refusing to grant defendant's motion for judgment as of nonsuit. In this connection the defendant pleads self-defense, and contends that the evidence offered by the State exculpates him on this plea.

Taking the evidence and the facts stipulated in the light most favorable to the State, the conclusion does not follow as a matter of law.

In this connection it is appropriate to note: (1) Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. (2) Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. And (3) manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

Moreover, it is well established in this State that the intentional killing of a human being wth a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree. And when this implication is raised by an admission or proof of the fact of an intentional killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it. See *S. v. Utley*, 223 N.C. 39, 25 S.E. 2d 195, and cases cited. Hence motion to non-

suit is not tenable. See *S. v. Vaden,* 226 N.C. 138, 36 S.E. 2d 913; *S. v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482; *S. v. Artis,* 233 N.C. 348, 64 S.E. 2d 183; *S. v. Brannon,* 234 N.C. 474, 67 S.E. 2d 633.

Indeed there is evidence of flight by defendant after the shooting of deceased. This is competent to be considered by the jury in connection with other circumstances in passing upon the question of guilt. See *S. v. Payne,* 213 N.C. 719, 197 S.E. 573, and cases cited. Also *S. v. Peterson,* 228 N.C. 736, 46 S.E. 2d 852.

Moreover, when the sufficiency of the evidence offered on the trial in Superior Court is challenged by motion for judgment as of nonsuit under G.S. 15-173, the evidence is to be taken in the light most favorable to the State.

Nevertheless, when the State, as in the case in hand, has introduced in evidence the statement of defendant, the statement is presented as worthy of belief. And when such statement tends to exculpate defendant, he is entitled to whatever advantage it affords, even to an acquittal when it is wholly exculpatory. However, the State by offering the statement of defendant is not precluded from showing that the facts were different. See *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, and cases cited.

Defendant also presents for decision on this appeal question as to whether the trial court erred in refusing to set the verdict aside as being against the greater weight of the evidence. This is without merit for that in North Carolina a motion to set aside a verdict as contrary to the weight of the evidence is addressed to the sound discretion of the trial court, and the refusal of the court to grant same is not subject to review on appeal. See *S. v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250; *S. v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909.

Defendant also presents question in brief filed on this appeal whether under the evidence in this case sentence imposed upon the defendant, that is, a term of from fifteen to twenty years in State Prison, is excessive and oppressive, and an infliction of cruel or unusual punishment within the meaning of Art. 1, Sec. 14, of the State Constitution.

But when a person is convicted of murder in the second degree the punishment prescribed by statute, G.S. 14-17, is imprisonment in the State Prison for not less than two years nor more than thirty years.

In this connection this Court has held uniformly that a sentence is not excessive or cruel or unusual when within the limits prescribed by the Legislature. It is within the discretion of the judge, and not subject to review on appeal. *S. v. Woodlief,* 172 N.C. 885, 90 S.E.

137; *S. v. Fleming,* 202 N.C. 512, 163 S.E. 453; *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Daniels,* 197 N.C. 285, 148 S.E. 244.

Indeed this headnote in *S. v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654, epitomizes the holdings of this Court in this manner: "When a statute prescribing the punishment for a statutory offense fixes limitations upon the severity of the punishment, the court has discretionary power to fix the punishment within the limitations prescribed, and a sentence of imprisonment for the maximum period allowed by the statute cannot be held excessive or in violation of the constitutional rights of defendant."

Other exceptions shown in the record of case on appeal have been given due consideration, and in them error is not made to appear.

It is a well settled rule in North Carolina that the burden is upon the appellant to show prejudicial error amounting to a denial of some substantial right and in the absence of such showing there is no reversible error. *Kennedy v. James,* 252 N.C. 434.

Therefore since error in the trial court is not made to appear, there is

No error.

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CLIFF R. WYATT v. NORTH CAROLINA EQUIPMENT COMPANY.

(Filed 23 November, 1960.)

**1. Sales § 13—**

Both an express and an implied warranty are elements of a contract of sale, binding the seller absolutely for the existence of the warranted qualities irrespective of any fault on the part of the seller.

**2. Sales §§ 17, 27—**

The right to recover on a breach of warranty is limited to those in privity of contract, with the sole exception that an ultimate consumer or user may recover when the warranty is addressed to him.

**3. Same: Master and Servant § 18—**

Ordinarily the rule that a seller is not liable to a stranger for breach of warranty is applicable to an employee of the buyer.

**4. Sales § 30—**

Ordinarily the right of a stranger to the contract to recover for injury resulting from defect in the article sold must be based upon negligence.

**5. Sales §§ 17, 27: Master and Servant § 18—**

Allegations to the effect that plaintiff was an employee of the pur-

chaser of the machinery and was injured while operating the machinery as a result of breach of warranty that the machinery was fit for the purposes for which it was designed and sold, fail to state a cause of action, since the employee, a stranger to the contract, is not entitled to recover for breach of warranty.

**6. Sales § 30—**

The seller of a chattel may be held liable by a stranger to the contract for injuries resulting to such stranger from the dangerous character or condition of the chattel only if the seller knew of such defect or could have discovered such dangerous character or condition in the exercise of reasonable care.

**7. Pleadings § 2—**

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

**8. Pleadings § 12—**

A demurrer admits the facts alleged, but does not admit the pleader's legal conclusions.

**9. Negligence § 20—**

The complaint in an action to recover for negligence must allege facts upon which the legal conclusions of negligence and proximate cause may be predicated.

**10. Sales § 30: Master and Servant § 18— Allegations held insufficient to state cause against seller for injuries to employee of purchaser resulting from defect in machinery.**

In this action by an employee of the purchaser of machinery against the seller to recover for injuries sustained by the employee while operating the machinery, the complaint alleged that the machinery was inherently dangerous, that the bucket attached or caused to be attached to the dirt loading machinery by the seller was improperly balanced, that the bucket was warranted to raise and lower itself only by manual activation, and that while plaintiff was backing the machinery with the bucket raised, in order to load dirt on a truck, the machinery tilted forward, throwing plaintiff from the operator's seat to the hood, that at the same time the bucket began to raise and lower itself automatically, and that the arms or hydraulic cylinder attached to the bucket crushed the entire lower portion of plaintiff's body. *Held:* Demurrer was properly sustained in the absence of allegations as to defect in the design, material or construction of the machinery that would cause the bucket to raise or lower without being intentionally manipulated or accidentally struck, and the absence of allegations as to defects in the design, material or construction of the loader causing it to be improperly balanced when used normally for the purposes for which it was designed, the doctrine of *res ipsa loquitur* being inapplicable.

**11. Negligence § 5—**

The doctrine of *res ipsa loquitur* does not apply when the instrumentality causing the injury is not under the exclusive control or management of defendant.

WYATT *v.* EQUIPMENT CO.

APPEAL by plaintiff from *Craven, Special Judge,* April Term, 1960, of GASTON.

Civil action to recover damages on account of personal injuries sustained by plaintiff while operating, as an employee of Neal Hawkins Construction Company, an International Harvester Model T-D-9 Loader sold by defendant to said Construction Company, heard below on defendant's demurrer to amended complaint.

Plaintiff's factual allegations, summarized or quoted, are as follows:

On February 15, 1955, defendant, "engaged in . . . the selling and servicing of heavy equipment and machinery," sold the Loader to said Construction Company "with a warranty of its fitness for the purpose for which it was designed and sold," namely, for moving and elevating dirt and other materials, including the loading of such materials on trucks, and "with a warranty that the bucket attached to said loader would raise and lower itself only by manual activation or operation under normal operating conditions."

From February 15, 1955, until July 10, 1956, the Loader was at all times "properly and carefully serviced and maintained by its owner, Neal Hawkins Construction Company."

On July 10, 1956, about 1:00 p.m., on Piedmont Street in Kings Mountain, North Carolina, plaintiff, as operator, was using the Loader "to load dirt onto trucks for hauling." He placed the bucket in a digging position, "scooped the bucket partially full of damp dirt or earth," and then "immediately raised the bucket" to a position "approximately level with the top of the radiator" so that it (the bucket) "could be driven to the left or to the right." Then he commenced to move the Loader backwards to the point where trucks could be loaded. While moving the Loader backwards, "the rear end of said loader suddenly and without manual activation, raised itself from the ground and immediately thereafter said loader suddenly, violently, and without manual activation tilted forward, thereby throwing the plaintiff from his seat on said loader, to the hood covering the motor of the loader." ". . . immediately before and as the plaintiff was thrown onto the hood, over the motor of the loader, and after he landed on said hood, the bucket full of dirt attached to said loader, was raising and lowering itself automatically and without manual activation or operation on the part of the plaintiff." ". . . as the bucket full of dirt . . . lowered itself after the plaintiff was thrown onto the hood covering the motor of the loader, or as the loader lowered itself while the bucket was on the ground, the arms or supports holding and supporting the bucket to the loader, or the hy-

draulic cylinder attached thereto, crushed the entire lower portion of the plaintiff's body. . ."

Plaintiff was a competent and experienced operator of heavy equipment, and on July 10, 1956, was operating the Loader carefully and prudently in the manner and for the purposes for which the Loader was designed, manufactured and sold.

The alleged defects in the Loader were latent, "not visible to the naked eye, or capable of detection by ordinary care, nor were said defects apparent to the plaintiff."

Plaintiff alleged defendant negligently and carelessly (1) "attached or caused to be attached" to said Loader "a bucket or loading device which improperly balanced said loader" when used "for the purposes and in the manner for which it was designed, manufactured and sold," and (2) "attached a loading device" to the Loader "in such a manner that the bucket thereof raised and lowered itself automatically and without manual activation or operation"; and that defendant knew, or by the exercise of due care should have known, that the alleged defects in the Loader were of such nature as to cause it to tilt forward violently when used in the manner and for the purposes for which it was designed, manufactured and sold, and on account of such defects the Loader was "inherently dangerous" and "likely to cause great injury to its operator."

Plaintiff alleged that his injuries were caused by defendant's negligence in the respects alleged and by defendant's breach of warranty "of merchantability and fitness."

Defendant demurred on the ground that the amended complaint does not state facts sufficient to constitute a cause of action either in tort or for breach of warranty, setting forth with particularity the asserted deficiencies.

Judge Craven, in announcing his ruling sustaining the demurrer, inquired whether plaintiff desired leave to amend. Plaintiff's counsel stated that "further amendments were not desired" and that plaintiff would rest upon the pleading then before the court. Whereupon, judgment, sustaining the demurrer and dismissing the action, was entered. Plaintiff excepted and appealed.

*William N. Puett and E. R. Warren for plaintiff, appellant.*

*Allen & Hipp, Thomas W. Steed, Jr., and L. B. Hollowell for defendant, appellee.*

BOBBITT, J. A warranty, express or implied, is contractual in nature. Whether considered collateral thereto or an integral part

thereof, a warranty is an element of a contract of sale. 77 C.J.S., Sales § 302; 46 Am. Jur., Sales § 299.

"The obligation arising under a warranty is that of an undertaking or promise that the goods shall be as represented or, more specifically, a contract of indemnity against loss by reason of defects therein." 77 C.J.S., Sales § 302(d). "The effect of an express warranty undoubtedly is to bind the seller absolutely for the existence of the warranted qualities. If an implied warranty is properly called a warranty, the consequences should be similar. It should make no difference, therefore, whether the seller was guilty of any fault in the matter." Williston on Sales, Revised Edition, § 237.

"Subject to some exceptions and qualifications, it is a general rule that only a person in privity with the warrantor may recover on the warranty." 77 C.J.S., Sales § 305(b); 46 Am. Jur., Sales § 306.

Our decisions are in accord. *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30, and cases cited. Absent privity of contract, there can be no recovery for breach of warranty except in those cases where the warranty is addressed to an ultimate consumer or user. Ordinarily, the rule that a seller is not liable for breach of warranty to a stranger to the contract of warranty is applicable to an employee of the buyer. *Berger v. Standard Oil Co.* (Ky.), 103 S.W. 245, 11 L.R.A. (N.S.) 238. Negligence is the basis of liability of a seller to a stranger to the contract of warranty. *Enloe v. Bottling Co.*, 208 N.C. 305, 180 S.E. 582, and cases cited; *Caudle v. Tobacco Co.*, 220 N.C. 105, 16 S.E. 2d 680.

In *Simpson v. Oil Company*, 217 N.C. 542, 8 S.E. 2d 813, cited by appellant, *Seawell, J.*, referring to *Thomason, supra*, said: "The Court simply held that the purchaser from the retail dealer was neither party nor privy to the contract between the vendor and vendee and, therefore, could not avail himself of any warranty that may have existed between them." In *Simpson*, the basis of plaintiff's cause of action against the manufacturer and distributor of "Amox" was the warranty *to the ultimate consumer* appearing on the can sold to the druggist and purchased from him by plaintiff. In this connection, see Williston, *op. cit.*, § 244(a).

In *Davis v. Radford*, 233 N.C. 283, 63 S.E. 2d 822, cited by appellant, a retailer of "Westsal," having been sued for damages for the alleged wrongful death of his customer on account of breach of implied warranty that the product was fit for human consumption, was held entitled to join the wholesaler from whom he purchased the product and to recover over against the wholesaler for any loss he might suffer on account of plaintiff's action. While the question was not

presented for decision, the opinion of *Devin, J.* (later *C. J.*), intimates that, under the ruling in the *Simpson* case, the plaintiff, had he elected to do so, could have maintained an action against the wholesaler. The pleadings disclosed that "Westsal," a salt substitute, was a patented bottled product. The wording of the notice or label appearing on the sealed bottle of "Westsal" is not disclosed.

The alleged warranties were made by defendant to the Construction Company incident to the sale of February 15, 1955; and plaintiff, a stranger to that transaction, does not allege facts sufficient to entitle him to recover damages for breach thereof.

In respect of negligence, this general statement is pertinent:

"One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so." Restatement, Torts, § 388.

"Liability may be imposed on a manufacturer who sells an article likely to cause injury in its ordinary use because of some latent defect or because inherently dangerous in the use to which he knows it will be put." *Lemon v. Lumber Co.*, 251 N.C. 675, 677, 111 S.E. 2d 868; *Tyson v. Manufacturing Co.*, 249 N.C. 557, 107 S.E. 2d 170; *Gwyn v. Motors, Inc.*, 252 N.C. 123, 126, 113 S.E. 2d 302.

As to the seller of a chattel known to have been manufactured by another, the rule has been stated as follows: "A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use." Restatement, Torts, § 401. Under this rule, liability depends upon whether such seller, by the exercise of reasonable care, could have discovered the dangerous character or condition of the chattel. Restatement, Torts, § 402.

Plaintiff alleges the Loader was "inherently dangerous" and "likely to cause great injury to its operator." As stated by *Rodman, J.*, in *Lemon v. Lumber Co., supra:* "It is not sufficient to merely allege

that an article is inherently dangerous. Unless the mere descriptive name indicates the dangerous character, the pleader must set out the facts which are relied upon to fix the dangerous character of the article."

Defendant was not the manufacturer of the International Harvester Loader. It sold and serviced such equipment. While plaintiff alleges defendant knew or by the exercise of due care should have known of the alleged defects, he also alleges the defects were latent and not capable of detection by ordinary care.

Plaintiff alleges the "bucket" and "loading device" were attached (or caused to be attached) to the Loader by defendant. Ordinarily, the descriptive term, International Harvester Loader, would imply a complete piece of equipment. If plaintiff, by such allegations, means to imply that the Loader was to some extent assembled by defendant, nothing alleged indicates this was done otherwise than in the manner prescribed by the manufacturer.

Plaintiff alleges the Construction Company "properly and carefully serviced and maintained" the Loader from February 15, 1955, to July 10, 1956. There is no allegation that the Loader, during this period of use, had either tilted forward without manual activation or that the bucket had raised or lowered itself without manual activation by the operator. Nor do plaintiff's allegations state or imply that defendant, at any time after February 15, 1955, either inspected or serviced the Loader or was requested to do so.

Before considering plaintiff's allegations as to the character of the alleged defects and what occurred when plaintiff was injured, we advert to certain well established legal principles.

The cause of action consists of the facts alleged. G.S. 1-122; *Lassiter v. R. R.*, 136 N.C. 89, 48 S.E. 642. "The complaint must show that the particular facts charged as negligence were the efficient and proximate cause, or one of such causes, of the injury of which the plaintiff complains." *Stamey v. Membership Corp.*, 247 N.C. 640, 645, 101 S.E. 2d 814. The facts alleged, but not the pleader's legal conclusions, are deemed admitted where the sufficiency of a complaint is tested by demurrer. *Stamey v. Membership Corp., supra.*

As stated by *Johnson, J.*, in *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193: ". . . negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged."

It is alleged that, on the occasion of his injury, plaintiff dug and

scooped dirt, raised the bucket to a position approximately level with the top of the radiator, then backed the Loader towards a point where trucks were to be loaded. How far had he backed the Loader before he was thrown from the operator's seat? When thrown from the operator's seat, was plaintiff backing the Loader on level ground or up or down an embankment or incline? Plaintiff's allegations provide no answers. Obviously, when the Loader tilted forward it was not properly balanced. But no facts are alleged as to defects in the design, materials or construction of the Loader causing it to be improperly balanced when in use under normal operating conditions for the purposes for which it was designed.

It is alleged that, on the occasion of his injury, plaintiff raised the bucket, then filled or partly filled with dirt, to a position approximately level with the radiator, so that the bucket "could be driven" to the left or right, and kept it in this position while backing the Loader until the time the Loader tilted forward. In the light of these allegations, the only reasonable meaning to be given plaintiff's allegation that the bucket raised and lowered "without manual activation or operation" is that plaintiff did not, by manipulation of a lever or similar mechanical device, cause such movement. But no facts are alleged as to defects in the design, materials or construction of the mechanism for the raising and lowering of the bucket that would cause the bucket to raise or lower unless the lever or similar mechanical device was manipulated intentionally or accidentally struck. Plaintiff alleges "the rear end of said loader suddenly and without manual activation raised itself from the ground and . . . tilted forward, thereby throwing (him) from his seat on said loader to the hood covering the motor of the loader," and "immediately before and as (he) was thrown onto the hood . . . the bucket . . . was raising and lowering itself automatically and without manual activation or operation on the part of the plaintiff."

Analysis of the complaint impels the conclusion that the allegations to the effect the Loader was improperly balanced must be considered a mere conclusion of the pleader in the absence of factual allegations as to what defects, if any, in the design, materials or construction caused it to tilt forward on the occasion of plaintiff's injury. As to the allegations that the bucket raised and lowered itself on the occasion of plaintiff's injury "without manual activation or operation": It is questionable whether the facts alleged are sufficient to show this was a proximate cause of the tilting forward of the Loader or an accidental result thereof. Be that as it may, the fact the bucket raised and lowered "without manual activation or operation" on the

occasion of plaintiff's injury, absent factual allegations as to defects in the design, materials or construction thereof causing it to so act, is insufficient basis for plaintiff's conclusion that defendant was negligent in this respect.

The doctrine of *res ipsa loquitur* does not apply "when the instrumentality causing the injury is not under the exclusive control or management of the defendant." *Smith v. Oil Corp.*, 239 N.C. 360, 367, 79 S.E. 2d 880.

Since the factual allegations of the complaint are insufficient to show plaintiff's injury was proximately caused by the negligence of defendant, the judgment of the court below is affirmed.

Affirmed.

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ELIZABETH W. MOYE v. JAMES S. CURRIE, COMMISSIONER OF NORTH CAROLINA DEPARTMENT OF REVENUE.

(Filed 23 November, 1960.)

**1. Taxation § 23½—**

While the construction placed upon a revenue act by the Commissioner of Revenue is not controlling upon the courts, such construction will be given due consideration by the courts in interpreting the statute.

**2. Taxation § 29—**

Where a resident conveys to a trustee her interest in a business located in another state, but retains her right to all income from the trust, such income, having been subjected to income tax by such other state, is exempt from income tax in this state under G.S. 105-147 (10) (b), prior to its repeal by Ch. 1340, Session Laws of 1957, since the resident remains the beneficial owner of her share of the business in such other state.

**3. Same—**

Where a resident beneficiary is also named a co-trustee of a testamentary trust of a business located in another state, the resident beneficiary's income from the trust is not exempt from income tax in this State, notwithstanding that the beneficiary takes an active part as co-trustee in the management of the business and the income of the business is subjected to income tax by the state in which it is situate, G.S. 105-147 (10) (b), since the resident's ownership of the legal title as trustee does not constitute her the owner, in her capacity as beneficiary, of an established business in another state.

APPEAL by plaintiff and defendant from *Hobgood, J.*, 23 May 1960 Term, of WAKE.

This is a civil action instituted by the plaintiff against the defendant to recover income taxes paid under protest and heard in the court below by the Presiding Judge without the intervention of a jury upon an agreed statement of facts and stipulations of the parties. The facts necessary to a disposition of these appeals are as follows:

1. John W. Woolfolk and his three daughters (one of whom is the plaintiff in this action) were the major owners of the Woolfolk Chemical Works which was a Georgia partnership with an established business and an investment in real and tangible property in the State of Georgia. In 1942 the total of their combined interests in the business amounted to 67½%, of which amount 17% was owned by Mr. Woolfolk, 17½% was owned by his daughter, the plaintiff herein, and 16½% was owned by each of his other two daughters. The remaining interests in the business, amounting to a total of 32½%, were owned by parties who were not members of the Woolfolk family.

2. In 1942 the plaintiff, her two sisters and their father determined that upon the death of Mr. Woolfolk, management and control of the business by them as owners of the combined 67½% interest therein would be jeopardized, since all three of the daughters were married and two of them (including the plaintiff) lived in states other than Georgia and that this situation would result in the business being managed and controlled by the owners of the other 32½% interest who were not members of the Woolfolk family.

3. In order to alleviate this situation and to provide a means whereby the Woolfolk family members would maintain management and control of the Woolfolk Chemical Works, each of the three daughters (including the plaintiff) placed her respective interest in an *inter vivos* trust with the Fulton National Bank (of Atlanta, Georgia) as trustee and Mr. Woolfolk placed his interest in a trust under his last will and testament with the same bank and the plaintiff as co-trustees.

4. In the above-mentioned *inter vivos* trust established by the plaintiff as the Elizabeth W. Moye Trust (hereinafter referred to as the "Moye Trust"), the plaintiff reserved for herself as beneficiary a lifetime interest in its net income. In this trust she stipulated, *inter alia,* that during her father's lifetime she could modify or revoke the trust, that it was her express desire that the business of the Woolfolk Chemical Works be continued, that after her father's death there shall be created an advisory Board consisting of certain named individuals, with which the bank as trustee would consult regarding the business and which would settle any disagreement between the trustee and the beneficiaries regarding the operation of the business, and that vacancies on the Board would be filled only after consulta-

tion with the income beneficiary, who at all times involved in this action was the plaintiff herein.

5. By his last will and testament, Mr. Woolfolk appointed the bank and his daughter, the plaintiff herein, as co-executors of his estate and established the above-mentioned testamentary trust (hereinafter referred to as the "Woolfolk Trust"), transferring his interest in the business to the bank and his daughter, the plaintiff herein, as co-trustees, with joint authority to administer the trust and to operate the business, the net income thereof to be paid to his wife and three daughters (including the plaintiff) during his wife's lifetime and to his three daughters after his wife's death. Mr. Woolfolk's trust contained substantially the same provisions contained in the plaintiff's *inter vivos* trust regarding the continuation and operation of the business and the advisory Board.

6. Upon Mr. Woolfolk's death in 1945 and at all times thereafter (including the years 1952 through 1956), the Woolfolk Chemical Works was (and still is) managed, controlled and operated through the medium of the trusts as set forth above. Prior to the establishment of her own *inter vivos* trust, the plaintiff was owner in fee of her 17½% interest in the business and actively participated in its administration and operation. After establishment of her *inter vivos* trust (including the years 1952 through 1956), the plaintiff was settlor and beneficiary of her own *inter vivos* trust and beneficiary of her father's testamentary trust, and actively served as co-trustee of her father's testamentary trust. From the death of her father in 1945 until his estate was closed in August 1950, the plaintiff actively served as co-executor of his estate.

7. During the years 1952 through 1956 the plaintiff was a resident of the State of North Carolina and received certain income as beneficiary of the "Moye Trust" on which both the States of Georgia and North Carolina levied and collected income taxes. The North Carolina taxes were paid under protest and this action instituted in apt time for their recovery. It was stipulated below that if the plaintiff was entitled to deduct the income from the "Moye Trust" pursuant to the provisions of G.S. 105-147(10)(b), which statute was in effect during the years 1952 through 1956, then the plaintiff is entitled to recover the taxes paid on income from that trust in the sum of $6,054.26, plus interest thereon at six per cent from 14 June 1957.

8. It was further stipulated that if the plaintiff was likewise entitled to deduct her income from the "Woolfolk Trust" she is entitled to recover the amount of $1,032.23 paid under protest, together with interest thereon at six per cent from 14 June 1957.

The court, after considering the agreed statement of facts, the stipulations, and after hearing the argument of counsel, made the following conclusions of law:

"(1) That plaintiff is entitled to deduct from her gross income for the tax years 1952 through 1956, inclusive, the income received by her from the Elizabeth W. Moye Trust and is therefore entitled to recover of defendant judgment in the amount of $6,054.26, together with interest thereon from June 14, 1957.

"(2) That plaintiff is not entitled to deduct from her gross income for the tax years 1952 through 1956, inclusive, income received by her from the John W. Woolfolk Trust and is not entitled to recover that part of her demand for refund which is attributable to the inclusion of such income in her gross income."

Based on conclusion number (1), judgment was entered in favor of the plaintiff in the amount of $6,054.26, together with interest at six per cent from 14 June 1957. The plaintiff and the defendant appeal, assigning error.

*McDougle, Ervin, Horack & Snepp for plaintiff.*

*Attorney General Bruton, Asst. Attorneys General Abbott and Pullen for defendant.*

DENNY, J. The question for determination on the defendant's appeal is whether or not a North Carolina resident, who was co-owner of an established Georgia business and who for business reasons transferred her interest therein as settlor of a living trust to a trustee for her own benefit, is entitled to the deduction allowed by G.S. 105-147 (10) (b), before its repeal by Chapter 1340, Session Laws of 1957, on account of income received by the beneficiary of said trust when such income has already been reported to and taxed by the State of Georgia?

The pertinent portion of former G.S. 105-147(10)(b) and upon which the plaintiff is relying, reads as follows: "Resident individuals having an established business or an investment in real or tangible property in another state or other states may deduct the net income from such business or property but only to the extent that such income is in fact reported for taxation in such other state or states which levies or levy a net income tax."

The defendant contends that the facts in this case are controlled by the case of *Sabine v. Gill*, 229 N.C. 599, 51 S.E. 2d 1.

In the *Sabine* case, James P. Grey, a resident of Mecklenburg County, North Carolina and the father of Mrs. Sabine, owned 93% of a hosiery mill and business located in the City of Bristol, Virginia, trading under the name and style of Grey Hosiery Mills, which was

being operated as a partnership by James P. Grey and others residing in the State of Virginia. In his last will and testament, which was probated in Mecklenburg County, North Carolina, Mr. Grey set up a testamentary trust, providing that the hosiery business should be continued after his death by named Virginia trustees and the other partners owning the remaining seven per cent interest in the business. Under the will, Commercial National Bank of Charlotte, North Carolina, as executor and trustee, was made the custodian of all the assets of the estate and empowered to collect, receive and disburse all the funds belonging thereto. In deference to this provision, the Corporation Court of the City of Bristol, in which the will in an ancillary proceeding had been probated and under which the executors and trustees had qualified, directed, authorized and empowered the Virginia executors and trustees to remit to the Commercial National Bank of Charlotte, the distributing agent and depository, all the distributable income from the Grey Hosiery Mills business to which the estate of the testator should become entitled. In 1943, the Commercial National Bank of Charlotte paid and distributed to Mrs. Sabine the sum of $40,114.50, that being the portion of the distributable income which Mrs. Sabine was entitled to receive as beneficiary under her father's will.

Virginia levied a tax on this income and it was paid. North Carolina taxed it and the tax was paid under protest and suit brought for its recovery based on the provisions of G.S. 105-147(10), the pertinent parts of which at that time read as follows: "Resident individuals and domestic corporations having an established business in another state, or investment in property in another state, may deduct the net income from such business or investment if such business or investment is in a state that levies a tax upon such net income."

This Court said: "True, there is an established business and an investment in the State of Virginia, but it belongs to the estate and not to the plaintiff or those like situated under the will. The latter, including the plaintiff, are neither legal nor equitable owners. * * * The plaintiff * * * has no such right in the established business or investment from which the revenue is derived and is not so related to it as would justify the Court in ignoring the trusteeship, which not only has the legal title, but the active custody, control and operation of the property and facilities which produced the income which the plaintiff received as a resident of the State."

In Prentice-Hall (North Carolina State and Local Tax Service, section 11,645.50), it is said: "Resident guardian is taxable on income re-

ceived from securities held by Virginia trustee, though Virginia taxes the same income against guardian (citing *Guaranty Trust Co. v. Virginia,* 59 S.Ct. 1, 305 U.S. 19, 83 L. Ed. 16). *Unless trust was created by beneficiary himself with his own funds or property, for business or investment,* beneficiary of foreign trust is not regarded as having an established place of business or investment in property in another state." (Emphasis added.) The foregoing statement is based on an opinion rendered by the Attorney General of North Carolina to the Commissioner of Revenue on 5 January 1939, construing this identical statute, which opinion is now on file in the office of the Attorney General.

The construction placed upon the Revenue Act by the Commissioner of Revenue will be given due consideration by the Court, although we have repeatedly held that such construction is not controlling. *Cannon v. Maxwell,* 205 N.C. 420, 171 S.E. 624; *Powell v. Maxwell,* 210 N.C. 211, 186 S.E. 326; *Valentine v. Gill,* 223 N.C. 396, 27 S.E. 2d 2; *Bottling Co. v. Shaw,* 232 N.C. 307, 59 S.E. 2d 819; *Rubber Co. v. Shaw,* 244 N.C. 170, 92 S.E. 2d 799; *In re Vanderbilt University,* 252 N.C. 743, 114 S.E. 2d 655.

In our opinion, the *inter vivos* trust created by the plaintiff as settlor and in which she retained the right to all the income therefrom, did not defeat her right to the deduction allowable under G.S. 105-147(10)(b). The Moye Trust was created not for the purpose of releasing control of or the interest in the Chemical business, but for the purpose of concentrating the respective family interests in the business to guarantee its continued operation. The plaintiff continued to be the equitable owner of 17½% of the partnership and we hold that she is entitled to recover a refund for the taxes paid under protest in accord with the judgment entered below.

PLAINTIFF'S APPEAL

The plaintiff contends that since the plaintiff was named as co-executor of the estate of J. W. Woolfolk and co-trustee of the testamentary trust, that she is entitled to deduct the income she received from the Woolfolk Trust under the provisions of G.S. 105-147(10)(b).

The plaintiff relies upon the *Sabine* case to the extent that in the *Sabine* case one of the reasons assigned why the plaintiff therein was not entitled to recover was because she held neither a legal nor an equitable interest in the testamentary trust, but as co-trustee in the Woolfolk Trust the plaintiff herein holds the legal title to the property in the testamentary trust.

It is true, the plaintiff is a co-trustee along with the Fulton Nation-

al Bank of Atlanta, Georgia, and they hold in custody the partnership interest of the J. W. Woolfolk estate under the testamentary trust for the purpose of continuing the business of the Woolfolk Chemical Works. The relationship of the plaintiff as a trustee under the testamentary trust is a fiduciary one and does not, in our opinion, give her by reason thereof an established business in another State within the contemplation of the provisions of G.S. 105-147(10)(b) insofar as the Woolfolk Trust is concerned.

In reply to a request from the Commissioner of Revenue, the Attorney General advised the Commissioner on 3 November 1938 as follows: " * * * Section 318 (4) of the Revenue Act of 1937 requires resident beneficiaries of a trust to return in this State sums distributed by the trustee during the taxable year. The taxability of such income is not affected by the fact that the State of the trust also lays a tax upon the same income.

"The trust was created by a person other than the taxpayer and the latter does not, within the meaning of section 322(10) of the Act (codified as North Carolina Code 7,880 (140) (10), later as G.S. 105-147 (10)), have a business or investment in the State of the trust." Biennial Report of the Attorney General of North Carolina, Volume 25, 1938-1940, page 74.

Again on 10 April 1940, the Attorney General was requested by the Commissioner of Revenue to give an opinion whether "sums received by a resident beneficiary from a foreign trust and derived from rents from land in other states are to be included in the gross income of the beneficiary. * * *

"Section 322 (5) provides that 'resident individuals * * * having an established business in another state, or investment or property in another state, may deduct the net income from such business or investment if such business or investment is in a state that levies a tax upon such net income.' This Section is inapplicable. The business or investment in such case is that of the trustee or trust estate and not that of the beneficiary. See my previous letters of November 3, 1938 and January 5, 1939." Biennial Report of the Attorney General of North Carolina, Volume 25, 1938-1940, page 127.

Therefore, in our opinion, the ruling of the court below as set forth in the second conclusion of law should be upheld, and it is so ordered.

Affirmed.

MRS. MICHELE GOLDMAN v. DR. ALBERT A. KOSSOVE AND DR. IRENE L. KOSSOVE.

(Filed 23 November, 1960.)

**1. Negligence § 37a—**

A mother taking her young son to a medical clinic for professional services is an invitee while on the premises.

**2. Negligence § 37b—**

An entrance or exit habitually used by invitees with the express or implied permission of the owner of the premises is within the scope of the invitation.

**3. Same—**

While the owner of the premises is not an insurer of the safety of his invitee, he is under duty to exercise due care to keep the premises, within the scope of the invitation, in a reasonably safe condition for use by the invitees, and to give them timely notice and warning of concealed perils known to the owner or ascertainable by him through reasonable inspection or supervision.

**4. Negligence § 37f—**

There is no presumption or inference of negligence from the mere fact that an invitee fell to her injury while on the premises, but in order to hold the owner liable in damages the invitee must establish negligence of the owner in failing to use due care to keep the premises in a reasonably safe condition or in failing to warn the invitee of hidden perils of which the owner knew or should have known in the exercise of reasonable inspection or supervision.

**5. Same—**

Evidence tending to show that an invitee, in stepping from the bottom step of the rear exit into grass some eight to twelve inches high, stepped into a hole concealed by the grass and fell to her injury, is insufficient to overrule nonsuit in the absence of evidence that the proprietors created or permitted the dangerous condition, or knew of its existence, or the length of time the hole had existed, since liability must be predicated upon actual or constructive knowledge of the proprietors of the existence of the dangerous condition.

**6. Negligence § 24a—**

The existence of negligence must be proven by facts leading to that conclusion, or by facts from which that conclusion may be inferred as a legitimate inference, and may not be established by facts raising a mere conjecture or surmise.

MOORE, J., dissenting.

RODMAN, J., joins in the dissent.

APPEAL by plaintiff from *Campbell, J.*, 23 May 1960 Regular Schedule B Civil Term, of MECKLENBURG.

GOLDMAN *v.* KOSSOVE.

Action for damages for personal injuries resulting from plaintiff stepping into a hole and falling.

From a judgment of involuntary nonsuit entered at the close of all the evidence, she appeals.

*Warren C. Stack and William E. Graham, Jr., for plaintiff, appellant.*
*Kennedy, Covington, Lobdell & Hickman for defendants, appellees.*

PARKER, J. This is a summary of plaintiff's evidence, and of defendants' evidence favorable to her: Dr. Albert A. Kossove and Dr. Irene L. Kossove are husband and wife and physicians, who have practiced together for many years in the city of Charlotte. On 11 January 1956, and for 18 years prior thereto and subsequent thereto, they owned as tenants by the entirety a two-story house at 1530 Elizabeth Avenue in Charlotte, which was called Kossove Clinic and in which they maintained offices, etc., in their practice of medicine. There were three entrances to the Clinic, a front entrance on Elizabeth Avenue, a side entrance, and a rear entrance in the back, where there is a parking lot in which their patients are permitted to park their automobiles off the street. A driveway led from Elizabeth Avenue to the parking lot. The parking lot was covered with gravel and dirt, and there were trees, shrubs and grass around its edge.

On 11 January 1956 plaintiff parked her automobile in the parking lot for the purpose of taking her four-year-old son to be examined by Dr. Albert A. Kossove in the Clinic. A dozen times prior thereto she had parked in the parking lot, and had entered the Clinic through the rear entrance. On this occasion she and her son used the rear entrance, and in order to get to the rear entrance she had to walk through about a four-feet area of grass eight to twelve inches high. There were four steps leading up to the rear entrance, and the grass was eight to ten inches high right by the steps. The grass was thick. As she walked into the Clinic through the rear entrance, she could not see what was underneath this grass. There was no path leading from the back steps to the parking lot.

After Dr. Albert A. Kossove had examined her little boy, she, with her son, walked out of his office and started down the hall to the rear entrance. Dr. Albert A. Kossove was walking with her, and said that her son's ear was better. He said nothing about her using the rear entrance. She started down the steps at the rear entrance, and as she stepped down the last step into the grass, half of her left foot went into a hole, and she fell down twisting her ankle. She was looking as she walked down the steps, and saw no hole. It was in the day-

time after lunch, and the visibility was good. She did not know how long the hole she stepped into had been there.

The first time she went to the Kossove Clinic she entered through the front entrance, and was taken to a little examining booth near the rear entrance. As she was leaving, Dr. Kossove was there with Mrs. Jones, an employee there, and Mrs. Jones said, "you know you can use the back door to get to the parking lot," and she did so. Many times before this occasion she had entered and left the Clinic through the rear entrance. She had stepped down the steps there into the grass at least 24 times before she fell, and had never seen a hole or depression there. Dr. Albert A Kossove was present a half dozen times, when she left by the rear entrance, and had never said anything about her using it. There were no signs in the Clinic notifying patients to use the front entrance only.

This Court said in *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408: "To constitute one an invitee of the other there must be some mutuality of interest. . . . Usually the invitation will be inferred where the visit is of interest or mutual advantage to the parties."

A person entering the professional office, or the premises thereof, of a physician for professional examination or treatment by the physician is an invitee. *Johnston v. Black Co.*, Cal. App., 91 P. 2d 921; *Gilligan v. Blakesley,* 93 Colo. 370, 26 P. 2d 808; *Reynolds v. John Brod Chemical Co.*, 192 Ill., App 157.

"In order to be an invitee or a business visitor it is not necessary that the visitor should himself be on the premises for the purpose of the possessor's business but it is sufficient that he be on the premises for the convenience or necessity of one who is on the premises for such purpose." 65 C.J.S., Negligence, p. 518.

In *Fortune v. R. R.*, 150 N.C. 695, 64 S.E. 759, it was held that a wife, who had accompanied her husband to defendant's station for the purpose of seeing him off as a passenger on defendant's train, was on defendant's premises by its implied invitation, and it was bound to exercise ordinary care for her safety.

In *Hamlet v. Troxler,* 235 F. 2d 335, it was held: Woman, who, while visiting daughter-in-law in defendant's hospital, was injured when she stepped into precipitous stairway leading to basement, by following directions of defendant's nurse who had permitted her to use toilet but had sent her to wrong door, was invitee, under North Carolina and Virginia law, at time of injury.

In *Cohen v. General Hospital Soc. of Connecticut,* 113 Conn. 188, 154 A. 435, the plaintiff went to the hospital for his wife, who had been a patient. The Court held he was an invitee.

"Where an invitee . . . has been intentionally or negligently misled into a reasonable belief that a particular passageway or door is an appropriate means of ingress or egress he is entitled to the protection of an invitee . . . while using such passageway or door. The duty of keeping the premises in a safe condition extends to ways of ingress or egress which, although not the proper ways, the owner of the premises permits customers to use without taking precautions to prevent such use. . . ." 65 C.J.S., Negligence, sec. 48(b).

In the instant case plaintiff carried her four-year-old son to the defendants' Clinic to be examined by Dr. Albert A. Kossove in his office in the Clinic. Dr. Albert A. Kossove told her, after he examined her little boy, her son's ear was better. Plaintiff's evidence viewed in a manner most favorable to her is sufficient to establish that her legal status at the time of her injury was that of an invitee as to that part of the premises of defendants where she fell and was injured.

Defendants owed to their patients, and those accompanying their patients on their premises for their convenience or necessity, a positive duty to keep the entry into and the exit from their Clinic, in which defendants maintained their professional offices or which entrances and exits, or any of them, such persons reasonably believed are held open to them by defendants as a means of access to, or egress from, their Clinic, in a reasonably safe condition for the use of their patients and those accompanying their patients for their convenience or necessity, and to give such persons timely notice and warning of latent or concealed perils known to defendants and not to them, or ascertainable by defendants through reasonable inspection or supervision. Defendants are not insurers of the safety of such persons on their premises, and in the absence of negligence there is no liability. *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493; *Garner v. Greyhound Corp.,* 250 N.C. 151, 108 S.E. 2d 461; 65 C.J.S., Negligence, p. 539.

No inference of actionable negligence on defendants' part arises from the mere fact that plaintiff suffered personal injury from a fall occasioned by stepping into a hole in the grass near the last step down as she walked out of the back entrance to the Clinic. *Fanelty v. Jewelers, supra.*

There is no evidence that defendants placed or permitted the hole to be near the back entrance to their Clinic, or that they knew anything about it. Plaintiff's evidence is that she had stepped down the steps there on the grass at least 24 times before she fell, and had never seen there a hole or depression. There is no evidence as to

how long the hole had been there, or what caused it to be there. The grass near the steps at the back entrance was thick and eight to ten inches high. Plaintiff contends that the fact that grass had grown around the hole to such an extent that it obscured it is "evidence from which the jury could find the hole had existed for a sufficient period to give constructive notice to defendants of its presence." The only description we have of the hole in the record is that half of plaintiff's left foot went in it. 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. In our opinion, the fact that thick grass eight to ten inches high was right by the steps at the rear entrance of the Clinic, and that plaintiff did not see the hole in the grass when she stepped on the grass, does not permit the legitimate inference that the hole in which plaintiff stepped had existed for a sufficient period of time to give constructive notice of its existence to defendants.

Considering the evidence in the light most favorable to plaintiff, it fails to show that defendants knew anything of the hole or that the defendants could have ascertained the hole was there before plaintiff stepped in it through reasonable inspection or supervision, and the evidence here would not justify a jury in finding that defendants had not exercised reasonable, ordinary or due care to keep the entrance to the rear of their Clinic reasonably safe for the use of plaintiff. The judgment below is

Affirmed.

MOORE, J., Dissenting. The evidence, when considered in the light most favorable to plaintiff, and the inferences to be reasonably drawn therefrom are, in my opinion, sufficient to make out a case of actionable negligence.

In the majority opinion the decision is made to turn on the following conclusion: "There is no evidence that defendants placed or permitted the hole to be near the back entrance to their clinic, or that they knew anything about it. . . . There is no evidence as to how long the hole had been there, or what caused it to be there." There

is the further conclusion that there is an insufficient showing that the hole had existed for a sufficient time to give defendants constructive notice of its existence. With these conclusions I disagree.

Defendant, Dr. Albert Kossove, testified that he and his co-defendant had practiced their profession in Charlotte for 20 years and that their clinic had been in this location for 18 years and that plaintiff had been coming to the clinic about a year. He stated further: "I never sowed any grass on that lot. As far as I recollect, it was the same grass that had been growing out there or volunteered since I bought the premises about 18 years ago. . . . During that 18 years I have had the grass cut or mowed or trimmed almost every week." Plaintiff testified: "When I stepped on the last step there was grass there and I stepped into the grass and the front part of my foot went into a hole . . . . I was looking down. I saw the grassy area. . . . I did not see the hole in which I stepped. I was looking but I did not see anything. There was high grass all around the step, . . . . I would say the grass was approximately eight to twelve inches high. . . . In answer to the question what portion of my foot went into the hole, which I testified about, I am pointing from the tip up to here, which I would think is approximately four to six inches. . . . I stepped from the last step to the ground and my foot went into a hole, but I did not see it because the grass was so high. . . . the grass was high and thick and rather dense around there. I could not see anything except the grass. . . . I had been up and down those steps and stepped on the grass immediately in front of the steps at least 24 times before this happened. . . . I never had gone up and down in the same spot. I never encountered or have seen anything. . . . The hole was opposite the left third of that lower step. . . . I did not get down and examine the hole at the time I got hurt. I measured it by the amount of foot that went in the hole. . . . I testified about four inches of my foot went in a hole approximately four to six inches, from this part to this; . . . I did not measure it. I can approximate it by the amount of my foot that went in the hole and I can tell you that it went all the way from the tip here, which would make a whole shoe, went in. I do know approximately how wide it was, because my entire shoe went in the hole part, my foot went in the hole, . . . It might have been deeper than four to six inches deep. It was as wide as my foot. Whether it was any wider than that I don't know."

Upon a motion to nonsuit, evidence should be taken in its natural and ordinary sense. It is certainly true that plaintiff's case may not rest on mere conjecture. By the same token the court should not

indulge in speculation in behalf of defendants. The evidence does not describe a freshly dug hole. It describes a hole larger than a woman's foot and 4 to 6 inches deep, overgrown and obscured by grass 8 to 12 inches tall. Grass does not grow in or around such a hole so as to obscure it in a brief period of time. The inference is inescapable that the hole had existed for a considerable period of time and defendants or their servants, who mowed and trimmed the grass, in the exercise of ordinary care could and should have discovered it.

The defendants had the duty to discover the hidden danger and warn their patients and other invitees of its presence and peril. It is negligence to fail to know what it is one's duty to know.

I vote to reverse.

RODMAN, J., joins in dissenting opinion.

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MYRBLE ROBERTSON, ADMINISTRATRIX OF NOAH ROBERTSON; AND MYRBLE LOVING ROBERTSON v. CLETUS FRANKLIN ROBERTSON AND THURMAN SPEASE ROBERTSON, HEIRS AT LAW.

(Filed 23 November, 1960.)

**1. Executors and Administrators § 16—**

While the authority of the court to order a sale of lands of a decedent to make assets is limited to the property owned by decedent, and the court may not order property owned by his heirs to be sold, the purchaser at the sale is entitled to a writ of assistance against the heirs as to all property purchased at the sale which is liable for the debts of the deceased.

**2. Same—**

Deed pursuant to a sale to make assets is subject to the same rules in ascertaining the boundaries of the land conveyed as though the instrument were a voluntary conveyance by the heirs, and what are the boundaries is to be determined as a matter of law by the court in conformity with the description set out in the deed to the purchaser, while the location of such boundaries on the ground is a question of fact for the jury.

**3. Same—**

In ascertaining the boundaries in accordance with the description set out in the deed to the purchaser at a sale of lands of decedent to make assets, it is proper for the court to consider the situation of the parties and all pertinent descriptive matter in order to ascertain the intent of the parties.

ROBERTSON *v.* ROBERTSON.

**4. Same—**

Where the petition for sale of realty to make assets describes the land by metes and bounds, excepting therefrom certain land theretofore sold by the decedent, with further averment to the effect that the land included in the description comprised a house, lot and outbuildings owned by decedent, and the heirs file answer admitting that the decedent was the owner of the real property described in the petition, the heirs are estopped by their admissions, supplemented by the order of sale and deed to the purchaser containing a description in conformity with that set out in the petition, and none of them may assert that the house and lot had theretofore been conveyed to one of them.

APPEAL by George W. Braddy from *Sharp, S. J.*, June 20, 1960 Term, of FORSYTH.

In May 1953 Myrble Robertson, individually and as administratrix of the estate of her deceased husband N. L. Robertson, instituted a proceeding against defendants, his children and heirs at law, pursuant to the provisions of G.S. 28-81 to make assets for the payment of debts. Section 7 of the petition alleged deceased owned at his death land described as: "Beginning at an iron stake on the east side of a Road now Norman Road, at a point 914 feet from Mt. Tabor Road, and on the east side of said Road, and being the South-west corner of Rupert Ring, and then running thence East along Rupert Ring's line 267 feet to an iron stake in the line of C. F. Shields property, thence south along Shields' line 306 feet to an iron in line of Shields' property, thence west along Shields' line 297 feet to a stake on the side of Road, thence north along the east side of the road 306 feet to the place of beginning, being the properties conveyed by O. L. Shields and wife to N. L. Robertson and wife Lenora M. Robertson by deeds recorded in D. B. 200, page 55, and by Quit claim deed recorded in D. B. 324, page 310, office of Register of Deeds of Forsyth County, and referred to for a full and complete description; Excepting a deed by N. L. Robertson and wife Lenora M. Robertson, to Cletus F. Robertson and wife, Flossie S. Robertson, D. B. 551, page 132, and D. D. Shields from N. L. Robertson and wife to D. D. Shields recorded in D. B. 567, p. 114, Office of Register of Deeds of Forsyth County, these deeds being excepted from the above described property."

Section 7 further alleges: "That it is necessary to sell said real property to create assets to finish settling said estate; and that said premises consist of a house and lot that it is not reasonably possible to set aside said dower in said premises. . .the widow is not able to make her home in just a portion of the premises, and during the past several months she has been required to live elsewhere.

"The property left consists of a 5-room house and lot and outbuildings."

Petitioner asked for the allotment of the cash value of her dower from the proceeds of sale.

Defendants, answering the petition, said: "That the allegations of paragraph VII of the petition are denied, except that it is admitted that the deceased was the owner of the real property described in the petition. It is further admitted that the widow is entitled to her dower in said real property.

To avoid a sale they aver in their further answer they had "advised the Petitioner, her counsel, and the Clerk of Court that they, the respondents, would pay any and all just debts presented against the said estate in order that the family home would not have to be sold to create assets."

On 22 February 1954 the assistant clerk of the Superior Court of Forsyth County, finding that sufficient time had been allowed defendants to provide funds to pay the debts and their failure to do so, ordered a sale of the property, reciting in the order that the widow was entitled to dower "in said premises, same being house and lot left by the deceased."

Pursuant to this order the administratrix sold the property to S. I. Craft for $2438.75 in May 1955. The sale was confirmed 9 June 1955 with direction that a deed be made. On 11 June 1955 the administratrix, reciting that she was acting pursuant to the order so entered, executed a deed to Craft, the purchaser, for property described as: "Same being the homeplace of Noah Leon Robertson dec. at time of his death; and lying and being in Forsyth County, N. C., on Norman Road. . . ," following which is a description by metes and bounds in substantial conformity with those set out in the petition, followed by an exception of the properties theretofore sold as recited in the petition.

On 7 July 1955 the assistant clerk of the Superior Court of Forsyth County, on motion of petitioner Myrble Robertson, and S. I. Craft, the purchaser, issued a writ of possession requiring defendant Thurman Spease Robertson to vacate and surrender possession to the purchaser. This writ was served on defendant Thurman Spease Robertson on the day it was issued. The record does not disclose any further action in the proceeding until February 1957 at which time S. I. Craft, purchaser at the judicial sale, filed a petition for a writ of possession requiring defendant Thurman Spease Robertson to surrender possession to him or his assignee George W. Braddy. Defendant Thurman Spease Robertson, answering the petition for the writ, denied

all of the allegations and for further answer thereto said: "That this respondent is occupying the house and portion of the lot which was specifically conveyed to his brother, CLETUS FRANKLIN ROBERTSON, by his father and mother by deed of conveyance recorded in the Office of the Register of Deeds of Forsyth County, in Deed Book 551, Page 132; that the said description contained in said deed specifically conveyed to the said CLETUS FRANKLIN ROBERTSON the house and a substantial portion of the lot which this petition seeks to dispossess this respondent from; that the notice of sale and the confirmation specifically excluded the portion of the lot on which the house was situated by the terms of the notice and the order of sale."

The clerk heard the parties. He found the purchaser was the owner of part of the property claimed by him. There is no building on that portion. He directed that a writ issue putting the petitioner Braddy in possession of that property. Petitioners Craft and Braddy excepted to the order so entered and appealed. The purchaser and his assignee appeared before Judge Armstrong in support of their motion for the writ. The defendants, Cletus Franklin Robertson and Thurman Spease Robertson, appeared and resisted the issuance of the writ. The court, after hearing the parties, entered an order remanding the cause "to the Clerk of the Superior Court for determination of all questions of fact and law, and for the issuance of a writ of possession, as by law provided." He directed a survey of the properties. On 4 April 1960, the clerk, after hearing the parties, found: ". . . that that portion of the land on which is situated a dwelling house is actually on the land that was deeded to Cletus Franklin Robertson and wife, Flossie S. Robertson by deed from N. L. Robertson and wife, Lenora May Robertson."

"That the Court has attached to and made a part of this order a map prepared by Otis A. Jones, a Registered Surveyor, said map being marked EXHIBIT A and that the Court has numbered the tracts shown on said map being marked Exhibit A; said tracts being numbered 1 through 5."

"That from admissions made to the Court and from evidence offered the undersigned Clerk, N. L. Robertson, at the time of his death and for sometime prior thereto occupied a dwelling house as shown on Tract No. 4 on the map attached hereto and made a part hereof."

Based on his findings he concluded that a writ of possession should issue giving the purchaser or his assignee the possession of lot no. 3. Lots 1 and 2 are the excepted portions sold to Shields. No question is raised as to those lots. Braddy, as assignee of the purchaser, ex-

cepted and appealed to the Superior Court. Judge Sharp affirmed the order of the clerk. Petitioner Braddy excepted and appealed.

*George W. Braddy for appellant.*
*No counsel contra.*

RODMAN, J. The purchaser at the sale made pursuant to the court's order was entitled as against defendants to a writ of possession for the property adjudged liable for the debts of decedent. *Alexander v. Thompson,* 211 N.C. 124, 189 S.E. 117; *Warehouse Co. v. Willis,* 197 N.C. 476, 149 S.E. 679; *Bank v. Leverette,* 187 N.C. 743, 123 S.E. 68; *Lee v. Thornton,* 176 N.C. 208, 97 S.E. 23; *Terrell v. Allison,* 21 Wall. 289, 22 L. ed. 634.

The court's authority to order a sale was limited to the property owned by decedent. It could not direct a sale of property owned by his heirs. Defendants cannot now be heard to say they owned and their father did not own the property ordered sold. The decree based on the judicial admissions made by defendants is *res judicata. Humphrey v. Faison,* 247 N.C. 127, 100 S.E. 2d 524; *Franklin County v. Jones,* 245 N.C. 272, 95 S.E. 2d 863; *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909; *McMillan v. Teachey,* 167 N.C. 88, 83 S.E. 175.

The order of sale was based on the administratrix's allegation of ownership and defendants' admissions. We must interpret these allegations and admissions which resulted in the sale and deed to petitioner as a voluntary conveyance by defendants. What are the rules applicable to determine properties so conveyed? It is well settled that the court must determine as a matter of law what property is conveyed and the boundaries thereof in conformity with the description set out in the instrument conveying title. Where they are located on the ground is a question of fact. *Batson v. Bell,* 249 N.C. 718, 107 S.E. 2d 562; *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603.

The court is charged with ascertaining the intent of the parties. *Lee v. McDonald,* 230 N.C. 517, 53 S.E. 2d 845; *Sugg v. Greenville,* 169 N.C. 606, 86 S.E. 695. To ascertain intent it is proper to look at the situation of the parties. *Reed v. Elmore,* 246 N.C. 221, 98 S.E. 2d 360. All descriptive matter should be considered. *Tice v. Winchester,* 225 N.C. 673, 36 S.E. 2d 257; *Realty Corp. v. Fisher,* 216 N.C. 197, 4 S.E. 2d 518.

The land claimed by petitioner admittedly lies inside the courses and distances set out in the pleadings and order of sale. Administratrix did not claim ownership of all of the lands within those boundaries.

Hence in praying for a sale, she excepted the parts which decedent had conveyed. On these allegations the burden rested on defendants to show the location of the property excepted. *Paper Co. v. Cedar Works,* 239 N.C. 627, 80 S.E. 2d 665; *Batts v. Batts,* 128 N.C. 21. Plaintiff alleged: "The property left consists of a 5-room house and lot and outbuildings." Defendants admitted their ancestor owned the property described and supplemented the administratrix's description by referring to the property proposed to be sold as "the family home."

Had the petition to sell merely described the land to be sold as the lot and dwelling occupied by N. L. Robertson at the time of his death, that description would have sufficed to identify the property. *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Gilbert v. Wright,* 195 N.C. 165 141 S.E. 577; *Carson v. Ray,* 52 N.C. 609. That in substance is what is alleged. It cannot be doubted that the defendants so understood. Any other construction would be at variance with the admissions appearing in their answer.

The pleadings, supplemented by the order of sale, now estop defendants from asserting that the dwelling was not a part of the property sold because actually within the boundaries of the deed to Cletus Robertson, recorded in D. B. 551, p. 132. The clerk erred in refusing to so hold. This was the legal question which Judge Armstrong directed the clerk to pass on. On petitioner's appeal from the clerk's ruling he was entitled to have the erroneous conclusion reversed. There was error in failing to do so.

Apparently no attempt has been made to establish the location of the boundaries of the lot occupied by N. L. Robertson as his family home. The cause is remanded for this factual determination. When the boundaries have been located upon such evidence as either party may desire to offer, the court may, if necessary, issue its writ of possession to put petitioner in possession of the property so located.

Reversed.

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E. M. HUNT v. SAM JONES CRANFORD.

(Filed 23 November, 1960.)

**1. Judgments § 28: Pleadings § 24—**

In an action involving liabilities arising out of an automobile accident, the defendant is entitled as a matter of right to amend his plead-

ings to allege a prior judgment in favor of a third party, adjudicating that the negligence of both parties to the pending action concurred in proximately causing the injury and damage to such third party resulting from the same accident, the plea of *res judicata* being asserted at the first opportunity after the prior judgment had been rendered.

**2. Automobiles §§ 42g, 46—**

Where, in support of defendant's plea of contributory negligence, there is evidence tending to show that plaintiff was traveling at excessive speed along the dominant highway in approaching the intersection at which he collided with defendant's vehicle, which was traveling on the servient highway, it is error for the court to fail to instruct the jury as to the effect of such excessive speed in charging upon the issue of contributory negligence.

MOORE, J., concurring in result.

PARKER and BOBBITT, JJ., concurring in part and dissenting in part.

APPEAL by defendant from *Sink, E. J.*, July, 1960 Civil Term, DAVIDSON Superior Court.

This civil action was instituted on January 26, 1960, to recover $2,100 property damage alleged to have been caused by the negligent acts of the defendant in that in the operation of his motor vehicle, (1) he failed to maintain a proper lookout for vehicles being operated on a dominant highway before entering; (2) failed to yield the right of way to plaintiff's vehicle as required by G.S. 20-158; (3) operated his motor vehicle upon the highway carelessly and heedlessly, and in wilful and wanton disregard of the rights and safety of others, contrary to provisions of G.S. 20-140.

The defendant, by answer, denied negligence on his part, pleaded in bar the contributory negligence of the plaintiff in that by his agent he operated his three-quarter-ton Ford truck at a speed of more than 65 miles per hour and, that by such negligent speed and failure otherwise to exercise due care, caused the accident and defendant's damage in the sum of $265. The action and counterclaim are for property damage only. Personal injury is not involved.

After this action was instituted and the pleadings filed, the defendant made a motion to amend his answer by adding thereto a plea in bar by judgment entered in another action involving injuries received as the result of this same accident. The defendant attached to his proposed amendment a copy of the judgment roll in the case of *E. L. Summey v. E. M. Hunt*, present plaintiff; Moody Dwight Gallimore, Hunt's driver; James Robert Clark; and Sam Jones Cranford, present defendant. That action was instituted March 15, 1960, in the Superior Court of Davidson County. The complaint alleged that the

plaintiff Summey was injured and his vehicle damaged by the concurrent negligent acts of all the defendants. Hunt and Clark filed a joint answer. The other two defendants filed separate answers. The cause was tried on June 15, 1960, in the Superior Court of Davidson County. The jury found issues of negligence against each of the four defendants and assessed Summey's damages at $5,500. From the judgment on the verdict there was no appeal.

The defendant in the present action contended the verdict and judgment in the Summey case constituted a bar to the plaintiff's right to recover in this action and that the court committed error in entering the following order on his motion to amend:

> "This cause coming on to be heard at the July 1960 Civil Term of the Superior Court of Davidson County, before his Honor H. Hoyle Sink, Judge Presiding, upon motion of the defendant to amend his answer as set out in his motion, and counsel for both parties having been given an opportunity to be heard, and briefs having been filed with the Court: IT IS NOW, THEREFORE, ORDERED that the motion of the defendant to amend his answer is hereby denied."

Defendant excepted and following this exception entered an exception "to the refusal of the court to hold that the above judgment (*Summey v. Hunt, et al.*) was *res 'adjudicata'* and *on* bar to plaintiff's action."

The pleadings in the *Summey* case and the evidence in the case now before us tended to show the Hunt truck, driven by Gallimore, struck the Plymouth driven by Cranford, then veered out of control into the path of the Summey Chevrolet, causing Summey's injury and property damage.

In the case now before us the court submitted the issues both as to plaintiff's claim and defendant's counterclaim. The jury found the defendant was negligent and the plaintiff was not contributorily negligent, and assessed plaintiff's damages at $1,900. From the judgment on the verdict, defendant appealed.

*Deal, Hutchins and Minor, By: Roy L. Deal, for defendant, appellant.*

*Cooke and Cooke, Charles W. Mauze for plaintiff, appellee.*

HIGGINS, J. Two questions are decisive of this appeal. First, did the court commit error in denying the defendant's motion to amend the answer by setting up the judgment in the *Summey* case? Second,

did the court commit prejudicial error in failing to charge the effect of plaintiff's excessive speed, or lack of it, on the issue of plaintiff's contributory negligence?

As to the first question, did the court act as a matter of discretion (not reviewable) or as a matter of legal right (reviewable) in denying the defendant's motion to amend the answer by setting up *res judicata* in bar of plaintiff's right to recover? The order makes no reference to the exercise of discretion. *Likas v. Lackey*, 186 N.C. 398, 119 S.E. 763; *Muse v. Muse*, 234 N.C. 205, 66 S.E. 2d 689; *Abernethy v. Yount*, 138 N.C. 337, 50 S.E. 696. In view of the lack of unanimity among the members of this Court in these decisions, we prefer to decide the question on grounds other than the failure of Judge Sink to state in his order whether he was acting in his discretion or as a matter of legal right. No doubt the failure to state he was acting in his discretion is entitled to some weight. The facts in this particular instance (each case should stand or fall on its own facts) disclosed that arguments and briefs were presented on the written motion to amend, to which was attached the judgment roll in the *Summey* case. Immediately following the entry of the order denying the amendment, the defendant filed exceptions on the ground the court failed to hold, as a matter of law, the present action is barred by the verdict and the judgment in *Summey v. Hunt, et al.* We attach some importance to the fact the plaintiff does not even argue that the court acted in its discretion, but does argue the doctrine of *res judicata* as applied in *Pack v. McCoy*, 251 N.C. 590, 112 S.E. 2d 118; *Lumberton Coach Co. v. Stone*, 235 N.C. 619, 70 S.E. 2d 673; and *Stone v. Coach Co.*, 238 N.C. 662, 78 S.E. 2d 605, is not applicable to the facts in this case for the reason that here four vehicles were involved, and after the initial collision between the Hunt and Cranford vehicles, the Hunt vehicle continued for some distance and a second collision took place between it and the Summey Chevrolet.

It must be remembered that Summey charged each of the defendants with negligent acts which caused the Hunt truck to be deflected into his lane of traffic. In short, he alleged his damage resulted from the combined negligent acts of all defendants. The verdict returned and the judgment rendered after full hearing support Summey's allegations.

We express no opinion on the validity of the defendant's plea of *res judicata*. Enough appears, however, to show the defendant was entitled to set it up. This he did at his first opportunity. This action was instituted and the original pleadings filed before the Summey

action was begun. Though subsequently brought, the *Summey* case was first tried.

The plaintiff argues Hunt's liability to Summey may have arisen by some negligent act or omission on Hunt's part after his truck collided with Cranford's Plymouth. On the other hand, the defendant contends that Summey charged all defendants with concurrent acts of negligence and that Hunt's truck was out of control as a result of the first collision, and no intervening act contributed to Summey's injury. See *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331.

As stated in the *Pack* case, our decisions go no further than to hold a finding and judgment against two or more defendants charged with joint and concurrent negligence establish their negligence and may be pleaded in bar by one defendant against another in a subsequent action between them based on the negligent acts at issue in the first cause. Such is the view of the majority of the members of this Court. However, there is persuasive authority in other jurisdictions to the effect that a judgment against two or more defendants does not determine their rights among themselves, unless their respective rights are placed in issue by cross or adversary pleadings. We do not wish to extend the scope of the *Pack* and *Lumberton Coach Company* cases. However, the defendant's showing is sufficient to entitle him as a matter of right to amend his pleadings by setting up the Summey judgment as a plea in bar. Whether he can establish the plea as properly applicable in this case must await the further hearing.

We now deal with the second question. The defendant pleaded as contributory negligence on the part of the plaintiff his speed of 65 miles per hour at the time of the accident. One witness testified in his opinion the speed of the truck was "anywhere from 60 to 65 miles per hour, probably more." Another witness testified that the speed of the truck was 65 miles per hour or more. The allegation and the evidence offered required the court to charge the jury as to the effect of excessive speed on the issue of plaintiff's contributory negligence. This the court failed to do. The failure was prejudicial error. *Primm v. King*, 249 N.C. 228, 106 S.E. 2d 223; *Kolman v. Silbert*, 219 N.C. 134, 12 S.E. 2d 915; *Spencer v. Brown*, 214 N.C. 114, 198 S.E. 2d 630.

This case is remanded to the Superior Court of Davidson County with direction that the defendant's motion to amend his answer be allowed, and that there be a

New trial.

MOORE, J., Concurring in result. It is agreed that the failure of "the Court to charge the jury as to the effect of excessive speed on

the issue of plaintiff's contributory negligence" is prejudicial and entitles defendant to a new trial.

But it seems to me that the court was correct, as a matter of law, in denying defendant's motion to be permitted to plead the judgment in the *Summey* case as *res judicata* of the instant case. It is true that the judgment in the *Summey* case has judicially established that Hunt and Cranford were concurrently negligent with respect to the collision between Hunt's pickup and Summey's vehicle, and that the negligence of each was a proximate cause of the Hunt-Summey collision. But it does not necessarily follow that their negligence concurred with respect to the Hunt-Cranford collision, or that the negligence of either was a proximate cause of the Hunt-Cranford collision. The two collisions were distinct. The alleged speed of the Hunt vehicle might well have been a proximate cause of Summey's damage and not a proximate cause of the Hunt-Cranford collision. Summey's allegations of negligence against Hunt included all of Cranford's allegations of contributory negligence against Hunt, and in addition the allegation of failure to yield one-half of the highway width. This last allegation might well have been the basis of the jury's finding of actionable negligence on the part of Hunt.

In the majority opinion it is said: "We do not wish to extend the scope of the *Park* and *Lumberton Coach Company* cases. However, the defendant's showing is sufficient to entitle him as a matter of right to amend his pleading by setting up the Summey judgment as a plea in bar. Whether he can establish the plea as properly applicable in this case must await the further hearing."

The pleadings and issues in both cases and the judgment in the *Summey* case are before us. What, in the further hearing, would render the plea applicable so as to bar the action? If anything, it would of necessity be the evidence. If it developed from the evidence that plaintiff was contributorily negligent as a matter of law or by reason of the jury's verdict, this would bar recovery by plaintiff in any event and the plea of *res judicata* would be needless surplusage.

PARKER and BOBBITT, JJ., concurring in part and dissenting in part. We concur in the award of a new trial for error in the charge but are of the opinion that, for reasons set forth in the dissenting opinion in *Pack v. McCoy*, 251 N.C. 590, 593, 112 S.E. 2d 118, the court properly denied defendant's motion for leave to plead the judgment in the *Summey* case as *res judicata*.

HOLLIS CARSWELL v. VESTER I. LACKEY.

(Filed 23 November, 1960.)

**1. Automobiles § 15—**

Failure of a motorist to stay on his right side of the highway and yield one-half the highway to an approaching vehicle is negligence *per se*. G.S. 20-148.

**2. Automobiles § 6—**

A violation of G.S. 20-140 is negligence *per se*.

**3. Automobiles § 42a—**

Nonsuit on the ground that plaintiff's own evidence disclosed that defendant's vehicle, although partly to the left of the center of the highway, was stationary, and that plaintiff's vehicle, approaching from the opposite direction, collided with it after leaving skid marks for some 261 feet, does not justify nonsuit when other portions of plaintiff's evidence are in conflict therewith and do not show that defendant even came to a complete stop prior to the collision.

**4. Negligence § 26—**

Nonsuit for contributory negligence may not be allowed if it is necessary to rely in whole or in part on defendant's evidence to sustain the plea.

**5. Automobiles § 42a—**

The failure of plaintiff to avoid colliding with defendant's vehicle, which was only partly over the center of the highway in plaintiff's lane of traffic, by driving onto the shoulders of the road, which were some 13 or 14 feet wide at the scene, cannot justify nonsuit on the ground of contributory negligence when plaintiff's evidence further tends to show that the shoulders of the road were dangerous because the highway had been resurfaced and the shoulders had not been built up to it, and that there was a ditch and creek running parallel with the road, since plaintiff's evidence does not disclose contributory negligence in this regard so clearly that no other conclusion can be reasonably drawn therefrom.

**6. Trial § 22c—**

Contradictions and discrepancies, even in plaintiff's evidence, are for the jury to resolve and do not justify nonsuit.

**7. Trial § 31b—**

It is error for the court to charge on an abstract principle of law not supported by any evidence in the case, or to charge upon an aspect of the law which is not supported by allegation.

**8. Pleadings § 28—**

Plaintiff must succeed, if at all, upon the case set up in his complaint.

**9. Automobiles § 46—**

Where plaintiff offers no evidence as to the speed of defendant's

vehicle and does not allege that defendant failed to keep a proper lookout, it is error for the court to charge the jury on either of these aspects of the law.

APPEAL by defendant from *Nettles, Emergency Judge,* Regular March 1960 Term, of BURKE.

Civil action to recover damages for personal injuries and damage to an automobile sustained in a head-on collision between an automobile driven by plaintiff and an automobile driven by defendant.

Defendant in his answer denies that he was negligent, pleads contributory negligence of plaintiff, and pleads a counterclaim against plaintiff in which he alleges that he was injured and his automobile damaged by the negligence of plaintiff.

Plaintiff filed a reply in which he denies the allegations set forth in defendant's counterclaim, and pleads contributory negligence of defendant.

The jury found by its verdict that plaintiff was injured and his automobile damaged by the negligence of defendant as alleged in his complaint, that he was free from contributory negligence, as alleged in defendant's answer, and awarded damages to plaintiff for personal injuries and for damages to his automobile. The issues submitted to the jury under defendant's counterclaim and under his evidence were not answered by the jury. No issue as to the alleged contributory negligence of defendant was submitted.

From a judgment in accord with the verdict, defendant appeals.

*Byrd & Byrd for plaintiff, appellee.*
*Williams, Williams & Morris for defendant, appellant.*

PARKER, J. Plaintiff and defendant offered evidence. Defendant assigns as error the denial of his motion for judgment of involuntary nonsuit made at the close of all the evidence.

Plaintiff's evidence tends to show the following facts:

About 3:30 p.m. on 1 November 1958 plaintiff was driving a new 1959 Ford automobile in a southern direction on his right side of N. C. Highway No. 18 about seven or eight or nine miles south of Morganton at a speed of 45 or 50 miles an hour. At the same time defendant was driving a 1951 Ford automobile in a northern direction on the same highway. The highway is asphalt paved and 22 feet wide, and, according to the testimony of a State Highway Patrolman, a witness for plaintiff, at the time it had a white line indicating the center of the highway. According to plaintiff's testimony,

the highway had no center line at the time. The highway was being resurfaced, and had warning signs that it was being repaired and the shoulders were dangerous. The asphalt had been poured, and the shoulders had not been built up to it. There was a drizzle or rain, and the road was wet.

A head-on collision of the two automobiles occurred on a little curve, a long, leaning curve. A side road, a private drive, leads off from the west side of the highway at the scene of the collision. Looking north from the scene of the collision the highway is real straight, and there is an unobstructed view of about a quarter of a mile. Looking south from the scene of the collision one can see 150 to 200 yards. At the time of the collision no other motor vehicles were in sight on the highway. At and near the scene of the collision the shoulder was 13 or 14 feet wide, and beyond the shoulder there is a ditch, and a creek running parallel with the road.

Plaintiff testified on direct examination: "I was operating my car south on the right hand side. At the time of this wreck my car was still in the south or right hand lane going south. I saw the 1951 Ford being driven by Mr. Lackey. . . . Well, he was meeting us, and I saw him a good ways from where we was at and as he drew closer to me, why, he come over towards the center of the road and as he . . . I had touched my brakes and he never did act like he was going to get back on his side of the road. . . . I laid off the brakes and when I hit them again he was coming on our side of the road. He completely had the road blocked there. I guess I was hurt; I was knocked out." On cross-examination plaintiff said he didn't know how far he was from defendant's automobile when he first saw it. On cross-examination he said: "I didn't say whether Mr. Lackey brought his car to a stop before the collision occurred. Well, as we was approaching him he was starting towards outside of the road and I touched my brakes and let off of them and by that time he started in again and I mashed by brakes plumb down and he had the road blocked on my side, and when we hit that's all I remember. I couldn't say whether I was stopped or moving at the time I hit him. I don't know, but I do say he had the road blocked. He was coming in at an angle."

Jessie L. Greene was riding as a passenger in the front seat of plaintiff's automobile. He testified on direct examination: ". . . I saw the car, and as we neared it — the 1951 Ford — it seemed to . . . Well, as we got nearer, it came toward the center of the road into our lane and he must have saw us. He stopped. When he stopped, he was . . . his left front wheel I'd say was 3 feet from the

right hand edge of the road travelling south. It's a wide road; he was sitting at an angle. . . . When I first saw the Lackey car, it was down the road. I don't know how far. . . . I didn't see the defendant Lackey give any hand signal." On cross-examination he said he was about 800 yards from defendant's automobile the first time he saw it. He said on cross-examination: "It is hard to say how far Mr. Carswell's Ford was from him at the time he came to a stop. I'd say we were 100 yards from the 1951 Ford when it came to a stop. After it came to a stop, it never moved after that until the collision occurred."

A State Highway Patrolman, a witness for plaintiff, arrived at the scene shortly after the collision. When he arrived, defendant's automobile was in the left lane travelling south, and plaintiff's automobile was off on the shoulder going south. There was debris in the center of the road, and there was a quantity of it in the right lane headed south — more so than in the left lane. In the right lane going south he saw skid marks 261 feet long, which stopped 10 or 12 feet before they reached the debris. There was a break of six or seven feet in the skid marks, and these marks veered to the center of the road where debris was found. The sole damage to the two automobiles was on their left fronts.

Defendant's evidence tends to show as follows: He was on his side of the road. He saw plaintiff's automobile coming toward him zigzagging and with his tires squalling. He brought his automobile to a complete stop, giving a left turn signal before he stopped. Plaintiff's automobile crashed into him on his side of the road, and knocked his automobile back 33 feet.

Defendant contends in his brief that the chief reason why his motion for judgment of involuntary nonsuit should be sustained is that plaintiff's evidence shows that defendant came to a complete stop from which he did not move, when plaintiff was 100 or 300 feet away, and with no other traffic on the highway and a 13 or 14-feet shoulder on plaintiff's right, plaintiff skidded more than 261 feet into defendant's automobile.

It is true, plaintiff's witness Greene testified on cross-examination defendant brought his automobile to a complete stop before the collision. But plaintiff testified on direct-examination: "I laid off the brakes and when I hit them again he was coming on our side of the road." And plaintiff testified on cross-examination: "I didn't say whether Mr. Lackey brought his car to a stop before the collision occurred. Well, as we was approaching him he was starting towards outside of the road and I touched my brakes and let off of them and

by that time he started in again and I mashed my brakes plumb down and he had the road blocked on my side, and when we hit that's all I remember." Considering plaintiff's evidence in the manner most favorable to him, it does not show unequivocally that defendant brought his automobile to a complete stop before the collision when plaintiff was 100 or 300 feet away, or that he brought it to a complete stop before the collision.

Plaintiff avers in his complaint that defendant was negligent (1) in operating his automobile in that he did not give to plaintiff's automobile meeting him at least one-half of the main travelled portion of the roadway as nearly as possible in violation of G.S. 20-148, (2) in driving his automobile at an unlawful and negligent rate of speed, and turning his automobile on to plaintiff's right hand side of the road, when he knew, or should have known, that his actions would cause a violent collision between his and plaintiff's automobiles, and (3) in driving his automobile "carelessly, heedlessly in wilful or wanton diregard of the rights and safety of others, and without due caution and circumspection, and in a manner so as to seriously endanger the lives and property of others using the said public highway, and particularly the life and property of the plaintiff, when he failed to yield the right of way to the plaintiff and drove his said car over into the plaintiff's right hand lane of traffic in direct violation of G.S. 20-140," and that such negligence proximately caused plaintiff's injuries and damage to his automobile.

A violation of G.S. 20-148 is negligence *per se. Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1. A violation of G.S. 20-140 is negligence *per se. Crotts v. Overnite Transportation Co.,* 246 N.C. 420, 98 S.E. 2d 502. Ordinarily, proximate cause is for the jury. *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730.

Plaintiff has presented plenary evidence tending to show defendant's negligence in support of the allegations in his complaint, with the exception that plaintiff has offered no evidence tending to show that defendant was driving his automobile at an unlawful or negligent rate of speed, or at a rate of speed so as to endanger or be likely to endanger any person or property on the highway.

The Court cannot allow a motion for judgment of involuntary nonsuit on the ground of contributory negligence on the part of the plaintiff in actions for personal injury, if it is necessary to rely either in whole or in part on defendant's evidence to sustain the plea of contributory negligence. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

This Court said in *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360; "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."

"Only when plaintiff proves himself out of court is he to be nonsuited on the evidence of contributory negligence." *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601.

The highway on which plaintiff and defendant were travelling was being resurfaced, and the shoulders were dangerous by reason of the fact that the asphalt had been poured, and the shoulders had not been built up to it. At and near the scene of the collision the shoulder is 13 or 14 feet wide, and beyond the shoulder there is a ditch, and a creek running parallel with the road. In our opinion, a study of plaintiff's evidence does not establish facts necessary to show contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom. Such being the case, a judgment of involuntary nonsuit on the ground of contributory negligence would have been improper. *Bondurant v. Mastin*, 252 N.C. 190, 113 S.E. 2d 292.

"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 trial court was correct in denying defendant's motion for judgment of involuntary nonsuit made at the close of all the evidence.

The first issue reads: "Was the plaintiff, Hollis Carswell, injured and his property damaged by the negligence of the defendant, as alleged in the complaint?" In respect to this issue the trial court charged in part: "Or if you find from the evidence and by its greater weight, the burden being upon the plaintiff to so establish, that the defendant at the time and place in question was operating his automobile without due care and circumspection or at a speed or in a manner so as to endanger or be likely to endanger the person or property of another; or if you find that he failed to keep a proper lookout; or that he failed to keep his car under proper control — and so find from the evidence and by its greater weight, the burden being on the plaintiff to so establish, and that the violation of any

one of these acts, or all of them, was the proximate cause, or a proximate cause of the injury and damage to the person and property of the plaintiff — if you so find from the evidence and by its greater weight, the burden being upon the plaintiff to so establish, the court charges you it would be your duty to answer the first issue Yes."

Defendant assigns this part of the charge as error on the grounds (1) that plaintiff has offered no evidence tending to show that defendant was operating his automobile at a speed so as to endanger or be likely to endanger the person or property of another, and (2) that plaintiff did not allege defendant's failure to keep a proper lookout.

Plaintiff's evidence does not tend to show that defendant was operating his automobile at a speed so as to endanger or be likely to endanger the person or property of another or that he was operating it at an unlawful or negligent rate of speed, and plaintiff has not alleged in his complaint or reply that defendant failed to keep a proper lookout.

G.S. 1-180 declares that the judge in giving a charge to the petit jury "shall declare and explain the law arising on the evidence given in the case." The headnote of *Farrow v. White,* 212 N.C. 376, 193 S.E. 386, in our Reports reads: "Where there is no allegation or evidence that defendant driver failed to give a warning signal required of him by the statute under the circumstances, it is error for the court to charge the law requiring the giving of such signal, since the court is required to charge the law arising upon the evidence, C.S., 564."

This Court said in *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560: "The court committed error in charging with respect to the defendant's operation of his car at a reckless rate of speed. Her objection seems to be valid. The complaint does not allege and the evidence does not show speed. It is error to charge on an abstract principle of law not supported by any view of the evidence."

If the plaintiff is to succeed at all, he must do so on the case set up in his complaint. *Sale v. Highway Com.,* 238 N.C. 599, 78 S.E. 2d 724.

In charging on the first issue that if the jury found from the evidence and by its greater weight, the burden of proof being on the plaintiff, "that the defendant at the time and place in question was operating his automobile . . . or at a speed . . . so as to endanger or be likely to endanger the person or property of another; or if you find that he failed to keep a proper lookout . . . , and that

the violation of any one of these acts, or all of them, was the proximate cause, or a proximate cause of the injury and damage to the person and property of the plaintiff . . . , the court charges you it would be your duty to answer the first issue Yes," the trial court committed prejudicial error, which entitles defendant to a new trial, and it is so ordered.

New trial.

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JAMES L. VICKERS v. C. R. RUSSELL AND T. L. McDANIEL.

(Filed 23 November, 1960.)

**1. Pleadings § 28—**

Plaintiff's proof must conform to his allegations, since proof without allegation is ineffectual.

**2. Automobiles § 41a—**

Plaintiff passenger's allegations were to the effect that his injuries resulted from a collision occurring when one defendant turned left to enter an intersecting street and collided with the car in which plaintiff was riding, and which was driven by the other defendant, as this defendant was attempting to pass at the intersection. Plaintiff's evidence tended to show that the car in which he was riding stopped suddenly and that the collision occurred when the other car, which had started to turn left and had stopped, rolled backward down a steep grade and struck the car in which plaintiff was riding. *Held:* Nonsuit for variance was proper.

**3. Trial § 23f—**

Where there is a material variance between plaintiff's allegations and proof, nonsuit is proper.

APPEAL by plaintiff from *Johnston, J.*, April Term, 1960, of DAVIDSON.

Personal injury action instituted March 28, 1959, growing out of a collision in Thomasville, N. C., on June 16, 1958, about 5:30 p.m., between a 1946 Chevrolet owned and operated by defendant McDaniel and a 1951 Chevrolet owned and operated by defendant Russell. Plaintiff, a guest passenger in the McDaniel car alleges the collision and his injuries were proximately caused by the joint and concurring negligence of defendants.

According to plaintiff's allegations in original complaint, the factual situation on which the allegations of negligence are based was, in substance, as follows:

Both cars were traveling west on East Main Street, the McDaniel car following the Russell car "very closely," as they approached the "T" intersection where Connell Crossing Street extends south from East Main. Russell was driving "on his extreme right hand side . . . within a few feet of the curb," and McDaniel was driving "in the center . . . with the left wheels . . . a few feet over the center thereof to his left." McDaniel "was attempting to pass . . . Russell as they approached said intersection and . . . Russell, without giving any signal whatsoever, attempted to make a left turn into . . . Connell Crossing Street before he reached the center of the intersection, and immediately thereafter the left front of . . . McDaniel's automobile and the rear of . . . Russell's automobile violently collided, at which time plaintiff was thrown about the interior of . . . McDaniel's automobile and his head and shoulders were struck," and plaintiff was severely and permanently injured.

Plaintiff alleged McDaniel was negligent in that: (a) In violation of G.S. 20-152, McDaniel was following the Russell car more closely than was reasonable and prudent. (b) In violation of G.S. 20-150, McDaniel was attempting to overtake and pass the Russell car at said intersection.

Plaintiff alleged Russell was negligent in that: (a) In violation of G.S. 20-154, Russell made a left turn from a direct line without first seeing that such movement could be made in safety and without giving any signal of his intention to make such turn. (b) In violation of G.S. 20-153, Russell, intending to make a left turn into Connell Crossing Street, did not approach the intersection in the traffic lane to the right of and nearest to the center of East Main Street and did not pass beyond the center of the intersection and to the right thereof before turning his car to the left.

Plaintiff alleged (in general terms) that each defendant operated his automobile carelessly and heedlessly, in wilful and wanton disregard of the rights and safety of others, and without due caution and circumspection, and at a speed and in a manner so as to endanger or be likely to endanger persons and property upon said streets.

McDaniel, answering, denied negligence on his part and alleged the collision was caused solely by the negligence of Russell. McDaniel's factual allegations, in substance, are as follows: Proceeding south on Connell Crossing Street, there is a sharp incline leading up to the railroad tracks. Russell made a sudden left turn into Connell Crossing Street from East Main without giving any signal and "as he started up the sharp incline, his automobile suddenly came to a stop

and immediately rolled backwards into the intersection," the rear end of the Russell car crashing into the left front of the McDaniel car. Upon observing the Russell car backing towards him, McDaniel "immediately turned to his right but was unable to avoid being struck by the Russell automobile."

As a further defense, McDaniel pleaded as an estoppel the judgment roll in a prior action instituted in the Superior Court of Davidson County on August 30, 1958, in which the plaintiff herein had sued the defendants herein for damages for personal injuries caused by said accident of June 16, 1958. McDaniel attached to and made a part of his answer copies of the papers alleged to constitute said judgment roll. It appears therefrom that, in said prior action, a demurrer by McDaniel to the complaint was sustained November 1, 1958; that the plaintiff did not appeal or except; that McDaniel was not required to file and did not file an answer to the complaint but was required to answer and did answer Russell's cross complaint against McDaniel for contribution under G.S. 1-240; and that judgment of voluntary nonsuit was entered on March 28, 1959, the day on which plaintiff instituted the present action.

Russell, answering herein, denied negligence on his part and alleged the collision was caused solely by the negligence of McDaniel. Russell's factual allegations, in substance, are as follows: The McDaniel car was following the Russell car very closely. While traveling in his right lane on East Main Street, Russell slowed his car, gave a proper signal for a left turn and brought his car almost to a complete stop before making the left turn in order to allow an automobile approaching (eastbound) on East Main Street to pass. When this occurred, the McDaniel car ran into the rear of the Russell car. Russell's answer contains a cross complaint against McDaniel for contribution under G.S. 1-240.

After defendants had answered, plaintiff was permitted to file an amendment to complaint in which he alleged: "5A. That when plaintiff was first thrown about the interior of defendant McDaniel's automobile as aforesaid, his head and shoulders struck the right front windshield and dash board of the same, which occurred when said automobile first came to a sudden stop; that plaintiff was momentarily dazed or knocked unconscious, during which time he was unable to see for a few moments; that the force and momentum which first dazed or knocked plaintiff unconscious occurred at the time of the collision or a moment before the collision when defendant McDaniel's automobile first came to a sudden stop." Except as amended, plaintiff adopted and ratified his original complaint.

At the conclusion of plaintiff's evidence, the court, allowing the motion of each defendant therefor, entered judgment of involuntary nonsuit as to both defendants and dismissed the action at the cost of plaintiff. Plaintiff excepted and appealed.

*W. H. Steed for plaintiff, appellant.*
*Walser & Brinkley for defendant Russell, appellee.*
*Smith, Moore, Smith, Schell & Hunter for defendant McDaniel, appellee.*

BOBBITT, J. A plaintiff must make out his case *secundum allegata.* He cannot recover except on the case made by his pleading. Proof without allegation is no better than allegation without proof. *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786, and cases cited.

The gist of plaintiff's factual allegations in original complaint is that (1) plaintiff "was thrown about the interior of . . . McDaniel's automobile" and injured when the left front of the McDaniel car "violently collided" with the rear of the Russell car, and (2) this occurred immediately after Russell attempted to make a left turn into Connell Crossing Street.

In the amendment, plaintiff did not delete any of his original allegations nor did he add to his original specifications of negligence, but alleged he "was first thrown about the interior of . . . McDaniel's automobile . . . when said automobile first came to a sudden stop," and that "the force and momentum which first dazed or knocked plaintiff unconscious occurred at the time of the collision *or* a moment before the collision when . . . McDaniel's automobile first came to a sudden stop." (Our italics.)

The amendment does not allege that McDaniel suddenly and negligently stopped his car *prior to collision with the Russell car* and on account thereof plaintiff was "thrown about the interior of McDaniel's automobile" and injured. Indeed, if the amendment were construed as containing such allegation, the equivocal allegations of the amendment would be in direct conflict with the plain and explicit allegations of the original complaint.

Uncontradicted evidence tended to show:

East Main Street is thirty feet wide. It has no marked center line. Connell Crossing Street, approximately twenty feet wide, "comes to a dead end" at East Main. Railroad tracks cross Connell Crossing Street approximately twenty-five feet (south) from the south curb of East Main. The elevation of Connell Crossing Street at the railroad tracks is five or six feet higher than its elevation at East Main.

Plaintiff's wife, a sister of McDaniel, and two Vickers children, ages nine and eleven, were also guest passengers in the McDaniel car. Mrs. Vickers was on the front seat, between McDaniel, the driver, and plaintiff.

The "left front corner" of the McDaniel car was damaged, *i.e.*, the left front fender, the headlight and part of the grille. The "front of the rear bumper" and the trunk of the Russell car were damaged.

Russell alleged his car was struck by the McDaniel car while he was waiting, almost completely stopped, for an approaching (eastbound) car to pass before he made a left turn into Connell Crossing Street. In this connection, it is noted that plaintiff alleged the collision occurred immediately after Russell "attempted" to make a left turn into Connell Crossing Street.

According to McDaniel's allegations, Russell completed a left turn into Connell Crossing Street and the collision occurred when the Russell car rolled backwards, down the sharp incline, the rear thereof striking the front of the McDaniel car. In this connection, it is noted that the complaint contains no allegation to the effect that a collision occurred in this manner.

McDaniel, *offered by plaintiff*, testified the collision occurred in the manner he had alleged; and both plaintiff and plaintiff's wife *testified* that the Russell car, having entered Connell Crossing Street, rolled back into the intersection and collided with the McDaniel car. As Mrs. Vickers expressed it: "Russell . . . pulled up here and must have stopped, and then he shot back and hit the left front fender of the McDaniel car." Under this testimony, the negligence of Russell in backing his car or permitting it to roll backwards into the intersection was the proximate cause of its collision with the McDaniel car. But the complaint contains no allegation that Russell was negligent in this respect or that the collision occurred in this factual situation.

As to McDaniel, plaintiff and his wife testified in substance: McDaniel "suddenly stopped" his car. When this occurred, plaintiff was thrown into the windshield and momentarily dazed. Thereafter, the Russell car rolled back from Connell Crossing Street and struck the (stopped) McDaniel car. As indicated above, negligence of McDaniel, if any, in suddenly stopping his car *prior to collision with the Russell car* was not alleged. It is noted that plaintiff, on cross-examination, testified: "The first time I ever said anything about McDaniel's car coming to a sudden stop was in here on the witness stand today."

In addition, plaintiff testified: "My belief is there were two collisions. The first one when the McDaniel car came to a sudden stop. The front of the McDaniel car hit the Russell car, and it went forward up the incline, and the Russell car rolled back down and collided with the left front of the McDaniel car and knocked the hood open." But this testimony as to plaintiff's belief there were two collisions was stricken by the court in view of plaintiff's further testimony, in the absence of the jury, that the only collision he saw occurred when the Russell car backed into the McDaniel car and the only reason he had *to believe* there had been a prior collision was the fact that the McDaniel car "suddenly stopped." Plaintiff did not except to this ruling. Moreover, there is no allegation that more than one collision occurred.

There is testimony tending to show that each of the defendants was negligent in certain of the respects alleged by plaintiff. Whether such alleged negligence is related to plaintiff's injuries as a proximate cause thereof depends upon the basic factual situation. As indicated above, plaintiff's evidence tends to establish a basic factual situation at variance in material respects from that alleged. Nothing appears to indicate that plaintiff moved for leave to amend his complaint to conform to the evidence offered by him at trial.

Confronted by the material variance betweeen plaintiff's allegations and proof, the court below properly entered judgment of involuntary nonsuit. *Lucas v. White,* 248 N.C. 38, 42, 102 S.E. 2d 387, and cases cited; *Moore v. Singleton* and *Hall v. Singleton,* 249 N.C. 287, 106 S.E. 2d 214. As stated by *Winborne, C. J.,* in *Lucas v. White, supra:* "The court cannot take notice of any proof unless there is a corresponding allegation."

It is noted that judgment of involuntary nonsuit for material variance between *allegata* and *probata* does not preclude plaintiff from instituting a new action.

In view of the basis of decision, it is unnecessary to consider plaintiff's assignment of error directed to the overruling by the court of plaintiff's demurrer to McDaniel's further defense based on alleged estoppel.

Affirmed.

WALTON S. DENNIS, JR., ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS IN THE CITY OF RALEIGH v. THE CITY OF RALEIGH, A MUNICIPAL CORPORATION.

(Filed 23 November, 1960.)

**1. Municipal Corporations § 4—**

A municipal corporation has only those powers conferred upon it by statute and those powers necessarily implied by law therefrom. G.S. 160-1.

**2. Taxation § 4—**

What constitutes a necessary expense within the purview of Art. VII, Sec. 7, of the State Constitution is for determination by the Supreme Court.

**3. Same—**

Art. VII, Sec. 7, prohibiting a municipal corporation from expending funds derived from taxation for purposes other than necessary expenses without the approval of its voters applies to all taxes which a municipal corporation may levy or collect, and therefore a municipal resolution appropriating funds derived from sources other than *ad valorem* taxes for an unnecessary expense is void in so far as it purports to authorize for such purpose the use of funds derived from taxes other than *ad valorem* taxes.

**4. Same—**

The expenditure by a municipality of funds for the purpose of advertising the advantages of the city in an effort to secure new industry is not for a necessary municipal expense within the meaning of Art. VII, Sec. 7, of the State Constitution.

**5. Taxation § 5—**

When authorized by statute, a municipality has power to appropriate for a public purpose available surplus funds not derived from taxes or a pledge of its credit, and while legislative declaration that a particular expenditure is for a public purpose is entitled to great weight, what is a public purpose is a judicial question.

**6. Same—**

The expenditure of funds by a municipality for the purpose of advertising to promote the public interest and general welfare of the city is for a public purpose for which, under legislative authority, it may, without a vote, appropriate funds not derived from taxation.

**7. Same: Municipal Corporations § 35—**

An appropriation by a municipality of funds to its Chamber of Commerce for use in advertising to promote the public interest and general welfare of the city under authority of a resolution providing that such funds should be used exclusively for that purpose and providing supervision and control by the city of the expenditure of the funds, is valid in so far as the appropriation is limited to nontax revenue of the city,

the city having been given express legislative authority to expend money for such purpose. Chapter 1184, Section 22(40), Session Laws of 1949.

APPEAL by plaintiff from *McKinnon, J.*, September Regular Civil Term, 1960, of WAKE.

Taxpayer's action for injunctive relief.

On June 20, 1960, the City Council of the City of Raleigh adopted a resolution which, after recitals, provides: "That the sum of $500 is hereby appropriated from surplus funds of the City derived from sources other than ad valorem taxation to the Raleigh Chamber of Commerce to be used exclusively for the purpose of advertising the advantages of the City of Raleigh in an effort to secure the location of new industry within the City. Before any expenditure of said appropriation shall be made, there shall be submitted to and approved by the City Council of the City of Raleigh the specific advertising to be done and the approximate cost thereof. All funds turned over to the Raleigh Chamber of Commerce pursuant to this resolution shall be accounted for by the Raleigh Chamber of Commerce before the expiration of the fiscal year of the City ending June 30, 1961." It is alleged and admitted that the Raleigh Chamber of Commerce is "a private corporation, having corporate purpose to encourage, advance and promote the industrial, commercial, civic and social interests in the City of Raleigh and its surrounding territory."

The $500.00 so appropriated has not been paid to the Raleigh Chamber of Commerce but will be unless payment thereof is enjoined.

No issues of fact are raised by the pleadings. Plaintiff alleges said appropriation is neither for a necessary expense nor for a public purpose and "the contemplated use of the funds constitutes an unlawful and misapplication of funds from the public treasury of the City of Raleigh and is an unlawful expenditure." Answering, defendant denies these allegations. By agreement, the cause was submitted for final judgment.

The court, after setting forth the facts substantially as stated above, concluded as a matter of law that said appropriation was for a public purpose and did not violate any of the provisions of the Constitution of North Carolina. Thereupon, it was adjudged "that the restraining order sought by plaintiff be and the same is hereby denied," and it was ordered that plaintiff pay the costs. Plaintiff excepted and appealed.

*Teague, Johnson & Patterson for plaintiff, appellant.*
*Paul F. Smith for defendant, appellee.*

BOBBITT, J. A municipal corporation has "the powers prescribed by statute, and those necessarily implied by law, and no other." G.S. 160-1. Defendant relies solely on the statutory authority granted by Section 22(40) of Chapter 1184, Session Laws of 1949, "The Charter of the City of Raleigh," which provides:

> "Sec. 22. Expressed Powers Enumerated. In addition to the powers now or hereafter granted to municipalities under the general laws of the State of North Carolina, the City of Raleigh shall have the following expressed powers hereby granted to it:
> ". . .
> "(40) To appropriate annually, in the discretion of the city council, not exceeding twenty-five hundred dollars ($2500.00) to any association in the city organized for the purpose of advertising the city or promoting the public interest and general welfare of the city; *provided, however,* that any such appropriation, which is hereby declared to be for a public purpose, shall be from funds of the city derived from sources other than ad valorem taxation."

Constitutional limitations upon the power of the General Assembly include the following: "No . . . 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." N. C. Constitution, Art. VII, Sec. 7.

In *Ketchie v. Hedrick,* 186 N.C. 392, 119 S.E. 767, a tax to provide a fund to be expended "under the direction and control of the directors of the Chamber of Commerce of High Point, N. C.," for purposes similar to those here considered, was held invalid and uncollectible on the ground such expenditure was not for "a necessary governmental expense." High Point had levied the tax under the purported authority of a private legislative act. Whether a tax should be levied for such purpose was not submitted to the electors.

Thereafter, the General Assembly enacted Ch. 33, Public Laws of 1925, the general statute now codified as G.S., Ch. 158, applicable to a municipal corporation if and when approved by a majority of the qualified voters thereof. G.S. 158-2. When so approved, it authorizes the governing body to appropriate funds, limited as to amount, derived from general taxes for purposes similar to those here concerned. The 1925 Act was considered in *Horner v. Chamber of Commerce,* 231 N.C. 440, 57 S.E. 2d 789, where a judgment sustaining a

demurrer to the complaint was reversed, and again in *Horner v. Chamber of Commerce,* 235 N.C. 77, 68 S.E. 2d 660, where a judgment for plaintiff, based on findings of fact and invalidating the challenged appropriation, was affirmed. The ground of decision was that, in contravention of the 1925 Act, "the Burlington City Council made an absolute gift of the tax moneys to the Chamber of Commerce without specifying how they were to be spent, and without reserving the right to direct or control their use," and that "(t)he Chamber of Commerce indistinguishably commingled the tax moneys and all its other revenues, and indiscriminately used the resultant common fund to pay rents, salaries, and other expenses incurred by it in carrying out its corporate functions." (235 N.C. 81.)

What constitutes a necessary expense within the terms of Art. VII, Sec. 7, is for determination by this Court. *Wilson v. High Point,* 238 N.C. 14, 76 S.E. 2d 546, and cases cited. An expenditure for the purposes set forth in the resolution of the Raleigh City Council is not a necessary expense within the meaning of this constitutional provision. *Ketchie v. Hedrick, supra.* Hence, *no* tax may be levied or collected for such purpose unless approved by a majority of the qualified voters.

The resolution of the Raleigh City Council, in accordance with the phraseology of the charter provision, purports to make the appropriation from funds derived from sources other than *ad valorem* taxation. But the provisions of Art. VII, Sec. 7, are not limited to *ad valorem* taxation. They apply with equal vigor to all taxes a municipal corporation may levy or collect. Hence, the appropriation, insofar as it purports to authorize the use *of tax funds* other than those derived from *ad valorem* taxes, is void.

There remains for consideration whether the City of Raleigh, by virtue of said charter provision, has authority to make such appropriation from surplus funds not derived from taxation of any kind.

"A state legislature can neither compel nor authorize a municipal corporation to expend any of its funds for a private purpose, and consequently, since practically every undertaking of a municipality does or may require the expenditure of money, a municipal corporation cannot, even with express legislative sanction, embark in any private enterprise, or assume any function which is not in a legal sense public. If there is any restriction implied and inherent in the spirit of American Constitutions, it is that the government and its subdivisions shall confine themselves to the business of government, for which they were created, but if a specific provision prohibiting the expenditure of public funds for private purposes is required, it

is found in the clause which forbids the taking of property for other than public uses; for since the funds of a municipality are necessarily directly or indirectly raised by taxation, the expenditure of money by a municipality for private purposes does or may necessarily result in the taking of the property of individuals under the guise of taxation for other than public uses." 38 Am. Jur., Municipal Corporations § 395; *Brown v. Comrs. of Richmond County,* 223 N.C. 744, 28 S.E. 2d 104.

A municipal corporation, when authorized by statute, has power to appropriate *for a public purpose* available surplus funds not derived from taxes or a pledge of its credit. *Brumley v. Baxter,* 225 N.C. 691, 699, 36 S.E. 2d 281, and cases cited; *Greensboro v. Smith,* 241 N.C. 363, 367, 85 S.E. 2d 292.

A legislative determination that a particular expenditure is for a public purpose, while entitled to great weight, is not conclusive. Final decision is for judicial determination. *Briggs v. Raleigh,* 195 N.C. 223, 230, 141 S.E. 597; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211.

In *Airport Authority v. Johnson,* 226 N.C. 1, 8, 36 S.E. 2d 803, *Seawell, J.,* states: " 'Public Purpose' as we conceive the term to imply, when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care." See opinion of *Stacy, C. J.,* in *Briggs v. Raleigh, supra,* for a full discussion of the distinction between a public purpose and the promotion of private business or property interests.

"*Where the statutory power exists,* courts have permitted municipalities to advertise their advantages to attract trade and industry to the community." (Our italics.) Rhyne on Municipal Law, § 15-6; 37 Am. Jur., Municipal Corporations § 127. Decisions based on lack of express legislative authority are not relevant.

In *Sacramento Chamber of Commerce v. Stephens* (Cal.), 299 P. 728, which involved an appropriation made pursuant to a charter provision, the opinion of *Waste, C. J.,* states: "Furthermore, we are of the view that, by common consent, it is now generally held to be well within a public purpose for any given locality to expend public funds, within due limitations, for advertising and otherwise calling attention to its natural advantages, its resources, its enterprises, and its adaptability for industrial sites, with the object of

increasing its trade and commerce and of encouraging people to settle in that particular community."

The appropriation made by the Raleigh City Council to the Raleigh Chamber of Commerce is for use *exclusively* for "advertising the advantages of the City of Raleigh in an effort to secure the location of new industry within the City." No part of the funds so appropriated is to be expended by the Raleigh Chamber of Commerce unless and until specific advertising and the cost thereof is first submitted to and approved by the Raleigh City Council. Except to the extent expended for approved specific advertising, the Raleigh Chamber of Commerce is to account to the City of Raleigh for said $500.00 on or before June 30, 1961. The factual situation here is quite different from that considered in *Horner v. Chamber of Commerce, supra.*

The appropriation authorized by the charter provision is for advertising to promote the public interest and general welfare of the City. The resolution of the Raleigh City Council contains no suggestion that the fund will be expended for any other purpose. There is no allegation that the contemplated advertising is for the purpose of promoting private business or property interests. Absent an attack on such ground, it must be assumed that no expenditure will be approved by the Raleigh City Council unless it be within the authority granted by the charter provision.

The court below held the appropriation was for a public purpose. We agree. However, it was not for a necessary expense within the meaning of Art. VII, Sec. 7, and payment may not be lawfully made from funds derived from taxation of any kind. Hence, it was error to deny *in its entirety* plaintiff's application for injunctive relief and to dismiss the action.

Accordingly, the judgment of the court below is vacated and the cause remanded for the entry of a judgment enjoining payment from funds derived from taxation of any kind but denying plaintiff's application for injunctive relief insofar as it relates to payment from available surplus funds not derived from taxes of any kind.

Error and remanded.

MRS. ROBERT L. FAW, JR. v. THE TOWN OF NORTH WILKESBORO.

(Filed 23 November, 1960.)

**1. Municipal Corporations §§ 12, 28—**

Evidence tending to show that an alley in a municipality was paved and was habitually used by the public as a walkway, and that the municipality maintained a water line with meter boxes in the alley, is sufficient to show that the municipality exercised such control over the alley as to constitute it a public way within the purview of the rule that a municipality is under duty to exercise reasonable care to keep its streets in a reasonably safe condition for public use, there being no distinction in law between a public street and a public alley.

**2. Municipal Corporations § 12—**

A pedestrian is entitled to recover damages resulting from a fall on a public street or alley only upon a showing of negligence on the part of the municipality as a proximate cause of the fall.

**3. Same—**

Where defect in a public way proximately causes the fall of a pedestrian to her injury, the municipality may be held liable only if injury from such defect might reasonably have been foreseen and the officers of the town knew of such defect or such defect had existed for such length of time that its officers should have discovered it in the exercise of due care, and therefore had constructive notice thereof.

**4. Municipal Corporations § 5—**

In selling water for private consumption, a municipality is engaged in a proprietary capacity and is liable for negligence in connection therewith; in supplying water for fire fighting purposes or for other public purposes, a municipality is engaged in a governmental capacity and cannot be held liable for negligence in connection therewith.

**5. Municipal Corporations § 12—**

Evidence tending to show that plaintiff was injured in a fall resulting when the lid of a water meter box, located in a public alley, dislodged as she stepped on it, that the lid of the box was insecure because it had become worn and rounded, that it was apt to bounce off when stepped on, and that such condition had existed for some four to six years, is sufficient to be submitted to the jury on the issue of the municipality's negligence and does not disclose contributory negligence as a matter of law.

APPEAL by plaintiff from *Olive, J.*, Regular June Term, 1960, of WILKES.

Action for damages for personal injury resulting from plaintiff, while she was walking in a paved alley of the town of North Wilkesboro, stepping on the cover of a water meter box, which cover bounced off on the pavement, and her left foot and leg went into the box causing the injury.

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

*McElwee, Ferree & Hall for plaintiff, appellant.*
*Whicker & Whicker for defendant, appellee.*

PARKER, J. In the town of North Wilkesboro there is an alley paved with concrete about 30 feet wide running between Ninth and Tenth Streets. Plaintiff in her complaint alleges that defendant provided for and regulated a water works for the citizens of the town. Defendant in its answer admits the truth of this allegation, but alleges that in the operation of the water works it acted in a governmental function. In its answer defendant admits that on 19 May 1959 it maintained for the benefit of the public an underground water valve in this alley, and that covering this valve there was a circular water meter cover about ten inches in diameter made of metal, that this circular water meter cover fitted in a lip about one-half inch in width located on the water meter box.

About 10:30 a.m. on 19 May 1959, a clear, warm day, plaintiff holding her two-year-old son by the hand was walking on this alley in the direction of Tenth Street for the purpose of purchasing a toy for her son at Crest Dime Store. Before entering Tenth Street her left foot and leg fell into a water meter box about three or four or five feet from Tenth Street and back of Crest Dime Store. As she fell, there was a big clang resulting from the metal cover of the water meter box bouncing off on the pavement five or six inches from the water meter box. When plaintiff was helped up, the outer skin of her leg had been torn away, and her leg had a lot of grease, blood and stuff coated on it. She is now 24 years old, and had walked on this alley since she was a small child hundreds of times. Automobiles use this alley. The alley has no sidwalk. She was looking where she was going. She did not see the water meter box, and had never seen one in the alley.

About 1:30 p.m. on the day plaintiff fell, her husband went to the alley, and saw the cover or lid of the water meter box in which his wife said she fell. The cover or lid was round, and fitted down on top of the box that was down in the ground. On the rim or lip of the water meter box he saw gravel, cinders and dirt. In his opinion, the cover or lid did not fit. He saw this water meter box again in May 1960, and the cover or lid he saw there then was the same cover or lid he saw there on 19 May 1959.

Fidell Frazier, a licensed plumber in the State of North Carolina

since 1947, who, for 17 years has had to contend as a plumber with water meters in towns and cities three or four times a week, and, who, during that time has observed rims and covers of water meter boxes, testified as a witness for plaintiff. In May 1960 he examined the water meter box, its rim and cover in the alley near Tenth Street back of Crest Dime Store. The rim was worn off, rounded, and the lid was worn off, rounded. The rim had quite a bit of play, it was much larger than the cover or lid. He testified: "I put the lid on there and stepped on the edge of it and it kicked right off. I put it on again and stepped on it and it didn't kick off and I put it on the third time and stepped on it and it kicked off the third time, two out of three times. The lid sits right down into the rim. There is a form around the rim for the lid to sit on in the box and it just sits down inside there. It has about a half inch to five-eights play, I have an idea. The cover did not fit flush into the rim." In his opinion as a plumber the conditions he saw there existed in 1959, and had existed for at least four to six years.

The complaint specifically alleges "that the defendant failed to provide the plaintiff and others similarly situated a safe place in which to walk upon the public alleyway of the said town." The term "alley," it seems, relates exclusively to a way in a town or city. *Parsons v. Wright,* 223 N.C. 520, 27 S.E. 2d 534; 25 Am. Jur., Highways, p. 343. Defendant's answer does not allege that it is a private alley, but refers to it as an alley. It does not allege that the alley did not belong to the town, or that it was not under the control of the town.

There is no evidence as to who owns this alley, or who paved it or who maintains it. There is evidence in the record that defendant has three water meter boxes in this alley, and defendant admits in its answer that it "maintains, operates and controls a water line located in the alley leading from Ninth to Tenth Streets in the town of North Wilkesboro." Plaintiff's evidence, considered in the manner most favorable to her, suffices to show that defendant municipality exercises some control at least over this alley in operating water works for the benefit of its citizens, that this is a public alley connecting Ninth and Tenth Streets in the town, and by its use in fact by the public for many years it has become a street of the town. See *Whitacre v. Charlotte,* 216 N.C. 687, 6 S.E. 2d 558; *Musick v. Borough of Latrobe,* 184 Pa. 375, 39 A. 226. This Court said in *Parsons v. Wright, supra:* "It (an alley) is available for all who desire to use it, and it forms a part of the system of streets or public ways of the town or city."

"Public alleys, like streets, are under the control of the municipal authorities, and the prevailing rule is that there is no distinction, in law, between a public street and a public alley, and hence a public alley is governed by the rules applicable to streets." McQuillin, Municipal Corporations, 3rd Ed., Vol. 10, p. 541.

The general rule in this country is that a municipality which has full and complete control over the streets and highways within its corporate limits is held liable in damages for injuries occasioned by its failure to use reasonable care to keep a public alley, which is used as a public way, in a reasonably safe condition for such use. *Ferguson v. City of Yakima,* 139 Wash. 216, 246 P. 287, 48 A.L.R. 431; Anno 44 A.L.R. pp. 814-815 — Liability of municipality for injury to traveller in alley; 63 C.J.S., Municipal Corporations, pp. 103-104; 25 Am. Jur., Highways, sec. 401, Alleys.

This Court said in *Smith v. Hickory,* 252 N.C. 316, 113 S.E. 2d 557: "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 streets 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." This duty is now imposed by statute, with a proviso not applicable upon the evidence here. G.S. 160-54.

It appears from the allegations in the complaint and the admissions in the answer that the town of North Wilkesboro owns and operates a water works system, including water meter boxes, for supplying its inhabitants with water for domestic purposes, and itself with water for the extinguishment of fires.

It is generally held, that insofar as a town or city undertakes to sell water for private consumption it is engaged in a commercial venture, as to which it functions in a proprietary or corporate capacity, and for negligence in connection therewith it is liable. Insofar, however, as a municipality undertakes to supply water to extinguish fires, or for some other public purpose, it acts in a governmental

capacity, and cannot be held liable for negligence. *Klassette v. Drug Co.*, 227 N.C. 353, 42 S.E. 2d 411; *Woodie v. North Wilkesboro*, 159 N.C. 353, 74 S.E. 924; McQuillin, Municipal Corporations, 3rd Ed., Vol. 18, pp. 423-424.

We have held in *Bailey v. Asheville*, 180 N.C. 645, 105 S.E. 326, and in *Gasque v. Asheville*, 207 N.C. 821, 178 S.E. 848, that a municipality is liable for injuries to persons resulting from its negligence in connection with a water meter box it owns and maintains in its street. See also the following water meter box cases in which the municipality was held liable: *Wilkins v. Rutland*, 61 Vt. 336, 17 A. 735; *City of Boulder v. Burns*, 135 Colo. 561, 313 P. 2d 712; *Butler v. City of McMinnville*, 126 Ore. 56, 268 P. 760; and also McQuillin, Municipal Corporations, 3rd Ed., Vol. 18, pp. 430-431. *Gettys v. Marion*, 218 N.C. 266, 10 S.E. 2d 799, is factually distinguishable.

Plaintiff's evidence, considered in the manner most favorable to her, tends to show that defendant operated and maintained a water meter box for the benefit of its inhabitants placed in a public alley connecting Ninth and Tenth Streets in the town of North Wilkesboro, which alley was used by the public as a street, that the cover or lid of this water meter box was insecurely fastened and apt to bounce off if a pedestrian stepped on it due to the cover and the rim of the water meter box having become worn and rounded and the rim being larger than the cover, that this dangerous condition had existed for at least four to six years, a time sufficient to give defendant constructive notice of such dangerous condition, and that the character of this defect was such that injuries to pedestrians using this public alley in a proper manner might be reasonably anticipated by defendant. Certainly, plaintiff's own evidence does not show as a matter of law that she was guilty of contributory negligence. The judgment of involuntary nonsuit entered below is

Reversed.

MYRTLE ISOM ADAMS v. H. P. TAYLOR, TRUSTEE FOR THE CHASE MANHATTAN BANK AND THE GOODYEAR MORTGAGE CORPORATION. AND THE CHASE MANHATTAN BANK AND THE GOODYEAR MORTGAGE CORPORATION.

(Filed 23 November, 1960.)

**1. Judgments § 34: Eminent Domain § 14—**

Where judgment in condemnation proceedings of a part of a mortgaged tract of land provides by consent that the compensation should be applied to the mortgage indebtedness, the parties are bound by the judgment.

**2. Payment § 3—**

Where judgment in proceedings condemning a part of a mortgaged tract of land directs that the amount of compensation recovered should be applied to the mortgage indebtedness, the payment is not voluntary, and neither the mortgagor nor mortgagee is entitled to direct the application of payment, but the court should so do in accord with intrinsic justice and equity.

**3. Same: Eminent Domain § 14: Mortgages § 16½—**

Where part of a mortgaged tract of land is condemned and the judgment directs that the compensation be applied to the reduction of the mortgage indebtedness, evidenced by a single note payable in a specified number of monthly installments, the payment should be applied so as to disturb the contractual rights and obligations of the parties no further than necessary, and therefore should not be used to reduce the number of installments or to shorten the time for payment, but the amount of the monthly payment required to discharge the indebtedness, principal and interest, in the contractual time, should be recomputed on the basis of the debt as thus reduced.

**4. Mortgages § 19—**

Where there is dispute as to the amount of the monthly payments necessary to discharge the mortgage indebtedness in accordance with the rights of the parties under the contract, foreclosure is properly enjoined when the holder of the note demands monthly payments in excess of that to which he is entitled, and upon computation of the correct amount of the monthly payments, the mortgage debtor will be given a reasonable time to pay the installments then due.

APPEAL by defendants from *Phillips, J.*, June 1960 Term, of ANSON.

On 3 March 1953 plaintiff and her husband borrowed $7,400 from Goodyear Mortgage Corporation. As evidence of the debt so created they executed a note for that sum bearing interest at 4% per annum. By the terms of the note the amount borrowed and interest to accrue were payable in 300 equal monthly installments beginning 1 May 1953 and ending 1 April 1978.

Contemporaneously with the execution of the note and to secure payment thereof, plaintiff and her husband executed a deed of trust

on a house and lot owned by them. The deed of trust recites the debt, execution of the note, and the method of payment. It authorizes the [illegible] to accelerate the time for payment and to require foreclosure of mortgagor's equity of redemption upon default in payment of any monthly installment. The note was sold by Goodyear Mortgage Corporation to Chase Manhattan Bank.

In October 1954 plaintiff became the sole owner of the property described in the deed of trust.

The North Carolina State Highway Commission took for highway purposes a portion of the land described in the deed of trust. Plaintiff and the trustee in the deed of trust thereupon filed a petition to have the value of the portion taken judicially determined. At the June 1958 Term of Anson Superior Court judgment was entered fixing the fair compensation at $2,925. The judgment as originally entered in that proceeding provided: "That the sum of TWO THOUSAND NINE HUNDRED TWENTY-FIVE DOLLARS ($2,925.00) be paid by the Clerk to the Chase Manhattan Bank of New York City to be applied by them upon that indebtedness which is secured by a Deed of Trust to T. L. Caudle, Trustee for the Goodyear Mortgage Corporation . . ." This judgment was by consent modified as to the amount to be paid to Chase Manhattan Bank, reducing the amount so to be paid to $2,425, the remaining $500 to be paid to counsel for petitioners for his services. The court did not then direct the manner in which the payment should be applied.

On 24 July 1958 the sum of $2,425 was paid to Chase Manhattan Bank. Payments made by plaintiff sufficed to discharge all monthly payments accruing on or prior to 1 August 1958.

Plaintiff, insisting that the amount received in the condemnation proceeding should be used to discharge the monthly payments as they accrued, declined to make further monthly payments until that amount had been consumed. The Bank insisted upon payment of $39.06, the amount stated in the note.

Defendant Taylor was, at the instance of the Bank, substituted as trustee. The Bank declared a default and caused the property to be sold in April 1959, at which time defendant Chase Manhattan Bank was the highest bidder. Plaintiff, alleging that the fair market value of the property at the time of foreclosure was $6,500, sought and obtained a restraining order enjoining consummation of the sale. At the hearing before Judge Phillips, the right to foreclose was made to turn upon the question of whether plaintiff was compelled to continue making monthly payments of $39.06 until the unpaid balance was paid, or whether she had a right to require the application of

the $2,425 to the monthly payments to accrue until that sum had been exhausted. Judge Phillips held that plaintiff had a right to require the application of the monies received from the condemnation proceeding to discharge monthly installments thereafter accruing until that sum had been exhausted. He enjoined consummation of the foreclosure sale. Defendants excepted and appealed.

*Ottway Burton for plaintiff, appellee.*
*Taylor, Kitchin & Taylor for defendant, appellant.*

RODMAN, J. It is not necessary to determine whether, as defendant Bank argues, it, as mortgage creditor, had merely a lien on the monies which the Highway Commission was required to pay, *Liverman v. R. R.*, 109 N.C. 52; or, as mortgage creditor, it was required to apply the monies so paid to reduce the debt secured by the mortgage, *Bonner v. Styron*, 113 N.C. 30. It is sufficient for the purpose of this appeal to note that the judgment fixing the compensation required the application of that sum to plaintiff's debt. The trustee, representing the Bank as mortgage creditor, was a party to that proceeding. The provision requiring application to the debt was inserted by consent. That provision of the judgment cannot now be challenged.

The payment made by the Highway Commission was not a payment voluntarily made by the debtor. The taking of the land was over the protest of debtor and creditor. Compensation for the taking was enforced by judicial proceeding. Since the payment was not voluntary, the debtor had no right to direct how it should be used, nor did the creditor have that right. *Paving Co. v. Speedways*, 250 N.C. 358, 108 S.E. 2d 641; *McSween v. Windham*, 89 S.E. 500; *Citizens & Southern Bank v. Armstrong*, 95 S.E. 729; *In re Cunningham's Estate*, 142 N.E. 740; 70 C.J.S. 256, 40 Am. Jur., 811. Since neither debtor nor creditor had a right to direct the manner in which the payment should be used, it became the duty of the court to direct application so as to accord with "intrinsic justice or the equity of the case." *Power Co. v. Clay County*, 213 N.C. 698, 197 S.E. 603; *Stone Co. v. Rich*, 160 N.C. 161, 75 S.E. 1077.

What is the intrinsic justice or equity of this case? The answer is to be found in the contract made in 1953 between plaintiff and Goodyear Mortgage Corporation. It then loaned plaintiff $7,400. The debt carried interest at the rate of 4% per annum. It was then agreed that plaintiff might repay this loan with interest to accrue thereon in 300 equal consecutive monthly installments, the first install-

ment being payable 1 May 1953. These installments would, as paid, decrease the amount of the principal debt by the monthly reduction in accrued interest. The amount of $39.06, fixed as the monthly payment, was a mere mathematical computation of the amount necessary to make payment in the time agreed. The creditor had no right to shorten the time for payment unless the debtor defaulted.

The act of the Highway Commission in taking part of the mortgage security should not be permitted to impair the contractual rights and obligations of the parties further than necessary. Where there is foreclosure of a mortgage securing several notes, the law requires rateable application of the proceeds to all of the notes thereby secured. *Demai v. Tart*, 221 N.C. 106, 19 S.E. 2d 130; *Bank v. Trust Co.*, 199 N.C. 582, 155 S.E. 261; *Whitehead v. Morrill*, 108 N.C. 65; *Kitchin v. Grandy*, 101 N.C. 86. The taking by the Highway Commission may, we think, be treated as a partial foreclosure. If plaintiff's debt had been made payable in 300 notes, one due each month, the proceeds from any foreclosure would have to be applied proportionately on each note. We conceive of no reason which changes this rule merely because the debt is evidenced by a single note payable in installments rather than in separate notes.

The payments voluntarily made by plaintiff sufficed to discharge the installments due on and prior to 1 August 1958. She had voluntarily paid 64 installments, reducing the debt by the amount of principal included in each of these installments. By the contract (note and deed of trust) she had the right to discharge the balance of the debt in 236 monthly installments. On 24 July 1958 there was an involuntary payment of $2,425 as directed by the decree of condemnation. No reason is suggested why this payment should diminish the time and reduce the number of installments fixed for plaintiff to pay when the loan was made. When the balance owing on 1 August 1958 is ascertained by deducting all payments, voluntary and involuntary, the amount of plaintiff's debt as of that date is fixed. By contract she has 236 months in which to make payment of this principal. How much it is necessary for her to pay each month to discharge that sum, with the interest to accrue thereon, by 1 April 1978 is a mere matter of mathematical computation. The discharge of her debt by monthly payments in the amount so ascertained accords with the intent of the parties when the loan was made and is therefore the equity of this case.

Plaintiff had no right to demand that she be permitted to use any part of the security to pay interest to accrue many months in the future. Defendant had no right to insist on shortening the time

fixed by contract for payment. The attempted foreclosure was properly enjoined because of the wrongful demands by defendants for excessive monthly payments.

The cause is remanded for computation of the amount to be paid monthly to discharge the debt not later than 1 April 1978. Plaintiff will be entitled to credit on the monthly payments so ascertained the $44 she paid 27 October 1958 and the $30 she paid 19 January 1959. She will be allowed a reasonable time after the computation has been made to pay the installments then due.

The cause is remanded to the Superior Court to modify and correct the judgment in accordance with this opinion.

Modified and affirmed.

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CLAIR G. SEARS v. MARIE SEARS.

(Filed 23 November, 1960.)

1. **Divorce and Alimony § 25: Constitutional Law § 26: Judgments § 32—**

A decree of divorce rendered in another state having jurisdiction of the parties is *res judicata* as to all matters in issue and determined therein. Constitution of the United States, Art. IV, Sec. 1.

2. **Divorce and Alimony § 16—**

A decree of divorce *a mensa et thoro*, awarding permanent support, obtained by the wife in another state, is a bar to a cross action for alimony without divorce set up by her in the husband's action instituted here for divorce on the ground of two years separation, since even though the judgment for subsistence is not final, it is subject to modification only by the court rendering the decree, and is therefore *res judicata* the matter.

3. **Divorce and Alimony § 4—**

The doctrine of recrimination obtains in this State, and a defendant in an action for divorce may set up as a defense in bar that plaintiff himself is guilty of misconduct constituting ground for divorce.

3. **Same: Divorce and Alimony § 13—**

A decree awarding a divorce *a mensa et thoro* with permanent subsistence to the wife based upon the misconduct of the husband does not preclude the husband from maintaining an action for divorce on the ground of two years separation, G.S. 50-6, when such action is instituted more than two years subsequent to the rendition of the decree of divorce, since the effect of the decree is to legalize the separation even though the separation was initially due to the fault of the husband, and there-

fore the husband's initial misconduct cannot be made the basis of a plea of recrimination.

**5. Divorce and Alimony § 13—**

A decree of absolute divorce on the ground of two years separation obtained by the husband does not affect the wife's right to continued subsistence in accordance with a prior decree obtained by her. G.S. 50-11.

APPEAL by defendant from *Sharp, S. J.*, at June 6, 1960 Special Civil Term, of MECKLENBURG.

Civil action for absolute divorce on the grounds of two years separation, as provided by G.S. 50-6.

Clair G. Sears, the husband, a resident of North Carolina, filed this action on 27 January 1960, for absolute divorce on the ground of two-years separation. The wife, Marie Sears, answered, setting up certain defenses and counterclaims.

First: A counterclaim for alimony without divorce pursuant to G.S. 50-16, and incorporated within her First Further Answer and Defense a plea as follows: "7. That in 1951 this defendant, as plaintiff, instituted an action in the Supreme Court of the State of New York, Queens County, against the plaintiff, as defendant, for a divorce from bed and board and for support. That in said action judgment was entered granting this defendant, as plaintiff in said action, a divorce from bed and board because of the cruel and inhuman treatment by the defendant therein, the plaintiff herein, and ordering the plaintiff herein to pay to the defendant herein permanent support and maintenance.

"8. That this defendant specifically pleads the complaint of this defendant in said action in New York, the Findings of Fact and the Conclusions of Law and the Judgment entered therein as part of this Further Answer and Defense and this defendant hereby incorporates by reference such public records as a part of this paragraph as fully and to the same extent as if set forth herein verbatim."

Second: A counterclaim for a money judgment for past due installments due to the defendant-wife from the plaintiff-husband pursuant to the final judgment issued by the Supreme Court of New York, Queens County, as stated above in paragraph 7 and 8 of defendant-wife's answer.

And Third: A plea of recrimination as a bar to the right of the husband to a divorce, setting forth abandonment of the wife by the husband, and the cruel and inhuman conduct of the husband, as found as a fact by the New York court.

Thereafter, the plaintiff-husband filed a motion to strike portions

of the Answer and the entire Second and Third Further Answers and Defenses. When the motion to strike came on for hearing the plaintiff-husband demurred *ore tenus to* the First, Second and Third Further Answers and Defenses of the defendant-wife upon the ground that said defenses do not state facts sufficient to constitute defenses to the action of the plaintiff for absolute divorce.

The court sustained the demurrer *ore tenus* to the First and Third Further Answers and Defenses. And from judgment in accordance therewith, the defendant-wife appeals to the Supreme Court and assigns error.

*Charles T. Myers for plaintiff, appellee.*
*Clayton & London for defendant, appellant.*

WINBORNE, C. J. The questions presented on appeal are whether or not the lower court erred in sustaining the plaintiff-husband's demurrer *ore tenus* to the defendant-wife's First and Third Further Answers and Defenses.

As is shown above, the defendant-wife stated in her answer that she had obtained a judgment of divorce from bed and board from the plaintiff-husband in the courts of New York State on the grounds of cruel and inhuman treatment, and that the New York decree ordered the husband, plaintiff here, to pay to the wife, defendant here, permanent support. Therefore, the first question for decision is this: In an action for absolute divorce in North Carolina, is a counter-claim by the defendant-wife for alimony without divorce barred when the counterclaim shows upon its face that the wife has secured a prior New York judgment for divorce *a mensa et thoro*, and an award of permanent support and maintenance?

The rule in North Carolina is that a divorce decree rendered in a sister state which is valid and entitled to recognition under the Full Faith and Credit Clause of the United States Constitution, Art. IV, Sec. 1, is *res judicata* as to all matters in issue and determined, and a bar to a subsequent suit for the same relief. *Arrington v. Arrington*, 127 N.C. 190, 37 S.E. 212; *Jenkins v. Jenkins*, 225 N.C. 681, 36 S.E. 2d 233; *Howland v. Stitzer*, 231 N.C. 528, 58 S.E. 2d 104; *Barber v. Barber*, 217 N.C. 422, 8 S.E. 2d 204; *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 102 S.E. 2d 469.

In the *Howland v. Stitzer* case, *supra*, *Denny, J.*, writing for the Court, said: " 'Under the full faith and credit clause of the Constitution of the United States, a judgment rendered by a court of one State is, in the courts of another State of the Union, binding

and conclusive as to the merits adjudicated. It is improper to permit an alteration or re-examination of the judgment, or of the grounds on which it is based * * *.' "

Thus it appears that there is nothing in this case to indicate that the New York judgment is not valid. Indeed, the defendant-wife who procured that judgment pleads it as a valid decree. The doctrine of *res judicata* is clearly applicable to the situation presented by the pleadings herein. The parties here are the identical litigants who were before the New York court in 1952 when the judgment was entered granting defendant-wife a divorce *a mensa et thoro* and support and maintenance. Indeed, as is stated in *Bates v. Bodie*, 245 U.S. 520, 38 S. Ct. 182, 62 L. Ed. 444, " * * * If the second action is upon the same claim or demand as that upon which the judgment pleaded was rendered the judgment is an absolute bar * * * ."

In *Barber v. Barber, supra,* and *Kinross-Wright v. Kinross-Wright, supra,* it is said that an order for the payment of alimony is *res judicata* between the parties, but is not a final judgment, since the court has power to modify the orders for changed conditions of the parties.

And in *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251, the Indiana Court held that: " • * * a judgment or decree obtained in another State is conclusive here as to all matters which were or might have been then adjudicated. Hence a decree of divorce in Kentucky, in which alimony was allowed, concludes the wife from applying in this State for a further provision although such original allowance was insufficient * * * Divorces *a mensa et thoro,* in England, and statutory divorces here, and the consequent allowance of alimony, are predicated on the relationship of husband and wife, and the obligation of the husband to provide for the suitable maintenance of the wife. Taking the matter then as it stood in England, we find no precedent, except in a few extreme cases, where any court has interfered in granting a maintenance to the wife, other than the court that granted the divorce * * * ."

And *Maclay v. Maclay*, 147 Fla., 77, 2 So. 2d 361, is a case in which it was held that a New York decree of divorce *a mensa et thoro* which adjudicated that the husband was guilty of wrongdoing, and was granted because of the husband's cruel and inhuman treatment toward his wife was *res judicata* as to issues there determined, in husband's Florida suit for divorce.

Moreover, in Nelson On Divorce, 2nd Ed. p. 522, it is said: " • • • An alimony or support decree rendered in one State, or a provision for alimony or support, being such as to be accorded recog-

nition in another State under the Full Faith and Credit Clause * * * may operate in the latter State as a bar to another action for alimony, or as an adjudication of matters determined or involved in its rendition * * * ."

Furthermore, in *Howland v. Stitzer, supra, Justice Denny,* quoting from *Paulin v. Paulin,* 195 Ill. App. 352, said: " 'True it is that every decree for alimony is subject to be varied at a subsequent time by the court entering the decree, yet no other court can disturb it, and until such court does so, it remains fast, firm, and final.' "

The next question is whether or not the defendant-wife's plea of recrimination is a bar to the right of the husband to get an absolute divorce in this action. The plaintiff-husband contends that since a final judgment of divorce from bed and board, *a mensa et thoro,* had been obtained more than two years from the time he instituted this suit for divorce *a vinculo matrimonii,* the defendant-wife cannot now set up the defense of recrimination even though it has been judicially determined that he, plaintiff-husband, was at fault.

The doctrine of recrimination is recognized in North Carolina. It is well settled that the defendant to an action for divorce may set up as a defense in bar that the plaintiff was guilty of misconduct which in itself is a ground for divorce. Also our divorce statutes do not authorize the granting of a divorce to one spouse where the other pleads and establishes recrimination.

In *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466, *Stacy, C. J.,* writing for the Court, declared: " * * * It is true the statute under review provides that either party may sue for a divorce or for a dissolution of the bonds of matrimony, 'if and when the husband and wife have lived separate and apart for two years', etc. However, it is not to be supposed the General Assembly intended to authorize one spouse willfully and wrongfully to abandon the other for a period of two years, and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong * * *." See also *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471.

However, in *Lockhart v. Lockhart,* 223 N.C. 559, 27 S.E. 2d 444, this Court held that the effect of a judgment granting a divorce *a mensa et thoro* was to legalize the separation of the parties which theretofore had been caused by the husband's actions, and that after two years from the date of such judgment, the husband could proceed to an absolute divorce. See also *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296.

In fine, the effect of the judgment in *Lockhart v. Lockhart, supra,* was to legalize the separation of the parties which theretofore had

been an abandonment on the part of the plaintiff. He could not thereafter be charged with desertion.

Therefore, the husband is entitled to bring his action for an absolute divorce regardless of fault since the New York judgment in 1952 had the effect of legalizing the separation date, and the wife cannot defend on the ground of recrimination.

Nothing in this decision or in any decree of divorce granted in this action shall have the effect of impairing or destroying any right of the defendant-wife to receive alimony or other rights provided for her under any judgment or decree of a court of competent jurisdiction rendered before the rendering of a judgment of absolute divorce herein. G.S. 50-11.

For reason stated, the judgment below is

Affirmed.

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IN THE MATTER OF DONNA FAYE WOODELL.

(Filed 23 November, 1960.)

1. Notice § 3—

Where motion to modify for change of condition a decree awarding the custody of a minor is served on respondents, but the hearing at the time designated is postponed, another judge of the Superior Court may thereafter, upon findings, supported by evidence, that the interest of the minor required the motion to be heard at the earliest possible date and that respondents had sufficient notice, hear the motion, and respondents, participating in the hearing and offering evidence, waive their right to further notice, G.S. 1-581, there being nothing to indicate that respondents lacked sufficient time, or failed to introduce any evidence they had or desired to present.

2. Infants § 9—

A decree modifying a prior order awarding the custody of a minor to her paternal grandparents by awarding the child's custody to her mother will be affirmed when the decree is based upon findings, supported by evidence, of a material change of conditions subsequent to the prior order and that the best interest of the child, upon the conditions then subsisting, required the awarding of her custody to her mother.

3. Same—

A surviving parent has a natural and legal right to the custody and control of a child of the marriage, and while this right is not absolute, it may be denied only when the interest and welfare of the child clearly require.

IN RE WOODELL.

APPEAL by Steve Woodell and Beulah Woodell from an order of *Hooks, Special Judge,* signed 9 June 1960, RANDOLPH.

Proceeding initiated by petition in the Juvenile Court of Randolph County on 12 September 1959 to determine the custody of Donna Faye Woodell, ten years old, as between petitioner, her mother, Lena Hill Woodell Coltrane, and her paternal grandparents, Steve Woodell and Beulah Woodell, with whom the child then resided.

On 17 September 1959 the Judge of the Juvenile Court of Randolph County, after a hearing, found that it would be to the best interests of the child to award her custody to her mother, and entered a judgment accordingly. From this judgment, her grandparents appealed to the Superior Court.

The appeal was heard at the Special Superior Court September 1960 Civil Term of Randolph before Judge Susie Sharp. After a hearing Judge Sharp found, *inter alia,* as follows: The petitioner is now married to Clyde Coltrane, and three children have been born to this marriage. Petitioner is a person of good character, but she becomes mentally incompetent when pregnant. The stepfather of Donna Faye Woodell has been unkind and cruel to her. Petitioner has at times left her husband, Clyde Coltrane, because of his conduct toward her. Petitioner loves her daughter and her daughter loves her, but her emotional instability, present marital status and obligations prevent her from properly caring for Donna Faye Woodell. Donna Faye Woodell receives $57.80 per month from the government on account of her deceased father's death. Donna Faye Woodell lived with her paternal grandparents, when her mother was a mental patient at Butner, and was well cared for and happy. Her paternal grandparents are fit and proper persons to have her custody, and the best interests of the child require that her custody be awarded to them. Whereupon, Judge Sharp awarded her custody to her paternal grandparents, with a proviso that the mother shall have Donna Faye Woodell each week from Friday afternoon until after breakfast on Sunday, and with a proviso as to the use of Donna Faye Woodell's allowance from the government. From Judge Sharp's order, petitioner appealed to the Supreme Court.

On 9 November 1959, Judge Frank M. Armstrong presiding entered an order dismissing the appeal on the ground that petitioner had abandoned it.

On 12 April 1960, petitioner filed a motion in the Superior Court alleging, *inter alia:* At the time Judge Sharp entered her order petitioner was incompetent, as appears in Lunacy Docket 4, p. 478, in the office of the Clerk of the Superior Court of Randolph County,

but since then she has been declared competent as appears by judgment of the Clerk designated as A 27482. Since Judge Sharp's order Ralph Vernon Woodell, a son of Steve and Beulah Woodell, lives in their house, and he is a man of very bad reputation, has been convicted of larceny and many other offenses, and it is contrary to the best interests of Donna Faye Woodell to live in the house with him. Petitioner and her husband are proper persons to have the custody of the child. Wherefore, petitioner prayed that Judge Sharp's order be modified to award her the custody of her daughter. On the day of the filing of this petition, petitioner had served on Steve and Beulah Woodell a copy of this motion and a notice that she on 22 April 1960 would move before Judge Crissman presiding over a term of Randolph Superior Court that her motion be allowed. On 22 April 1960 Judge Crissman continued the motion due to a jury trial in which he was engaged.

On 27 May 1960 petitioner had served on the attorney for Steve and Beulah Woodell a notice that she would request Judge Crissman to hear her motion at the courthouse in Troy on 1 June 1960 at 1:30 p.m. On 2 June 1960 Judge Crissman entered an order that the motion shall be heard on 7 June 1960 at 9:30 a.m. at High Point.

On 7 June 1960 petitioner moved before Judge Hooks presiding over a civil term of Randolph Superior Court that her motion for a modification of Judge Sharp's order be allowed. Judge Hooks entered an order on the same day in which he recites that counsel for petitioner and Steve and Beulah Woodell were present in court and were heard, and it appearing to him that it would be to the best interests of Donna Faye Woodell for such motion to be heard at the earliest possible date, and that Steve and Beulah Woodell have had sufficient notice of the motion, and that the motion should be heard at 2:30 p.m. on 9 June 1960 in the courthouse at Asheboro, he decreed that the motion would be heard at such time and place.

In the hearing on 9 June 1960 before Judge Hooks, petitioner and Steve and Beulah Woodell were represented by counsel and introduced evidence. After hearing the evidence and arguments of counsel, Judge Hooks entered an order in which he found facts in substance as follows: When Judge Sharp entered her order on 30 September 1959, petitioner was under a mental disability, having been committed to the State Hospital at Butner. She has been adjudicated since then mentally competent by order of the Clerk of the Superior Court of Randolph County, and restored to all of her rights. She is now fully competent to have the care and custody of Donna

Faye Woodell. She is a person of unimpeached character and reputation. The best interest of Donna Faye Woodell would be served if her custody is awarded to her mother. There has been a change in circumstances since Judge Sharp entered her order. Whereupon, Judge Hooks decreed that full custody of Donna Faye Woodell be awarded to petitioner, her mother, and that the paternal grandparents be allowed to visit the child at petitioner's home during reasonable hours.

From this order Steve and Beulah Woodell appealed to the Supreme Court.

*Moser & Moser for petitioner, appellee.*
*Ottway Burton for respondents, appellants.*

PARKER, J. Steve and Beulah Woodell assign as errors: (1) The recital in Judge Hooks' order dated 7 June 1960 that it appears to him that it would be to the best interest of Donna Faye Woodell that petitioner's motion for a modification of Judge Sharp's order be heard at the earliest possible date, and that Steve and Beulah Woodell have had sufficient notice of the motion, and that no further notice of such motion should be given; (2) the signing of the order.

G.S. 1-581 reads: "When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order made without notice, prescribe a shorter time."

The written motion for a modification of Judge Sharp's order is in the record, had been served on Steve and Beulah Woodell on 12 April 1960, and presumably was before Judge Hooks. It appeared from the face of this motion that changed circumstances since Judge Sharp's order called for a different arrangement of custody to protect and promote the welfare of Donna Faye Woodell. Contrary to appellants' argument that the recital of facts in Judge Hooks' order of 7 June 1960 has no evidence to support it, there was evidence in the written motion to support the recital in his order of June 1960 that it would be to the best interests of the child for the motion to be heard at the earliest possible date, and that appellants had had sufficient notice of the motion.

In the hearing before Judge Hooks on 9 June 1960 appellants were represented by counsel and offered evidence. This Court said in *Collins v. Highway Com.*, 237 N.C. 277, 74 S.E. 2d 709: "A party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participat-

ing in it." Appellants did not request Judge Hooks to continue the hearing on 9 June 1960 to a later date. There is nothing in the record to indicate that at the hearing on 9 June 1960 appellants had any evidence, or desired to present any evidence, other than what they presented, or that they lacked sufficient time to prepare for hearing the motion, which motion had been served on them on 12 April 1960, or that they were prejudiced in any way by having the hearing on 9 June 1960. Appellants' three assignments of error in respect to Judge Hooks' order of 7 June 1960, and as to having the hearing of petitioner's motion on 9 June 1960 are overruled.

Appellants in their brief have not discussed, or even referred to, their assignment of error to the order of Judge Hooks of 9 June 1960 awarding the custody of Donna Faye Woodell to her mother. Judge Hooks' findings of fact in the order stand unchallenged. His findings of fact show changed circumstances calling for a different arrangement to protect and promote the welfare of Donna Faye Woodell. His findings of fact, which are supported by evidence in the record, support his conclusions and order awarding the custody of this child to her mother. This Court said in *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759: "Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." No error of law appears on the face of the record.

The order of Judge Hooks signed on 7 June 1960, and his order signed on 9 June 1960 are

Affirmed.

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STATE v. GENE NANCE.

(Filed 23 November, 1960.)

**1. Criminal Law §§ 125, 140—**

A motion for a new trial for newly discovered evidence may not be made in a criminal case in the Supreme Court, but may be made only in the trial court, at the trial term, or, in case of appeal, at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court.

**2. Intoxicating Liquor § 13c—**

Evidence of defendant's guilt of illegal sale of intoxicating liquor to a minor *held* sufficient to take the case to the jury.

APPEAL by defendant from *Hooks, Special Judge,* August Criminal Term, 1960, of CABARRUS.

This is a criminal action in which the defendant, Gene Nance, was originally tried and convicted in the Cabarrus County Recorder's Court on a warrant charging him with the illegal sale of intoxicating liquors to a minor, Bill Eudy, age 15 years. The defendant appealed to the Superior Court.

Bill Eudy testified that he was 16 years of age at the time of the trial below; that on the night of 25 November 1959 he and Ronnie Kiker went to the defendant's home, knocked on the door and entered the hall thereof; that theretofore he and the said Ronnie Kiker had "made up between us" the money; that Ronnie told the defendant he wanted to buy a pint of liquor; that the defendant got the liquor and gave it to Ronnie, who handed the defendant $3.50. These boys then went to the high school where a dance was in progress and drank the liquor. Later, the same evening, these same boys and Wayne Starnes each put up some money, returned to the defendant's home and bought another pint of liquor. Eudy testified that, "Me and Ronnie gave him (the defendant) $3.50 for it." Ronnie Kiker testified that he was only 17 years of age at the time of the trial below.

The jury returned a verdict of guilty. From the judgment imposed, the defendant appeals and assigns error.

*Attorney General Bruton, Asst. Attorney General McGalliard for the State.*

*Ann L. McKenzie for defendant.*

PER CURIAM. The defendant has filed in this Court a motion for a new trial based on newly discovered evidence.

A motion for a new trial for newly discovered evidence in a criminal case may be made in the trial court only, at the trial term, or, in case of appeal, at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court. *S. v. Casey,* 201 N.C. 620, 161 S.E. 81; *S. v. Edwards,* 205 N.C. 661, 172 S.E. 399; *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520.

The defendant assigns as error the refusal of the court below to grant his motion for judgment as of nonsuit made at the close

of the State's evidence and renewed at the close of all the evidence. In our opinion, the evidence was sufficient to take the case to the jury. This assignment of error is overruled.

No prejudicial error has been made to appear that in our opinion would justify the granting of a new trial.

No error.

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LEWIS A. SHINN v. ETHEL WILLEFORD SHINN.

(Filed 23 November, 1960.)

APPEAL by plaintiff from *Preyer, J.*, August 1960 Term, CABARRUS Superior Court.

Civil action instituted by the plaintiff on July 12, 1960, for absolute divorce on the grounds of more than two years separation. The complaint alleged the residence of the parties, their marriage on November 22, 1923, the birth of three children, all of whom are now of age, the separation of the parties in 1944 or 1945.

After the service of process on the defendant, Ethel Willeford Shinn, her physician, Dr. F. Lee Nance, made an affidavit that the defendant was, and has been since 1958, suffering from multiple sclerosis and diabetes mellitus from which she is "progressively going downhill . . . In my opinion Mrs. Shinn is neither physically nor mentally capable of defending an action against her in any court. It is doubtful whether she could physically attend court." Upon this affidavit the clerk superior court made an order appointing Katherine Shinn Barringer as guardian *ad litem* to defend the action.

The guardian *ad litem* filed answer in which she alleged: (1) The plaintiff abandoned the defendant in 1945 and since that time has failed and refused to provide the defendant with any support whatever. (2) The plaintiff is able-bodied and regularly employed and amply able to support the defendant. The guardian *ad litem*, in behalf of her ward, asked the court to allow temporary alimony and counsel fees and, after hearing, to make a permanent award.

The plaintiff filed a reply to the claim of alimony, counsel fees, etc., denied the material allegations, and entered a plea of the three-years and ten-years statutes of limitations in bar of the claim.

The court, after notice and hearing, awarded alimony *pendente*

*lite* and counsel fees. From this order the plaintiff prosecutes this appeal.

*B. W. Blackwelder, for plaintiff, appellant.*

*Bedford W. Black and James E. Roberts, by James E. Roberts, for defendant, appellee.*

PER CURIAM. The superior court, after notice and hearing, entered an order allowing alimony *pendente lite* and counsel fees. The showing was sufficient to support the order. Other questions must await the final hearing.

Affirmed.

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STATE v. CLARENCE PUGH.

(Filed 23 November, 1960.)

APPEAL by defendant from *Burgwyn, E. J.*, at May-June 1960 Term, of LEE.

Criminal prosecution upon a bill of indictment charging defendant Clarence Pugh with murder in the first degree of one Charles Otis Nodine.

Plea: Not guilty.

Upon former trial, upon evidence offered by the State, the jury returned a verdict of guilty of the felony and murder in the manner and form as charged in the bill of indictment, pursuant to which the court pronounced judgment of death by inhalation of lethal gas as provided by law. And on appeal to this Court the opinion recites that considering the evidence offered by the State in the light most favorable to the State, it appears sufficient to withstand motion for judgment as of nonsuit, — to the denial of which defendant excepted. However error in the trial was declared and a new trial granted. See *S. v. Pugh*, 250 N.C. 278, 108 S.E. 2d 649.

Pursuant thereto, in due course, the case came on for hearing at the May-June 1960 Term, and again upon arraignment defendant pleaded not guilty. And upon re-trial both the State and defendant offered evidence on which the case was submitted to the jury under the charge of the court. The jury returned a verdict of guilty of the felony and murder in the first degree, and recommended life

imprisonment thereon. In accordance therewith the trial judge ordered and adjudged "that defendant Clarence Pugh be, and he is hereby sentenced to State's Prison for and during the term of his natural life," and ordered that he be forthwith conveyed to the State Penitentiary at Raleigh, North Carolina, and delivered to the warden of the State Penitentiary.

Defendant Clarence Pugh excepted thereto and prayed an appeal, and appeals *in forma pauperis* to the Supreme Court of North Carolina, and assigns error.

*Attorney General Bruton, H. Horton Rountree, Assistant Attorney General for the State.*

*Clawson L. Williams, Jr., S. Ray Byerly for defendant, appellant.*

PER CURIAM. The evidence shown in the record of the case on appeal here presented, taken in the light most favorable to the State, is sufficient to make out a case for consideration by the jury on the charge of which defendant Clarence Pugh stands convicted, and to support the verdict of the jury as hereinabove set forth. Indeed, careful consideration of the several exceptions assigned for error fails to reveal error of such prejudicial nature that the judgment below should be disturbed. Rather, it should be and it is affirmed.

Hence in the judgment there is

No error.

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F. F. SHORES AND WIFE, MARY LEE SHORES v. JAMES L. RABON AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY.

(Filed 23 November, 1960.)

APPEAL by defendant Insurance Company from *Armstrong, J.*, February 1960 Civil Term, of UNION.

This cause was here at the Fall Term 1959 on appeal by defendant insurer from a judgment in favor of plaintiffs for $8,000. *Shores v. Rabon,* 251 N.C. 790, 112 S.E. 556. It was then held feme plaintiff was not entitled to recover; male plaintiff was entitled to recover the debt due him on 5 January 1958—one-half of the Reese note—but not in excess of $8,000 as fixed by the policy. The cause

was remanded for a determination of the amount owing to the male plaintiff.

The parties then stipulated: ". . .FIFTEEN THOUSAND TWO HUNDRED ONE AND 47/100 DOLLARS ($15,201.47) was the balance due on the Note from C. Woodrow Reese and wife, Pearle W. Reese, to F. F. Shores and wife, Mary Lee Shores, as of January 5, 1958, after applying cash payments made thereon by C. W. Reese, *et ux.*" Based on this stipulation the court entered judgment in favor of the male plaintiff for one-half the total debt, to-wit, $7,600.73. Defendant insurer excepted and appealed.

*O. L. Richardson and William G. Pittman for plaintiff, appellee.*
*Smith & Griffin for defendant, appellant.*

PER CURIAM. Appellant contends the judgment is erroneous because the court declined to credit the debt with the value of the land received as a result of the foreclosure. This was one of the questions considered and determined adversely to the insurer on the prior appeal. The word "extinguished," used in the concluding sentence of the opinion on the prior appeal, was used in the sense of payment in whole or in part.

That opinion is the law of the case. If deemed erroneous, the proper course to pursue was to petition for a rehearing, not to appeal again.

Affirmed.

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STATE v. NANNIE HELTON.

(Filed 23 November, 1960.)

APPEAL by defendant from *Crissman, J.*, May 1960 Special Term, CABARRUS Superior Court.

Prosecution upon a warrant charging the defendant with the possession for purpose of sale and selling taxpaid liquors. The attorney for the defendant and the solicitor for the State stipulated: "This case was properly before the Court, having been tried in the Cabarrus County Recorder's Court, and an appeal having been taken to the Cabarrus County Superior Court."

Deputy Sheriff Mullis, a witness for the State, testified in substance that he and another deputy drove to the rear of defendant's

house at 11:50 at night. He went to the back door, knocked, the defendant opened the door and, in response to his request to buy liquor, she invited him into the kitchen where she opened a cabinet containing several pints. He bought one pint of Bourbon Deluxe whisky for which he paid the defendant $3.50. The bottle of whisky was identified and offered in evidence.

The defendant's attorney, by cross-examination, sought to impeach the testimony of Deputy Mullis; whereupon the State called Deputy Sheriff Atwood who testified he went with Deputy Mullis to the house of the defendant on the night of August 1, 1959. Mullis went to the house and when he came out he had a bottle of whisky. The officer identified the bottle of whisky which had been previously introduced in evidence. The defendant, without offering evidence, made a motion to dismiss, which the court denied. From a verdict of guilty and judgment thereon, she appealed.

*T. W. Bruton, Attorney General, Harry W. McGalliard, Assistant Attorney General for the State.*

*Ann L. McKenzie for defendant, appellant.*

PER CURIAM. We have examined all assignments of error, in support of which the defendant has cited authority, or assigned reason or argument. We find them without merit. In the trial below, there is

No error.

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STATE OF NORTH CAROLINA v. LEON M. KNIGHT.

(Filed 23 November, 1960.)

APPEAL from *Hobgood, J.*, August 1960 Term, of LEE.

This is a criminal action. The warrant charges that defendant, Leon M. Knight, on 16 May 1960 operated a motor vehicle on a public highway while under the influence of intoxicating liquor. From a verdict of guilty and judgment entered thereon in the County Criminal Court of Lee County defendant appealed to Superior Court.

In Superior Court there was a trial *de novo*. Plea: not guilty. Verdict: guilty. Judgment: prison sentence, suspended on conditions. Defendant appeals.

*Attorney General Bruton and Assistant Attorney General McGalliard for the State.*

*Gavin, Jackson, Gavin & Williams for defendant.*

PER CURIAM. Exceptions to the charge of the court are without merit. The evidence was sufficient to make out a case for the jury. In the trial we find no prejudicial error.

No error.

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IN THE MATTER OF THE CUSTODY OF LARRY WICKER AND NANCY WICKER.

(Filed 23 November, 1960.)

APPEAL by respondent (Lloyd Wicker) from order of *Williams, Resident Judge,* signed July 2, 1960, from LEE.

*Habeas Corpus* proceeding under G.S. 17-39 to determine, in a contest between Nellie Yow Wicker, petitioner, and Lloyd Wicker, respondent, husband and wife living in a state of separation without being divorced, the custody of the two children of the marriage, namely, Larry Wicker, age 12, and Nancy Wicker, age 9.

Hearings, on affidavits offered by petitioner and respondent, were held June 11, 1960, and June 18, 1960. By order of July 2, 1960, the court, based on findings of fact set forth therein, awarded custody to petitioner during specified periods and to respondent during other specified periods.

Respondent excepted and appealed.

*Gavin, Jackson, Gavin & Williams for petitioner, appellee.*

*Seawell & Wooten and Hoyle & Hoyle for respondent, appellant.*

PER CURIAM. All findings of fact necessary to support the order of July 2, 1960, are supported by evidence, including the finding "that the best interests and best welfare of both of said children demands that their care, custody and control be committed to the partial custody and control of both the father and mother, and said custody be divided into different periods in the way and manner" set forth with particularity; and careful consideration of each of respondent's assignments of error fails to disclose error of law in respect of said order.

Affirmed.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. THE NORTH CAROLINA MOTOR CARRIERS ASSOCIATION AND THE CITY OF WILMINGTON, NORTH CAROLINA.

(Filed 30 November, 1960.)

**1. Constitutional Law §§ 6, 7: Utilities Commission § 1—**

Questions of policy in regard to rates for public utilities and carriers fall within the province of the legislative body, some of which it has delegated to the Utilities Commission. Whether the Legislature has given the Utilities Commission authority to initiate on its own motion an investigation of the entire rate structure of carriers, and place the burden upon the carriers to show that the old rate structure, which had been in effect for a number of years with the approval of the Commission, were just and reasonable, *quaere?* G.S. 62-72, G.S. 62-121.29, G.S. 62-26.

**2. Utilities Commission § 5—**

On appeal by the affected carriers from an order of the Utilities Commission putting into effect a schedule of rates, it is the province of the courts to review the administrative decision to see that the rights of the parties involved are protected.

**3. Carriers § 5: Utilities Commission § 3—**

Mileage alone is not a sufficient basis for the determination of intrastate rates by the Utilities Commission, but the Commission must consider all factors involved in rate making, including competition from interstate carriers, the different modes of transportation, the topography and volume of business as affecting costs, etc.

**4. Same—**

An order of the Utilities Commission striking out a rate structure which had been in existence for a number of years and substituting therefor a rate structure based solely on mileage, with a sole exception to meet barge competition between two specified termini, is properly reversed on appeal for failure of the Commission to take into consideration other relevant factors in rate making, but, there being some evidence before the Commission of inequities in the rates theretofore listed in the tariffs, the cause should not be dismissed, but should be remanded for further hearing and disposition with respect to rates found to be unjust, unreasonable or unlawfully discriminatory.

APPEAL by North Carolina Utilities Commission from *Mintz, J.*, May 1960 Term, NEW HANOVER Superior Court.

This proceeding was initiated on February 28, 1957, by the North Carolina Utilities Commission, upon its own motion, to conduct an investigation "with respect to the policies, practices, rates and charges now in effect on and in connection with movements of petroleum and petroleum products, in tank trucks, by motor vehicle common and contract carriers from and to points and places in North Caro-

lina." The North Carolina railroads, the City of Wilmington, the North Carolina Oil Jobbers Association, and Esso Standard Oil Company intervened.

The Commission began its hearing on October 15, 1957. The proceeding was designated Docket No. T825, Sub 13 — the purpose of which is "to determine whether the rates and charges (of the respondents listed in Appendix B) . . . or any of such rates . . . are unjust and unreasonable, prejudicial, preferential, or in violation of the law." The Commission announced: " . . . The burden of proof rests upon them (respondent motor carriers) in this proceeding to show that the said rates and charges for the transportation of petroleum products are just and reasonable, and upon failure to . . . show that said rates and charges are just and reasonable, the Commission will fix and order into effect the minimum or maximum, or minimum and maximum rates and charges it deems to be just and reasonable."

The Commission called and examined as its only witness Mr. Noah, its staff expert, who identified and offered exhibits showing rates in effect at the time of the investigation. These studies and charts showed terminals in North Carolina where motor tank trucks, both common and contract carriers and railway tank cars, are loaded with petroleum products, the various points of delivery throughout the State, and the rates and charges fixed by the carriers in their tariffs on file with the Commission. These tariffs had been in effect with the Commission's approval from 1942, with certain changes made in 1952. Perhaps of significance in the present condition of the record, is the fact that many of these tariffs are "paper," that is, practically no actual transportation of petroleum products is involved. The witness pointed out that the tariffs in effect in various instances show charges in some instances more for shorter than for longer hauls, the same for different length hauls, and different amounts for the same length hauls. After explaining the charts, Mr. Noah testified: "I do not have any information as to which of the destinations or termination points that I refer to in my Exhibit No. 1 have bulk storage facilities. I do not have any information available now as to what volume of the traffic I referred to moves on scale rates rather than on point-to-point rates, or what percentage of traffic that constitutes. Let me point out again that these exhibits show only an analysis of rates as published in the tariffs. We have not undertaken to develop by any investigation volume of tonnage or any other operational question."

" . . . There have been a few instances in the past where our Department has discussed violations of that statute (long and short

hauls, G.S. 62-128) in so far as motor carriers are concerned with either Mr. Outlaw or Mr. Forest in the office of the North Carolina Motor Carrier's Association. I do not recall those commodities or points at the moment. With respect to those instances, it is true that the Association or the tariff agent corrected the tariff to conform with the long haul statute."

The Motor Carriers Association introduced evidence to the effect that the basis for the rates now in effect was established in 1942 or 1943, with adjustments in 1952. The carriers seek permission to stay on the present rates, but if changes were to be made, the committee proposed a scale of rates which would produce the same revenue and would correct any inequities pointed out by Mr. Noah. "Our committee would be glad to change any inequities in the tariff at any time. In fact, in times past it has been called to our attention that there were inequities and for that matter typographical errors that we have changed immediately when they were called to our attention. As I turn through the five graphs (as filed by Mr. Noah) there are various places from each terminal where there are one or two very high rates. The ones that I have seen so far there is no movement to them that I have heard of in recent years." Such are what the trade calls "paper rates." " . . . our committee would change any rate of those high points that was not reasonable. There are many points in North Carolina which are low because they were first put in by the rails to meet some interstate rate or some water-borne rate. There is one rate in particular . . . that is very low because of the competition that the rails themselves had . . . from Wilmington to Fayetteville . . . by barge up the Cape Fear. . . . In order to keep any of that traffic the trucks put in the same rate that the rails had put in. . . . That . . . is regarded throughout the industry as an excessively depressed rate based on competition alone."

Esso Standard Oil Company, one of the interveners, contended the change from the existing rate to a strictly mileage rate would react to the material detriment and nullify its recent expenditure of $1,341,000 in expanding its terminal facilities at Wilmington. Change in the rate structure as proposed by the Commission "would be detrimental to carriers operating primarily from Wilmington (port terminal) or Thrift (pipeline terminal near Charlotte)" as future movements would be made from Charleston, port terminal, and Camp Croft, pipeline terminal, in South Carolina; and in the same manner movement from Norfolk, Virginia, would take away traffic from Morehead City, North Carolina.

Tariffs from these points in South Carolina and Virginia to points in North Carolina are governed by interstate rates which are lower than those based on the mileage rule proposed by the Commission. The carriers and the State of North Carolina have gone to great expense to develop port facilities at Wilmington and Morehead City. The carriers, both motor and rail, have developed terminal facilities for the handling of petroleum products in great quantities and have geared their operations accordingly. Great loss will result unless carriers' tariffs are such as will permit them to meet competition from outside the State.

Mr. Downing, who has had 39 years experience in traffic and transportation, and presently Director of Wilmington Bureau of Rates and Industry, stated to the Commissioner that to enable Wilmington to maintain its competitive position, "A prerequisite is a . . . rate structure flexible enough to enable the carriers serving Wilmington to meet competition at other ports and inland points." In 1956, 2,898,528 tons of petroleum products moved into Wilmington by ocean tankers. The competition is partially from origins located outside the State. The statement cites distances and rates from Charleston, South Carolina, to cities in North Carolina. For example, the rate per 100 pounds from Charleston to Asheville is 37.4¢. The rate in North Carolina for the same distance is 38.6¢. All State carriers serving Wilmington will require wide latitude; otherwise the traffic now moving from Wilmington will be diverted to points outside the State.

Numerous witnesses for the respondents and the interveners testified in substance that petroleum products move in intrastate commerce from ocean terminals at Morehead City, Wilmington, and by barge to Fayetteville; and from pipeline terminals at Thrift, Salisbury and Friendship. These products also move into North Carolina in interstate commerce from ocean terminals at Charleston, South Carolina, and Norfolk, Virginia, and from pipeline terminals at Camp Croft, South Carolina, and from two points in East Tennessee. Light petroleum products seldom move more than 150 miles over North Carolina roads or railroads. The witness expressed the opinion that a straight uniform mileage tariff rate would cause the transfer of such movement from Wilmington and Morehead City to Charleston and Norfolk, and from pipeline terminals in North Carolina to terminals in South Carolina and Tennessee.

A witness for Esso Standard Oil Company testified:

"I. That the Esso Standard Oil Company has been operating

under the rates published in North Carolina Motor Carriers Association, Inc., Tariff N C U C No. 50, and we find them to be both just and reasonable without prejudice to either consignee, consignor or carrier. That we have not received any complaint from either customer or carrier regarding rates as published.

"II. That any change in the rate structure detrimental to Wilmington, North Carolina, as a shipping point would nullify our additional of $1,341,000 spent during the period January 1, 1955, through September 30, 1957. This money was expended to increase traffic through the Port of Wilmington by use of super tankers and will discourage a further expenditure of monies in this behalf. This will deprive the City of Wilmington of revenue normally received from sale of provisions, equipment, supplies, etc., to these vessels.

"III. That any change in the rate structure would be detrimental to carriers operating primarily from Wilmington or Thrift, North Carolina, as product now being delivered from these shipping points would be diverted to Charleston or Camp Croft, South Carolina, depriving North Carolina intrastate carriers of revenue that they are now enjoying."

At the conclusion of the hearing, the Commission made the following findings:

"1. That respondents have failed to sustain the burden of proving that present rates and charges for the transportation of Petroleum and Petroleum Products, in tank trucks are just and reasonable, except that present rate of 11.1 cents applicable from Wilmington to Fayetteville and River Terminal to meet barge competition has been justified as a reasonable minimum competitive rate;

"2. That rates and charges for the transportation of Petroleum and Petroleum Products, in tank trucks, as described in Items 30 and 40 of North Carolina Motor Carriers Association, Inc., Agent, Tariff No. 5-I, NCUC No. 50, by motor-vehicle common carriers participating therein are unjust and unreasonable and result in undue preference or advantage to and undue discrimination against persons and places, in violation of G.S. 62-121.28(3);

"3. That rates and charges for the transportation of Petroleum and Petroleum Products, in tank trucks, by motor-vehicle contract carriers having schedules of minimum rates and charg-

es on file with the Commission as listed in Appendix A hereto are unreasonable in violation of G.S. 62-121.30;

"4. That in the interest of both the public and the carriers rates and charges on Petroleum and Petroleum Products in tank trucks should be uniform, thus giving each shipping and receiving point a nonpreferential or nonprejudicial rate;

"5. That except from Wilmington to Fayetteville and River Terminal rates and charges as minima set forth in Appendix B hereto are just and reasonable minimum rates and charges for the transportation of Petroleum and Petroleum Products, in tank trucks, by both motor-vehicle common and contract carriers; and

"6. That motor-vehicle common and contract carrier rates should be made on distance constructed over highways authorized by the State Highway Commission for traffic of the weight of Petroleum and Petroleum Products in tank trucks."

Upon the basis of these findings, the Commission ordered into effect uniform rates per 100 pounds based entirely on mileage. The rates for rail transportation in tank car lots are precisely the same as for tank trucks. The order provided, however, that distances shall be computed on the basis of highway rather than rail mileage. The order makes this one exception: "Not applicable to movements from Wilmington to Fayetteville and River Terminal."

The respondents and interveners filed exceptions to the findings of fact upon the ground they are not supported by any competent or material evidence, and without that support the rate change was not justified. The Commission overruled these exceptions and ordered the rates into effect.

After exhausting all administrative remedies, the respondents and interveners appealed to the Superior Court of New Hanover County. Upon the record duly certified by the Commission, Judge Mintz heard the appeal and, after hearing, entered judgment in part as follows:

"1. The final order of the Commission found the rates under investigation to be unlawfully discriminatory because in many instances the motor carriers were charging less for longer hauls than for shorter hauls and the same amount for different length hauls and different amounts for the same length hauls. This finding is only supported by testimony of the Commission's witness showing disparities between rates when related solely to distance. The finding is, therefore, unsupported by competent material

and substantial evidence in view of the entire record as submitted. * * *

"3. That said Commission's order is not supported by any substantial material and competent evidence that the public has been injured or that present rates of the motor carriers create any unlawful monopoly or constitutes unjust and unreasonable rates.

"4. That said order is not supported by any material evidence upon which the Commission could take into consideration other proper factors for fixing rates among others but not limited to investment of jobbers, shippers and carriers, based upon existing rate structure, variations in terrain in different areas of the state, competitive advantages and disadvantages with out-of-state terminals, and competition of private carriers.

"5. That the substantial rights of the appellants and interveners have been prejudiced because the Commission's findings, inferences, conclusions and decision are made upon unlawful proceedings, and unsupported by competent material and substantive evidence, in view of the entire record as submitted, are arbitrary and capricious, and are affected by other errors of law as set out in the Notices of Appeal and Assignments of Error of the Appellants and Interveners."

From the judgment of the Superior Court, the Commission appealed.

*Thomas Wade Bruton, Attorney General, F. Kent Burns, Assistant Attorney General for the North Carolina Utilities Commission, appellant.*

*James B. Swails, Cicero P. Yow for the City of Wilmington, North Carolina, appellee.*

*Allen & Hipp, by Edward B. Hipp for North Carolina Motor Carriers Association, appellee.*

HIGGINS, J. The Commission ordered the inquiry entirely, on its own motion, without any complaint that rates in effect were unfair, unjust, discriminatory, or should be changed. The respondents and interveners, therefore, argue the Commission was without authority to wipe out the rates and tariffs filed by the carriers, approved by the Commission, and accepted by the shippers and all customers after all parties for years had geared their operations, made their investments, relying on those rates. Apparently Judge Mintz was impressed by the logic of the argument.

Whether, under the circumstances here disclosed, it was wise to strike down an old and established rate structure and to supplant it with one entirely new and founded on so narrow a base as mileage, is probably a question of policy rather than one of law. Policy decisions are for the Legislature, some of which are left to the Commission. The Legislature, by G.S. 62-72, G.S. 62-121.29, has given the Commission authority to inquire into intrastate rates for the transportation by common carriers of petroleum products by truck or rail, or both. The Commission initiated this inquiry into a rate structure which had been in effect with Commission approval for years without objection either from the public, any carrier, shipper, or customer. The long acquiescence of the Commission in the existing tariff rate offered at least some assurance of stability to this type of transportation business. However, purporting to act under G.S. 62-26, the Commission pointed its finger at all truck and rail carriers and said, You must here and now justify these rates or we shall reverse our former holding that they are just and reasonable and shall hold they are unjust and unreasonable and supplant them with new rates. Whether the Legislature intended to give such plenary authority over the whole rate structure may be open to question. The Act says when any rate, schedule, practice, act, etc., is under investigation, the burden of proof shall be on the carrier or public utility whose rate, etc., is under investigation to show that the same is just and reasonable. The statute uses the word "carrier" or "utility" in the singular. See *Utilities Commission v. Carolina Power & Light Co.*, 250 N.C. 421, 109 S.E. 2d 253; *Scull v. R. R.*, 144 N.C. 180, 56 S.E. 876. Here, the Commission makes the rule applicable to all carriers and all rates. The Commission is the complainant, the prosecutor and the judge. The policy of courts, under such circumstances, is to review administrative decisions to see that rights are protected. *Russ v. Board of Education*, 232 N.C. 128, 59 S.E. 2d 589. The question here discussed is raised by the record — a direct answer is not now required. The main controversy may be resolved on other grounds.

Two critical questions arise on the record. First, does the evidence aided by any proper presumption show the rates in effect at the time the investigation started to be unjust, unreasonable, and discriminatory? Second, does the evidence show the proposed rates to be just, reasonable, and lawful?

The evidence of the Commission's rate expert as depicted by his charts, shows the rates on file in certain instances are lower for long-

er haul than for a shorter haul; the same for different length hauls; and different for the same length hauls. The tariffs cover hauls from all terminals. However, the evidence shows that a large percentage of the points and rates listed are paper rates. In view of this fact, Mr. Noah's admission severely dilutes, if it does not destroy, probative value of his charts. He said: "Let me point out again that these exhibits show only an analysis of rates as published in the tariffs. We have not undertaken to develop by any investigation volume of tonnage or any other operational question." The Commission contends the mere fact that tariffs show different rates for different distances is in itself a showing of discrimination, and cites as authority, *Hines v. R. R.*, 95 N.C. 434; *Lumber Co. v. R. R.*, 141 N.C. 171, 53 S.E. 823. In these cases the plaintiff sued to recover for freight overcharges on the ground the carrier charged other shippers a lesser rate for similar services. In the *Lumber Co.* case the Court said: "So dependent are all commercial activities upon adequate service by the great companies which conduct these public employments, that the general situation demands the stern code that all who apply shall be served with adequate facilities for reasonable compensation, and without discrimination." These cases interpret shippers' rights to equal rates with others under existing statutes. The fundamentals of ratemaking were not involved.

It appears even from Mr. Noah's evidence that rate-making involves more than mileage. The Commission's order itself makes an exception and states the order is not applicable to movements from Wilmington to Fayetteville and River Terminal. This exception leaves the old rate in effect. There are factors involved in rate-making which justify lower per-mile rates from some points than from others. The evidence indicates that business of some carriers and from some distribution points will be taken away unless a competitive rate lower than the Commission's schedule is permitted. The law does not contemplate that all rates shall be equal for like distances. Room is left for a rate structure which takes all factors of rate-making into account. G.S. 62-121.28 makes unlawful a rate that creates an *unjust* discrimination or *undue* or *unreasonable* advantage. Many factors give Wilmington, for example, *advantages* over Thrift. These arise from location, accessibility to sea lanes, volume of business and cost of movement. For example, the cost of operation over steep and crooked mountain roads where snow and ice are not infrequent handicaps is more than in the coastal area. Wilmington, therefore, has a natural advantage over Thrift. Recognizing these advantages by provision for a lower per-mile rate is not unjust discrimination.

Failure to recognize them may be unjust discrimination. Notwithstanding the Commission's declaration to the contrary in its order denying the rehearing, the effect of the Commission's order is to make new rates. Mileage alone is not a sufficient base for rates. 13 C.J.S., Carriers, § 291, p. 668; *Texas & Pacific Railway Co. v. United States,* 289 U.S. 627.

Notwithstanding the Commission's order that the investigation shall embrace "charges for the transportation of petroleum and petroleum products . . . by common and contract carriers," actually the evidence and new rates ordered into effect apply only to common and not to contract carriers. The reasons for this limitation are set forth by *Justice Parker* in *Utilities Commission v. Towing Corp.,* 251 N.C. 105, 110 S.E. 2d 886.

The evidence before the Commission was sufficient to show some inequities in rates listed in the tariffs. It was insufficient to support an order that the entire rate structure was unjust and unreasonable. For the same reasons, the evidence was insufficient to show the schedule of rates ordered into effect by the Commission, based entirely on mileage, are just and reasonable.

The judgment of the Superior Court to the extent it reversed the order of the Utilities Commission, is affirmed. So much thereof as directs the Commission to dismiss the proceeding, is reversed. The Superior Court will remand the proceeding to the Utilities Commission for such further hearing and disposition as may be appropriate with respect to the rates of any common carrier of the products here contemplated as may be found to be unjust, unreasonable, or unlawfully discriminatory.

Affirmed in part and reversed in part.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. ABERDEEN AND ROCK FISH RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, AND SOUTHERN RAILWAY COMPANY

AND

MOTOR CARRIERS OF PETROLEUM AND PETROLEUM PRODUCTS IN TANK TRUCKS, MEMBERS OF THE NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, J. T. OUTLAW, AGENT.

AND

THE CITY OF WILMINGTON, NORTH CAROLINA.

(Filed 30 November, 1960.)

APPEAL by the North Carolina Utilities Commission from *Mintz, J.*, May 1960 Term, NEW HANOVER Superior Court.

This proceeding originated before the North Carolina Utilities Commission upon its order of investigation into the rates and charges on intrastate movement of Petroleum and Petroleum Products in carload lots. Notice of hearing was served on the railroads. The City of Wilmington, The North Carolina Motor Carriers Association, Inc., J. T. Outlaw, Agent for Motor Carriers of Petroleum and Petroleum Products, intervened. At the hearing the Commission called as a witness its railroad rate expert, Mr. Low, who introduced as exhibits certain charts showing rail and truck rates for petroleum products from terminals in North Carolina to various points of delivery in this State. The evidence of the Commission's rate expert and of the respondents and interveners was of the same general tenor as that introduced in the companion case, *State of North Carolina ex rel Utilities Commission v. The North Carolina Motor Carriers Association* and the *City of Wilmington, ante* 432. However, Mr. Low, on cross-examination, stated: "My whole study here is based on tariff rates without any regard to the movements. As a rate expert over the years I would say that the volume of movements has some significance in rate making. If I were making rates I would be interested in the volume of movements as distinguished from just paper rates."

At the conclusion of the hearing, the Commission found existing rates unjust, unreasonable, and discriminatory, and ordered into effect new rates based entirely on mileage. The order provided that mileage should be determined by the highway measurements rather than rail measurements. The Commission denied rehearing. The respondents and interveners appealed to the superior court. Judge Mintz found facts and entered judgment setting aside the order of the Utili-

ties Commission and remanding the case to the Utilities Commission to be dismissed. The Utilities Commission appealed.

*Thomas Wade Bruton, Attorney General, F. Kent Burns, Assistant Attorney General for the North Carolina Utilities Commission, appellant.*

*Donal L. Turkal, for Seaboard Air Line Railroad Company, appellee.*

*James A. Bistline, for Southern Railway System, appellee.*

*R. B. Gwathmey, Albert B. Russ, Jr., David E. Wells for Atlantic Coast Line Railroad Company, appellee.*

*Simms & Simms for appellees.*

*Allen & Hipp, By: Edward B. Hipp for North Carolina Motor Carriers Association, appellee.*

*James B. Swails, Cicero P. Yow for City of Wilmington, appellee.*

HIGGINS, J. The questions of fact and principles of law involved in this proceeding are in substance the same as those discussed in the companion case, *State ex rel Utilities Commission v. The North Carolina Motor Carriers Association, et al, ante* 432. The railroads contended, however, the proviso at the end of G.S. 62-31 gives the railroads the right to reduce rates either directly or by change in classification. *Bennett v. Southern R. R.*, 211 N.C. 474, 191 S.E. 240. The Commission contended the proviso was repealed by Chapter 725, Session Laws of 1945. This dispute may be considered and passed on by the Commission in the further hearing.

For the reasons assigned in the companion case, so much of the judgment of the Superior Court as reversed the order of the Commission is affirmed. So much of the judgment as directs the Commission to dismiss the proceeding is reversed. The Superior Court will remand the proceeding to the Utilities Commission for further hearing and disposition not inconsistent with the opinion in this and in the companion case.

Affirmed in part and reversed in part.

J. R. BARNES AND WIFE, SADIE M. BARNES v. MILDRED E. HOUSE AND HUSBAND, CHARLES H. HOUSE, RUTH E. FITZHUGH AND HUSBAND, JOHN FITZHUGH, HERMAN M. PATE AND WIFE, SALLY W. PATE, JANIE LEE JAMES AND HUSBAND, DORAN JAMES, HALLIE P. PATE AND HUSBAND, JOHN PATE, EVA P. FROEN AND HUSBAND, CLIFFORD D. FROEN, ANNIE MAY PHILLIPS AND HUSBAND, CLIFFORD H. PHILLIPS, GERTRUDE P. HOOD AND HUSBAND, W. GRAHAM HOOD, WILLIAM A PRINCE AND WIFE, JULIA MAE PRINCE, JULIA P. NASH AND HUSBAND, BUSH W. NASH, AMOS C. PRINCE AND WIFE, NELLIE PRINCE, JOHN S. PRINCE AND WIFE, WOODY PRINCE, CHARLES PRINCE AND WIFE, SUE G. PRINCE, ALMA PRINCE (WIDOW), ALMA S. FRICK AND HUSBAND, JOE FRICK, JULIA SATTERFIELD (WIDOW), MARY CLEVE PAGE AND HUSBAND, EDWIN PAGE, FRANCES S. BARBEE AND HUSBAND, H. C. BARBEE, JR., AND MARJORIE C. PRINCE.

(Filed 30 November, 1960.)

**1. Wills § 46—**

A warranty deed of a contingent remainderman conveys his interest, since upon the happening of the contingency vesting title in him, he is estopped from denying his grantee's title.

**2. Cancellation and Rescission of Instruments § 9—**

On the issue of fraud in procuring the execution of a deed for a nominal consideration, the fact that the grantee later sold the land at a price comparably less than his purchaser paid for other property in the neighborhood, is no evidence of fraud, and therefore evidence of the prices paid for the other land by the transferree is properly excluded.

**3. Same—**

Where the parties to a deed understand that the conveyance was made for the purpose of having the grantee transfer to a designated person, misrepresentations as to the identity of the grantee cannot constitute an element of fraud when such grantee conveys to the designated third person and thus effectuates the understanding of the parties.

**4. Same—**

Grantors may not assert misrepresentations as to the amount of the land embraced in the conveyance when the grantors are of legal age and were not prevented from reading the instrument by any trick, fraud, artifice, mistake or oppression.

**5. Cancellation and Rescission of Instruments § 6—**

Where it appears that more than three years prior to the institution of an action to rescind a deed for fraud for misrepresentations as to the quantity of land embraced in the conveyance, the grantors were served with summons in another action expressly setting out the fact that they had conveyed the entire tract of land, the action for rescission is barred by the three year statute of limitations.

**6. Appeal and Error § 42—**

Where before the jury has retired the court corrects a *lapsus linguae* in the charge and gives a correct instruction on the point, the error is ordinarily cured.

APPEAL by defendants from *Bone, J.*, May Civil Term, 1960, of WAYNE.

This is an action instituted by the plaintiffs to remove a cloud from the title to their 30-acre tract of land, such cloud consisting of adverse claims of the defendants. Twenty-three of the defendants, including spouses, filed an answer in which they deny the plaintiffs' ownership of the land and ask that a deed executed as of 3 February 1945 by the defendants to the plaintiffs' predecessors in title be set aside on the ground of fraud and that the defendants be decreed the owners of the land. Eleven defendants did not answer. Marjorie C. Prince answered and disclaimed any interest in the property.

The pertinent facts are set out as follows:

1. It is admitted in the pleadings that E. C. Prince at the time of his death in 1913 was the owner of a tract of land embracing the 30-acre tract involved in this action; that his will devising the larger tract is the common source of title of the plaintiffs and the defendants.

2. E. C. Prince devised the tract of land as follows: "I hereby leave everything I have to my brothers & sisters & my nephew, Rufus Prince Satterfield, for their life & then to their children." E. C. Prince was survived by five brothers and sisters and the nephew named in his will.

3. The life beneficiaries in the will, without the remaindermen being represented, purported to divide the lands in a partitioning proceeding (instituted in December 1913, see *Barnes v. Dortch*, 245 N.C. 369, 95 S.E. 2d 872), and the 30-acre parcel in controversy, designated as Lot No. 6, was allotted to Chester H. Prince, a brother of the testator.

4. Chester H. Prince and his wife, Marjorie C. Prince, never had any children. All the other life beneficiaries under the will did have children who survived them. Chester H. Prince conveyed his life estate in the 30-acre tract of land allotted to him in the partitioning proceeding to his wife, Marjorie C. Prince, by deed executed on 1 February 1937 and duly recorded on 30 June 1937 in the office of the Register of Deeds of Wayne County in Book 244 at page 128.

5. Naomi P. Early and others executed and delivered to Marjorie C. Prince, wife of Chester H. Prince, a warranty deed dated 3 Feb-

ruary 1945 for the 30-acre parcel of land now in controversy, which was duly recorded in Book 294 at page 401 in the office of the Register of Deeds of Wayne County. The grantors in this deed were all the heirs at law of E. C. Prince (other than Chester H. Prince) who were living both (1) at the time and (2) upon the filing of this action after the death of the last surviving life beneficiary under the will of E. C. Prince. All the defendants in this action, other than spouses under subsequent marriages, executed the above deed as grantors. The answering defendants set up a counterclaim to set aside this deed on the alleged ground of fraud.

6. On 15 June 1945, Marjorie C. Prince and her husband, Chester H. Prince, executed and delivered to the plaintiffs in this action a deed for the 30-acre tract of land in controversy, which deed is recorded in Book 294 at page 483 in the office of the Register of Deeds of Wayne County.

7. On 6 August 1949, Crawford-Norwood Company, which purchased a different lot or share of the E. C. Prince lands as allotted under the partitioning proceeding as referred to hereinabove, brought an action in the Superior Court of Wayne County against all the persons who were interested in any of the lands devised under the will of E. C. Prince (including all the defendants in this action other than spouses under subsequent marriages) for the purpose of validating and making the aforesaid partitioning proceeding binding upon all parties claiming an interest in the E. C. Prince lands. On 10 October 1949, a judgment was rendered which validated the partitioning proceeding. In the complaint in the Crawford-Norwood proceeding it was alleged that "Marjorie C. Prince, wife of * * * Chester H. Prince, who is still living and who has no children, claimed to own the share allotted to Chester H. Prince in said division * * * by virtue of a deed made to her executed by all the defendants in this action except said Chester H. Prince, said deed being dated February 3, 1945, and recorded in the Registry of said Wayne County in Book 294 at page 401." Each of the defendants in the present action was a party defendant in the above action (except spouses by subsequent marriages), and each defendant in the aforesaid proceeding was served with summons and a copy of the complaint in said proceeding which was instituted on 6 August 1949. In this proceeding it was alleged that Marjorie C. Prince and Chester H. Prince "conveyed away said Lot No. 6 in the E. C. Prince land division by warranty deed dated June 15, 1945, and recorded in the Registry of said Wayne County in Book 294 at page 483." The defendants filed no answer in the proceeding to validate the division of the E. C. Prince lands.

8. The answering defendants claim title based entirely upon the alleged invalidity of the deed referred to in paragraph 5 above, which they attack on the ground of fraud. The plaintiffs in their reply denied the alleged fraud and pleaded estoppel and the three- and ten-year statutes of limitation. At the trial, most of the answering defendants testified that they signed the deed without reading it and got the impression or were told that it was a deed to the homeplace and not to the entire 30-acre tract, and that they thought they were making a deed to Chester H. Prince and not to his wife; that they understood Chester H. Prince wanted to convey the house and lot, which constituted only a part of the 30-acre tract, to a niece, Sadie M. Barnes, one of the plaintiffs herein. The evidence further tends to show that the above deed which the defendants now attack, stated a consideration of one dollar, and that the consideration paid by the plaintiffs for the 30-acre tract was $5,000 which the plaintiffs paid to Chester H. Prince and his wife at the time the property was conveyed to Sadie M. Barnes and her husband, J. R. Barnes, in June 1945. The answering defendants testified to varying circumstances under which they signed the deed. In some instances the witnesses testified that they read the deed and understood that the deed was made to Marjorie C. Prince and that they knew the entire 30-acre tract was included in the deed. Practically all of the defendants testified that, nothing was said to them about any consideration for their signature; no defendant testified that he or she was promised any consideration in connection with the execution of the deed in 1945 or that they expected to be paid any consideration for the execution of said deed; that Chester H. Prince was a favorite uncle who lived in Norfolk, Virginia, and had befriended his nieces and nephews on numerous occasions; and the evidence tends to show that practically all of them looked to him for assistance when they were in need. The evidence also tends to show that the defendants knew the homeplace was to be conveyed to Sadie M. Barnes, a niece of Chester H. Prince and an heir of E. C. Prince, in order that she might move into the homeplace, repair it and maintain it so that the uncle, Chester H. Prince, would have a place to stay when he came back to North Carolina to visit. He lived in Norfolk, Virginia, for many years prior to his death and often expressed the desire that the homeplace should remain in the family.

The jury answered the issue as to the fraudulent execution of the deed in question against the defendants. The jury further found that the plaintiffs purchased the lands for a valuable consideration and

that the counterclaim of the defendants was barred by the statute of limitations.

It was agreed that the following issue, to wit, "Are the plaintiffs the owners in fee simple of the lands described in the complaint free and clear of any lawful claims of the following named defendants?" should be answered by the court, depending upon how the preceding issues were answered by the jury. The court answered the above issue in the affirmative as to each defendant except John S. Prince. The evidence revealed that at the time of the execution of the deed dated 3 February 1945, John S. Prince was in the United States Air Force in China and that his mother, Alma Prince, signed the deed for him purportedly as his attorney. She was not authorized to sign the deed in his behalf; at least no power of attorney was ever recorded or located. The cause was retained for further proceeding with respect to the interest, if any, of the defendant John S. Prince in the said tract of land.

Judgment was entered on the verdict to the effect that the plaintiffs are the owners in fee simple of the 30-acre tract of land, free from the adverse claims of the defendants (naming them except John S. Prince), and that the adverse claims of said defendants are wrongful and constitute a cloud upon plaintiffs' title and that the plaintiffs are entitled to have said cloud removed.

Defendants appeal, assigning error.

*J. Faison Thomson & Son, Scott B. Berkeley, and James N. Smith for plaintiffs.*

*Langston & Langston, F. Ogden Parker, and Dees, Dees & Smith for defendants.*

DENNY, J. We have set out hereinabove a rather comprehensive statement of facts in order that the pertinent questions involved in this litigation may be fully understood.

The case of *Barnes v. Dortch,* 245 N.C. 369, 95 S.E. 2d 872, involved a proceeding instituted by the plaintiffs herein to authorize the sale of the 30-acre tract of land now in controversy, pursuant to the provisions of G.S. 41-11. With respect to the power to sell said tract of land and give a fee simple title thereto, this Court held that in 1945 it could not be ascertained who will ultimately take under the will of E. C. Prince; that the ultimate takers of the property allotted to Chester H. Prince, if he died without having a child or children, could not be ascertained until his death. *Burden v. Lipsitz,* 166 N.C. 523, 82 S.E. 863. Therefore, since the plaintiffs in that pro-

ceeding had not made all the heirs at law of E. C. Prince parties thereto, the proceeding was held to be ineffective for the purpose contemplated.

The partitioning proceeding instituted in 1913 by the life tenants under the will of E. C. Prince, having been ratified by possession and acquiescence therein by all the heirs of the testator and further validated by a decree of the Supreme Court in 1949, in which proceeding all the defendants in this action were parties defendant, except spouses by subsequent marriages, is not challenged in this proceeding. Consequently since all the heirs at law of E. C. Prince signed the warranty deed dated 3 February 1945, conveying all their interest in the 30-acre tract of land allotted to Chester H. Prince to Marjorie C. Prince, and all these heirs survived Chester H. Prince, who died on 3 July 1959, and are parties to this proceeding, the deed executed by them in 1945 is valid and binding on them unless it was procured by fraud.

Where one has only a contingent interest in land and conveys such interest by warranty deed, such deed passes the contingent interest in the land, by way of estoppel, to the grantee as soon as remainder vests by the happening of contingency upon which such vesting depends. *Foster v. Hackett,* 112 N.C. 546, 17 S.E. 426; *Ford v. McBrayer,* 171 N.C. 420, 88 S.E. 736; *James v. Hooker,* 172 N.C. 780, 90 S.E. 925; *Baker v. Austin,* 174 N.C. 433, 93 S.E. 949; *Bourne v. Farrar,* 180 N.C. 135, 104 S.E. 170; *Woody v. Cates,* 213 N.C. 792, 197 S.E. 561; *Thames v. Goode,* 217 N.C. 639, 9 S.E. 2d 485.

No question was raised or issue submitted in the trial below with respect to any consideration in connection with the execution of the warranty deed dated as of 3 February 1945. The only issue submitted with respect to consideration was as follows: "Did the plaintiffs purchase said lands for a valuable consideration?" This issue was answered in the affirmative. There was no objection made or exception interposed to any of the issues submitted to the jury.

The defendants assign as error the refusal of the court below to allow the defendants' counsel to cross-examine the plaintiff J. R. Barnes with respect to the value of other properties he had purchased from the heirs of E. C. Prince, some of such properties having been purchased about the same time the plaintiffs purchased the 30-acre tract which had been allotted to Chester H. Prince. In our opinion, the court below very properly excluded this evidence. There was no controversy in the trial below because the 1945 deed was executed for a nominal consideration only. Therefore, if the plaintiffs, as the evidence tends to show, paid Marjorie C. Prince and her husband, Chester

H. Prince, $5,000 as purchase price for the 30-acre tract of land allotted to Chester H. Prince, what these plaintiffs paid for other properties would be immaterial on the question of fraud in connection with the execution of the deed dated 3 February 1945. Marjorie C. Prince and her husband, Chester H. Prince, would have had the right to have conveyed this property to these plaintiffs for a nominal consideration if they had so desired. The defendants were permitted to testify in their opinion as to the value of the 30-acre tract of land on 3 February 1945. This assignment of error is overruled.

The defendants assign as error the failure of the court below to include in its instruction to the jury with respect to fraud, not only as to the quantity of land conveyed but also as to the alleged fraudulent misrepresentation as to the grantee. The evidence supports the view that these defendants were entirely willing to convey their interest in the homeplace to Chester H. Prince in order that he might convey it to the plaintiffs, but they insist that a fraud was committed upon them by inserting Marjorie C. Prince as grantee, who had theretofore been conveyed the life interest in the 30-acre tract of land allotted to Chester H. Prince. The evidence establishes unequivocally that the grantee in the 1945 deed, with the joinder of her husband, did convey the 30-acre tract which contained the homeplace to the plaintiffs in accordance with the understanding of the defendants. Their only complaint with respect thereto is that the title passed through Marjorie C. Prince instead of through Chester H. Prince. If the deed had been made to Chester H. Prince, he could not have conveyed a good title to the premises to the plaintiffs without the joinder of his wife, Marjorie C. Prince, and she could not convey a good title thereto without the joinder of Chester H. Prince. Since Marjorie C. Prince and her husband carried out exactly what all the defendants say they understood was to be done by Chester H. Prince at the time they executed the deed in 1945, insofar as the old homeplace was concerned, no possible harm has been done to these defendants by the transfer through Marjorie C. Prince instead of through Chester H. Prince. This assignment of error is wholly without merit and is overruled.

Now as to the quantity of land conveyed in the warranty deed executed in 1945. A number of these defendants testified that they did not know that the entire 30-acre tract, which included the homeplace, was conveyed in the 1945 deed until after the death of Chester H. Prince in 1959. Others testified that they read the deed and knew the 30-acre tract was included. The reasons given by other defendants as to why they did not read the deed they executed in 1945 before

signing it, are, in our opinion, insufficient to support an issue of fraud in the procurement of the deed. All the grantees in the deed executed in 1945 were at that time of legal age, none of whom was under any disability, all of whom were literate, and many of them were operating businesses of their own or holding responsible positions.

In the case of *Finance Co. v. McGaskill,* 192 N.C. 557, 135 S.E. 450, it is said: "The duty to read an instrument, or to have it read, before signing it is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity. *Grace v. Strickland,* 188 N.C. p. 373. There are none so blind as those who have eyes and will not see; none so deaf as those who have ears and will not hear. *Furst v. Merritt,* 190 N.C. p. 402, and cases there cited."

Moreover, in our opinion, had there been fraud in the procurement of the deed in 1945 with respect to the quantity of land included therein, the counterclaim to recover possession of the 30-acre tract of land by reason of such alleged fraud is barred by the statute of limitations, as found by the jury.

In this connection, these defendants, if they had really desired to do so, could have read the deed involved herein before they signed it in 1945. Furthermore, in the Crawford-Norwood proceeding referred to hereinabove, it was expressly pointed out in the complaint therein that all these defendants, except spouses by subsequent marriages, did, in 1945, execute a warranty deed to Marjorie C. Prince to the land allocated to Chester H. Prince, and that Marjorie C. Prince and her husband, Chester H. Prince, did execute a deed to such lands which conveyed the same to the plaintiffs herein. Summons and a copy of the complaint in the above proceeding were served on each and every one of the defendants, in 1945, except spouses by subsequent marriages. It is true that none of the defendants filed an answer in the Crawford-Norwood proceeding. Even so, this does not change the fact that they were served with a complaint that expressly set out the fact that said deed in 1945 purported to convey the very land they now claim, and which they now claim they did not know they conveyed until after the death of Chester H. Prince in 1959.

The defendants assign as error the instruction given by the court to the jury with respect to the burden of proof on the issue as to whether or not the defendants' counterclaim was barred by the three-year statute of limitations. The instruction given was erroneous. However, at the end of the charge and before the jury retired, the court informed the jury that such erroneous instruction had been due "to

a slip of the tongue," and should be corrected, the court then said, "I now do so," and proceeded to give a correct instruction on the issue. This assignment of error is likewise overruled.

There are a number of other assignments of error brought forward on this appeal, but upon a careful examination of them, in our opinion, no sufficient prejudicial error has been shown in the trial below that would justify a new trial.

No error.

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A.L.R. 2d

MOLLIE HOOVER v. CECIL GREGORY, T/A CITY CAB CO.

AND

POLLY HAMM v. CECIL GREGORY, T/A CITY CAB CO.

(Filed 30 November, 1960.)

**Appeal and Error § 42—**

Reference in the charge to liability insurance will not be held for error on plaintiff's appeal, since any prejudice to defendant is cured by the verdict, and any prejudice to plaintiff from the instruction that insurance premiums are determined on the basis of losses suffered by the insurance companies which all must bear, *is held* not sufficiently prejudicial to plaintiff as to require a new trial, since the effect of one accident on any juror's future insurance premium would be too insignificant to overcome the court's positive instruction that the existence or non-existence of liability insurance should not be considered in reaching a verdict.

PARKER, J., dissenting.

MOORE, J., concurs in dissent.

APPEAL by plaintiffs from *Armstrong, J.*, March 1960 Term, RICHMOND Superior Court.

Civil actions to recover damages for injuries alleged to have resulted from the actionable negligence of the defendant in the operation of a 1955 Pontiac automobile in which the plaintiffs were riding as passengers at the time it left the road and turned over. The two actions were seperately brought but were consolidated and tried together.

The pleadings and evidence raised issues of negligence, contributory negligence, and damages. The jury found the defendant was negligent and plaintiffs were contributorily negligent. From the judgment dismissing the cases, plaintiffs appealed.

*Page & Page, by John T. Page, Jr., for plaintiffs, appellants.*
*Bynum & Bynum for defendant, appellee.*

HIGGINS, J. The plaintiffs' only assignments of error challenge the following portion of the court's charge:

> "There is one other matter that I must call to your attention, and of which the court takes judicial notice. And of which, as I say, is a matter of common knowledge to all people, that in North Carolina in 1958 every person who owned and operated a motor vehicle in North Carolina was required to do one of two things, that is, provide some sort of liability insurance or post some sort of a bond. You are not concerned with that fact even though you may know about it. You would violate your oaths and would not be fit to serve on a jury if you would let that fact have any bearing upon your verdict in this case, that is, you should not speculate about whether the parties are insured or not insured. You know if a plaintiff in a suit, and this has nothing to do with this case, if a person is prudent enough to take out some insurance and gets hurt in some sort of accident whether it is an automobile or some other accident and his insurance company pays him, that does not prevent him from suing another for negligence and recovering. So, this matter of having liability insurance in North Carolina must be faced by all of our people, jurors, litigants, judges and lawyers and everybody else, and we must be mindful that this fact has no place in the jury box. Premiums are determined upon the losses and liabilities suffered by insurance companies which we all must bear, but nevertheless, that should not enter into a jury's verdict. It would be just as bad to let that enter into one's verdict as it would to say on the other hand that a person has insurance. You first got to determine in cases like this whether or not there is liability, and then if there is liability, what is the damage that naturally and proximately flow and have been suffered by the parties, and whether they have insurance or don't have insurance has nothing in the world to do with the case."

The plaintiffs seek to call to their aid the rulings of this Court that any evidence or reference to liability insurance in cases of this character is improper and should be kept from the jury. Our rule is stated and authorities cited by *Justice Denny* in *Taylor v. Green*, 242 N.C. 156, 87 S.E. 2d 11: "Ordinarily, in the absence of some

special circumstance, it is not permissible under our decisions to introduce evidence of the existence of liability insurance or to make any reference thereto in the presence of the jury in the trial of such cases."

The purpose of the rule is to have the jury fix damages against the party who caused them on the basis of the evidence in the case. It has been considered improper for the jury to award damages for no better reason than that they will be paid by a rich insurance company domiciled in a distant city.

In this case the learned and painstaking judge, after delivering clear and correct instructions, added at the end the portion to which the assignments of error are addressed. His purpose in doing so is not apparent. Whether counsel had argued the provisions of the Financial Responsibility Act we do not know. What the judge did was to call attention to the terms of the Act and to give emphatic instructions that the jury should give no consideration thereto. If the jury accepted the court's admonition to disregard liability insurance, neither party was prejudiced. If it did not accept the admonition, the existence of insurance might have prejudiced the defendant. The verdict cured any such harmful effect. However, the plaintiffs contend the jury might have been influenced by the court's remark about insurance rates being determined by losses and liabilities. Both before and after the remark, the judge cautioned the jury not to let such matters enter into the verdict. The effect of one accident on any juror's future insurance premium would be too insignificant, it seems to us, to overcome the judge's positive instructions as to the rule of damages, and that insurance had nothing to do with the case.

This opinion goes no further than to hold that on the facts here disclosed the plaintiffs have failed to show prejudicial error.

No error.

PARKER, J., dissenting. The trial judge's totally irrelevant statement about automobile liability insurance in his charge to the jury is set forth in the majority opinion.

Centuries ago the son of David, king in Jerusalem, wrote *"there* is no new *thing* under the sun." Ecclesiastes, Chapter 1, Verse 9. So far as a diligent search by myself and my law clerk discloses the quoted part of the charge is a new *thing* under the sun. I am fortified in my opinion by the fact that the majority opinion and the briefs of counsel cite nothing like it from the thousands of volumes of reported cases from the Courts of the lands where the English tongue is spoken.

The trial judge charged the jury that they, the defendant, and all other persons in North Carolina, who own and operate automobiles, were required to have automobile liability insurance or post a bond, and then specifically charged, "premiums are determined upon the losses and liabilities suffered by insurance companies, which we all must bear."

The majority opinion states this was not prejudicial, because the judge charged before and after this specific statement about premiums not to let insurance enter into their verdict, and because "the effect of one accident on any juror's future insurance premium would be too insignificant, it seems to us, to overcome the judge's positive instructions as to the rule of damages, and that insurance had nothing to do with the case." To this reasoning, I do not agree.

What the trial judge charged the jury about the determination of the size of the insurance premiums was prejudicial to plaintiffs, in my opinion, and nothing he said before and after that specific statement about premiums could undo the damage done them. *S. v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173.

What was the probable effect of the judge's charge in respect to the determination of the size of premiums for automobile liability insurance on the minds of the jury? The majority opinion states the effect of the one case here would be too insignificant to effect their verdict. My mind reaches a different conclusion. I think the probable effect was highly prejudicial to plaintiffs, because the jury would probably believe that to award plaintiffs substantial damages or any damages at all might tend to increase the size of the premiums they would be required to pay under our State statute for automobile liability insurance to operate their automobiles, and, therefore, might probably cause them to award plaintiffs nothing as damages, which they in fact did. The reluctance of people to pay insurance premiums increased in size is known to all.

*Justice Walker* said for the Court in *Withers v. Lane*, 144 N.C. 184, 56 S.E. 855: "The judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged."

I am confident the learned and experienced trial judge thought what he said about insurance in his charge was not prejudicial or irrelevant.

I vote for a new trial.

MOORE, J., concurs in dissent.

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STATE v. KATHRYN B. CRUSE, FRED O. CRUSE AND MAX E. CRUSE.

(Filed 30 November, 1960.)

1. **Bills and Notes § 19—**

A person authorized to sign his name under the printed name of his employer on the employer's checks, and who does so under direction merely as a clerical task to authenticate the checks, cannot be found guilty of violating G.S. 14-107 upon the non-payment of the checks for insufficient funds.

2. **Same—**

Persons directing their employee to issue checks on the firm's account, knowing at the time that the firm did not have sufficient funds or credits with the drawee bank to pay the checks on presentation, are guilty of knowingly putting worthless commercial paper in circulation. G.S. 14-107.

3. **Criminal Law § 87—**

The court has authority to order prosecutions of several defendants for offenses growing out of the same transaction to be consolidated for trial.

4. **Bills and Notes § 20—**

Evidence that defendants instigated the drawing of checks on their firm's account and the delivery of the checks to creditors of the firm in payment of the firm's indebtedness, together with testimony of officers of the drawee bank that the firm did not have sufficient funds or credits therein to provide payment of the checks on presentation, and that defendants knew they could not draw on paper accepted by the bank merely for collection until the items had been collected, is sufficient to support a finding by the jury that the checks were drawn and delivered at the instigation of defendants with knowledge that the maker was without funds or credits sufficient to provide payment.

5. **Same—**

The fact that a firm's checks are payable to its own order and delivered without endorsement to its creditor for collection does not affect the liability of those instigating the issuance of the checks under G.S.

14-107, when at the time such persons have knowledge that the firm had insufficient funds or credits with the drawee bank with which to pay same.

6. **Bills and Notes § 6—**

Where a check is made payable to the drawer's own order and delivered to the drawer's creditor without endorsement, the right to collect passes to the lawful holder by mere delivery, and he has the right to demand endorsement. G.S. 25-55.

7. **Bills and Notes § 20: Criminal Law § 34—**

In a prosecution for issuing worthless commercial paper with knowledge that there were insufficient funds on deposit or to the credit of the drawer with which to pay same, the issuance of other worthless checks by the drawer during the same period is competent for the purpose of showing *scienter*.

APPEAL by defendants from *Pless, J.*, May 1960 Special Term, of CABARRUS.

Seven warrants were issued by the County Recorder's Court of Cabarrus County for each defendant. Each of the warrants for defendant Kathryn B. Cruse charged that on a specific date she drew and delivered to a person named in the warrant a check on a named bank for a specific amount, knowing at the time that she did not have sufficient funds on deposit in or credit with the bank to pay the check upon presentation.

Each of the warrants for defendants Fred O. Cruse and Max E. Cruse charged the named defendant with soliciting, aiding, and abetting Kathryn B. Cruse in drawing and delivering a check to a named person on a named bank for a specific amount, which check was drawn by Kathryn B. Cruse for Farmers Livestock Market and on its account in said bank with knowledge at the time of such aiding and abetting that Farmers Livestock Market did not have sufficient funds on deposit in or credit with said bank to pay the check on presentation, in violation of G.S. 14-107.

Each defendant was convicted on each warrant in the recorder's court. On appeal to the Superior Court the jury returned a verdict of guilty as to each defendant on each of the charges. Judgments were entered on the verdicts and defendants appealed.

*Attorney General Bruton and Assistant Attorney General McGalliard for the State.*

*Kenneth B. Cruse and C. M. Llewellyn for defendant, appellants.*

RODMAN, J. On the trial it was stipulated that Fred O. Cruse,

Max E. Cruse, and Kermit L. Cruse were the owners and operators of Farmers Livestock Market, doing business under that trade name; that Kermit L. Cruse did not actively participate in the operation of the business; that Kathryn B. Cruse, wife of Fred O. Cruse, "was employed as a secretary in the office of said firm."

The owners and operators of Farmers Livestock Market were engaged in selling livestock at auction. For this service the business received a commission computed on the selling price of the livestock. Farmers Livestock Market issued its check to the owner of the livestock so sold for the amount bid less commissions and service charges made by Farmers Livestock Market.

During the periods named in the warrants, Farmers Livestock Market carried accounts with the Bank of Rockwell and Piedmont Bank and Trust Company. It used for payment of its obligations printed forms of checks with the printed name of Farmers Livestock Market as the drawer or maker. Seven owners of livestock made sales in January and February. Each received in payment a check on the depositary bank named in the warrant. These checks bore the signature of Kathryn B. Cruse under the printed name of Farmers Livestock Market. She was authorized to sign checks on the bank accounts of Farmers Livestock Market. Each check so signed was delivered to the person named in the warrant.

From the admissions and the testimony it is apparent that Kathryn B. Cruse did not give her personal check on her bank account for the livestock sold at auction, as charged in the warrants. All she did was perform the clerical task of filling in the printed forms and signing the same to authenticate the instrument as a check of Farmers Livestock Market. There is no evidence to show that she violated the provisions of G.S. 14-107 as charged in the warrants. *S. v. Dowless,* 217 N.C. 589, 9 S.E. 2d 18. There was error in refusing to allow her motion for nonsuit.

The warrants for Fred O. Cruse and Max E. Cruse charge them with aiding and abetting Kathryn B. Cruse in drawing and delivering checks of Farmers Livestock Market on the banks named in the warrants, knowing at the time that Farmers Livestock Market did not have sufficient funds on deposit in or credit with the named banks to pay the checks on presentation.

Each warrant for Fred O. and Max E. Cruse stated facts constituting the crime defined in the second paragraph of G.S. 14-107. The motion to quash based on the asserted failure to charge facts constituting a criminal act was properly overruled. *S. v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745; G.S. 15-153.

The exception to the order consolidating the cases for trial is without merit. The court had plenary authority to order the consolidation. G.S. 15-152; *S. v. Bryant*, 250 N.C. 113, 108 S.E. 2d 128.

The act made criminal by G.S. 14-107 is knowingly putting worthless commercial paper in circulation. *S. v. Yarboro*, 194 N.C. 498, 140 S.E. 216. Officers of the banks testified Farmers Livestock Market did not have on deposit in the bank on which the checks were drawn funds or credits to provide payment on presentation. They further testified that defendants knew Farmers Livestock Market could not draw on paper accepted by the banks merely for collection until actually collected. The evidence was sufficient for the jury to find that the checks were drawn and delivered at the instigation of defendants with knowledge that the maker was without funds or credit sufficient to provide for payment.

The fact that the checks were drawn by Farmers Livestock Market payable to its own order and delivered to its creditor for collection without endorsement is without significance. The right to collect passed to the lawful holder merely by delivery. He had a right to call upon the payee to endorse. G.S. 25-55. The statute makes the delivery of worthless commercial paper a crime. It is the making and delivering of the worthless check which is made criminal. The motion to nonsuit was properly overruled.

The State offered several checks other than those named in the warrants drawn at the same time on the same banks which banks refused to honor because of insufficient funds or credit. These checks were offered and admitted only to establish *scienter*. The evidence was competent for that purpose. *S. v. McClain*, 240 N.C. 171, 81 S.E. 2d 364; *S. v. Batson*, 220 N.C. 411, 17 S.E. 2d 511.

As to Kathryn B. Cruse — Reversed.

As to Fred O. and Max E. Cruse — No error.

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THE GENERAL TIRE AND RUBBER CO. v. DISTRIBUTORS, INC.

(Filed 14 December, 1960.)

1. **Trial § 36—**

**While the form and number of issues ordinarily rest in the sound discretion of the trial judge, the judge is required to submit such issues as are necessary to settle the material controversies raised by the pleadings and to support the judgment.**

**2. Claim and Delivery § 2—**

In claim and delivery, defendant's answer denying plaintiff's right to immediate possession and defendant's wrongful detention of the goods raises these issues for the determination of the jury, and the submission of issues determining only whether plaintiff wrongfully took possession of the goods is insufficient, since even if it be established that plaintiff did not wrongfully take possession of the goods it would not follow that defendant had wrongfully detained them or that plaintiff has the right of permanent possession as against defendant so as to support judgment that plaintiff is entitled to keep possession of the goods.

**3. Frauds, Statutes of § 1—**

A contract consigning goods to be stored in the consignee's warehouse, with provision for payment as the goods are withdrawn, is not required to be in writing. G.S. 22-1.

**4. Contracts § 5—**

A written contract which does not come within the purview of the statute of frauds may be modified by subsequent parol agreement.

**5. Consignment Contracts § 1—**

Where a consignment agreement between a manufacturer and a distributor provides that the agreement is terminable upon three days notice by either party, a subsequent agreement that the distributor should make monthly payments, so as to purchase the inventory within three years, modifies the original agreement as to the three days notice, and precludes the manufacturer from terminating the contract within three years except for breach of the contract by the distributor in failing to make payment for current withdrawals or failure to pay the monthly installments on the purchase price as specified in the contract.

**6. Claim and Delivery § 2—**

In this action to recover possession of certain merchandise consigned by plaintiff to defendant under a contract stipulating that defendant was to purchase the inventory in monthly installments over a period of three years and also pay for current withdrawals, plaintiff is entitled to repossess the goods only upon breach of the contract by defendant in failing to make the payments as stipulated, and it is error for the court to place the burden of proof upon defendant to prove that plaintiff's seizure and retention of the goods under claim and delivery was wrongful.

**7. Evidence § 5—**

The parties have a substantial right in the correct placing of the burden of proof, which ordinarily rests on that party asserting the affirmative of the issue.

**8. Claim and Delivery § 2— Defendant asserting special damages resulting from seizure of goods under claim and delivery has burden of proving quantum of damages.**

Where a manufacturer seizes goods which it had consigned to its

distributor for failure of the distributor to make payments on the purchase price and payment for current withdrawals as specified in the consignment contract, the distributor's answer setting up a denial of the manufacturer's right to immediate possession and asserting that the repossession of the goods by the manufacturer was wrongful and resulted in a breach of the collateral distributorship contract, in effect sets up a counterclaim for special damages, and while no recovery may be had on the counterclaim if the manufacturer was entitled to seize and retain possession of the goods, if the issues of right to immediate possession and wrongful detention of the goods should be answered in favor of the distributor, the burden of proof would be upon the distributor on the counterclaim to prove wrongful breach of the distributorship contract by the manufacturer and the *quantum* of damages.

**9. Principal and Agent § 3—**

When a distributor contract is for an indefinite time, it is terminable at the will of either party upon reasonable notice, and what constitutes reasonable notice depends upon the facts and circumstances of each case, and is ordinarily a mixed question of law and of fact.

**10. Same—**

In determining what is a reasonable time for the termination of a distributor contract, the amount of promotional expenditures incurred by the distributor, the length of time the contract had been in operation before notice of termination, prospects for future profits, and whether the contract had proven profitable up to the time of notice, are all circumstances to be considered with the other circumstances of the particular case.

**11. Contracts § 29—**

The measure of damages for the wrongful termination of a distributor contract by the manufacturer is ordinarily the loss of prospective net profits of which the distributor was deprived by such wrongful termination insofar as they can be ascertained and measured with reasonable certainty, and where the contract specifically stipulates that the distributor should bear the promotional expenses, such expenses are not recoverable.

**12. Contracts § 5—**

Subsequent parol negotiations which do not reach the stage of an agreement of the parties cannot modify the original contract, and are properly disregarded in ascertaining what is the agreement of the parties, but may be considered only insofar as they bear upon the issue of damages.

**13. Claim and Delivery § 5: Damages § 10—**

Where the consignor seizes and retains the goods in claim and delivery under *bona fide* claim of right based upon breach of the contract of consignment by the consignee, the consignee may not recover punitive damages even though the consignor's seizure be wrongful, since punitive damages may be awarded only for a wrong done willfully or under circumstances of rudeness, oppression, or reckless and wanton disregard of the rights of claimant.

APPEAL by defendant from *Campbell, J.*, 28 March 1960 Civil "B" Term, of MECKLENBURG.

This is a civil action instituted by The General Tire and Rubber Company, an Ohio corporation, plaintiff, against Distributors, Inc., a North Carolina corporation with its principal office in Charlotte, defendant. Action was commenced 24 March 1958 by issuance of summons and ancillary proceedings in claim and delivery. Plaintiff sues for possession of certain merchandise consigned by it to defendant and stored in defendant's warehouses in Charlotte and Greensboro. Plaintiff alleges that it is the owner and entitled to the immediate possession of the merchandise, and that same is wrongfully detained by defendant. Defendant denies that plaintiff is entitled to the possession of the merchandise, denies that it was wrongfully detained, and counterclaims for damages for breach of distributorship contract on the part of plaintiff.

Trial was had before judge and jury. Issues were submitted to and answered by the jury as follows:

"1. Did the plaintiff wrongfully take its inventory from the defendant's warehouses in March 1958? Answer: No.

"2. If so, what amount is the defendant entitled to recover of the plaintiff? Answer: (no answer)."

The court entered judgment declaring plaintiff entitled to "keep and retain" the merchandise, denying recovery by defendant on its counterclaim, and taxing defendant with the costs.

Defendant appealed and assigned errors.

*Orr, Osborne & Hubbard for plaintiff.*
*Ralph C. Clontz, Jr., for defendant.*

MOORE, J. This case was here at the Fall Term, 1959. In the opinion delivered by *Bobbitt, J.*, the judgment of the court below sustaining a demurrer to defendant's counterclaim was reversed. *Rubber Co. v. Distributors*, 251 N.C. 406, 111 S.E. 2d 614. The pleadings are summarized in that opinion and there is no necessity for a comprehensive review of the pleadings on this appeal. We set out herein a general survey of the transactions between the parties and refer to the pleadings only when necessary to an understanding of the questions presented.

The plaintiff manufactures Bolta-Floor vinyl flooring and other floor covering products. In July 1956 plaintiff and defendant entered into a parol agreement whereby defendant became the sole and exclusive distributor of plaintiff's line of floor covering products for

North and South Carolina, effective 30 July 1956, for "an indefinite period of time . . . so long as defendant made reasonable efforts to promote said products. . . ." (Quotation is from article V of defendant's counterclaim). Defendant offered evidence that the distributorship was to continue a minimum of seven years, two years to promote and establish the line and five years for profitable operation to recoup promotion costs. However, this testimony as to definite time is contrary to defendant's pleadings. Plaintiff offered evidence that the distributorship was to continue as long as the parties could "mutually work with one another and mutually profit by the association."

Defendant was required to dispose of a competitive line of products which it had been selling and distributing prior to the making of this contract. This was done.

Defendant agreed to promote plaintiff's products in the Carolinas at its own expense. It was a new line which had been put on the market 1 January 1956. According to defendant's evidence the promotion entailed considerable cost and involved the acquiring of dealers, local advertising, furnishing samples and displays to dealers and others, and personal calls on architects. According to plaintiff no extra expense for promotion was contemplated for the reason that defendant was already established in this type of business and liberal quantities of samples and advertising matter would be and were furnished by plaintiff.

Defendant had insufficient working capital to purchase and store in its warehouses an adequate inventory of floor covering products to implement and maintain the distributorship. As a credit arrangement, the parties executed in writing a "Warehouse Agreement" or consignment contract dated 30 July 1956. It provides that merchandise be consigned to defendant and placed in defendant's warehouses, title is to remain in plaintiff until the goods are disposed of in the course of business, defendant is to furnish monthly inventories of the consigned goods and lists of transfers to and from stock and make weekly reports of withdrawals, defendant is to make financial statements of its business upon request and make payments monthly for withdrawals from inventory, and breach of the agreement shall be just cause for termination and the agreement may be "cancelled by either party at any time upon three days' written notice." It was orally agreed that the consigned inventory should be approximately $30,000.00 in value.

Plaintiff says that there was parol understanding that the warehouse agreement would be terminated at the end of one year, at

which time defendant was to purchase and pay for the inventory. Defendant says it was a permanent arrangement to last as long as the distributorship. However, there was a new agreement in July 1957 respecting this matter. Plaintiff agreed to continue consigning the goods as before for the ensuing three years, and defendant was given three years to consummate the purchase of the inventory. At the first of each month plaintiff was to bill defendant for 1/36 of the inventory of the warehouses as of the end of the preceding month, and defendant was to pay these billings along with the current accounts. The payments on inventory were to be kept in a trust fund and at the end of the 36 months period be applied to the purchase and title would then pass to defendant. Plaintiff agreed to withdraw from the warehouses slow-moving items, and its representative was to inspect and agree upon the items to be withdrawn. These items were not removed until December 1957.

In the latter part of 1957 and until June 1958 defendant was in arrears in payment of its current accounts up to $5500.00. It never paid any installments for purchase of the consigned merchandise. Defendant explained that it had in its files for several months a check for payment of the arrearage in current accounts, but did not transmit it or pay the purchase installments for the reason that slow-moving goods were not withdrawn from the inventory promptly and the installment billings were not correct.

In January 1958 plaintiff advised that defendant's business was getting shaky and requested guaranties signed by defendant's stockholders. On 24 February 1958 defendant offered to make arrangements for a cash purchase of inventory, requested a conference and asked 30 days to put affairs in order. On 28 February 1958 plaintiff demanded guaranties or surrender of the inventory. Defendant did not furnish guaranties from stockholders, but sent the personal guaranties of its president and vice-president and their wives.

On 6 March 1958 plaintiff wired defendant requesting surrender of the consigned goods. On 24 March 1958 this action was commenced. The merchandise was seized under claim and delivery proceedings, held by the sheriffs for three days and delivered to plaintiff in default of replevin bond.

Thereafter, defendant offered again to purchase the inventory and at the trial explained that it had made arrangements with a New York factor for the necessary funds. Defendant continued to take orders for plaintiff's products and either sent the orders directly to plaintiff or filled them on a cash basis from a warehouse in Char-

lotte maintained by plaintiff. Plaintiff required that the orders mailed to it be accompanied by cashiers' checks.

There was a conference and discussion by the parties on 1 May 1958. Defendant contends a new contract was made whereby the warehouse agreement was reinstated, a credit arrangement for current withdrawals of merchandise was agreed upon, and the distributorship continued. According to defendant's version it was to immediately pay the $5500 arrearage and furnish the personal guaranties of its president and vice-president in the amount of $3000 each to secure current accounts. The past due account was paid in full in June 1958. The guaranties were submitted. Plaintiff contends no contract was made, that it agreed to consider reinstatement of the warehouse agreement and the arrangement for current credit provided defendant would pay its account in full, furnish a satisfactory financial statement, and give acceptable guaranties supported by a showing of solvent assets other than investments in defendant corporation and homes of guarantors.

Plaintiff advised defendant that the financial status of defendant corporation and the guarantors was not satisfactory and declined further credit.

Defendant filed answer in this action on 18 July 1958 and set up a counterclaim for $50,000 damages for breach of contract and $100,000 punitive damages for wilful, wanton and malicious conduct of plaintiff in breaching the contract.

Plaintiff gave no notice of termination of the distributorship until after defendant had filed its counterclaim.

Defendant offered testimony that it had expended $22,915.91 in promoting plaintiff's line of floor covering in the Carolinas.

Defendant is now insolvent. Its balance sheet for the year ending 31 August 1956 showed a net operating loss of $414.58, and for the year ending 31 August 1957 a net operating loss of $10,900. During the fiscal year 1956-1957 the ratio of its assets to liabilities declined from 1.26 to 1, to 1.16 to 1, and the book value of stock from $98.57 to $64.58.

Appellant makes twenty-two assignments of error. Only three merit discussion. Defendant's motion for nonsuit at the close of the evidence was properly overruled.

The questions for consideration are: (1) Were the issues submitted by the court sufficient in form and substance to present all phases of the controversy? (2) Did the court err in placing the burden of proof on defendant? (3) Did the court err in its instructions on damages?

Issues arise upon the pleadings only. G.S. 1-196. *Darroch v. Johnson,* 250 N.C. 307, 311, 108 S.E. 2d 589. An issue of fact arises on the pleadings whenever a material fact is maintained by one party and controverted by the other. *Wells v. Clayton,* 236 N.C. 102, 105, 72 S.E. 2d 16. Ordinarily the form and number of issues in a civil action are left to the sound discretion of the judge. *Lumber Co. v. Construction Co.,* 249 N.C. 680, 685, 107 S.E. 2d 538. ". . . 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 in the pleadings, and . . . in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this Court will remand the case for a new trial." *Tucker v. Satterthwaite,* 120 N.C. 118, 122, 27 S.E. 45. G.S. 1-200; *Nebel v. Nebel,* 241 N.C. 491, 502, 85 S.E. 2d 876.

In an action for possession of personal property, wherein ancillary proceeding in claim and delivery is issued, an affidavit is required declaring that plaintiff is the owner of the property claimed or is lawfully entitled to its possession by virtue of a special property therein, and that the property is wrongfully detained by the defendant. G.S. 1-473. *Acceptance Corp. v. Waugh,* 207 N.C. 717, 719, 178 S.E. 85. A defendant's denial of the allegation that it is in the wrongful possession of the personal property in question raises an issue for the jury. *Coulbourn v. Armstrong,* 243 N.C. 663, 666, 91 S.E. 2d 912.

In the instant case plaintiff alleges that it is "the owner and entitled to the immediate possession" of the consigned merchandise and "that said property is wrongfully detained by the defendant. . . ." Defendant admits that plaintiff is the "titleholder" of the merchandise, but denies "that the plaintiff is or was entitled to immediate possession" thereof and denies that it wrongfully detained the property. These pleadings raise an issue or issues of fact as to whether plaintiff was on 24 March 1958 entitled to immediate possession of the property and whether defendant wrongfully detained it. The issues submitted by the court are not sufficient to determine these questions. The jury verdict purports to decide only that plaintiff did not wrongfully take its inventory from defendant's warehouses in March 1958. ". . . a verdict should be certain and import a definite meaning free from ambiguity and sufficient in form and substance to support a judgment. . . ." *Coulbourn v. Armstrong, supra.* From the fact that plaintiff did not wrongfully take the inventory, it does not

necessarily follow that defendant wrongfully detained it or that plaintiff had the right of permanent possession as against defendant. The vital issue was not submitted to the jury. *Bank v. Broom Co.*, 188 N.C. 508, 510, 125 S.E. 12. The issues submitted do not support the judgment "that the plaintiff is entitled to keep and retain the inventory and stock of merchandise. . . ."

The trial court may have concluded that there were admissions which rendered it unnecessary for the jury to determine this initial phase of the case. The original "Warehouse Agreement," pleaded by both parties, provides that it may be "canceled by either party at any time upon three days' written notice." And there was a stipulation "That plaintiff made due demand for return of . . . merchandise. . . ." The original "Warehouse Agreement" was not a contract required by law to be in writing. G.S. 22-1. The provisions of such a written contract may be modified by a subsequent parol agreement. *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 636, 32 S.E. 2d 34. It was admitted by both parties that an agreement was reached in July 1957 whereby defendant was to purchase and become the owner of the inventory by making monthly payments over a period of three years, at the end of which period title would pass. This abrogated the three days' notice provision and entitled defendant to retain possession for the three-year period provided it made the payments as agreed or was excused therefrom by conduct of plaintiff and performed the other provisions of the contract on its part. *Erskine v. Motors Co.*, 185 N.C. 479, 491, 117 S.E. 706. A termination of the contract upon three days' notice is repugnant to an installment purchase agreement. As stated in the opinion on the former appeal in this case: "It (plaintiff) did not have such right (to immediate possession), notwithstanding title thereto was in plaintiff until disposed of in accordance with the provisions of the 'Warehouse Agreement,' if it was agreed that the 'Warehouse Agreement' and the distributorship were to continue until July 31, 1960." *Ibid,* pp. 411-2. (Parentheses added.) To this statement we add the following proviso: unless plaintiff show a breach of the contract as modified by the parol agreement of July 1957. Proof of three days' written demand for possession of the inventory and refusal by defendant do not entitle plaintiff to immediate possession. To entitle plaintiff to possession there must be proof of a breach of the contract, such as an unjustifiable nonpayment of current accounts or purchase installments, or unsatisfactory operation. If defendant breached the contract, its detention of the goods was wrongful and plaintiff was entitled to possession — otherwise not. There

was evidence of such breach, but defendant's evidence on this record tended to controvert it. It was for the jury to determine. The court was in no position to assume a breach on the part of defendant.

The court placed the burden of proof of the first issue upon defendant. The burden of proof as to plaintiff's alleged right of immediate possession and defendant's wrongful detention of the property is on the plaintiff. *Smith v. Cook,* 196 N.C. 558, 559, 146 S.E. 229. "The burden of proof constitutes a substantial right. The burden of proof on an issue ordinarily rests on the party who asserts the affirmative thereof. . . ." Strong: N. C. Index, Vol. 2, Evidence, s. 5, pp. 248-9. *White v. Logan,* 240 N.C. 791, 792, 83 S.E. 2d 892; *Benner v. Phipps,* 214 N.C. 14, 15, 197 S.E. 549.

There must be a new trial. Ordinarily we do not chart the course of the retrial. But because of the novelty in this jurisdiction of some of the questions raised we have decided that some general discussion will be helpful.

Obviously, if the issue or issues above indicated are answered in favor of plaintiff, the jury need not consider defendant's counterclaim for damages. If defendant breached the contract, entitling plaintiff to possession of the property, it could not benefit from its own wrong or default and would not be entitled to damages. But, if the jury should resolve the indicated issue or issues in favor of defendant, then the jury should pass upon the final issue: What damages, if any, is defendant entitled to recover of plaintiff?

"In an action for the recovery of specific personal property . . . if they (the jury) find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding the property." G.S. 1-203. See also G.S. 1-230. It will be observed that defendant does not ask for a return of the property. It treats the contract as breached by the conduct of plaintiff and asks damages. On this record, if the contract was terminated by plaintiff so as to entitle defendant to damages, it was by reason of the taking of the inventory under claim and delivery and the withholding thereof from defendant. Defendant's counterclaim is in effect a pleading of special damages for plaintiff's taking and withholding the merchandise.

The original contract between the parties was partly written and partly oral. It consisted of the parol agreement making defendant exclusive distributor of the floor covering products in the Carolinas, and the written "Warehouse Agreement" arranging credit. The con-

tract was modified by the oral purchase agreement of July 1957. There was no actual interference with defendant's operations until the inventory was seized under claim and delivery in March 1958. Defendant's contentions seem to be, and the trial judge so understood them, that the taking and withholding of the inventory worked a breach of the entire contract, that it was impossible to maintain the distributorship on a profitable basis without a stock of goods and credit, and damages should be allowed for the conduct of plaintiff in seizing and withholding the inventory. So upon the damage issue the burden is on the defendant to satisfy the jury by the greater weight of the evidence: (1) that the seizure and withholding of the inventory by plaintiff effected a breach of the distributorship contract, and (2) the *quantum* of damages resulting therefrom.

In most respects the charge of the court on the issue of damages was correct — especially with respect to prospective profits. But defendant contends there was error in that the court's instructions did not permit recovery for expenditures made by defendant in promoting the distributorship. It is our opinion that the court, on this record, did not err in this respect. But a discussion of this phase of the case is in order.

The distributorship contract was for an indefinite period. Defendant's answer so alleges. "A contract for an indefinite period, which by its nature is not deemed to be perpetual, may be terminated at will on giving reasonable notice." 17 C.J.S., Contracts, s. 398, p. 887. *Erskine v. Motors Co., supra; Fulghum v. Selma,* 238 N.C. 100, 76 S.E. 2d 368; *Metals Corp. v. Weinstein,* 236 N.C. 558, 73 S.E. 2d 472. "Reasonable time is generally conceived to be a mixed question of law and fact." *Trust Co. v. Insurance Co.,* 199 N.C. 465, 469, 154 S.E. 743. Williston in discussing agency or distributor contracts says:

> "(3) Where the agreement contains no provision whatever for its termination.
>
> "Quite properly this has been held an enforceable executory contract, binding upon each party for a reasonable time. It is the settled law of agency that if the agent or employee furnishes a consideration in addition to his mere services, he is deemed to have purchased the employment for at least a reasonable period where the duration of the employment is not otherwise defined. A similar result should be reached though the dealer is a buyer-distributor rather than a technical agent, where in addition to undertaking to pay for the manufacturer's products

as ordered, he promises to establish or maintain adequate sales and demonstration facilities or to provide a maintenance and repair service for handling said products."

Williston on Contracts, Rev. Ed., Vol. 4, S. 1027A, p. 2852.

In *Elson & Co. v. Beselin & Son* (Neb. 1928), 218 N.W. 753, 756, an exclusive sales agency case, it is said: "Where the continuation of a contract is without definite duration the law implies a reasonable time, and what is a reasonable time is to be determined from the general nature and circumstances of the case. When the obligor has expended a substantial sum of money or value or has substantially rearranged his business, as in this case, preparatory to engaging upon the terms of agreement for the benefit of obligee, he ought, through fairness, to have a reasonable time and notice of the cancellation of the contract in order that he might have a reasonable opportunity to put his house in order." Also see *Erskine v. Motors Co., supra; Jack's Cookie Co. v. Brooks* (CC4C 1955), 227 F. 2d 935, cert. den'd. 351 U.S. 908; *Brooks v. Cookie Co.* (CC4C 1956), 238 F. 2d 69.

In *Allied Equipment Co. v. Weber Engineered Products* (CC4C 1956), 237 F. 2d 879, plaintiff had an exclusive distributor contract which was cancelled by defendant. The contract was oral. Plaintiff contended that it was to develop a distribution system in the territory, and that in doing so it had expended large sums of money and should be allowed to recover therefor. The court said: "On this first question we hold therefore that, if, pursuant to an understanding with Weber, Allied expended sums of money in developing a distributorship system for Weber products throughout Virginia, it was entitled to the right of distributorship for such a period of time as would enable it to recoup these and any other expenditures which with the knowledge of Weber it incurred in reliance upon the arrangement." *Ibid.*, p. 882.

The case of *Erskine v. Motors Co., supra,* is in some respects similar to the instant case. It is reported in 32 A.L.R. 196, forms the basis for an extended annotation, and is widely cited throughout the country. Plaintiffs and defendant entered into a contract whereby plaintiffs would be exclusive sales agents in the Asheville and Hendersonville areas for automobiles manufactured by defendant. The contract provided that either party could cancel upon five days' notice. A third party claimed the agency rights and at once began interfering with the arrangement. Plaintiffs offered to give up the dealership. Defendant assured plaintiffs they could retain the

contract, the contract would not be cancelled, and defendant would assist plaintiffs in making a success of the business. Defendant accepted orders for 276 automobiles to be shipped during the ensuing eight months period. Plaintiffs leased a building, purchased equipment, contracted for advertising, employed salesmen, and incurred other expenses. After two months defendant cancelled the contract and refused further shipments. Plaintiffs sued for damages. The court held that plaintiffs had a good cause of action and declared: "The measure of damages is the difference between the contract prices at which the automobiles were to be delivered to plaintiffs . . . and the market value of the automobiles during the period fixed by the contract for their delivery. . . ." With reference to the expenses incurred by plaintiffs in preparation and furtherance of the agency, the court said that the language and conduct of defendant were such as "to impress the plaintiffs to believe that they should go safely ahead with their projected scheme as agents or distributors . . . and make the anticipated expenditures . . ." and "If we (the court) should hold that plaintiffs have no legal right to be reimbursed for their outlay, under such circumstances, and to recover their reasonable and certain profit thus promised to them, would be to disregard all well settled principles in like cases." (Parentheses ours.) Thus, it seems, the court ruled that plaintiffs' preparatory expenses were recoverable in that case.

In the instant case defendant, according to its own allegations, agreed to bear the cost of promotion, as a part of the consideration for the contract. And as said in *Lumber Co. v. Plaster Co.* (Ala. 1913), 62 S. 560, "Without the consideration he was not entitled to the profits, and with the profits he is not entitled to a return of the consideration."

In 17 A.L.R. 2d, Anno: Breach of Contract — Expenditures, s. 8, p. 1318, in discussing the rule as applied to distributors' contracts, it is said: "Even if the contract contemplates preliminary expenditures of time or money by the agent or buyer — as for advertising or traveling or even leasing and fitting up salesrooms — he cannot recover these in addition to his prospective profits on the articles to be sold, figured, for example, as the difference between the price to him and the price at which they would be sold, less the future cost of selling them." Also see *Holton v. Motor Car Co.* (Mich. 1918), 168 N.W. 539.

In the foregoing annotation (17 A.L.R. 2d p. 1319) the *Erskine* case is discussed as follows: "It is to be noticed that the immediate selling profits on the automobiles would be the difference be-

tween the purchase price and the selling price. But it cannot well be assumed that the court intended that these should be recovered and the outlay in addition. If the profits were to be taken as the difference between the total sales during the period of the contract and the purchase price of the automobiles to be sold with these expenses added, the case would be different. If this probable net operating income was what was meant by the court, the *dictum* is not contrary to the general rule that the plaintiff cannot recover the profits and what he would have sustained anyway if the contract had been performed."

In any event, the *Erskine* case, as to damages, seems easily distinguishable from the instant case. In *Erskine,* the breach occurred almost immediately after the making of the contract, the expenditures were induced by promises which defendant apparently did not intend to keep at the time it made them, and recovery of profits was limited to those orders already accepted by defendant. In the instant case the contract had run for nearly two years, the expenditures for promotion were a part of the consideration for the contract, both parties had derived benefits therefrom, defendant had specifically assumed the payment thereof, and recovery of prospective net profits, if any, is permitted during a period which, under the circumstances, constitutes a reasonable time.

Where the duration of a distributor contract is indefinite and distributor has expended substantial sums in establishing and promoting the distributorship and such expenditures were within the contemplation of the parties, the contract may be terminated after the lapse of a reasonable time. What a reasonable time is depends upon the circumstances in the particular case. Among the circumstances to be considered in determining reasonable time are: The amount of preliminary and promotional expenditures, the length of time the distributorship has been in operation before notice of termination, what the prospects for future profits are, and whether it has proven profitable during actual operation. It is not a question of whether distributor has recouped his expenditures, but whether he has had a fair opportunity. In the case at bar, there is a dispute as to whether any additional promotional expenses were contemplated. There is evidence that the business has been increasingly unprofitable. In short, the expenditures are not recoverable as such, but are evidence to be considered along with the other evidence in the case in determining whether distributor has been given a reasonable period for enjoyment of the contract.

Under the agreement of July 1957, it was contemplated that the distributorship would continue until July 31, 1960, at least, provided defendant lived up to the contract, paid the purchase installments and current accounts, and showed a satisfactory operation. It is for the jury to determine whether defendant was permitted to retain the distributorship for a reasonable time, and, if not, to ascertain the damages, if any, he reasonably suffered by the alleged wrongful termination. As indicated by the court in its charge, the recovery, if any, would be those net profits which can be ascertained and measured with reasonable certainty during that period, if any, beyond the date of the seizure of the inventory which would constitute reasonable time under the circumstances.

The court in its charge made no reference to the alleged agreement of 1 May 1958. In this we find no error. The record discloses that the arrangement proposed in the conference on that date did not get beyond the negotiation stage. There was no meeting of the minds. Mr. Carson, defendant's president, testified: "With reference to the original distributorship, Mr. Towsley (plaintiff's credit manager) said we would go back to that agreement whereby we were being consigned the merchandise. Mr. Towsley also said that we must pay off the outstanding approximately $5500 we owed General Tire & Rubber Company, and we must release General Tire & Rubber Company from any damages we had suffered as a result of that action." A detailed discussion of the negotiations is unnecessary. It suffices to say that there is no evidence that a release was ever executed or tendered plaintiff. Instead, defendant filed its answer and counterclaim. Apparently, if an agreement had been reached, it was contemplated that it be a novation. Whether the making of such an agreement would have improved defendant's position in this case, *quaere*. However, evidence of the negotiations is competent insofar as it bears on the issue of damages.

The court correctly refused to submit an issue as to punitive damages. Punitive damages may be awarded only where the wrong is done wilfully or under circumstances of rudeness, oppression or in a manner which evinces a reckless and wanton disregard of the litigant's rights. *Hinson v. Dawson*, 244 N.C. 23, 27, 92 S.E. 2d 393; *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 344, 88 S.E. 2d 333. Neither the pleadings nor the evidence on this record will support an award of punitive damages.

New trial.

J. G. ROBBINS AND WIFE, FAITH P. ROBBINS v. C. W. MYERS TRADING POST, INC.

(Filed 14 December, 1960.)

**1. Appeal and Error § 60—**

A decision of the Supreme Court must be interpreted in the light of the facts of the case in which the language is used, and where, on a former appeal, the meaning of a particular term of the contract was not involved and no evidence adduced in the prior trial in regard thereto, the former opinion cannot be held to have adjudicated this question.

**2. Contracts § 12—**

A contract is to be construed as a whole and each clause and word must be considered with reference to the other provisions of the agreement and be given effect if possible by any reasonable construction.

**3. Same—**

Where the language of a contract is free from ambiguity and its meaning clear, its construction is a matter of law for the court, and parol evidence will not be heard to contradict, add to, or vary its terms, since it will be presumed that the parties inserted all provisions by which they intended to be bound.

**4. Same: Contracts § 26—**

Where a construction contract provides that the contractor should "complete in a satisfactory manner and as a first class turn-key job the entire construction of said dwelling * * * To use the same kind of material used" in a specified house, the phrase "first class turn-key job" refers to labor and the completion of the dwelling for occupancy and cannot be construed to refer to the quality of materials, since the materials to be used are expressly stipulated and controlled by the provision that they should be the same kind used in the other dwelling referred to.

**5. Same—**

Where a construction contract stipulates the materials to be used in plain and unambiguous language, the kind and quality of the materials is controlled by the written agreement, and testimony of witnesses as to the meaning of its provisions as to the kind and quality of the materials to be used, and testimony of plaintiff as to subsequent declarations of defendant as to the meaning of this specification, is incompetent as tending to vary the written instrument.

**6. Same—**

Where a construction contract stipulates that the materials to be used should be the same kind as those used by the contractor in another dwelling, and it appears that the contractor had constructed two other dwellings fitting the description, parol evidence is competent to identify the dwelling referred to.

RODMAN, J., concurring in result.

DENNY and BOBBITT, JJ., join in concurring opinion.

ROBBINS *v.* TRADING POST.

APPEAL by defendant from *Phillips, J.*, 21 March 1960 Term, of FORSYTH.

Civil action to recover damages for alleged breach of a written contract to build a dwelling house for plaintiffs.

The jury found that defendant had breached the contract, and awarded damages in the sum of $4,600.00.

From judgment in accord with the verdict, defendant appeals.

*Leake & Phillips and Wood & Stone for plaintiffs, appellees.*
*Eugene H. Phillips for defendant, appellant.*

PARKER, J. This case was here on a former appeal by defendant, and a new trial was awarded, because of the admission of incompetent evidence. *Robbins v. Trading Post,* 251 N.C. 663, 111 S.E. 2d 884.

The pleadings of the parties, consisting of a complaint and answer, in both trials are identical. The complaint alleges that defendant contracted to construct for plaintiffs on their land "a dwelling house according to certain plans and specifications and 'complete in a satisfactory manner and as a first class turn-key job, the entire construction of said dwelling' " for $10,000.00, the completion of the house, the delivery of possession of it to plaintiffs, the payment by plaintiffs of the contract price, and breach of the contract by defendant in that the house was not a first class turn-key job and satisfactory for the reason that inferior materials and workmanship were used in its construction. Defendant in its answer admits the execution of the contract, the payment of the purchase price, denies that the materials used and the workmanship were inferior, and avers that the contract was performed in accord with the terms thereof.

The contract was in writing. It was introduced in evidence by plaintiffs, and read to the jury. Its relevant parts are: "Builder agrees to commence and complete in a satisfactory manner and as a first class turn-key job the entire construction of said dwelling . . . ; IT BEING UNDERSTOOD AND AGREED that said dwelling shall be exactly like house built on Endsley Ave. house #13, except house is to have one-half brick front with the rest of the house planked up and down, house to have screens installed, full basement with no garage, oil heat to each room, tile bath to have the choice of the color of the tile in bath and kitchen, knotty pine paneling inside, fireplace in the basement and upstairs, planked up and down just like Endsley Ave. house #13 on the corner, house to have a straight

roof. . . . To be the same size house but the kitchen is to be 2 foot bigger and the bedroom smaller. To use the same kind of material used in Endsley Ave. house #13. . . . It is agreed that any substantial variation from this contract to be binding shall be in writing and signed by the parties hereto."

A. E. Gentry, a contractor and builder, who has built about eight houses a year for six or eight years, was a witness for plaintiffs. He testified on direct-examination that in his trade and business he knew what a first class turn-key job was. He was then asked what he would consider a first class turn-key job to be. Defendant assigns as error the admission of his answer over its objection as follows: "Well, it would be in a first class manner; in other words, your joints would be fitted good where you join pieces together, and you would be using a good material, that wouldn't be chipped out or knotty, full of knots, or holes, knotholes, rather." Defendant further assigns as error that Gentry on direct-examination was permitted to testify that it would cost $4,600.00, in his opinion, to repair the Robbins' house and put it in the condition that the contract calls for. Gentry testified on cross-examination: "I testified in giving my interpretation of the contract, that first class workmanlike manner and turn-key job contemplated both the best materials and the best workmanship. Your workmanship can still be first class if you don't have good materials altogether. But the end result, if inferior materials are used, still would not measure up to what you would think of a first class job. All of the materials in the house on Endsley Avenue are not of first grade quality."

Plaintiffs do not assail the building contract on the ground of fraud or mistake. This action is on the building contract as written. In order to determine the rights of the parties, it is essential that we consider the written building contract.

The Court in its opinion on the former appeal said: "The contract provides that the building 'shall be exactly like house built on Endsley Ave. house # 13' (with minor exceptions) and shall be constructed of 'the same kind of material used in Endsley Ave. house #13.' These are the plans and specifications."

In the first appeal there was no evidence in the record as to the meaning in the building trade of "a first class turn-key job the entire construction of said dwelling," as there is in the evidence in the second appeal. This Court said in *Light Co. v. Moss*, 220 N.C. 200, 17 S.E. 2d 10, quoting from Walter, Brief-Writing and Advocacy, p. 78: " 'Courts repeatedly have held that the language of their opinions must be read in connection with the facts of the case in which the

language was used.' " Bearing this well settled principle of law in mind it is plain that the Court on the former appeal did not consider and decide the legal effect and meaning of the words "a first class turn-key job the entire construction of said dwelling" as used in the written contract and as used in connection with all the other words in such contract.

"A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole. Individual clauses in an agreement and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect. The foregoing rules are applicable in the interpretation of building and construction contracts." 17 C.J.S., Contracts, § 297.

The building contract provides, "it is understood and agreed that said dwelling shall be exactly like house built on Endsley Ave. house #13," with a number of changes specified in the contract. Defendant assigns as error the admission in evidence over its objection of testimony of male plaintiff on direct-examination to the effect that when these changes were being discussed C. W. Myers, president of defendant, said he would put in first class material all through plaintiffs' house. The male plaintiff then testified: "He said the materials in the Endsley Avenue house were scraps and they was rent houses and he built them for rent houses, and they were scraps from other houses that he had built. We asked him about that at the time we signed the contract." Then he was asked: "And what did he say about that?" He answered: "He said, 'it is wrote in the contract to be first class material.' " Defendant assigns as error the denial of his motion to strike the answer. Plaintiffs contend the challenged testimony was competent to explain a latent ambiguity in the contract as to the kind of material to be used in the construction of their dwelling, that the words "first class turn-key job" were meant to identify the kind of material to be used, and that Myers' statement was an admission by defendant that the words "first class turn-key job" meant in the construction business good material and good workmanship. C. W. Myers testified on cross-examination: "My man drew that contract. I did not put in there about first class turn-key construction to deceive these people; it was put in there to be as good as that or better, and it is better; it must be a pretty good house if it is worth $12,000.00 today. I think it is a first class

turn-key job for the price of the house. I contracted to build them a house for a first class turn-key job, with the same kind of material that is in the other house. That is the contract."

Plaintiffs state in their brief: "Plaintiffs in neither trial denied that the contract required the 'same kind of material' as in the Endsley Avenue house. Plaintiffs do not at this time ask for a construction of the contract which disregards this term of the contract. Plaintiffs do ask, however, that the contract be construed as a whole, including the term 'first class turn-key job,' in the light of the evidence introduced to establish the intended meaning of that term. Plaintiffs contend the intent of the parties was strictly a matter for the jury."

The written contract states the defendant agrees to complete "as a first class turn-key job the entire *construction* of said dwelling." (Emphasis ours.) Nothing is said in these quoted words about material to be used in the construction of the dwelling. Webster, New International Dictionary, 2nd Edition, defines turn-key job thus: "Any job or contract in which the contractor agrees to complete the work to a certain specified point, and to assume all risk." The contract then specifically states: "IT BEING UNDERSTOOD AND AGREED that said dwelling shall be exactly like house built on Endsley Ave. house #13 (with minor exceptions). To use the same kind of material used in Endsley Ave. house #13."

It seems plain that the words "as a first class turn-key job the entire construction of said dwelling," as used in the contract, considered not as a detached portion but in connection with the other words in the contract, must have been used in their ordinary sense, and meant that defendant would build a complete house, that is one ready for occupancy by plaintiffs as a dwelling, and did not mean the kind of material to be used in its construction, because the material to be used in the construction was stated exactly in the contract, "to use the same kind of material used in Endsley Ave. house #13." We find no ambiguity or uncertainty in the language of the building contract before us as to the kind of material to be used in the construction of plaintiffs' dwelling. Such being the case, "the rule is that where the language of a contract is free from ambiguity, the ascertainment of its meaning and effect is for the court, and not for the jury." *Young v. Mica Co.*, 237 N.C. 644, 75 S.E. 2d 795. This rule is applicable as to building and construction contracts. 9 Am. Jur., Building and Construction Contracts, p. 8.

The terms of the building contract are clear and unambiguous as to the kind of material to be used in the construction of plaintiffs'

dwelling. Such being the case, it has long been the law in this State the court is bound to enforce the contract as it finds it. To accept plaintiffs' contention that C. W. Myers said "it is wrote in the contract to be first class material," and therefore this evidence is competent to show the intended meaning of the parties as to the kind of material to be used, would be to make a new contract for the parties. "Where the contract is, in fact, understood by one of the parties in a certain sense and the other party knows that he so understands it, then the undertaking is to be taken in that sense, provided this can be done without making a new contract for the parties." *Weger v. Robinson Nash Motor Co.*, 340 Ill. 81, 172 N.E. 7. This has been quoted in *Keefer Coal Co. v. United Electric Coal Cos.*, 291 Ill. App. 477, 10 N.E. 2d 210; *Hurd v. Illinois Bell-Telephone Co.*, 136 F. Supp. 125. This evidence is incompetent, and should have been stricken.

The building contract provides that in constructing the dwelling for plaintiffs "the same kind of material used in Endsley Ave. house #13" shall be used. This contract also speaks of "Endsley Ave house #13 on the corner." The evidence shows that defendant had constructed a dwelling on the southwest corner of Endsley Avenue and Euclid Avenue, and also a dwelling on the northwest corner of Endsley Avenue and Euclid Avenue. Both houses were constructed of inferior or substandard material, but the house on the southwest corner was built of better material than the house on the northwest corner. Plaintiffs' evidence tends to show that "Endsley Ave. house #13" in the contract refers to the house on the southwest corner of Endsley Avenue and Euclid Avenue, and plaintiffs so contend: defendant's evidence tends to show that "Endsley Ave. house #13" refers to the house on the northwest corner, and defendant so contends. The question as to the identity of the house #13 Endsley Avenue on the corner was not raised in the trial on the former appeal, and the opinion on that appeal did not consider or decide it.

This Court said in *Ray v. Blackwell*, 94 N.C. 10: "It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound, 1 Greenleaf Ev., Sec. 76. *Etheridge v. Palin*, 72 N.C. 213." What we have quoted from this case was quoted in *Oliver v. Hecht*,

207 N.C. 481, 177 S.E. 399, where, after the quotation, the Court said: "We have frequently quoted the *Ray* case, *supra,* as it is a clear and concise expression of the law on the subject." We have consistently held that the above quotation from the *Ray* case is the law in this State. *Bost v. Bost,* 234 N.C. 554, 67 S.E. 2d 745.

The testimony of A. E. Gentry to the effect that in the building trade a first class turn-key job meant the use of good material and that to repair plaintiffs' house with good material would cost $4,600.00 would be to contradict and nullify the clear and unambiguous provision of the building contract in the instant case "to use the same kind of material used in Endsley Ave. house #13," and the admission of this incompetent evidence was prejudicial to defendant and error.

There is a latent ambiguity in the words "Endsley Ave. house #13." It is a question of identity — a fitting of the description to the house —, which can only be done by evidence outside or *dehors* the written contract. *Institute v. Norwood,* 45 N.C. 65; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246. This is a question of identity, and is an issue of fact for a jury to determine under appropriate instructions by the court. When the jury has determined this issue, then there is for their determination the issue as to whether or not the same kind of material was used in the construction of plaintiffs' dwelling as was used in the construction of the dwelling identified as "Endsley Ave. house #13."

The court also committed prejudicial error in permitting Kenneth E. Foster, a witness for plaintiff, to testify over defendant's objection that the words "a first class turn-key job" in the building trade mean first class material shall be used in construction of a building, and further that to repair plaintiffs' house and make it "a first class turn-key job" would cost, in his opinion, $4,879.00.

The court erred in permitting the male plaintiff to testify that when the changes to be made in the construction of plaintiffs' house were being discussed, C. W. Myers said he would put in first class material all through plaintiffs' house, as above set forth, for the reason that the contract having been reduced to writing, the parties are presumed to have inserted in the contract all the provisions by which they intend to be bound. *Ray v. Blackwell, supra.*

Defendant is entitled to a new trial, and it is so ordered.

New trial.

RODMAN, J., concurring in result. Plaintiffs are entitled to such

damages as the law may allow for the breach of a contract correctly interpreted. To interpret it is necessary to ascertain the intent of the parties when the contract was made. That intent binds them. When they have chosen words which are plain and unambiguous to express that intent, neither may offer evidence to show a different understanding.

The opinion of the majority applies this rule to the contract therein quoted. I think the rule is not applicable to the facts of this case. The contract obligates defendant to construct "in a satisfactory manner and as a first class turn-key job." It also provides that "the same kind of material used in Endsley Ave. house" shall be used.

Plaintiffs were permitted to show what, in the building trade, the phrase "first class turn-key job" means, when, as here, the builder is obligated to furnish both labor and material. I think the evidence competent. The contract does not say that workmanship shall be first class but materials may be shoddy. To reach that result, it is necessary to conclude that the word "kind" in the phrase "kind of material used" necessarily means both quality and character of material. Unexplained, that meaning might be given to it, but it is also susceptible, I think, to a meaning of character without regard to quality. The *kind of material to be used* is pine, ash, poplar, gum, or mahogany wood or brick or concrete as used in the Endsley Avenue house. In ordinary parlance one might inquire, "What kind of material was used in making the garment?" and receive a reply, "Wool, cotton, or silk."

In ascertaining the meaning of the word "kind," it is well to remember the language of *Justice Holmes*: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 62 L. ed. 372.

The contract was written by an official of defendant. If we are permitted to hear the author's own interpretation of the phrase "first class turn-key job," made when he was writing the contract, we find that it covers both materials and workmanship.

I think the rule here applicable is as stated by *Brown, J.*, in *Neal v. Ferry Co.*, 166 N.C. 563, 82 S.E. 878. He said: "It is well settled that where words or expressions are used in a written contract, which have in particular trades or vocations a known technical meaning, parol evidence is competent to inform the court and jury as to the exact meaning of such expression in that particular trade or voca-

tion, and it is for the jury to hear the evidence and give effect to such expressions as they may find their meaning to be."

Plaintiffs are, I think, entitled to have the jury consider the evidence declared incompetent.

When the intent of the parties has been properly ascertained from the words used, plaintiffs are entitled to such damages for the breach as are allowed by law.

On the previous appeal, 251 N.C. 663, 111 S.E. 2d 884, it was said: "Plaintiffs' evidence tends to show that in order to remedy deficiencies a substantial part of what has been done must be undone. If the jury accepts plaintiffs' theory of the case, the measure of damages is the 'difference in value' rule stated above." That is the law of this case. Notwithstanding the rule so announced, the court, over defendant's objection, permitted plaintiffs to offer evidence and the jury to base its verdict on the cost of remodeling rather than the difference in value between the house as contracted for and the house as constructed. As a result plaintiffs have judgment for more than they are entitled to. This error entitles defendant to a new trial.

DENNY and BOBBITT, JJ., join in concurring opinion.

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ROY L. JONES, ADMINISTRATOR OF THE ESTATE OF MARVIN COMER JONES, DECEASED v. DOUGLAS AIRCRAFT COMPANY, INC., ORIGINAL DEFENDANT, AND BOYD & GOFORTH, INC., ADDITIONAL DEFENDANT.

(Filed 14 December, 1960.)

**1. Torts § 6—**

The right of one defendant sued in tort to the joinder of another for the purpose of contribution rests solely on statute and may be enforced only in the manner prescribed by the statute. G.S. 1-240.

**2. Same—**

A defendant seeking the joinder of another for contribution is in effect a plaintiff as to such other, and the demurrer of the additional defendant to the cross-action for contribution must be determined on the basis of whether the facts alleged in the cross-action are sufficient to show that such other was a joint *tort-feasor* whom the plaintiff could have joined as a defendant if plaintiff had so desired, and in determining this question neither the allegations of the complaint nor the evidence adduced by the plaintiff against the original defendant in a former trial may be considered.

**3. Same—**

It is not required that the defenses set up in an answer be consistent, and a defendant sued in tort may deny negligence, set up the defense of contributory negligence, and allege in the alternative that, if he were negligent, a party sought to be joined for contribution was also negligent and that such negligence concurred in proximately causing the injury or death.

**4. Same—**

While the original defendant may not set up in his cross-action for contribution that the injury was caused by an instrumentality entirely different from that asserted in the complaint, when the cross-action relates to the cause alleged in the complaint and is predicated upon the same basic factual situation, demurrer on the ground that the cross-action does not stem from the cause of action alleged in the complaint is untenable.

**5. Same— Allegations in cross-action held insufficient to state cause of action for contribution.**

Intestate, an employee of an equipment company, was furnished as the operator of a crane rented by a company having a contract for certain construction on a military base owned by the Federal Government. Intestate was killed when the boom of the crane, in the course of his employment, came in contact with a high tension wire. Suit for wrongful death was instituted against the company having the sole and exclusive control of the premises and of operations thereon under contract with the Government. This defendant filed a cross-action for contribution against the contractor upon allegations that the foreman of the contractor knew that intestate and the crane were on the premises and knew, or in the exercise of due care should have known, that the overhead transmission line had not been de-energized and failed to warn intestate, and that such information as intestate had in regard to the nature of the work and the place it was to be performed was received from such foreman. *Held:* In the absence of allegation that intestate was an employee of the contractor so as to invoke any legal duty arising from the employer-employee relationship, or allegation that the foreman advised intestate that the line had been de-energized or as to what information or instructions the foreman had given plaintiff's intestate, the cross-action is insufficient to state a cause of action against the contractor for contribution.

**6. Negligence § 37b—**

When a person has knowledge of a dangerous condition, the failure to warn him of what he already knows is without significance.

APPEAL by Douglas Aircraft Company, Inc., from *Sharp, Special Judge,* May 1960 Special Civil Term, of MECKLENBURG.

Plaintiff instituted this action against Douglas Aircraft Company, Inc., (hereafter referred to as Douglas) and S. P. Smith, J. P. Rogan and Robert E. Bolick, employees of Douglas, to recover damages

for the death, on April 9, 1957, of Marvin Comer Jones, plaintiff's intestate, alleging his death was caused by the negligence of said defendants.

The said defendants filed a joint answer.

Prior to the commencement of trial at March 9, 1959, Regular Term, Schedule B, a judgment of voluntary nonsuit was entered as to Bolick; and, at the close of plaintiff's evidence at said trial, judgments of involuntary nonsuit were entered as to Smith and Rogan. (The said individuals are no longer parties to the action.) As to Douglas, there was a verdict and judgment in favor of plaintiff. On appeal by Douglas, a new trial was awarded for error in the charge. *Jones v. Aircraft Co.*, 251 N.C. 832, 112 S.E. 2d 257.

On April 19, 1960, upon motion of Douglas, Boyd & Goforth, Inc., (hereafter referred to as Boyd & Goforth) was made an additional party defendant. Douglas then supplemented its original answer by asserting a cross action against Boyd & Goforth under G.S. 1-240 for contribution. Boyd & Goforth demurred to Douglas' cross complaint on grounds considered in the opinion.

This is an appeal by Douglas from an order sustaining Boyd & Goforth's said demurrer. Plaintiff, whose action is against Douglas but not against Boyd & Goforth, is not a party to this appeal.

*Carpenter & Webb and John G. Golding for original defendant Douglas Aircraft Company, Inc., appellant.*

*Helms, Mulliss, McMillan & Johnston for additional defendant Boyd & Goforth, Inc., appellee.*

BOBBITT, J. The question for decision, whether the cross complaint alleges facts sufficient to entitle Douglas, if adjudged liable to plaintiff, to enforce contribution from Boyd & Goforth under G.S. 1-240 as a joint *tort-feasor,* is to be determined solely on the basis of the pleadings. Evidence offered at the trial in March, 1959, as disclosed by the record on former appeal, is not relevant. Nor may we assume what allegations of the respective parties will be supported by evidence at the next trial.

*Plaintiff's allegations against Douglas* are summarized or quoted in the following (our numbering) paragraphs:

1. On the morning of April 9, 1957, the 70-foot boom of a power operated crane struck an overhead high tension electric power transmission line. When this occurred, plaintiff's intestate, the operator of the crane, then on the ground, came in contact with the electrified crane and was instantly killed.

2. This occurred on premises in Charlotte, North Carolina, owned by the United States of America and known as the Charlotte Ammunition Depot. Under contract or arrangement with the United States of America, Douglas had sole and exclusive control of said premises and of operations thereon.

3. Douglas, with the knowledge, consent and concurrence of the United States of America, contracted with Boyd & Goforth to construct an addition "to the Douglas plant" on said premises. Boyd & Goforth leased or rented the crane from Charlotte Equipment Company for use in pouring concrete. Under their agreement, Charlotte Equipment Company was to furnish and did furnish an operator for said crane, to wit, plaintiff's intestate, an employee of Charlotte Equipment Company.

4. Douglas, and its said employees, were notified that the crane would arrive on the premises on the morning of April 9, 1957, and of the necessity of having the current cut off from the overhead transmission lines, and knew the operator of the crane would be in imminent danger unless the transmission lines were de-energized when the crane (with its 70-foot boom) was in close proximity thereto.

5. Smith, Douglas' General Manager, had "general responsibility for the operation of the premises and of the facilities thereof." Rogan, Douglas' Works Manager, had responsibility "for all things in connection with the construction operations being performed by Boyd & Goforth, Inc." Bolick, Douglas' Foreman, "was charged with the specific duty on the 9th day of April 1957, of seeing that all electricity was cut off of the wires which might be contacted by . . . the crane and the boom thereof operated by" plaintiff's intestate.

6. Douglas, and its said employees, "expressly undertook and agreed to see that said electricity was cut off prior to the arrival of the said crane and boom on the premises at the place where it was to be used," and plaintiff's intestate was so advised. Plaintiff's intestate, "in reliance on the representations by the defendants that the electricity had been cut off from the power lines . . . in close proximity to said building addition, moved his crane into position to pour concrete," "pursuant to his duties to his employer, Charlotte Equipment Company," and for the purpose of carrying out his employer's contract with Boyd & Goforth.

The gist of plaintiff's alleged specifications of negligence is that Douglas, and its said employees, with knowledge of the danger to plaintiff's intestate, negligently failed, after agreeing to do so, to cut off the high voltage current on said transmission lines without warn-

ing plaintiff's intestate that they had failed to fulfill their said obligation.

In said joint answer, Douglas denied all of plaintiff's allegations as to its negligence.

For a first further answer and defense, Douglas pleaded, in bar of plaintiff's right to recover, that negligence on the part of plaintiff's intestate (1) was the sole proximate cause of his death or (2) contributed to his death as a proximate cause thereof. In support of these pleas in bar, Douglas alleged, *inter alia*, that plaintiff's intestate drove the crane from a place of safety near the Boyd & Goforth field construction office to the scene of the accident in violation of express instructions he had received from Boyd & Goforth.

For a second further answer and defense, Douglas alleged that Charlotte Equipment Company was the employer of plaintiff's intestate and furnished him a defective crane; that Charlotte Equipment Company's compensation insurance carrier had paid an award to the dependents of plaintiff's intestate; and that, on account of said negligence of Charlotte Equipment Company, any recovery by plaintiff against Douglas should be reduced to the extent of the amount so paid and to which the compensation insurance carrier would otherwise be entitled as subrogee.

Before setting forth the allegations of Douglas' cross complaint, the following well established rules are noted.

Douglas may enforce contribution from Boyd & Goforth only because of and in the manner prescribed by G.S. 1-240. See *Bell v. Lacy*, 248 N.C. 703, 104 S.E. 2d 833, where many decisions relating to this statute are cited. G.S. 1-240 permits "a defendant, who has been sued in a tort action, to bring into the action for the purpose of enforcing contribution, any joint tort-feasor, against whom the plaintiff could have originally brought suit in the same action." *Winborne, J.* (now *C. J.*), in *Wilson v. Massagee*, 224 N.C. 705, 713, 32 S.E. 2d 335; *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67, 70, 86 S.E. 2d 780. As to Boyd & Goforth, Douglas is, in effect, a plaintiff. *Etheridge v. Light Co.*, 249 N.C. 367, 369, 106 S.E. 2d 560, and cases cited.

The rule applicable in testing Douglas' cross complaint is whether it appears *from the facts alleged therein* that Douglas and Boyd & Goforth are joint *tort-feasors* in respect of the death of plaintiff's intestate. *Hobbs v. Goodman*, 240 N.C. 192, 81 S.E. 2d 413; *Hayes v. Wilmington*, 243 N.C. 525, 539, 91 S.E. 2d 673. "A demurrer tests the legal sufficiency of the pleading demurred to, admitting for the

purpose the truth of all matters and things alleged therein." *Canestrino v. Powell,* 231 N.C. 190, 196, 56 S.E. 2d 566.

It may be conceded that the facts alleged by Douglas in its first further answer and defense, *if established at trial,* would bar recovery by plaintiff against Boyd & Goforth as well as against Douglas. However, as stated by *Johnson, J.,* in *Hayes v. Wilmington, supra* (p. 540), "a defendant who elects to plead a joint tort-feasor into his case is not required to surrender other defenses available to him. Nor may an additional party defendant who is brought in as a joint tort-feasor on cross complaint of an original defendant escape the plea against him by borrowing from contradictory allegations made by the cross-complaining defendant by way of defense against the plaintiff . . . It is elemental that a defendant may set up and rely upon contradictory defenses." See *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434.

The fact that an original defendant denies negligence and otherwise asserts defenses in bar of the plaintiff's right to recover does not preclude him from alleging, conditionally or in the alternative, that *if he were negligent* a third party was also negligent, and that the negligence of such third party concurred with the negligence of the original defendant in causing the injury or death. *Hayes v. Wilmington, supra* (pp. 533-534), and cases there cited.

"It is elemental that a demurrer may not call to its aid facts not appearing on the face of the challenged pleading." *Hayes v. Wilmington, supra* (p. 538), and cases there cited. Hence, in respect of Boyd & Goforth's demurrer, decision rests solely upon the sufficiency of the facts alleged in the pleading challenged thereby, to wit, Douglas' cross complaint.

One ground of demurrer asserted by Boyd & Goforth is that there is "a misjoinder of parties and causes of action in that the cross action is not related to and does not stem from the alleged cause of action set out in the complaint." In *Hobbs v. Goodman, supra,* the decision cited by Boyd & Goforth in support of this ground of demurrer, the plaintiff alleged she was injured when a store sign projecting over the sidewalk fell upon her. She sued Goodman, the lessee of the premises, alleging Goodman had erected the sign in a negligent manner. Goodman, in cross complaint against the landlord for contribution under G.S. 1-240, alleged that the plaintiff *was not injured by a falling sign* but by a part of the metal cover of an awning the landlord had negligently erected prior to Goodman's occupancy of the premises. Judgment sustaining the landlord's demurrer to the cross complaint was sustained on the ground that the facts

alleged therein *as to what injured the plaintiff* were entirely different from those on which the plaintiff based her cause of action against Goodman. On the same ground, the landlord's demurrer to Goodman's amended cross complaint was sustained. *Hobbs v. Goodman,* 241 N.C. 297, 84 S.E. 2d 904.

As to what caused the death of plaintiff's intestate on April 9, 1957, the allegations of the complaint and of Douglas' cross complaint are in complete accord. Hence, *Hobbs v. Goodman, supra,* does not support Boyd & Goforth's contention in respect of said ground for demurrer.

The principal ground of demurrer presents this question: Does the cross complaint allege facts sufficient to state a cause of action on which the plaintiff, if he sought to do so, could recover from Boyd & Goforth as a *tort-feasor?*

Douglas' allegations against Boyd & Goforth are summarized or quoted in the following (our numbering) paragraphs:

1. On April 9, 1957, at approximately 8:00 a.m., plaintiff's intestate "caused or permitted the 70-foot boom of the crane to come in contact with an overhead transmission line, causing the body of the crane to be electrically charged, and that thereafter the plaintiff's intestate while standing on the ground touched the body of the crane and was electrocuted, and that these events occurred at the site of the work being done by Boyd & Goforth, Inc."

2. Boyd & Goforth, under and pursuant to a contract *with the United States Army* (through the corps of Engineers) "was engaged in the construction of additions to a building on the premises of the Charlotte Ordnance Missile Plant." (Our italics.)

3. On April 9, 1957, "as he had been on previous occasions," plaintiff's intestate was upon the premises of the Charlotte Ordnance Missile Plant "by virtue of a contract or arrangement between Boyd & Goforth, Inc., *and the employer of the plaintiff's intestate, Charlotte Equipment Company,* for the purpose of operating a crane owned by the said Charlotte Equipment Company." (Our italics.)

4. Douglas "had no right to control or to supervise either Boyd & Goforth, Inc., or the plaintiff's intestate, or any aspect of the work which they were doing, and did not, in fact, exercise any such control or supervision or give at any time any information or instructions to the plaintiff's intestate concerning the work on the premises or concerning the presence or absence of power in the electric transmission lines."

5. "Under the several contractual relationships existing, any request for the de-energization of power in any transmission line on

the premises would be made by Boyd & Goforth, Inc., to a representative of the Corps of Engineers of the United States Army, who, in turn, had the responsibility to notify an officer or representative of the Ordnance Service of the United States, who, in turn, would coordinate and forward the request to certain designated senior personnel of Douglas Aircraft Company, Inc., who would arrange for the de-energization if the same could be safely done without endangering other persons or processes; any notification from Douglas Aircraft Company, Inc., as to whether power could be turned off or was turned off at any time would likewise be made back through these same officers and representatives in reverse order so that in no event would any employee of Douglas Aircraft Company, Inc., give any such information to either the plaintiff's intestate or to Boyd & Goforth."

6. No employee of Douglas ever gave "to either the plaintiff's intestate or to Boyd & Goforth," any information as to whether the power on said transmission line had been or would be cut off "in connection with the circumstances giving rise to plaintiff's intestate coming in contact with the electric transmission lines."

7. Plaintiff's intestate "received *such information as he had* as to the nature of the work to be done, the place where it was to be done and the circumstances under which it was to be done (including the presence or absence of power in the overhead transmission lines referred to in the complaint) through and from John Chaney, who was employed by Boyd & Goforth, Inc., as its Superintendent and who in dealing with the plaintiff's intestate was acting within the course and scope of his employment and in the furtherance of the business of Boyd & Goforth, Inc." (Our italics.)

8. From the time plaintiff's intestate entered the premises of the Charlotte Ordnance Missile Plant at 7:30 a.m. until he was electrocuted at 8:00 a.m., "the said John Chaney knew or in the exercise of due care should have known that the plaintiff's intestate and the crane of the Charlotte Equipment Company was *(sic)* upon the premises and . . . knew or in the exercise of due care should have known that the overhead high tension transmission line referred to in the complaint had not been cut off or de-energized."

9. Boyd & Goforth, "through its Superintendant, John Chaney, and its other employees on the premises, failed to warn the plaintiff's intestate of the fact that said overhead transmission line was energized when they knew of such fact and when they further knew or in the exercise of due care should have known of the presence of the crane upon the premises and by reason of the fact that they

failed to take appropriate precautions to prevent movement of the crane by the plaintiff's intestate into the area where it might come in contact with the energized transmission line when they knew that the plaintiff's intestate looked solely to them for instructions and warnings, and when they further knew that they had exclusive knowledge of such information and instructions as they had previously given the plaintiff's intestate concerning his work and the presence or absence of danger from the overhead transmission lines."

On former appeal, *Jones v. Aircraft Co.*, 251 N.C. 832, 834, 112 S.E. 2d 257, the opinion states, incident to a consideration of Douglas' exception to the court's refusal of nonsuit, that there was evidence sufficient to permit but not compel a jury to find, *inter alia*, that "Jones, when he left Charlotte Equipment Company with the crane to work for Boyd & Goforth, became, for the period so employed, the servant of Boyd & Goforth. *Jackson v. Joyner*, 236 N.C. 259, 72 S.E. 2d 589."

It is noted: (1) This statement related to evidence adduced at said former trial, not to facts alleged in any pleading; and such evidence is not for consideration on this appeal. (2) Boyd & Goforth was not then a party to the action. (3) The statement did not constitute the basis of decision.

In *Jackson v. Joyner*, cited in the opinion on former appeal, decision was based upon the rule that "where a servant has two masters, a general and special one, the latter, if having the power of immediate direction and control, *is the one responsible for the servant's negligence.*" (Our italics.) The evidence was held sufficient to support a finding that a surgeon was liable for the negligence of a nurse, a general employee of the hospital, while acting under the immediate direction and control of the surgeon during the performance of an operation. As stated by *Johnson, J.*: "The power of control is the test of liability under the doctrine of respondeat superior." In this connection, see *Hodge v. McGuire*, 235 N.C. 132, 69 S.E. 2d 227; 57 C.J.S., Master and Servant § 566; 35 Am. Jur., Master and Servant § 541; Annotation, "Liability under respondeat superior doctrine for acts of operator furnished with leased machine or motor vehicle," 17 A.L.R. 2d 1388; Restatement, Agency § 227.

For present purposes, it is sufficient to say that Douglas does not allege that plaintiff's intestate was an employee of Boyd & Goforth either generally or on the occasion of the fatal injury. Nor does Douglas allege to what extent, if any, Charlotte Equipment Company had surrendered its right to exercise full control of plaintiff's intestate, who, according to Douglas' allegation in its cross

complaint as well as in its answer, was the employee of Charlotte Equipment Company. Hence, under Douglas' allegations, any legal duty owing by Boyd & Goforth to plaintiff's intestate did not arise out of the relationship of employer-employee or master-servant.

Incidentally, it is noted that if an employee and his employer are subject to the Workmen's Compensation Act, this Act provides the employee's exclusive remedy for an accident arising out of and in the course of his employment. G.S. 97-9; G.S. 97-10 (superseded by Ch. 1324, S.L. of 1959). And it is well settled that a third party *tort-feasor*, when sued for the injury or death of such employee, is not entitled to have the employer joined as a joint *tort-feasor* under G.S. 1-240. *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768, and cases cited; *Johnson v. Catlett*, 246 N.C. 341, 98 S.E. 2d 458; *Clark v. Freight Carriers*, 247 N.C. 705, 102 S.E. 2d 252.

In order for plaintiff's intestate, if he sought to do so, to recover damages from Boyd & Goforth as a *tort-feasor*, the facts alleged must be sufficient to establish (1) a legal duty, (2) a breach thereof, and (3) death proximately caused by such breach. *Ramsbottom v. R. R.*, 138 N.C. 38, 41, 50 S.E. 448.

Boyd & Goforth, according to Douglas' allegations, was negligent in that it failed to warn plaintiff's intestate that the overhead transmission lines were energized when Chaney knew of this fact and knew or should have known that plaintiff's intestate was on the premises of the Charlotte Ordnance Missile Plant from 7:30 a.m. until 8:00 a.m.

Douglas alleges that plaintiff's intestate, on the morning of April 9, 1957, "was upon the premises of the Charlotte Ordnance Missile Plant, as he had been on previous occasions." Douglas' allegations do not disclose where the crane was with reference to the location of the overhead transmission lines or what, if anything, plaintiff's intestate was doing, during the period from 7:30 a.m. to 8:00 a.m.

The only reasonable inference to be drawn from Douglas' allegations is that plaintiff's intestate, as well as Douglas and Boyd & Goforth, was fully aware of the danger involved in operating the crane in the vicinity of the overhead transmission lines *if and when said lines were energized.* When a person has knowledge of a dangerous condition, a failure to warn him of what he already knows is without significance. *Petty v. Print Works*, 243 N.C. 292, 304, 90 S.E. 2d 717, and cases cited.

Douglas does not allege that plaintiff's intestate, when he moved the crane into the area of the overhead transmission lines, did not then know the lines were energized. True, plaintiff had so alleged;

but Douglas is no more entitled to rely upon allegations of the complaint in aid of his cross complaint than Boyd & Goforth is entitled to rely thereon in support of its demurrer to the cross complaint. Moreover, there is no allegation that Boyd & Goforth, on the morning of April 9, 1957, gave plaintiff's intestate any information to the effect the lines had been de-energized or directed him to move the crane into the area thereof.

Douglas alleges plaintiff's intestate looked to Chaney, Boyd & Goforth's Superintendent, for instructions as to the presence or absence of power in the overhead transmission lines, and that Boyd & Goforth's employees knew "they had exclusive knowledge of such information and instructions as they had previously given the plaintiff's intestate concerning his work and the presence or absence of danger from the overhead transmission lines." As to what instructions Chaney or any of Boyd & Goforth's employees had given plaintiff's intestate on the morning of April 9, 1957, or prior thereto, Douglas' allegations are silent.

We cannot assume the instructions given by Boyd & Goforth to plaintiff's intestate, whatever they were, were sufficient to impose liability upon Boyd & Goforth any more than we can assume, as Douglas alleged in its first further answer and defense, that plaintiff's intestate drove the crane from a place of safety near the Boyd & Goforth field construction office to the scene of the accident in violation of express instructions he had received from Boyd & Goforth.

Absent allegations as to what information and instructions Boyd & Goforth had given plaintiff's intestate, the conclusion reached is that the facts alleged in the cross complaint are insufficient to show that a breach of a legal duty owing by Boyd & Goforth to plaintiff's intestate proximately caused his death.

Affirmed.

ALVIN McGINNIS v. OLD FORT FINISHING PLANT AND LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 14 December, 1960.)

1. **Master and Servant § 82—**

The Industrial Commission has authority to promulgate rules not inconsistent with Article One of the Workmen's Compensation Act for the purpose of carrying out the provisions of the Act, G.S. 97-80, and the rule of the Commission requiring that upon appeal to the full commission the particular grounds for appeal should be set forth or be deemed abandoned, is valid.

2. **Master and Servant § 93—**

Where, in the hearing before the Industrial Commission, claimant challenges only the findings and conclusions as to whether later disability was the result of new injuries or was but a recurrence of his former condition, he may not on appeal to the Superior Court assert for the first time that the defendants had waived the provisions of G.S. 97-47, since this would be a change in the theory of trial.

3. **Same—**

The findings of fact of the Industrial Commission are conclusive if supported by any evidence, and when its conclusions of law are supported by the findings, the award must be affirmed.

APPEAL by plaintiff from *Craven, S. J.*, at May Special Term, 1960, of McDOWELL.

Proceeding under the North Carolina Workmen's Compensation Act.

The record shows that "this is an action instituted by one Alvin Luther McGinnis against Old Fort Finishing Plant, as employer, and Liberty Mutual Insurance Company, as insurance carrier, for the purpose of recovering compensation on account of injuries sustained by him by accidents arising out of and in the course of his employment with the defendant, Old Fort Finishing Plant. Said accidents allegedly occurred on July 27, 1956, and April 2, 1957. On or about May 5, 1958, plaintiff had a recurring back condition which was duly reported to his employer and demand for compensation was thereafter made. Plaintiff's claim for compensation benefits allowed by the Workmen's Compensation Act was denied by the defendants, whereupon, in the manner required by law, plaintiff applied to the North Carolina Industrial Commission for a hearing, and his said claim for compensation benefits was duly scheduled for hearing and was heard by Deputy Commissioner Robert F. Thomas at Marion, North Carolina, on June 1, 1959, where and when the following proceedings were had."

And the record shows that after offering testimony counsel for plaintiff announced that that was all the evidence that plaintiff would offer, except the testimony of Doctors Severn and Burleson, for which purpose counsel for claimant moved, and the court ordered, that the case be re-set in Asheville.

The record shows that the cause came on for hearing in Asheville on 2 September, 1959, before Commissioner Brookes Peters, presiding, when and where the said doctors testified.

And the record also shows that the case having been heard at Marion by Deputy Commissioner Thomas on 1 June, 1959, and at Asheville on 2 September, 1959, the following findings of fact and conclusions as matters of law which were entered by the parties at the hearing as

*"STIPULATIONS*

"(1) That on and prior to July 27, 1956, and April 2, 1957, Alvin McGinnis and the Old Fort Finishing Plant were subject to and bound by the provisions of the Workmen's Compensation Act.

"(2) That at said times the employer-employee relationship existed between claimant and defendant employer.

"(3) That at said times the Liberty Mutual Insurance Company was the compensation carrier.

"(4) That claimant's average weekly wage while so employed was $54.80.

"(5) That on July 27, 1956, claimant sustained an injury by accident arising out of and in the course of his employment with defendant employer.

"(6) That defendants admitted liability and the parties entered into an agreement on Commission Form 21, approved by the Commission August 23, 1956, pursuant to which compensation at the rate of $32.50 per week was paid from August 7, 1956, to August 13, 1956.

"(7) That on April 4, 1957, the parties entered into a further agreement on Commission Form 26, approved by the Commission April 16, 1957, pursuant to which compensation at the rate of $32.50 per week was paid for a further period of total disability from April 2, 1957, to April 29, 1957."

And "based upon all the competent evidence adduced at the hearing the Deputy Commissioner makes the following additional

*"FINDINGS OF FACT*

"(1) Claimant, a white male, 35 years of age, admittedly sus-

tained an injury by accident arising out of and in the course of his employment with defendant employer on Friday, July 27, 1956, resulting in an injury to his back. An agreement on Industrial Commission Form 21 (defendants' exhibit A) was entered into by claimant and defendants which, among other things, provided that claimant's disability began on Monday, July 31, 1956, and for payment of compensation at the rate of $32.50 per week from August 7, 1956, and continuing for necessary weeks. Claimant was disabled from July 31, 1956, to August 13, 1956. The seven-day waiting period was deducted and claimant was paid one week's compensation to cover the period August 7, 1956, to August 13, 1956, as appears by Closing Receipt, Industrial Commission Form 27 (defendants' exhibit B).

"(2) Claimant was treated by a local physician, who referred him to Dr. R. Joe Burleson of Asheville, and on August 1, 1956, claimant was examined and treated by Dr. Burleson, who was of the opinion that claimant had sustained an acute low back strain. Dr. Burleson again examined claimant on August 8, 1956, when he was of the opinion that the claimant could return to light work about August 13, 1956. Upon further examination by Dr. Burleson on August 22, 1956, claimant was improved. Dr. Burleson last examined claimant at that time on September 12, 1956. Claimant had been wearing a back brace which Dr. Burleson instructed him to start leaving off when he was not working and also instructed the claimant in exercises to strengthen his back. Claimant was to return to Dr. Burleson for a final check two weeks thereafter, which claimant did not do.

"(3) After returning to work on August 14, 1956, claimant continued to have difficulty with his back and wore his back brace at all times. On April 1, 1957, claimant was again examined by Dr. Burleson, giving a history of 'a new injury occurring on Friday, March 29, 1957, in again bending over to pick up a roll of cloth.' Dr. Burleson prescribed treatment for a recurrent back strain. Upon examination on April 8, 1957, Dr. Burleson recommended that claimant spend more time in bed. Upon further examination by Dr. Burleson on April 12, 1957, claimant was improved. Upon examination on April 22, 1957, claimant was considerably improved and on April 29, 1957, claimant was continuing to improve and Dr. Burleson recommended that he return to light duty requiring no lifting. Dr. Burleson again examined claimant on May 15, 1957, when his back was all right except for a little morning stiffness and claimant was released for regular duty, was not to return un-

less he had further difficulty and was dismissed with no permanent disability.

"(4) A further agreement on Industrial Commission Form 26 (defendants' exhibit C) was entered into by claimant and defendants pursuant to which claimant was paid compensation at the rate of $32.50 per week for the period April 2, 1957, to April 29, 1957. Claimant was also at this time paid for the seven-day waiting period, which covered the period July 31, 1956, to August 6, 1956. Closing Receipt, Industrial Commission Form 27 (defendants' exhibit D), was signed by claimant on May 23, 1957, and claimant received the final payment of compensation on or before April 23, 1957.

"(5) Claimant returned to work on April 30, 1957, and continued to work for defendant employer until May 5, 1958, when his back condition again became acute. On May 8, 1958, claimant was examined by Dr. Henry D. Severn of Asheville, who found that claimant had a recurrence of his back strain. On said date claimant gave a history that he developed a recurrence of his back pain on May 4, 1958, with no history of reinjury. Dr. Severn also examined claimant on May 13, May 22, August 6, 1958; January 15, 1959, and August 31, 1959.

"(6) On May 29, 1958, claimant's attorney, Mr. Story, wrote the Industrial Commission as follows: 'Mr. McGinnis has employed me to represent him in the prosecution of his claim for workmen's compensation benefits due by reason of injuries sustained during the course of his employment with the above company. It would be appreciated if you would forward me the necessary forms on which to file such claim.' (Reference Claimant's Exhibit 1).

"(7) Claimant reached the end of the healing period on January 15, 1959, and has 20 per cent permanent loss of use of his back.

"(8) From May 5, 1958, to January 15, 1959, claimant was temporarily totally disabled by reason of his back condition.

"(9) Beginning in September 1958, claimant drew unemployment compensation at $27.00 per week for a period of about 10 weeks.

"(10) Claimant did not sustain an injury by accident to his back arising out of and in the course of his employment with defendant employer on March 29, 1957, or on April 2, 1957, or at any other time during his employment with defendant employer except on July 27, 1956. The acute episode claimant had with his back beginning on or about March 29, 1957, was simply a recurrence of his former condition."

And the Hearing Commissioner continued as follows:

"The foregoing findings of fact and conclusions of law engender the following additional

*"CONCLUSIONS OF LAW*

"(1) Claimant did not sustain an injury to his back by accident arising out of and in the course of his employment with defendant employer on March 29, 1957, or on April 2, 1957, or at any other time during his employment with defendant employer except on July 27, 1956. G.S. 97-2(6).

"(2) Claimant's further claim in this matter is controlled by the provisions of G.S. 97-47 and claimant having failed to make further claim with the Industrial Commission within one year after May 23, 1957, is barred. G.S. 97-47.

"Based upon the foregoing findings of fact and conclusions of law the Deputy Commissioner makes the following

*"AWARD*

"Claimant's claim for compensation be, and the same is hereby denied.

"Each side shall pay its own costs except that defendants shall pay an expert witness fee in the sum of $15.00 each to Dr. Henry D. Severn and Dr. R. Joe Burleson.

(Signed) Robert F. Thomas
Deputy Commissioner."

Thereafter on 29 September 1959, plaintiff, by letter of Paul J. Story, his attorney, acknowledged receipt of copy of the opinion of the Hearing Commissioner, expressing desire to give notice of appeal to the Full Commission, and requesting forms on which to make such an appeal.

And thereafter on 6 November 1959, plaintiff, by his said attorney, gave notice of appeal and of application for review to the North Carolina Industrial Commission, sitting as the Full Commission, and alleging "error on the part of the Hearing Commissioner for that: 1. The findings of fact, and conclusions of law based thereon, that claimant did not sustain a second injury on March 29 or April 2, and that plaintiff's disability which began on March 29th was a recurrence of his former condition.

"2. The finding of fact, and conclusion of law based thereon, by the Hearing Commissioner that the closing receipt (Defendants' Exhibit D) was a closing receipt for injuries received on March 29th or April 2nd as the case may be.

"3. Failure of the Hearing Commissioner to take into consideration,

and find as a fact, that the claimant had not reached the end of his healing period on May 23, 1957.

"4. The failure of the Hearing Commissioner to make any finding of fact, or conclusion of law based thereon, that when claimant was returned to lighter work on April 30, 1957, at the same wage, the N. C. Industrial Comm. retained jurisdiction for a period of 300 weeks, thereafter, on the theory that wages were being paid in lieu of compensation.

"5. For that the Hearing Commissioner, failed to find as a fact that claimant sustained a new injury on March 29th, or April 2, 1957, as the evidence may disclose, and that no closing receipt has been executed by claimant in regard thereto.

"6. For that there is no evidence to sustain finding of fact No. 10 and conclusions of law Nos. 1 and 2.

"All grounds for appeal not specifically set forth herein are hereby specifically waived and abandoned except as otherwise provided by law and the rules of the Industrial Commission."

Thereafter as shown by the record the case came on for hearing before the Full Commission on 15 December 1959, counsel for both claimant and defendants being present and heard, "and after carefully reviewing all the competent evidence, the findings of fact, conclusions of law and award theretofore made" the Full Commission is of the opinion that the record in pertinent part will not support a finding of fact other than the facts found by the Hearing Deputy Commissioner. Therefore on 31 December 1959, in opinion filed, the Full Commission denies each and "every one of the plaintiff's exceptions, adopts 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 is hereby affirmed"— the opinion being signed by the Chairman, and examined and approved by Associate Commissioners.

And thereafter on 21 January 1960, as shown by the record on this appeal, plaintiff by his attorney, Paul J. Story, gave notice of appeal to Superior Court of McDowell County— service of which was accepted and personal service waived.

Plaintiff under caption of "Plaintiff's Assignments of Error" on such appeal sets out sixteen separate paragraphs of purported error.

Thereafter the cause coming on for hearing upon appeal and being heard, the judge of Superior Court presiding at May 1960 Special Term of McDowell County Superior Court, entered judgment as follows: " • • • and it appearing to the court that plaintiff has filed objections and exceptions to the Findings of Fact, Conclusions of

Law, and Award, the same being sixteen in number, and being fully set out in plaintiff's assignments of error made to the award of the North Carolina Industrial Commission, and the court, after having reviewed the record of all proceedings had in this matter, being of the opinion that the Conclusions of Law are supported by Findings of Fact, and the Findings of Fact are supported by competent evidence and are correct, with one exception corrected by consent of counsel for all parties, in open court, and the court being further of the opinion that plaintiff is not entitled to the additional Findings of Fact and Conclusions of Law required and as set forth in his said Assignments of Error;

"Now, therefore, it is Ordered, Adjudged and Decreed as follows: 1. That Stipulation No. 7 contained in the opinion and award by Robert F. Thomas, Deputy Commissioner, dated September 25, 1959, be corrected to read as follows: That on April 4, 1957, the parties entered into a further agreement on Commission Form 26, approved by the Commission April 16, 1957, pursuant to which compensation at the rate of $32.50 per week was paid for a further period of total disability from April 2, 1957, to April 29, 1957.

"2. That each and every one of plaintiff's exceptions and objections, as set forth in plaintiff's Assignments of Error, and in his Notice of Appeal, be and the same are hereby overruled.

"3. That the Findings of Fact, Conclusions of Law, and the Award of the Single Commissioner, and of the Full Commission, be and the same are hereby affirmed, and that plaintiff's claim against the employer and carrier be and the same is hereby denied, and that the cost of this action be taxed against the plaintiff."

Plaintiff excepted to the judgment as signed, and appeals to the Supreme Court, and assigns error.

*Paul J. Story for plaintiff, appellant.*
*Van Winkle, Walton, Buck & Wall for defendant appellees.*

WINBORNE, C. J. Plaintiff, appellant, in brief filed states this as the questions involved on this appeal: "Did defendants, by their conduct, waive the provisions of G.S. 97-47 as a defense to plaintiff's claim for compensation, and are said defendants now estopped to plead said statute in bar of plaintiff's right to recover herein."

In this connection the North Carolina Industrial Commission has authority under G.S. 97-80 to make rules, not inconsistent with Article One of the Workmen's Compensation Act, for carrying out the provisions thereof. Pursuant thereto the Commission has adopt-

ed a rule "XXI" pertaining to appeal to the Full Commission. It provides: "1. In every case appealed to the full commission the particular grounds for the appeal must be stated * * *," and "4. Particular grounds for appeal not set forth in the application for review shall be deemed to be abandoned and argument thereon shall not be heard before the full commission.

In the case in hand the plaintiff in filing application for review of the opinion and award of the hearing commissioner states six grounds, neither one of which pertains to the matter of waiver by defendants of the provisions of G.S. 97-47. Indeed the application for review there expressly states that "All grounds for appeal not specifically set forth herein are hereby specifically waived and abandoned except as otherwise provided by law and the rules of the Industrial Commission."

And the defendants contend, and it seems properly so, that the position now taken by plaintiff appellant is a change of theory in Superior Court from that pursued before the hearing commissioner and the full commission. This is not permissible. See among others *Paul v. Neece,* 244 N.C. 565, 94 S.E. 2d 596; *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222; *Bivins v. Southern Ry. Co.,* 247 N.C. 711, 102 S.E. 2d 128.

*Paul v. Neece, supra,* states: "It is a well settled principle in this State that the theory upon which the case is tried in the courts below must prevail in considering the appeal and in interpreting a record and in determining the validity of exceptions." See *Simons v. Lebrun,* 219 N.C. 42, 12 S.E. 2d 644. Also *Hinson v. Shugart,* 224 N.C. 207, 29 S.E. 2d 694.

Thus the first part of the questions stated does not arise, and, hence, the second part becomes moot.

This being so, the North Carolina Industrial Commission being a fact finding body, G.S. 97-86, *Brice v. Salvage Co.,* 249 N.C. 74, 105 S.E. 2d 439, has made findings of fact which, under decisions of this Court, are held to be conclusive on appeal, both in the Superior Court and in the Supreme Court, when supported by competent evidence. See among many others: *Nissen v. Winston-Salem,* 206 N.C. 888, 175 S.E. 310; *Hildebrand v. Furniture Co.,* 212 N.C. 100, 193, S.E. 294; *Fox v. Mills, Inc.,* 225 N.C. 580, 35 S.E. 2d 869; *Fetner v. Granite Works,* 251 N.C. 296, 111 S.E. 2d 324.

An examination of the record reveals adequate evidence to support the findings of fact made, and the conclusions of law as arising thereon.

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

ALEXANDER DUMAS v. THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

(Filed 14 December, 1960.)

**1. Process § 12— Evidence that foreign corporation was doing business in this State held sufficient to support service on resident agent.**

Evidence to the effect that a foreign railroad corporation, maintaining no trackage within the State, did maintain three agents in this State at fixed places of business, that the agent upon whom process was served not only solicited freight by seeking to have shipments from points within the State, and also shipments from points outside the State to points within the State, routed so as to use the facilities of his company, but also that the agent had some discretion in determining which shipments would be profitable and should be sought, and that, upon request for passenger accommodations, he consummated the request by telephoning his company's passenger department in another state and arranging that the requested tickets should be left with the ticket agent at a specified place for the passenger, *is held* sufficient to sustain the court's findings that the nonresident railroad company was doing business in this State within the purview of G.S. 1-97, and that the agent was not merely procuring orders which had to be accepted out of the State before becoming binding contracts, G.S. 55-131(B)(5), and service on such agent is valid. *Lambert v. Schell,* 235 N.C. 21, cited and distinguished.

**2. Same: Constitutional Law § 20—**

Whether a foreign corporation is doing business in North Carolina so as to suject it to the jurisdiction of the State's Courts is essentially a question of due process of law under the 14th Amendment to the Federal Constitution, which must be decided in accord with the decisions of the U. S. Supreme Court.

APPEAL by defendant from *Gwyn, J.,* February Civil Term, 1960, of GUILFORD — High Point Division.

Civil action by a resident of Guilford County to recover damages for personal injuries sustained on 29 August 1959 in a collision between a tractor semi-trailer unit, in which plaintiff was a helper, and a train of defendant on a grade crossing near Madison, West Virginia, heard on motion made by defendant, on special appearance, to dismiss for want of service of summons.

This motion was heard by Judge Gwyn, who by consent of counsel deferred his decision to a subsequent term. At the Special September Term, 1960, Judge Gwyn entered on 6 September 1960 the following order:

"From all the evidence the court is of the opinion, finds as a fact, and, therefore, holds that the defendant maintains offices in the State of North Carolina, that William Hudson Trent is manager of defend-

ant's office at Winston-Salem, N. C., that service of summons in this action was had upon said William Hudson Trent, defendant's agent, that the activities of defendant in North Carolina consisted at the time of the bringing of this suit and still consist of more than 'soliciting or procuring orders where such orders require acceptance without the state before becoming binding contracts,' as contemplated by Section 55-131(B)(5) of the General Statutes; that the conduct of defendant constituted transacting business within North Carolina.

"It is now, therefore, ordered and adjudged that the service of summons and complaint in this action by the Sheriff of Forsyth County on W. Hudson Trent, General Agent for defendant, constitutes a valid legal service of summons and the motion to dismiss is accordingly denied."

From this order defendant appeals.

*D. C. MacRae and Julian Franklin for plaintiff, appellee.*
*James B. Lovelace for defendant, appellant.*

PARKER, J. The Chesapeake and Ohio Railway Company, hereinafter called the company, is a Virginia corporation with its legal domicile and principal office in the city of Richmond, Virginia. The summons in this action was issued on 14 January 1960 by the clerk of the Superior Court of Guilford County, and served 15 January 1960 on "Mr. William Hudson Trent, general agent Chesapeake and Ohio Railway Co." by the sheriff of Forsyth County.

In support of its motion the company offered in evidence the affidavits of T. H. Keelor, its secretary, and of William Hudson Trent, who resides in the city of Winston-Salem, North Carolina, and is an employee of the company in the traffic department, and is designated a general agent. Plaintiff's evidence consists of the testimony of William Hudson Trent, who was called by plaintiff as a witness.

These facts appear from the evidence: The company operates a railway system through the States of Virginia, West Virginia, Kentucky, and northward, but has no railway lines or tracks, nor does it operate any trains, cars, or other equipment in, on, or across the State of North Carolina. The company has in its employ in North Carolina as its agents William Hudson Trent, who is in charge of an office maintained by the company in the Reynolds Building in Winston-Salem, A. G. Daughtrey, who is in charge of an office maintained by the company in the Liberty Life Building in Char-

lotte, and W. F. Michie, who is in charge of an office maintained by the company in the Insurance Building in Raleigh. William Hudson Trent has a secretary in the office employed by the company. This office was opened about 1924. The name of the company appears on the door of the office, and the company's name appears in the building directory. The company's name appears in the Winston-Salem Telephone Directory. The furniture in the office is owned by the company, and is listed for taxes at about $350.00. A. G. Daughtrey has working under his direction in the office in Charlotte one or more persons employed by the company to assist him in performing his duties. The same is true as to W. F. Michie. A. G. Daughtrey and W. F. Michie are designated general agents. The company paid William Hudson Trent a salary for the year 1959 of $9,072.00 by cheque from Huntington, West Virginia. The salaries of A. G. Daughtrey and W. F. Michie closely approximate the same amount. The salaries of the office employees and the rentals on the offices are paid by cheques of the company from outside of North Carolina. The company does not have, and never has had, a bank account in North Carolina. No employee of the company collects any money in North Carolina for it.

The company publishes through rates with North Carolina carriers. William Hudson Trent testified: "My business is selling the commodity that The Chesapeake and Ohio Railway Company has to sell, which is transportation. We do not serve Cleveland. We serve Chicago. If I heard of a proposed shipment of a carload of knitted goods by P. H. Hanes Knitting Company from Winston-Salem, consigned to Chicago, I would endeavor to have the Traffic Manager at Hanes Hosiery or whoever the shipper might be route in connection with our line. He would probably route the shipment Southern Railway to Louisville, Kentucky, then to Chicago, and The Chesapeake and Ohio Railway Company would not be involved. There would be several routes available to him, and the most feasible route for my company to participate in would be over the Southern Railway Company to Lynchburg, Virginia, and over the Chesapeake and Ohio Railway Company from Lynchburg, Virginia, to destination. The bill of lading would be signed by Southern Railway. The revenue would be computed according to tariffs to cover the entire haul. The through rate would be based on the rate published and applicable tariffs at that time. My company would take the shipment in Lynchburg and take it to destination and deliver it. If it is a collect shipment, Chesapeake and Ohio Railway Company would collect the freight charges at

destination. Then in our inter-line settlements we would pay the Southern Railway Company its portion of the revenue, probably sending it to their auditor in Atlanta. Out of that haul the Chesapeake and Ohio Railway Company would derive its portion of the revenue. . . . I would say within my territory which embraces northern, central North Carolina and southern Virginia, that we would handle a total tonnage of 1400 cars a month. How many of those may originate or terminate within the State of North Carolina, I couldn't estimate. That covers my general territory of which I have charge or jurisdiction. I have no idea as to the freight revenue derived from that, as I receive nothing in the way of revenue on cars involved. . . . I sell no passenger traffic whatsoever, no tickets, accept no monies. The manner in which I handle passenger traffic is when I have a request for it, I have to phone our Passenger Department in Richmond, Virginia, and tell them what is desired in the way of accommodations and train schedules, and ask them to leave it at whichever one of our ticket agents that the party here in North Carolina may be — at the point where he would board the train. Quite frequently, it is Clifton Forge. . . . If I find that there is a most desirable shipment coming to North Carolina from a point where my company originates, I would seek that business if the competition was involved. If it was a desirable piece of business, I surely would seek it. If there is such a case as that, we could be the originating carrier, and some other carrier would be the delivering carrier in North Carolina. The revenue would be received prepaid or collect and divided between the two carriers on the basis of I. C. C. approved division sheets. My job is to seek the most lucrative business in North Carolina, whether it is ingoing or outgoing. That is Mr. Daughtrey's and Mr. Michie's job also. I get the business here in North Carolina so that my road can take it somewhere else to another point and derive the revenue out of freight originating here consigned to North Carolina, but only through tariffs approved by the Commission. We hold ourselves out as a common carrier by rail."

The company has not qualified to do business in North Carolina by compliance with the applicable statutes.

This question is presented for decision: Is the defendant company doing business in North Carolina through an agent in the State?

Defendant contends that we held in *Lambert v. Schell*, 235 N.C. 21, 69 S.E. 2d 11, that a corporate defendant doing identical acts as the corporate defendant here was not doing business or maintaining a local agent within this State so as to render it amenable to process issued in the case.

In the *Lambert* case and in the instant case, the corporate railway defendants neither own, lease or operate any line of railway nor any transportation facilities within the State of North Carolina. In the *Lambert* case the judge found that the corporate defendant's activities consist "of the solicitation of freight and passenger business originating in or destined to points in North Carolina, which in the course of interstate and transcontinental transportation will be routed so as to move over the lines of the Union Pacific Railroad Company while within the general territory in which the lines of said company are located." In the *Lambert* case the summons was served on David R. Walker as passenger and travelling freight agent of the corporate defendant. Walker maintained offices in Winston-Salem, and as to his activities the court found the following facts: His "duties and business as such agent and representative were to cultivate good will among manufacturers' representatives in Western North Carolina and other points for and on behalf of said Union Pacific Railroad Company, with a view and purpose of inducing the routing or shipment of freight from such manufacturers over the lines of said Union Pacific Railroad Company, to solicit business for said railroad, to adjust grievances, and generally to conduct the business of said railroad in this state."

The facts in the instant case are far from being indentical with the facts in the *Lambert* case. In the instant case we have more than the mere solicitation of freight and passenger traffic by defendant's agent Trent. For instance, when he has a request for passenger traffic, he phones the company's passenger department in Richmond, Virginia, and tells them what is desired in the way of accommodations and train schedules, and asks them to leave these things with a ticket agent of the company where the passenger will board one of defendant's trains. In other words, Trent in North Carolina consummates the request or the successful solicitation of passenger traffic. Further, if he is successful in the solicitation of freight traffic, and the Southern Railway Company carries the goods to Lynchburg, Virginia, and the defendant company carries the goods to their destination, the bill of lading is signed by Southern Railway Company in North Carolina, and the through rate is based on the published rate and applicable tariffs at that time, and the defendant company in North Carolina publishes through rates with North Carolina carriers. Such activities are a regular, continuous and sustained course of business by Trent in North Carolina for defendant company, so that in Trent's territory the defendant company, in his words, "would handle a total tonnage of 1400 cars a month." This must be some

substantial part of the ordinary business of defendant corporation. The evidence does not disclose the tonnage in Daughtrey's and Michie's territory, but it must be considerable, because they are paid approximately the same salary as Trent. All of this constitutes in the practical sense, both doing business and engaging in business in North Carolina, and should do so in a legal sense.

The Court very aptly said in *Frene v. Louisville Cement Co.*, 134 F. 2d 511, 516: "Solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. No business man would regard 'selling,' the 'taking of orders,' 'solicitation' as not 'doing business.' The merchant or manufacturer considers these things the heart of business."

In *Green v. Chicago, B. & Q. R. Co.*, 205 U.S. 530, 51 L. Ed. 916, it was held that "mere solicitation" by a railroad company of freight and passenger business within the State did not constitute doing business there so as to permit the State to subject the railroad to *in personam* jurisdiction. "While never overruled, later cases from the Supreme Court and a number of lower court opinions drastically curtailed this doctrine, (in the *Green* case), and held that solicitation coupled with slight additional activities of the corporation in a jurisdiction has been held to subject the corporation to personal service of process." Fletcher, Cyclopedia of the Law of Private Corporations, 1955 Revised Vol. 18, p. 479.

Recent decisions of the United States Supreme Court have greatly expanded the concept of a State's jurisdiction over nonresident defendants and foreign corporations. *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L. Ed. 95, 161 A.L.R. 1057; Anno. U. S. Supreme Court Reports, 96 L. Ed. 495 *et seq.*

In evaluating the decisions of the United States Supreme Court dealing with the question as to what facts are sufficient, or not sufficient, to support the power of the forum to subject a foreign corporation to a suit *in personam,* it must be kept in mind that the fundamental test has undergone a substantial change in *International Shoe Co. v. Washington, supra,* which in lieu of the former theories of "implied consent," "presence," or "doing business" introduces the "minimum contacts" test and the "fair play and substantial justice" rule, and this rule has been followed in subsequent cases like *Travelers Health Ass'n. v. Com. of Virginia,* 339 U.S. 643, 94 L. Ed. 1154; *Labonte v. American Mercury Magazine,* 98 N.H. 163, 96 A. 2d 200, 38 A.L.R. 2d 742, with elaborate annotation in A.L.R., pp. 747 *et seq.; Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A. 2d 664, 25 A.L.R. 2d 1193.

In the *International Shoe* case appears the following dictum: "While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, (citing authorities), there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."

A subsequent decision of the United States Supreme Court made the dictum law. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 96 L. Ed. 485.

In *International Harvester Co. v. Kentucky*, 234 U.S. 579, 58 L. Ed. 1479, the Court in reference to its former decision *Green v. Chicago, B. & Q. R. Co., supra,* stated it had no desire to depart from that decision, which, however, it said "was an extreme case."

"Solicitation of business aided by other manifestations of corporate presence will warrant the conclusion that a foreign corporation is doing business in the State not withstanding none of such manifestations is singly capable of carrying the weight of such inferences." 20 C.J.S., Corporations, p. 167.

The Court said in *Putnam v. Publications*, 245 N.C. 432, 96 S.E. 2d 445: "Whether a foreign corporation is doing business in North Carolina, so as to subject it to the jurisdiction of the State's Courts, is essentially a question of due process of law under the U. S. Constitution, Amendment 14(1), which must be decided in accord with the decisions of the U. S. Supreme Court. *Harrison v. Corley*, 226 N.C. 184, 37 S.E. 2d 489; *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N.W. 28, 60 A.L.R. 986 (where many cases are cited)."

It appears from Trent's testimony that he had some measure of control over the company's business and was empowered to exercise some discretion with respect to it, for he testified, "if I find that there is a most desirable shipment coming to North Carolina from a point where my company originates, I would seek that business if the competition was involved," and "my job is to seek the most lucrative business in North Carolina, whether it is ingoing or outgoing." This permits the fair inference that if Trent, in his judgment and discretion, does not consider business profitable to his company he is empowered not to seek it.

Considering the activities of defendant's agents in North Carolina as a whole, and not as isolated acts, we are of the opinion, and so hold, that their activities for their company are so regular, continu-

ous, sustained, and substantial, and of such a nature as to constitute within the intent and meaning of G.S. 1-97 an engaging or doing of business in this State, through agents in this State, so as to give to the courts of this State jurisdiction over defendant for the cause of action here alleged to have occurred in the State of West Virginia, and to make defendant company amenable to process issued by such North Carolina courts.

Of course, there may be inconvenience to the defendant company to hold it amenable to suit in the State of North Carolina by a resident of North Carolina for an alleged cause of action originating in the State of West Virginia, but certainly nothing which amounts to a denial of due process. The summons was served on defendant's agent, it has knowledge of the action because the defendant company is represented by its attorney here in the instant case, and has a reasonable time after this appeal is decided to file answer and defend on the merits. Cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223.

Defendant's assignment of error to this finding of fact by the court "the activities of defendant in North Carolina consisted at the time of the bringing of this suit and still consists of more than 'soliciting or procuring orders where such orders require acceptance without the state before becoming binding contracts,' as contemplated by Section 55-131(B)(5) of the General Statutes" is overruled. The other assignments of error of defendant are overruled.

The judge's findings of fact are supported by competent evidence, and they support his conclusions, and order based thereon. The order appealed from is

Affirmed.

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IN THE MATTER OF IRENE PEARL KIMEL.

(Filed 14 December, 1960.)

**1. Habeas Corpus § 4—**

In *habeas corpus* proceedings to determine the right to the custody of a minor child, the findings of fact of the trial court are conclusive when supported by competent evidence.

**2. Habeas Corpus § 3—**

In *habeas corpus* proceedings to determine the right to the custody of a minor child, the burden is upon petitioner to show that, in the

event she is awarded custody of the child, resources for the support and maintenance of the child are or will be available.

3. **Parent and Child § 5: Bastards § 11—**

The fact that the mother of an illegitimate child consented that the natural father of the child should have its custody, and the fact that she did not seek to obtain custody of the child subsequent to her marriage to a third person until after the death of the father of the child, the child having been maintained and well supported by its father, *is held* insufficient to show that the mother had wilfully abandoned the child so as to forfeit the right to its custody.

4. **Bastards § 11—**

The mother of an illegitimate child, if a suitable person, is ordinarily entitled to the care and custody of the child, even though there be others who are more suitable.

5. **Habeas Corpus § 3: Infants § 9— Findings held insufficient to support conclusion that best interests of child required awarding its custody to its mother.**

In proceedings by the mother of an illegitimate child to obtain the custody of the child from the widow of the child's father, who had cared for and maintained the child until his death, findings that the person whom the mother had married after the birth of the child is sympathetic with her efforts to obtain its custody and will cooperate with her in maintaining and supporting the child if custody is awarded her, is insufficient to support the conclusion that it is to the best interest of the child that its custody be awarded the mother, and the cause is remanded for further inquiry on the question of whether resources for the support and maintenance of the child are or will be available through petitioner or from the child's separate estate.

PARKER, J., concurring in the result.

APPEAL by respondent from *Fountain, Special Judge,* 25 April Term, 1960, of FORSYTH.

This is a proceeding to have the custody of the minor child, Irene Pearl Kimel, determined. An application for writ of *habeas corpus* was filed in the Superior Court in Forsyth County on 22 April 1960. The writ was issued on 2 May 1960, directing the Sheriff of Forsyth County to serve the writ on the respondent, Ruth Kimel, and to take possession of the minor child, Irene Pearl Kimel, immediately, and to have her before the court at 9:30 a.m. on 5 May 1960, and also requiring the respondent to appear before the court at said time in order that the court might inquire into the matters set forth in the petition. The writ was served on the respondent on 4 May 1960. When the matter came on for hearing, the petitioner and the respondent were represented by counsel.

The filing of a written return to the writ was waived. The petitioner and the respondent offered evidence, and upon the evidence offered, the court found the facts to be as set forth below: (Numbering ours.)

1. "The court finds as a fact that Irene Pearl Kimel is the daughter of the petitioner, Ollie Aungst Kuhlins; that she was born out of wedlock on January 2, 1952, in Canton, Ohio; that the father of Irene Pearl Kimel was Shirley A. Kimel, who at the time of the conception and birth of the minor child was unmarried; that after the birth of Irene Pearl Kimel two written agreements were entered into between the petitioner and Shirley A. Kimel, the father of the child, the first being on October 22, 1955, and the second being on February 9, 1956; that each of said agreements were executed in Canton, Ohio, and each relate to the maintenance, support, care and custody of the minor child."

2. " * * * (T)hat after the birth of the minor child, Shirley Kimel in all respects acknowledged the paternity of the child, and by appropriate proceeding in the courts of Ohio caused the child's name to be changed to Kimel."

3. " * * * (T)hat pursuant to the agreement between the petitioner and Shirley A. Kimel dated the 9th of February 1956, the exclusive care, custody and control of the child was granted by the petitioner to Shirley A. Kimel, and that from that time until his death Shirley Kimel had the complete custody, care and control of the minor child."

4. " * * * (T)hat on December 7, 1957, Shirley A. Kimel married the respondent, Ruth Kimel, and that they lived together as man and wife until the death of Shirley A. Kimel on November 25, 1959; that during that time Irene Pearl Kimel was a member of the household, living therein as a child of Shirley A. Kimel, and was treated by Ruth Kimel as her own child."

5. " * * * (T)hat Irene Pearl Kimel at all times lived in or near Canton, Ohio, until the death of her father on November 25, 1959, and that from the time her father had custody of her and until his death the petitioner did not interfere in any way with the care and custody and control of the child by her father; that immediately after the death of Shirley Kimel the petitioner requested and demanded custody of her minor child from Ruth Kimel, the respondent, who then had the sole custody of said child; that Ruth Kimel refused to deliver the child to her mother, and shortly thereafter learned that the petitioner was about to cause a writ of *habeas corpus* to be issued for the child in the State of Ohio; whereupon, the re-

spondent, Ruth Kimel, immediately left the State of Ohio and came to Winston-Salem, Forsyth County, North Carolina, where the relatives of her deceased husband have lived for many years; that one purpose of her departure from Ohio and her removal to North Carolina was to avoid process and hearing on the question of the custody of the child in the State of Ohio; that Ruth Kimel, with the minor child, arrived in Winston-Salem on December 2, 1959, and since that time has lived in a two-room apartment with the minor child and was living on Stratford Road, and was living at that place at the time the writ of *habeas corpus* was served on her."

6. " * * * (T)hat the petitioner was married to Arthur Henry Kuhlins on June 9, 1956, and that she now lives at 1518 Isler Road, N. W., Canton, Ohio, with her husband, in a six-room home owned by them; that she has one male child born of that marriage now less than three years of age."

7. " * * * (T)hat the petitioner has no income of her own but that her husband is employed in a custodial capacity for the Canton School Board in the State of Ohio, and earns $385.00 per month; that the husband of the petitioner knew Irene Pearl Kimel while she was in the care and custody of the petitioner and prior to the marriage of the petitioner and her present husband; that he is aware of the petitioner's efforts to obtain the custody of her child and is sympathetic to her efforts and will cooperate with the petitioner in maintaining, supporting and caring for the minor child if custody is awarded to petitioner."

8. " * * * (T)hat Mrs. Ruth Kimel is a person of excellent character and reputation, who is devoted to the minor child, Irene Pearl Kimel, and is a suitable person to have custody of the child. * * * (T)hat the petitioner is a person of good character and reputation and is a suitable person to have care and custody of the child."

9. " * * * (T)hat it is the wish of Irene Pearl Kimel, now eight years of age, to be permitted to remain in the custody of the respondent, Ruth Kimel, with whom she has lived since December 1957. * * * (T)hat Ruth Kimel is not related to the minor child, Irene Pearl Kimel, except to the extent that she was married to the deceased father of the child."

Upon the foregoing findings of fact the court concluded that it was to the best interest of the minor child that her custody be awarded to her mother, Mrs. Ollie Aungst Kuhlins, the petitioner herein. An order to that effect was entered.

From the foregoing order the respondent appeals, assigning error.

*Blackwell, Blackwell & Canady for petitioner.*

*Averitt, White & Crumpler; James G. White and Leslie G. Frye for respondent.*

DENNY, J. A careful examination and consideration of the affidavits, documentary evidence, and oral testimony adduced in the hearing below by the petitioner and respondent, leads us to the conclusion that the findings of fact hereinabove set out are supported by competent evidence. Therefore, the exceptions entered to the findings of fact and the assignments of error based thereon, are overruled.

However, finding of fact No. 7, in our opinion, is not sufficient to support the conclusion that it is for the best interest of the minor child, Irene Pearl Kimel, that her custody be awarded to her mother, the petitioner herein.

The petitioner testified that she has no income whatever of her own. It is clear that she is relying on her husband to support the child. Conceding as true all the petitioner said in the hearing below about her husband's income and his willingness to cooperate in the support of the child if the petitioner is awarded her custody, there is nothing in her testimony to support an order that would bind the husband of the petitioner to support her child. *S. v. Ray*, 195 N.C. 628, 143 S.E. 216. He did not join in the petition or otherwise establish his consent or willingness to assume the legal responsibility for the support of such child if her custody is awarded to the petitioner, and we have been unable to find any statute in effect in Ohio that would require him to support such child.

In our opinion, the burden is on the petitioner to show that, in the event she is awarded custody of the child, resources for the support and maintenance of the child are or will be available.

Certain statements in the testimony of the respondent tend to show that the minor child, Irene Pearl Kimel, has a personal estate of $40,000, or one-half of her father's estate, and that a guardian has been appointed for her in Forsyth County. According to the evidence, Irene Pearl Kimel was never adopted by her father, Shirley A. Kimel, and his wife, Ruth Kimel. Then the question rises: How can she inherit anything from her father? Section 2105.18 of the Ohio Revised Code, Volume 2, Illegitimate children deemed legitimate, provides: " * * * The natural father of a child by a woman unmarried at the time of the birth of such child, may file an application in the probate court of the county wherein he resides or in the county in which such child resides, acknowledging that such child is his, and upon consent of the mother, or if she be deceased or incompe-

tent, or has surrendered custody, upon the consent of the person or agency having custody of such child, or of a court having jurisdiction over the custody thereof, the probate court, if satisfied that the applicant is the natural father and that establishment of such relationship is for the best interest of such child, shall enter the finding of such fact upon its journal and thereafter such child shall be the child of the applicant as though born to him in lawful wedlock."

The agreement referred to hereinabove, dated 9 February 1956, sets out therein that, "Whereas, on the 21st day of June 1955, the said Shirley A. Kimel filed in the Probate Court of Stark County, Ohio a written declaration subscribed by him and attested by Lawrence W. Renner declaring that the said Shirley A. Kimel is the father of the said Irene Pearl Aungst who was born on January 2, 1952, and the said Ollie C. Aungst of Canton, Ohio, the mother of Irene Pearl Aungst, filed her answer and consent in the Probate Court of Stark County, Ohio, admitting that Shirley A. Kimel was the father of said child and consenting to the change of the name of said child from Irene Pearl Aungst to the name of Irene Pearl Kimel, and the Judge of the Probate Court of Stark County, Ohio, being satisfied that the said Shirley A. Kimel was of sound mind and memory and free from any restraint did therefore order that such facts be entered on the journal of said court and that a complete record of such proceedings be made, also that the name of said child be changed from Irene Pearl Aungst to Irene Pearl Kimel."

There would seem to be no doubt of the legal right of Irene Pearl Kimel to inherit from her father by reason of his compliance with the provisions of the above statute. Furthermore, the Ohio Revised Code, Volume 2, section 2105.06, Statute of descent and distribution, provides: "When a person dies intestate having title or right to any personal property or to any real estate or inheritance in this state, such personal property shall be distributed and such real estate or inheritance shall descend and pass in parcenary * * * in the following course: * * * (B) If there is a spouse and one child or its lineal descendants surviving, one half to the spouse and one half to such child or its lineal descendants, *per stirpes.*"

In our opinion, there is nothing disclosed by the record in this case to support the contention of the respondent that the petitioner had wilfully abandoned her child and, therefore, has forfeited her right to its custody.

This Court, in the case of *In re Shelton,* 203 N.C. 75, 164 S.E. 332, said: "It is well settled as the law of this State that the mother of an illegitimate child, if a suitable person, is entitled to the care

and custody of the child, even though there be others who are more suitable."

To the end that the question of support, and the further question as to whether or not Irene Pearl Kimel does have a substantial estate which she inherited from her father that might be available for her support, may be inquired into and considered in connection with what is for the best interest of said minor, this cause is remanded for further hearing and determination.

Error and Remanded.

PARKER, J., concurring in the result.

Irene Pearl Kimel will be nine years old on 2 January 1961. When she was four years old, her natural mother granted the exclusive care, custody and control of the child to her natural father, and he had such care, custody and control of the child until his death on 25 November 1959. On 7 December 1957 the natural father married respondent Ruth Kimel. During her natural father's married life the child lived in his home, and was treated by Ruth Kimel as her own child.

On 9 June 1956 the natural mother married Arthur Henry Kuhlins.

It appears that the child inherited $40,000.00 from the estate of her deceased natural father, and that a guardian has been appointed for her in Forsyth County, North Carolina. The child wishes to live with respondent Ruth Kimel, with whom she has lived since 7 December 1957.

The natural mother, after her marriage, did not seek to obtain custody, nor partial custody, of the child until the child had inherited $40,000.00. Did the natural mother's interest in obtaining the custody of the child originate when she learned that the child had inherited $40,000.00? Is her primary interest obtaining the custody of the child or obtaining possession of the inheritance? If custody of the child is awarded to the natural mother, what can or will be done to require the use of the child's inheritance for her exclusive benefit, and to secure its safety? The natural mother has no income of her own, and it does not appear that her husband owns any substantial property, though he has a monthly salary of $385.00. If her husband agrees to support the child, and then fails to live up to his agreement, how can it be enforced? In my opinion, all of these matters should be investigated and considered by the court in determining what will best promote the interest of the child, for that is the crucial question in this proceeding.

The case of *Harris v. Harris,* 115 N.C. 587, 20 S.E. 187, involved the custody of a nine and one-half-year-old child. The Court said: "What the preferences of the child were is not found as a fact, though this has weight always with a court in such cases according to the age and intelligence of the child." See also *Spears v. Snell,* 74 N.C. 210 (the infant here was thirteen years old), and *In re Gibbons,* 247 N.C. 273, 101 S.E. 2d 16 (the infant here was ten years old) to the effect that the feelings and wishes of the child, according to his mental capacity to form them, who is the party mainly concerned, should be given serious consideration by the court, in the exercise of its discretion, as to the person to whose custody and control the child is to be subjected. In my opinion, the feelings and wishes of the child here, according to her mental capacity to form them, should also be given serious consideration by the trial judge in his determination of her custody.

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JAMES J. CLARK, JR. v. HENRY GROVES CONNOR, AS THE EXECUTOR OF THE ESTATE OF SUSAN W. CLARK; W. T. CLARK, JR., AND WIFE, NANCY C. CLARK; MARY CLARK HUSSEY CARWILE AND HUSBAND, L. B. CARWILE; BESSIE CLARK HANCOCK HACKNEY AND HUSBAND, GEORGE HACKNEY; ELIZABETH CLARK DAVID FLOWERS AND HUSBAND, W. B. FLOWERS; W. T. CLARK, III, AND WIFE, JOAN CLARK; INEZ WOOD; JAY CLARK; BRANCH BANKING & TRUST COMPANY; CHARLES H. HACKNEY, ELIZABETH CONNOR HACKNEY, MARY CLARK HACKNEY, G. THOMAS DAVIS, JR., DAVID CLARK DAVIS, SUSANNE CLARK FLOWERS, W. B. FLOWERS, JR., RAYMOND CLARK, AND THE UNBORN DESCENDANTS OF W. T. CLARK, JR., AND MARY CLARK HUSSEY CARWILE; AND ROBERT G. WEBB, GUARDIAN AD LITEM OF ALL MINORS AND UNBORN DESCENDANTS OF W. T. CLARK, JR., AND MARY CLARK HUSSEY CARWILE; AND NANCY JOHNSON HACKNEY AND GEORGE HACKNEY, JR.

(Filed 14 December, 1960.)

**1. Wills § 33a—**

A general devise to a person specified carries the fee unless the will discloses a manifest intent to the contrary. G.S. 31-38.

**2. Wills § 31—**

Since the words of a will must be construed according to the context and the peculiar circumstances in each case, the same words may be given different constructions under dissimilar circumstances, and therefore each will presents a more or less unique problem of construction.

**3. Same—**

The language of a will and the sense in which the language was used by the testator are primary sources of ascertaining his intent, which is the polar star in the interpretation of every will.

**4. Same—**

A will is to be construed as a whole and every clause and word given effect if possible.

**5. Same—**

Ordinary words must generally be given their usual and ordinary meaning and technical words which have a well defined legal significance will be presumed to have been used in their technical sense when the language of the will does not show a contrary intent.

**6. Wills §§ 33a, 33d— Devise held to be in fee and not to create trust for benefit of testator's children.**

A devise and bequest of all of testator's property to his wife to take, hold and do with as she deems best for the benefit of herself and the children of the marriage transmits an absolute gift to the wife and does not create a trust for the children, notwithstanding a subsequent provision of the will that in the event his wife predeceased testator the property should be divided equally among the children after taking into consideration all advancements, and a still further provision that, if his wife survived him, any advancements made to the children by the testator or the wife should be accounted for in the division among the children to effectuate the purpose that the children should share equally in his estate and their mother's estate.

HIGGINS, J., dissents.

APPEAL by both plaintiff and defendants from *Parker, Joseph W., J.*, at June 1960 Civil Term, of WILSON.

Civil action instituted by plaintiff pursuant to the Declaratory Judgment Act, G.S. 1-253, *et seq.*, for the purpose of having the Court declare the rights of the parties to the action and under the last will and testament of J. J. Clark, deceased, interchangeably referred to as James J. Clark, so that in the main it creates a trust for the benefit of his children.

James J. Clark died in 1925, survived by his widow Susan W. Clark, and three children, William T. Clark, Jr., Mary Clark Hancock, and James J. Clark, Jr., and leaving a last will and testament reading as follows: "I, J. J. Clark, of the town of Wilson, North Carolina, being of sound mind and memory, and desiring to make disposition of any property which I may own at the time of my death, do make, declare, ordain and publish this my Last Will and Testament:

"ITEM I. My executrix hereinafter named, from the first monies

coming into her hands, shall pay all my just debts. She is hereby fully authorized and empowered to expend from my estate such sum as she may deem proper in the erection of a monument.

"ITEM II: I bequeath, devise and give all of my property of every kind and character, real, personal and mixed, wheresoever the same may be situate, unto my wife, Susan W. Clark, to take, hold, have and do with as she shall deem best and proper, for the benefit of herself and our children.

"ITEM 3. If the said Susan W. Clark shall die before me, then I devise, and bequeath all of my property to my three children, William T. Clark, Junior, Mary Clark Hancock, of Winston Salem, N. C., and James J. Clark, Junior, of Wilson, share and share alike. In making the division between my children, such sums of money or property as I may have advanced unto either of them shall be charged against such child or children and accounted for. At this date, I have advanced unto my daughter, Mary Clark Hancock, of Winston Salem, N. C., the sum of $2,000.00 and unto my son, William T. Clark, Junior, of Wilson, N. C., a lot on Broad Street. Each of the said children shall account for the money advanced and any real estate which may have been advanced to any one of said children is to be accounted for and valued as is provided for the valuation of advancements by the laws of the State of North Carolina.

"ITEM 4. In the event my wife shall survive me, then in the division amongst our children, any advancements made to any of them by me as well as any advancements which she shall make unto them, shall also be accounted for. The intent and purpose of this provision is that the said children shall share equally in my estate and in their mother's estate, and such advancements as may have been made by either of us shall be accounted for as if made by that one of us who survives the other.

"Item 5. I hereby nominate and appoint my wife, Executrix of this my Last Will and Testament, with full power and authority to carry out all the terms and provisions of the same accordance to the laws of the State of North Carolina in such cases made and provided. If my wife shall predecease me and I shall not in the meantime have made another will and testament, then I name and appoint W. T. Clark Executor of this my Last Will and Testament, and Wilson Trust and Savings Bank Guardian of my youngest son, James J. Clark, Junior, in the event he shall be a minor at the date of my death. My Executor, as soon as possible, will proceed to settle my estate and divide the same among our children.

"IN TESTIMONY WHEREOF, I, J. J. Clark, the testator here-

in named have hereunto set my hand and affixed my seal, in the presence of the witnesses whose names are hereunto subscribed, this October 16, 1923.

J. J. Clark (Seal)

"Signed, sealed, published and declared by J. J. Clark, the testator herein named, as his Last Will and Testament, in our presence, and we in his presence and in the presence of each other and at his request, have hereunto signed our names as attesting witnesses hereunto.

H. G. Connor, Jr.
J. W. Shealy."

The plaintiff is the youngest son of J. J. Clark and Susan W. Clark, both of whom died testate, he in 1925, and his will, as set out above, was duly probated. His widow, Susan W. Clark, qualified as his executrix. She administered his estate, and filed her final account on 29 September, 1926. In filing her final account as Executrix and in the handling of the property of J. J. Clark his widow apparently assumed that the will of her husband bequeathed and devised all of his property to her in fee simple. Indeed, more than 30 years have elapsed between the death of J. J. Clark and his wife.

Susan W. Clark did not remarry and she died 23 June 1959. Her will was duly probated in common form in the Superior Court of Wilson County. In her will Susan W. Clark disposed of all the real property acquired under the will of her husband except one parcel which she had theretofore sold.

Plaintiff filed this action in the Superior Court to construe the will of J. J. Clark. Specifically, he seeks by this action to have the court declare that the last will and testament of J. J. Clark created a trust, the corpus of which includes all the real property bequeathed and devised to his mother. The several adult defendants filed a joint answer and the minor defendants appeared and answered through their duly appointed gaurdian *ad litem*.

The cause came on for trial and the lower court entered judgment, the pertinent parts of which are as follows:

"The court is of the opinion that the will of J. J. Clark appointed his wife, Susan W. Clark, as Trustee of his estate for herself and their three children, to wit: James J. Clark, Jr., W. T. Clark, Jr., and Mary Clark Hancock (now Mary Clark Hussy Carwile), with requirement of equality of benefits to the children on termination of the trusts at the death of Susan W. Clark. The court is further of the opinion, however, that the will of James J. Clark did not impose upon his wife the necessity of making an election to dispose

of her own estate equally among said children in consequence of the acceptance of the benefits provided for her in the will of her husband, particularly in the unrestricted management of his estate as Trustee.

"It is now, therefore, considered, ordered and adjudged, as follows:

"1. That the plaintiff is entitled to receive under the will of his father one-third in value of the trust estate remaining in the hands of his mother at her death, to wit: such portion of the assets of his father's estate which was not expended for the support of the widow and children of James J. Clark, enhanced by unexpended income, and increases in value of the original and reinvested assets.

"2. As Trustee, Susan W. Clark had the right to expend any income of said trust estate for the use and benefit of herself and children in such manner as she deemed best.

"3. That under said will Susan W. Clark was not put to an election and no part of her individual property became a part of said trust estate.

"4. Upon the death of Susan W. Clark, the trust estate passed under the will to his three (3) children, James J. Clark, Jr., W. T. Clark, Jr., and Mary Clark Carwile; each of said children must account for any advancements made to him or her by their father, or their mother, from the trust estate.

"5. That, except at stated above, James J. Clark, Jr., is not entitled to receive any assets of his mother's estate identifiable as the products of her individual earnings or received by her from sources other than her husband's estate.

"6. That the executor of Susan W. Clark in making settlement shall take into account advancements made to the three children by their father, or by their mother, if made from trust assets.

"7. That the cost of this action, including attorneys' fees for counsel on both sides, are in the court's discretion taxed against the trust estate; that the order fixing the amount of attorneys' fees be deferred pending disposition of the appeal to the Supreme Court, which the parties indicate they intend to perfect."

To the signing of the judgment plaintiff and defendants separately excepted and appeal to the Supreme Court, and assign error.

*Battle, Winslow, Merrell, Scott & Wiley, John Webb, W. D. P. Sharpe, Jr., for plaintiff.*

*Lucas, Rand & Rose, Gardner, Connor & Lee, Robert G. Webb for defendants.*

WINBORNE, C. J. On Defendants' Appeal. The pivotal question involved on this appeal as stated by defendants is this: "Does the Will of J. J. Clark bequeath and devise his estate to his wife absolutely and in fee simple, or does it create a trust?"

The trial court was of opinion that the will created a trust for the benefit of the widow and children, and so held. In this ruling this Court is constrained to hold that there is error. The language used manifestly vested the widow with an estate in fee to the land devised. The words "to take, hold, have and do with as she shall deem best and proper, for the benefit of herself and our children" are precatory in nature. Indeed they are an admonishment to the widow rather than of creative intent.

The focal point relates to the language of Item II as stated in the will above set forth. And in this connection G.S. 31-38 pertinently provides that "When real estate shall be devised to any person the same shall be held and construed to be a devise in fee-simple, unless such devise shall in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity." The purpose of this statute was to change the common law rule that a devise of land without words of perpetuity conveyed a life estate only unless there was a manifest intention to convey a fee. And since the statute a devise will carry the fee unless it appears from the will that the testator intended to convey an estate of less dignity. This rule has been consistently applied in this State since the statute was passed in 1784. See *Andrews v. Andrews, ante,* 143, where numerous cases are cited.

And bearing in mind the admonition laid down by Higgins, J., in *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298, that it is extremely rare to find two cases alike, little or no aid can be derived by a court in construing a will from prior decisions in other will cases. It is not sufficient that the same words in substance or even literally have been construed in other cases. It often happens that the same identical words require very different constructions according to context and the peculiar circumstances of each case.

The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In ascertaining this intention the language used, and the sense in which it is used by the testator, is the primary source of information, as it is the expressed intention of the testator which is sought. *Little v. Trust Co.,* 252 N.C.

229, 113 S.E. 2d 689; *Bank v. Hannah,* 252 N.C. 556, 114 S.E. 2d 273.

Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its different clauses and provisions examined and compared, so as to ascertain the general plan and purpose of the testator, if there be one. Ordinarily nothing is to be added to or taken from the language used, and every clause and every word must be given effect if possible. Generally, ordinary words are to be given their usual and ordinary meaning, and technical words are presumed to have been used in a technical sense. If words or phrases are used which have a well-defined legal significance, established by a line of judicial decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent. If, when so considered, the intention of the testator can be discerned, that is the end of the investigation.

In the present case the devise in Item II of the will "I bequeath, devise and give all of my property of every kind and character, real, personal and mixed, wheresoever the same may be situate, unto my wife, Susan W. Clark, to take, hold, have and do with as she shall deem best and proper, for the benefit of herself and our children" is of the class of phrases above mentioned. In many cases where the courts have passed upon language identical or practically identical, it has been held that no trust is created and the widow gets a fee simple estate. The children take no interest or estate in the property given and are only mentioned to express motive for the devise to the wife. Indeed, "the wit of man has not yet discovered a safer repository than the mother for the rights and interests of children," in the language of *Keith, J.,* in *Tyack v. Berkeley,* 100 Va., 296, 40 S.E. 904.

Numerous cases pertinent to question here have been assembled in 49 A.L.R. 10; 70 A.L.R. 326 and 107 A.L.R. 896.

Furthermore it is worthy of note that the will of J. J. Clark appears to have been witnessed by H. G. Connor, Jr., then a distinguished member of the bar in this State. The language of his father, a member of this Court, writing in *St. James v. Bagley,* 138 N.C. 384, at page 395, 50 S.E. 841, is significant. It reads: "We also note that Mr. Wright, an eminent and learned member of the bar, is a witness to the deed. We may reasonably infer that he either wrote or was consulted in regard to the deed. The fact that no trust is declared is convincing proof in the light of other circumstances that none was intended."

In the light of the statute G.S. 31-38 and decisions of this Court, looking at the will as a whole, it is clear that the testator intended his wife, Susan W. Clark, to take a fee simple estate. Hence the rulings of the trial judge in conflict herewith is error. Having so decided, it is not necessary to consider the other assignments of error brought forward on appeal by the defendants-appellants. Neither is it necessary to consider the assignments of error brought forward by the plaintiff as they were predicated on the lower court's ruling that J. J. Clark's will created a trust. The case will be remanded to the Superior Court of Wilson County for the entry of a proper judgment.

Error and remanded.

HIGGINS, J., dissents.

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WILLIAM EDWARD FAIRCLOTH, JR., v. OHIO FARMERS INSURANCE COMPANY, A CORPORATION.

(Filed 14 December, 1960.)

**1. Insurance § 88—**

Insurer's contention that nonsuit in this action on a fire policy should have been granted for that insured's evidence disclosed that the fire occurred more than sixty days after verbal notice by insured of the removal of the property to a new location, and that therefore the oral contract was ineffectual under G.S. 58-177(d), was properly denied when insured does not rely upon a verbal agreement but upon waiver or estoppel of insurer to assert the provision as to the location of the personalty insured.

**2. Insurance § 76— Evidence held sufficient to support finding that insured paid additional premium to cover property at new location.**

In a trial by the court under agreement of the parties, evidence that insurer's agent notified insured of an additional premium for coverage upon the transfer of the personalty insured to another location, that insured, in financing the premium through a finance company, sent to insurer's agent the regular monthly payment, together with such additional premium, and that insurer's agent sent the check to the finance company without advising it of the payment of the additional premium, *is held* sufficient to sustain the court's findings that insured paid such additional premium, even though the finance company thereafter marked the contract satisfied when the amount paid equalled only the regular premium, it being a permissible inference that the finance company failed to collect the total amount because of the failure of insurer's agent to advise it of the payment of the additional premium.

**3. Insurance § 77—**

An insurer may waive or be estopped to rely on a provision or condition in a policy of insurance on personalty relating to the location of the property at a specified place.

**4. Insurance §§ 5, 80—**

In the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the insurer, even though a direct stipulation to the contrary appears in the policy.

**5. Same—**

Evidence tending to show that insured notified insurer's agent of the removal of the personalty insured from the location designated in the policy, that the agent advised insured to send an additional premium to cover the cost of extending coverage to the new location, that insured paid the additional premium and that the agent had knowledge of the new location, *is held* sufficient to sustain the conclusion that insurer waived the provisions of the policy or is estopped to rely thereon, even though endorsement modifying the policy in this respect was never issued.

**6. Estoppel § 6—**

Even though an estoppel must be pleaded, where the facts constituting the basis of the estoppel are set out in the pleading there is a sufficient pleading of the estoppel, notwithstanding the term "estoppel" is not used.

APPEAL by defendant from *Clark, J.*, Regular February 1960 Civil Term, of BRUNSWICK.

Civil action on a fire insurance policy.

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

*FINDINGS OF FACT MADE BY JUDGE SUMMARIZED.*

On 27 December 1957 plaintiff purchased in Raleigh a fire insurance policy in the amount of $1,500.00 from defendant through its agent Albert R. Perry, Jr., covering "Contents — In One-story, approved roof, frame walls dwelling, two-family apartment, located 214 S. Bloodworth Street, Raleigh, North Carolina." The policy was for a term of one year beginning 27 December 1957, and the total premium was $8.00. At the same time Perry sold plaintiff another policy on his automobile. Plaintiff paid Perry $7.65 in cash, and at Perry's suggestion executed a premium finance contract, effective the same date, with Century Consumer Discount Company promising to pay to the order of Century Consumer Discount Company the balance of the premiums on both policies in the amount of $30.35 plus a service charge of $2.65, which made the total amount $33.00, in

six monthly payments of $5.50 each, beginning 27 January 1958. In the premium finance contract, Century Consumer Discount Company agrees as attorney in fact for plaintiff to perform, *inter alia*, the following services for plaintiff:

> "(a) Provide a plan whereby the premium or the balance thereof as set forth in the above statement of account may be budgeted by the UNDERSIGNED on a monthly basis.
>
> "(b) Pay to the insurance company or its duly authorized agent the premium or balance thereof as set forth in the above statement of account."

Whereupon, defendant by its agent Perry, delivered its fire insurance policy to plaintiff.

On 25 January 1958 plaintiff paid the first monthly installment on the premium finance contract of $5.50 to Perry, agent of defendant, in his office, and Perry gave him a written receipt. The receipt was marked: "For Century Consumer Discount Co., 1st Budget Paym't." At the same time plaintiff notified Perry he was moving his personal property insured by defendant's policy from Raleigh to a farm near Shallotte, North Carolina. Perry wrote on a pad in his office a description and location of the house near Shallotte, and told plaintiff to send in an additional sum of $3.10 with his next monthly installment payment to cover the cost of extending the insurance coverage on his personal property at the new location.

On 18 February 1958 plaintiff made the February installment payment by postal money order of $5.50 to Perry. On 25 March 1958 he made an installment payment of $5.50 plus $3.10 for coverage by the policy at the new location by cheque in the amount of $8.60, which cheque was endorsed by Century Consumer Discount Company. On 28 April 1958 and 27 May 1958 plaintiff paid the regular installment payments of $5.50 by money order mailed to Century Consumer Discount Company. On 4 June 1958 he received notice from Century Consumer Discount Company that he owed a balance on his contract of $2.40 plus 25¢ penalty. Whereupon, he sent it $2.40 by money order, and received from it the premium finance contract marked paid on 20 June 1958.

Plaintiff never received any endorsement from defendant showing change in location of his property insured by defendant's policy. On 30 June 1958 his dwelling near Shallotte was destroyed by fire, including his personal property therein insured by defendant's policy. The fair market value of his insured personal property was $1,600.00, all of which was unencumbered, except for a balance of $70.00 on

a refrigerator, which was covered by insurance payable to mortgagee.

Before 12 July 1958 plaintiff notified defendant's agent, Albert R. Perry, Jr., in Raleigh of the destruction of his insured property by fire, and defendant informed him that his fire insurance policy had been cancelled, and he was due a premium refund. This was the first notice he had received of cancellation.

The court concluded that defendant was estopped to deny the extension of the insurance coverage to the new location by the acts of its agent, and the payments made to the agent by the plaintiff upon direction of the agent, and entered judgment against defendant in the amount of $1,500.00.

From this judgment, defendant appeals.

*S. B. Frink and E. J. Prevatte for plaintiff, appellee.*
*James, James & Crossley for defendant, appellant.*

PARKER, J. Only a part of the fire insurance policy here is set forth in the case on appeal. However, it seems to be a Standard Fire Insurance Policy of the State of North Carolina, and it so stated in defendant's brief.

Defendant's first assignment of error is that the court committed error in denying its motion for judgment of involuntary nonsuit under G.S. 58-177(d) made at the close of plaintiff's evidence. Defendant offered no evidence. G.S. 58-177(d) provides: "Binders or other contracts for temporary insurance may be made, orally or in writing, for a period which shall not exceed sixty days, . . . ." Defendant's contention is this: "Therefore, if the plaintiff is relying upon the alleged oral contract for a recovery against the defendant insurance company, as an oral contract for temporary insurance, it must fail because more than sixty days had expired, for the alleged agreement, if made, was made on January 25, 1958, and the fire did not occur until June 30, 1958, or more than five months thereafter. Therefore, a motion to dismiss should have been allowed." Defendant later states in its brief: "We respectfully submit, however, that the alleged oral agreement was not a contract for temporary insurance. It will be observed that the complaint alleges that the policy in question was executed and delivered to the plaintiff on December 27, 1957, at which time the property in question was located at 214 South Bloodworth Street, and that thereafter on January 25, 1958, the property insured was moved to the Claude Gore farm in Brunswick County. Therefore, the policy of insurance at the time it was issued became a valid and binding contract and could thereafter

only be modified as provided in the policy itself." It would have been improper to nonsuit plaintiff on the ground that he could not recover because of G.S. 58-177(d), for the reason that plaintiff's action is based upon defendant's waiver of, or estoppel to assert, provisions of its fire insurance policy respecting location of personal property covered therein, and not upon an oral contract in respect to change of location of plaintiff's insured personal property.

Defendant's second assignment of error is that the court committed error in denying its motion for judgment of involuntary nonsuit on all the evidence.

Defendant's third assignment of error is that the court committed error in finding as a fact that plaintiff "on March 25, 1958 sent check for $8.60 representing the regular payment of $5.50 and the additional $3.10 charged for extending the coverage to the new location."

Plaintiff testified: "I notified him (Albert R. Perry, Jr., defendant's agent) I was going to move to Shallotte. I was working for Wake Oil Company. After I moved to Shallotte, I was working for W. C. Gore. Mr. Perry told me the additional premium for the transfer would be $3.10. The $5.50 monthly payment for March and the $3.10 would amount to $8.60. This is a true photostatic copy of the check I mailed to Mr. Perry. I identify it as: PLAINTIFF'S EXHIBIT VI. It is for $8.60." This exhibit is a photostatic copy of the cheque, and is as follows:

"WACCAMAW BANK AND TRUST COMPANY 66-962
Shallotte, N. C. March 25, 1958
Pay to the Order of
WILLIAM EDWARD FAIRCLOTH, JR. $8.60
Eight and 60/100.....Dollars
/s/ W. C. Gore
Endorsed on back by William Edward Faircloth, Jr. FOR DEPOSIT ONLY: Century Consumer Disc. Co. Two rubber stamps from bank."

Defendant contends that plaintiff's documentary evidence shows the premium finance contract called for the payment of $33.00, that plaintiff paid on this contract only $33.00, and, therefore, this evidence shows defendant never received one penny of the $3.10 additional premium to cover transfer of the insured property to another location. The monthly installment payment for March 1958 was $5.50 and the additional premium for change of location was $3.10. Plaintiff mailed a cheque for $8.60 dated 25 March 1958 to defend-

ant's agent Perry. Perry must have sent this cheque to Century Consumer Discount Company, for the cheque shows it deposited it. It is a fair inference this $8.60 cheque was paid upon presentation, for there is no intimation in the evidence to the contrary. Plaintiff testified: "He (defendant's agent Perry) made out premium finance contract." It is a fair inference that Century Consumer Discount Company sent the payment of $8.60 to defendant, according to its contract with plaintiff, and there is no intimation in the evidence to the contrary. It seems clear from all the evidence that defendant received the $3.10 additional premium from plaintiff to cover transfer of his insured property to another location, and still has it. There is competent evidence offered by plaintiff to support the challenged finding of fact, and defendant's assignment of error in respect thereto is overruled.

The policy provides for other coverages only when endorsed on it or added thereto. The policy also provides "against all direct loss by fire . . . to the property described hereinafter while located or contained as described in this policy . . . but not elsewhere." The policy contains this waiver provision: "No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be. . . ."

The question we have to consider is whether or not defendant is estopped to rely on these provisions.

According to the great majority of cases, an insurance company may waive, or be estopped to rely on, a provision or condition in a policy of insurance relating to the location of the property at a specified place. *State Farm F. Ins. Co. v. Rakes,* 188 Va. 239, 49 S.E. 2d 265, 4 A.L.R. 2d 862; *Bankers F. & M. Ins. Co. v. Draper,* 242 Ala. 601, 7 So. 2d 299; *Delaware Ins. Co. v. Wallace* (1913; Texas Civ. App.) 160 S. W. 1130; *Montgomery v. Delaware Ins. Co.,* 55 S.C. 1, 32 S.E. 723; Anno. 4 A.L.R. 2d 871, where many other cases to the same effect are cited.

In Appleman's Insurance Law and Practice, Vol. 17, § 9569, page 261, *et seq.*, it is said that, "Although removal of personalty from the insured location may constitute a breach of a policy avoiding liability on the part of the insurer, such conditions of forfeiture are for the company's benefit and may be waived by it, or it may be estopped to rely thereon." The foregoing general statement is followed by an elaborate discussion of the subject and citations of authority.

The general rule is thus stated in 29A Am. Jur., § 872, page 86: "While in a minority of cases the view has been taken that the

restriction of the coverage to the property while located at a specified place is such an essential and integral part of the agreement itself that it cannot be waived or the coverage extended by estoppel to a different location, according to the great majority of cases an insurance company may waive, or be estopped to rely on, a provision or condition in a policy of insurance relating to the location of the property at a specified place. The rationale of the rule is that the restriction as to location is a provision of forfeiture for the benefit of the insurer which it may waive at its election." To the same effect see 45 C.J.S., Insurance, § 674, page 619.

This Court said in *Ins. Co. v. Grady*, 185 N.C. 348, 117 S.E. 289: "Another principle recognized in this jurisdiction and pertinent to the inquiry is that, in the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same."

Upon the facts found by the judge plaintiff told defendant's agent Perry that he was moving his personal property insured by its policy to a new location. This agent wrote on a pad in his office a description and location of the house plaintiff was moving his personal property into, and told plaintiff to send in an additional sum of $3.10 with his next monthly payment on the premium finance contract to cover the cost of extending coverage to the new location. Plaintiff paid the additional sum of $3.10, as told him by defendant's agent. This knowledge of the agent of the change of location of plaintiff's personal property, being within the scope of the powers entrusted to him, will be imputed to the defendant, as there is no suggestion of fraud between the agent and plaintiff. Equitably, if defendant did not desire to carry the risk longer, because of the change in the location of plaintiff's personal property, it ought, in fair dealing, to have returned the unearned premium, and rescinded the insurance contract, so that plaintiff could have known he no longer was protected thereby and would have been afforded an opportunity to obtain a new policy from another agent. It was only after plaintiff's personal property had been destroyed by fire, and he had notified defendant of such fact that the defendant notified him that his policy had been cancelled. The fact that the premium finance contract was returned to plaintiff marked paid, and that only $29.90 was paid on it instead of $33.00 seems clearly attributable to the failure of defendant's agent to notify Consumer Discount Company that the March payment of $8.60 was for the monthly installment

of $5.50 and $3.10 additional premium for transfer of his insured personal property to another location. All the evidence shows defendant received the $3.10 additional premium. And, it seems equally clear that defendant's agent failed to notify defendant that plaintiff had paid $3.10 additional premium for coverage of his personal property in a new location, and that this was the reason that defendant did not issue to plaintiff an endorsement to that effect, and did not receive all of the $33.00 specified in the premium finance contract. We think, and so hold, upon the facts found by the judge, the defendant is estopped to interpose as a defense to its liability, the failure of its agent to perform his duty.

It is contended by defendant that the estoppel is not pleaded. This contention is without force. The answer is, that construing the complaint liberally with a view to substantial justice between the parties, (G.S. 1-151), the facts which are necessary to constitute the estoppel are alleged in the complaint. Everything does appear in the complaint which goes to make out this position, except simply naming it as an estoppel in terms, and this is not of the substance. *Alston v. Connell*, 140 N.C. 485, 53 S.E. 292; *Worthington v. Wooten*, 242 N.C. 88, 86 S.E. 2d 767.

The facts found by the judge are supported by competent evidence, and the facts found support his conclusion of law based thereon, and his judgment. It, therefore, follows the judgment is

Affirmed.

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HENLEY PAPER COMPANY v. JOHN C. McALLISTER, JR.

(Filed 14 December, 1960.)

**1. Appeal and Error § 49—**

In a trial by the court under agreement of the parties, the judgment, in the absence of findings of fact in the record or request for findings, must be affirmed if it is based on any legal ground supported by the evidence.

**2. Contracts § 7—**

Evidence tending to show that defendant, after he had been in plaintiff's employment some three months, was required to sign the contract of employment which stipulated that plaintiff would not engage in like employment within territory specified for a period of three years after the termination of the employment for any cause, supports a finding that the covenant not to engage in like employment

within the territory specified was without consideration, even though there is conflicting evidence to the effect that the covenant was a condition of employment.

**3. Same—**

Contracts restraining employment are not favored and will be upheld only when founded on valuable consideration, are reasonably necessary to protect the interest of the covenantee, do not impose unreasonable hardship upon the covenantor, and do not unduly prejudice the public interest.

**4. Same—**

Defendant's employment was confined to the fine paper trade. A covenant that he would not engage either directly or indirectly in the manufacture, sale or distribution of paper or paper products in a territory extending in a 300 mile radius from any of plaintiff's divisions, embracing territory extending from Delaware to Alabama and from Indiana to the Atlantic, *is held* unreasonable and void in excluding defendant from too much territory and too many activities.

**5. Same—**

A covenant that an employee would not engage in like business within a designated territory for a specified time after the termination of the employment must be construed as it is written, and the courts may not render the contract valid in part by splitting up the territory designated, since this would make a new contract for the parties.

**6. Same—**

Evidence that after the execution of a contract of employment containing a covenant prohibiting the employee from engaging in like business within a specified territory for a period of three years after the termination of the employment for any cause, the parties entered into a subsequent agreement under which the employee was given new and different duties and the employer became obligated to pay a new and different compensation, and which made no reference to the covenant restraining employment, *is held* sufficient to warrant a finding that the subsequent agreement was not a modification of the original agreement, but was a new contract omitting the restrictions.

APPEAL by plaintiff from *Preyer, J.*, July 11, 1960 Special Civil Term, GUILFORD Superior Court (High Point Division).

In this civil action the plaintiff seeks to have the defendant enjoined from engaging, directly or indirectly, in the manufacture, sale, or distribution of paper or paper products within a radius of 300 miles from High Point, Charlotte, Gastonia, and Asheville. The plaintiff alleged in substance: Defendant entered the employment of the plaintiff on January 3, 1950, as a salesman of paper products, of which the plaintiff was a wholesale distributor, with offices in the four cities above named. Before entering upon his duties as a salesman

the defendant spent some time in the offices and departments in order that he might become familiar with plaintiff's methods of doing business. The commercial paper trade is highly competitive. Approximately 35 other distributors do business in the same territory. During the training period and later the defendant became familiar with plaintiff's trade secrets and methods which, if disclosed, would be valuable to a competitor, and likewise damaging to the plaintiff. The contract of employment entered into was dated January 3, 1950. The contract provided for defendant's employment as a full time salesman to be assigned a certain territory and to be paid by commission on sales. The plaintiff reserved the right to discontinue the services of any agent or sales representative for any act that "may not be considered as proper representation of the company in his assigned territory." In addition to the terms of the employment, the contract contained the following:

> "In consideration of the employment of the Salesman by the Company, the execution of this contract, and the sum of Ten ($10.00) Dollars in hand paid to the Salesman by the Company, the recepit of which is hereby acknowledged, the Salesman agrees with the Company that the Salesman shall not, for a period of three years after the termination of this contract, regardless of the cause or manner of said termination, either directly or indirectly engage in the manufacture, sale or distribution of paper or paper products within a radius of 300 miles of any office or branch of the Henley Paper Company or its subsidiary divisions, nor will he aid, assist or have any interest in any such business within the limits of the territory or during said time as herein provided except as an employee of the Company."

The plaintiff's complaint had attached to it as Exhibit C a written memorandum captioned "J. C. McAllister—A. D. Grant (officer in plaintiff company). This will confirm the agreement entered into this day between Mr. Henley (the plaintiff's President) and yourself that effective as of October 1, 1952, your compensation will be on the basis of $400.00 a month salary and, in addition, you will receive a salesman's commission on your sales to the Tri-Bee Label Company. In setting this basis of compensation it is understood that as head of our Fine Paper Kardex-stock control and sales desk department your full time and efforts will be devoted to this department, its part in the development of sales and in training sales personnel, the handling of branch requisitions, mill orders and such other duties as assigned you."

On March 23, 1954, the parties signed the following:

> "Confirming conversation between J. C. McAllister and A. B. Henley, President, Henley Paper Company, on this date, March 23, 1954, the Company hereby guarantees you compensation of $10,000 gross income per year effective Jan. 1, 1954. If commissions and other remuneration are less than $10,000.00, the Company will absorb the difference. If commissions and other remuneration exceed $10,000.00, the excess will be for your account.
>
> "This agreement is effective from Jan. 1, 1954, to terminate Dec. 31, 1955, by mutual agreement on thirty days notice."

The plaintiff further alleged that defendant, after notice, voluntarily terminated his employment with the plaintiff and immediately accepted employment with Snyder Paper Corporation, Hickory, North Carolina, one of the plaintiff's competitors. The defendant had kept at his own expense a record of sales, etc., obtained while he was employed by the plaintiff, which he used in seeking business for his new employer. The defendant offered to surrender the records made and kept at his own expense if plaintiff would pay the expenses incurred by the defendant in making them.

The evidence was in dispute as to whether the contract dated January 3, 1950, was signed at the time defendant entered plaintiff's employment or at some later date. The plaintiff adversely examined the defendant and the adverse examination was offered in evidence, but by which party does not clearly appear.

McAllister testified that three, four, or possibly six months after he began work for plaintiff the contract bearing date January 3, 1950, was presented to him by the plaintiff's Mr. Grant, who told him at the time, "all trainees sign this thing or they don't keep their job." The defendant signed the agreement. The record indicates that Mr. Grant, though present at the hearing, did not testify. The defendant offered in evidence certain documents which had been previously identified.

The parties, by stipulation, waived a jury trial. At the close of all the evidence the court denied the motion for a restraining order and dismissed the action. From the judgment accordingly, the plaintiff appealed.

*Schoch and Schoch, By: Arch K. Schoch for plaintiff, appellant.*

*Haworth, Riggs and Kuhn, and Jordan, Wright, Henson & Nichols, By: Welch Jordan for defendant, appellee.*

HIGGINS, J. The superior court did not assign its reasons for sustaining the demurrer to the evidence and for dismissing the action. The plaintiff contended the restrictive covenant in the contract was entered into at the time and as a part of the consideration for the original employment, and remained in force so long as defendant remained in plaintiff's employment. The plaintiff further contended the contract, because of the character of the business and knowledge thereof by the defendant, was reasonable, both as to time and territory, and should be enforced by injunction.

The defendant contended (1) the contract containing the restrictive covenant was not a part of the original employment agreement but was required after the defendant was already at work and was, therefore, without consideration; (2) was unreasonable and void because of the restraints sought to be imposed upon the defendant; (3) the original contract which contained the covenant was superseded by a new contract of employment which did not embrace the restrictive covenant.

Judge Preyer, not having been requested to do so, did not record findings of fact and conclusions of law. If his decision finds support on any legal ground it becomes our duty to affirm. Mr. McAllister testified that three, four, or possibly six months after he began his employment, Mr. Grant presented the contract and said, "All trainees sign this thing or they don't keep their job." Mr. Grant did not see fit to deny. Whether the evidence shows any consideration for the restrictive covenant is questionable. *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543; 152 A.L.R. 405; *Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315. The evidence disclosed the defendant was not advised of any restrictive covenant until he had been at work for three, four, or possibly six months. The evidence is sufficient to support a finding the covenant was without consideration.

The evidence shows the defendant was employed in the Fine Paper Division of the plaintiff's business. Likewise it shows the major part of the fine paper business is confined to North Carolina, South Carolina, East Tennessee, Southwest Virginia, and a small territory in West Virginia. The restricted area covered Virginia, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, parts of Alabama, Delaware, Indiana, Ohio, and Pennsylvania. The evidence shows the defendant's activities were confined exclusively to the sale and distribution of fine paper products. The restrictive covenant seeks to prevent "either directly or indirectly" engaging "in the manufacture, sale, or distribution of paper or paper products within a radius of 300 miles of any office or

branch of Henley Paper Company or any of its subsidiary divisions." The terms of the restriction, regardless of the cause or manner of discharge, prevented the defendant from taking a job connected with the manufacture, sale, or distribution of paper or paper products. The prohibition would prevent the defendant from cutting pulpwood or gathering linen rags to be used in the manufacture of paper or paper products. Nothing need be added to show the conditions have too many ramifications and impose an undue hardship upon one who had been employed to do no more that sell and deliver fine paper.

As this Court said in *Kadis v. Britt, supra,* "Contracts restraining employment are looked upon with disfavor in modern law. (citing many authorities.) And they have been held to be *prima facie* void. . . .

"For the most part, cases of this class are concerned with the effort on the part of the employer to protect his business against the subsequent use, by a competitor, of trade secrets confidentially acquired in the course of employment; . . . Such contracts are upheld only when they are 'founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest.' . . . To this must be added the condition that they do not impose unreasonable hardship upon the convenantor, . . ." See also, *Co-operative Association v. Jones,* 185 N.C. 265, 117 S.E. 174.

"Contracts in partial restraint of trade are still contrary to public policy and are void if nothing shows them to be reasonable. . . . (restriction covering territory) greater than is required for the protection of the plaintiff, is detrimental to the public interest, and is unreasonable and void." *Ice Cream Co. v. Ice Cream Co.,* 238 N.C. 317, 77 S.E. 2d 910.

According to plaintiff's own allegations, more than 35 competitors engage in the wholesale and distribution of all lines of paper products. The defendant's employment was "in the fine paper field." The plaintiff had a wider field of distribution for its coarse or industrial paper than for its fine paper. The defendant had nothing to do with industrial paper. Yet the contract excludes him from industrial paper. The plaintiff is a distributor, not a manufacturer, yet the contract prevents defendant from "either directly or indirectly" engaging in the manufacture, sale or distribution of paper or paper products in a territory extending in a 300-mile radius from any of plaintiff's divisions. The territory extends from Delaware to Alabama; from Indiana to the Atlantic. The contract excludes the defendant from too

much territory and from too many activities. It is, therefore, void and unreasonable. *Noe v. McDevitt*, 228 N.C. 242, 45 S.E. 2d 121.

Whether part of the contract might be deemed reasonable and enforceable is not the question. It comes to us as a single document. We must construe it as the parties made it. "The Court cannot by splitting up the territory make a new contract for the parties. It must stand or fall integrally." *Noe v. McDevitt, supra.*

The original contract established the relationship of employer and employee. It described duties to be performed by the employee — salesman; and compensation to be paid by the employer — commissions. Some time prior to November 4, 1952, the parties entered into another agreement. The memorandum thereof was drawn on that day by the plaintiff. The new agreement provided the defendant's compensation beginning October 1, 1952, should be $400 per month and commission on sales to Tri-Bee Label Company. It changed the defendant's duties completely and he became head of the Fine Paper Kardex-stock control and sales desk department. His duties were to develop sales and train sales personnel. By memorandum dated March 23, 1954, the defendant was guaranteed compensation of $10,000 per year. Thus by agreement subsequent to January 3, 1950, of which the exhibits quoted above are memoranda, the duties of the defendant and his compensation were changed without any reference to or mention of the original contract. Thus the defendant became employed to perform new duties and plaintiff became obligated to pay new and different compensation. Inasmuch as the parties by the subsequent agreement fixed the terms of employment and the obligation of the parties each to the other without any reference whatever to the original contract, it is not unreasonable to assume the new contract was intended as a substitution for and not a modification of the original agreement. With the exception of the restrictive covenant, all other provisions of the original contract were changed. The evidence before the court would warrant a finding the parties intended to make a new contract omitting the restrictions. *Tomberlin v Long*, 250 N.C. 640 109 S.E. 2d 365; *Roberts v. Mills*, 184 N.C. 406, 114 S.E. 530.

For the reasons indicated, the testimony and the record evidence before Judge Preyer offer abundant support from his order, which is

Affirmed.

DELLA BULLOCK WIMBERLY, GRACE P. SCARBORO, BENNIE PATE, JAMES CARL SMITH, EVA BULLOCK MOORE, BLANCHE BULLOCK WAGONER, VALLIE BULLOCK KEITH, MACK BULLOCK, ILA BULLOCK COOK, NOEL D. BULLOCK, CLAYBORN BULLOCK, CLIFTON BULLOCK, EDWARD M. BULLOCK, NED BULLOCK, EMILY BULLOCK RIDDLE, LESTER BULLOCK, ALDA BULLOCK WILSON, J. M. BULLOCK, ELVA BULLOCK POWELL, HOWARD BULLOCK, AGNES BULLOCK BASS, COY W. BULLOCK, MARY BULLOCK SMITH, BENTON T. BULLOCK, LEWIS A. BULLOCK, AND SUCH OTHERS OF THE HEIRS AT LAW OF THE LATE J. M. BULLOCK, DECEASED, WHO MAY DESIRE TO COME AND MAKE THEMSELVES PARTIES PLAINTIFF HEREIN V. CHARLES V. PARRISH, PERCEY J. PARRISH, CARLIE F. PARRISH, WILLIAM PARRISH, WOODROW PARRISH, RUBY P. HEDRICK AND ALICE P. RAYNOR, HEIRS AT LAW OF JAMES MAYLON PARRISH, DECEASED.

(Filed 14 December, 1960.)

**1. Trial § 25—**

Upon intimation of opinion by the court adverse to plaintiff on the law upon which the action is founded, or the exclusion of evidence offered by plaintiff which is necessary to make out his case, plaintiff may submit to nonsuit and appeal.

**2. Wills § 33c—**

The will in suit devised and bequeathed to testator's wife all of his property for life and directed that at her death the property should go to a designated person provided he should stay with and take care of testator's wife, otherwise the property should go to testator's heirs. *Held*: The condition involved duties in the nature of consideration and whether the condition was fulfilled could not be determined prior to the death of the life tenant, and therefore the condition was a condition precedent and the limitation over was contingent.

**3. Same—**

So long as there is an uncertainty as to the person or persons who will be entitled to enjoy a remainder, the remainder is contingent.

**4. Same—**

Where the evidence is conflicting as to whether a contingent remainderman had performed the duties imposed upon him as a condition precedent to the vesting of title in him, the issue is for the jury.

APPEAL by plaintiffs from *Hooks, S. J.*, July "A" Civil Term, 1960, WAKE Superior Court.

Civil action instituted on July 12, 1957, by the plaintiffs who are next of kin and heirs at law of J. M. Bullock, Deceased, against the defendants who are the next of kin and heirs at law of James Maylon Parrish, Deceased.

The controversy involves the title and right to possession of a

tract of land devised by J. M. Bullock in his will executed on December 10, 1916. Item 2 of the will provided:

> "I give and devise to my beloved wife L. E. Bullock all that tract of land that I now Reside on containing 30 acres more or less lying and being in the County of Wake near Kennebec also all of my personal property consisting of Horses Mules Wagons Buggys Cows Hogs or any other property that I may possess, at my death all of the above property I give to her for her natural life only and at her death all the above property I give to James Maylon Parrish a criple whom I have taken to Raise provided the said James Maylon Parrish shall stay with my wife and take care of her at my death other wise my property shall *decent* to my next of Kin."

J. M. Bullock died January 19, 1945. The widow, L. E. (Evie) Bullock, died October 25, 1956. No children were born of the marriage. James Maylon Parrish died on May 5, 1957. He was never married.

The plaintiffs allege in substance that for a number of years prior to her death, the widow, L. E. Bullock, was an invalid suffering from cancer and a mental disorder. During her later years she was in constant need of attention; that James Maylon Parrish, knowing of her need, was absent for long periods of time, frequently left her without food or water, causing her needless suffering; and that he failed to perform the conditions set forth in the will upon which depended his right to claim any interest thereunder. The plaintiffs pray that they be declared to be the owners in fee and entitled to the immediate possession of the land involved.

The defendants filed a demurrer upon the ground the will, made a part of the complaint, showed that James Maylon Parrish took a vested remainder in the lands described in Item 2 of the Bullock will and that the facts alleged could not work a forfeiture of his interest as remainderman. After the demurrer was overruled, the defendants answered, claiming that the vested remainder could not be defeated and denying that James Maylon Parrish failed to perform any condition of the will; that the defendants, his heirs, are now owners in fee. As a further defense, the defendants alleged that James Maylon Parrish rendered services to the testator and his wife and made improvements on the land reasonably worth $10,000. The defendants prayed that they be declared to be the owners and entitled to the possession of the land involved.

The evidence introduced by both parties was sharply conflicting

on the question whether James Maylon Parrish had complied with the proviso in the will. At the conclusion of all the evidence the court intimated it would give the jury peremptory instructions in favor of the defendants and upon such intimation the plaintiffs submitted to a nonsuit and appealed, assigning error.

*Dupree & Strickland, by Franklin T. Dupree, Dupree, Weaver, Horton & Cockman, By: F. T. Dupree, Jr., for plaintiffs, appellants.*
*William B. Oliver, Thomas A. Banks for defendants, appellees.*

HIGGINS, J. When, at the close of the evidence, the court intimated it would give the jury peremptory instructions to find for the defendants, the plaintiffs then had the option of waiting for the instructions, excepting to them and to the judgment and then appeal. Or, they could submit to a nonsuit and appeal. They chose the latter course. The procedure followed is amply supported by our decisions. *Justice Denny,* in *Rochlin v. Construction Co.,* 234 N.C. 443, 67 S.E. 2d 464, states the rule: "And where a judge intimates an opinion on the law which lies at the foundation of the action, adverse to the plaintiff, or excludes evidence offered by the plaintiff which is material and necessary to make out his case, he may submit to a nonsuit and appeal." (Citing many cases.)

In view of our decision in the case we refrain from discussing the evidence, except to say it was conflicting and sufficient to present a jury question whether James Maylon Parrish, after the testator's death in 1945, met the conditions, the fulfillment of which qualified him to take under the will. The date of the will and other evidence indicate both the testator and the widow, at the former's death in 1945, had reached somewhat advanced age. They were childless, though at the time the will was executed James Maylon Parrish had been taken into the home.

From an examination of the will, it is obvious the testator's primary purpose was to provide for his wife. At the beginning of the dispositive item of the will, he said: "I give and devise to my beloved wife L. E. Bullock all that tract of land . . . also all . . . other property that I may possess, at my death all of the above property I give to her for her natural life only and at her death all the above property I give to James Maylon Parrish . . . provided the said James Maylon Parrish shall stay with my wife and take care of her at my death other wise my property shall *decent* to my next of Kin."

We think it was the intent of the testator that James Maylon Parrish, in no event, should take or receive any interest prior to the

termination of Mrs. Bullock's life estate, and then only provided he had stayed with and taken care of her until the time of her death. In the event of his failure to fulfill the condition, the estate should go to his next of kin. Hence, the final taker could be determined only at the end of the life estate. This being so, the will does not give a vested remainder to James Maylon Parrish. "So long as there is an uncertainty as to the person or persons who will be entitled to enjoy a remainder, it is contingent." *Power Co. v. Haywood,* 186 N.C. 313, 119 S.E. 500. This construction is supported by the provision following. The primary and controlling purpose as gathered from the will was the intent of the testator to see to it that his widow, so long as she lived, had proper care and attention. The evidence is undisputed the widow's physical and mental condition in her declining years was such as to require someone to stay with and care for her. The evidence was sharply conflicting whether Parrish had performed these duties as required by the will. Compliance with its terms was a condition precedent to his taking under it. The disposition over to the next of kin distinguishes this case from those cited by the appellees. As stated by this Court in *Tilley v. King,* 109 N.C. 461, 13 S.E. 936: "It is insisted that where the condition requires something to be done which will take time, it should be construed as a condition subsequent. But, says a writer of high authority, if there be 'a condition which involves anything in the nature of a consideration, it is in general a condition precedent.' " Fulfillment of the condition was required before the estate could vest. Not until the death of the life tenant could it be known whether the condition had been fulfilled. If fulfilled, the estate vested in Parrish. If not, it vested in the next of kin. See *Brittain v. Taylor,* 168 N.C. 271, 84 S.E. 280.

We have found some legal difficulty in answering the question whether the devise to James Maylon Parrish was upon condition precedent or on condition subsequent. If the former, a showing of substantial compliance with the condition was necessary to the vesting of the estate; if the latter, the estate vested subject to being divested upon a showing of breach of the condition. "If the estate is to arise or be enlarged upon the performance of the condition, then the condition is said to be precedent; if it is to terminate or be lost by nonperformance of the condition, then it is called a condition subsequent . . . The former fixes the beginning, the latter the ending of the estate." Thompson on Real Property (Perm. Ed.) Vol. 4, § 233, p. 554. We think it was the testator's intent, as gathered from the will, that an estate in James Maylon Parrish was not to vest until he

had stayed with the widow and taken care of her until the time of her death.

*Patterson v. Brandon,* 226 N.C. 89, 36 S.E. 2d 717, 163 A.L.R. 1150, and other similar cases cited are distinguishable in that the performance of the condition was not in the nature of compensation for the devise and there was no limitation over. In Mr. Bullock's will the condition was in the nature of consideration for the devise and in default of the consideration the will carried a limitation over to his next of kin. *Hall v. Quinn,* 190 N.C. 326, 130 S.E. 18; *Finley v. King,* 3 Pet. 346, 7 U.S. L. ed. 711. A quotation from the opinion in the case of *Adams v. Johnson,* 227 Pa. 459, 76 A. 174, seems especially appropriate: The testator willed his estate to his wife "until her death, after which balance to Anna Bell Adams . . . providing said Anna Bell Adams continue to live with said Mary Ann Arthur until death. . . . He intended, as his will discloses, that after the death of his widow the farm should go the plaintiff, 'providing said Anna Bell Adams continues to live with said Mary Ann Arthur until death.' This condition is expressed in apt words . . . When she complied with the condition attached to the devise itself, the title was to vest in her. If she did not comply with the condition, and did not continue to live with Mrs. Arthur until her death, the title did not vest . . . The language of the will and all the circumstances surrounding the parties leave no doubt that such was the intention of the testator. It was therefore incumbent on the plaintiff to show a compliance with the condition under which she took the estate before she could recover in this action." To the same effect is *Marston v. Marston,* 47 Me. 495.

The pleadings and the evidence were sufficient to raise the issue of fact whether James Maylon Parrish complied with the conditions in the will that he "shall stay with my wife and take care of her." That issue must be resolved by the jury.

Reversed.

ANN TAYLOR HOLLOWELL TAYLOR, ADMINISTRATRIX OF THE ESTATE OF WAYLAND C. HOLLOWELL, JR., DECEASED v. THE TOWN OF HERTFORD, A MUNICIPAL CORPORATION.

(Filed 14 December, 1960.)

**Municipal Corporations § 12—**

A municipal corporation cannot be held liable for the death of a motorist killed while driving along a street constituting a part of a State Highway when the limb of a dead tree on the right of way fell and crushed the cab of his vehicle, since under G.S. 160-54, G.S. 136-93 and G.S. 136-41.1 (the repeal of the latter statute by its express terms not affecting pending litigation) the right to control the area was vested in the State Highway Commission.

APPEAL by plaintiff from *Burgwyn, Emergency J.*, at February Term, 1960, of PERQUIMANS.

Civil action to recover damages for the alleged wrongful death of Wayland C. Hollowell, Jr., when an elm tree fell on the cab of the truck he was driving in the Town of Hertford, North Carolina.

Wayland C. Hollowell, Jr., was killed 10 January, 1957, while driving his bread truck on Edenton Road Street, one of the most frequently traveled streets in the town of Hertford, and a portion of North Carolina Highway 37 and U. S. Highway 17.

Edenton Road Street runs through the town of Hertford in a general north-south direction. At the point where the incident complained of occurred, Edenton Road Street was approximately 50 feet wide. The traveled or paved portion of the street was approximately 30 feet wide from curb to curb. This 30-foot paved portion was bordered by 10-foot strips of land on each side.

A concrete sidewalk is located in the 10-foot strip of right-of-way on the east side of the paved portion of the street. In the 10-foot strip on the west side of the paved portion, the town owned, operated, and maintained a series of electric current transmission and distribution lines upon the usual poles. The town admitted that it was in the business of furnishing, selling, distributing and delivering electricity to its residents for a charge.

At a point just south of where King Street intersects the west side of Edenton Road Street, there was located, on the day in question, an elm tree. The tree was located several feet from the curb and near the electric lines of the defendant town.

There was evidence that the wind was gusty on the day in question.

The plaintiff introduced evidence tending to show:

(1) That in 1935 defendant town had agreed by contract with

the Highway Department to maintain the portion of Edenton Road Street which is in question.

(2) That the defendant town had cut the grass in the strip of land outside the curb on occasions prior to the incident complained of by the plaintiff administratrix.

(3) That the servants and agents of the defendant town had trimmed away portions of the limbs and branches of the elm tree to prevent interference with its power lines.

(4) That the State maintained only the paved traveled portion of the street now in question.

(5) That lightning had struck the tree in 1955, and that in 1956 it did not leaf out, having only a few green leaves. That in the summer of 1956 mushrooms grew on the tree.

(6) That the defendant was notified of the decayed and rotten condition of the tree, and that the city had at all times prior to the accident not done anything about the tree.

(7) That on the day the incident complained of occurred, the intestate was proceeding in a careful manner in a southerly direction along said Edenton Road Street. Just to the south of the intersection of King Street, the intestate's panel truck was struck by part of the elm tree. The tree fell on the cab of the truck, crushing it, and the intestate died as a result of the injuries received therein.

The record of case on appeal shows that at close of plaintiff's evidence defendant's motion for judgment as of nonsuit was allowed. To the judgment and the signing thereof plaintiff excepts, and, in open court, appeals to the Supreme Court and assigns error.

*John R. Jenkins, Jr., LeRoy, Goodwin & Wells for plaintiff, appellant.*

*Charles E. Johnson, John H. Hall for defendant, appellee.*

WINBORNE, C. J. In sustaining the motion to nonsuit, the court apparently relied on G.S. 136-41.1; G.S. 136-93 and G.S. 160-54. The record shows that counsel for defendant in making motion for judgment as of nonsuit called primarily to the Judge's attention three statutes which defendant contends either separately or in combination one with the other absolutely control the question, and basically are the premise that the control and the right to control the area under consideration was not that of the Town of Hertford but it was that of the State Highway Commission, or in any event, some person or some association or corporation other than the Town of Hertford; and that under the doctrine that in the absence of responsibility

there can be no liability in a negligence case. In this connection defendant directs attention to declarations by this Court in the cases of *Jones v. Greensboro,* 124 N.C. 310; 32 S.E. 675, and *Mack v. Marshall Field & Co.,* 218 N.C. 697, 12 S.E. 2d 235.

The *Jones* case, *supra,* was for the recovery of damages for personal injuries occasioned by reason of a dead limb falling on plaintiff from a shade tree on sidewalk of a street in Greensboro. And the Court in speaking of liability of the city growing out of the power conferred on the city over its streets, states that "each case must depend upon its exact facts and upon the circumstances of the particular case in view of statutory provisions of the State."

And in the *Mack* case, *supra,* it is said: " * * * in the absence of any control of the place and of the work there was a corresponding absence of any liability incident thereto. That authority precedes responsibility, or control is a prerequisite of liability, is a well recognized principle of law as well as of ethics."

And defendant contends, and we hold rightly so, that these statutes clearly demonstrate that the authority and control over the tree referred to in this action was that of the State Highway Commission.

G.S. 136-41.1 provides that "from and after July 1, 1951, all streets within municipalities which now or hereafter may form a part of the State highway system shall be maintained, repaired, improved, widened, constructed and reconstructed by the State Highway Commission to the same extent and in the same manner as is done on roads and highways of like nature outside the corporate limits. And the costs of such activities shall be paid from the State Highway and Public Works fund."

While it is true that the General Assembly of North Carolina by act of 1959 Session Laws, Chap. 687, Sec. 5, repealed G.S. 136-41.1, the repealing act expressly did not apply to pending litigation, and the instant action was then pending, — the summons therein being dated 8 January 1959, and service thereof 9 January 1959, and trial in February 1960.

The appellee contends that this statute, G.S. 136-41.1, standing alone would be sufficient to sustain the nonsuit.

And, furthermore, G.S. 160-54 declares that: "The board of commissioners shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best * * * ." And by Session Laws of 1949, Chap. 862, the General Assembly amended this statute, 160-54, by adding there: "Provided, however, so long as the maintenance of any street and/or bridges within the corporate limits of any town be taken over by the State

Highway and Public Works Commission, such town shall not be responsible for the maintenance thereof and shall not be liable for injuries to persons or property resulting from the failure to maintain such streets and bridges."

Thus the Town of Hertford calls attention to the specific language of non-liability on its part in respect to the falling of the elm tree in the stress of gusty winds.

The Town of Hertford, the appellee, points out that the case of *Pickett v. R. R.*, 200 N.C. 750, 158 S.E. 398, decided in 1931, is not authority against defendant on this appeal, for that the 1949 amendment to G.S. 160-54 was not then in force and effect.

Now, adverting to another applicable statute in support of appellee's position of non-liability, G.S. 136-93, in pertinent part it reads: " * * * No State road or State highway, other than streets not maintained by the State Highway Commission in cities and towns, shall be dug up for laying or placing pipes, conduits, sewers, wires, railways, or other objects, and no tree or shrub in or on any State road or State highway shall be planted, trimmed, or removed, and no obstruction placed thereon, without a written permit as hereinbefore provided for, and then only in accordance with the regulations of said Commission or its duly authorized officers or employees; and the work shall be under the supervision and to the satisfaction of the Commission or its officers or employees, and the entire expense of replacing the highway in as good condition as before shall be paid by the persons, firms, or corporations to whom the permit is given, or by whom the work is done."

Therefore, taking the evidence adduced upon the trial in Superior Court in the light most favorable to plaintiff, and giving to plaintiff the benefit of reasonable inferences to be drawn therefrom, the Court holds, applying the statutes, that plaintiff fails to make out a case, and the judgment of nonsuit below is

Affirmed.

RALPH H. FLEMING, JR. v. GEORGE R. DRYE AND JAMES CLIFFORD DRYE.

(Filed 14 December, 1960.)

**1. Automobiles § 46—**

When neither the allegations of the complaint nor plaintiff's evidence adduced facts which would constitute reckless driving on the part of defendant, the court correctly refrains from charging the jury thereon, notwithstanding that the complaint states the conclusion that defendant was guilty of reckless driving.

**2. Same—**

Where the complaint does not allege that defendant failed to give the statutory signal before making a left turn at an intersection and there is no contradiction in the evidence that defendant did in fact give the statutory signal, the court is not required to instruct the jury in regard thereto.

**3. Automobiles §§ 8, 17—**

G.S. 20-154(a) and G.S. 20-155(b) prescribe the respective rights and duties of two motorists approaching an intersection from opposite directions along the same highway when one of them intends to turn left at the intersection, and G.S. 20-155(a) has no application.

**4. Appeal and Error § 45—**

Where erroneous instructions are directed to an issue not reached or answered by the jury and to an issue answered in favor of appellant, the error cannot be held prejudicial to appellant.

**5. Appeal and Error § 39—**

The burden is upon appellant not only to show error, but also to show that the alleged error was material and prejudicial.

APPEAL by plaintiff from *Farthing, J.*, June 1960 Civil Term, of MECKLENBURG.

This is a civil action involving damages resulting from the collision of two automobiles at an intersection. Action was commenced 6 March 1959. Plaintiff, car owner and operator, sues defendants George R. Drye, driver, and James Clifford Drye, owner-passenger.

Plaintiff alleges that he suffered personal injury and damage to his car by reason of the actionable negligence of defendants, and defendants were negligent in that driver-defendant at the time of the accident violated the reckless driving statute, failed to yield one-half of the highway width, neglected to drive on his right half of the highway, failed to keep a reasonable lookout, and made a left turn at the intersection without first ascertaining that the movement could be made in safety.

Defendants deny the material allegations of the complaint and plead contributory negligence of plaintiff. Defendant owner-passenger counterclaims for personal injury and property damage.

The collision occurred about 5:55 p.m., 24 August 1958, at the intersection of U. S. Highway 29 and the Shankletown Road about one-half mile south of the city limits of Concord. Highway 29 runs generally north and south; Shankletown Road runs southeast and northwest. On Highway 29 about 100 yards south of the intersection there is a hill crest, and from this point there is a slight downgrade through the intersection and thence northwardly. Highway 29 has four lanes separated by white lines. Each lane is 11 feet wide. Two lanes are for northbound traffic, and two for southbound traffic. At the time of the accident the two western, or southbound, lanes were being resurfaced and were closed to traffic. But at the intersection there was an opening 24 feet wide across these lanes for accommodation of traffic on the Shankletown Road. With the southbound lanes closed, southbound traffic used the west or inside lane ordinarily used by northbound traffic. Appropriate signs along the highway at 100-yard intervals warned of road construction. The speed limit in the vicinity of the intersection was 45 miles per hour. At the intersection there was a clear vision for 800 feet to the south and 1500 to 2000 feet to the north along Highway 29.

Defendants were traveling northwardly along Highway 29, entered the intersection, attempted to make a left turn and were struck by plaintiff's car which was proceeding southwardly on the same highway. It had been misting rain and the highway was wet. A State Highway patrolman investigated the accident. He found debris about 4½ feet inside plaintiff's lane of travel and skid marks extending 20 feet from the rear wheels of plaintiff's car. These marks were inside plaintiff's lane. Both cars had front-end damage. Defendants' car had been knocked backwards 10 feet.

Plaintiff's version of the accident: Plaintiff approached the intersection at a speed of 35 miles per hour with his fog lights on. He slackened speed to 20 or 25 miles per hour as he neared the intersection. Defendants suddenly turned into plaintiff's lane and stopped when plaintiff was 50 to 60 feet away. Defendants' car protruded into plaintiff's lane about 4½ feet. Plaintiff immediately applied brakes and veered slightly to the right, but could not stop before the cars collided.

Defendants' version: Defendants approached the intersection at 35 miles per hour, entered the intersection, started to make a left turn and then observed plaintiff approaching at a distance of about

200 feet traveling at a speed of 55 to 70 miles per hour. Defendants stopped 3 or 4 feet inside plaintiff's lane, leaving a clearance of 8 or 9 feet for plaintiff to pass. Plaintiff applied brakes, skidded about 90 feet and struck defendants' car while moving at a speed ranging from 15 to 40 miles per hour. Defendants remained standing 8 to 10 seconds before the collision. Defendant-driver gave both a hand signal and mechanical signal before starting to turn. There was some debris in defendants' lane.

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

"1. Was the plaintiff injured and damaged by the negligence of the defendant, George R. Drye, as alleged in the complaint? Answer: No.

"2. If so, did the plaintiff by his own negligence contribute to his injury and damage as alleged in the answer? Answer: .....

"3. Was the defendant, George R. Drye, then and there operating said automobile as the agent of the defendant, James Clifford Drye, as alleged in the complaint? Answer: Yes (by consent).

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

a. For personal injury:

b. For property damage:

"5. Was the defendant, James Clifford Drye, injured and damaged by the negligence of the plaintiff as alleged in the answer? Answer: No.

"6. What amount, if any, is the defendant, James Clifford Drye, entitled to recover of the plaintiff?

a. For personal injury:

b. For property damage:"

Judgment was entered in accordance with the verdict, Plaintiff appealed and assigned error.

*Leon Olive for plaintiff, appellant.*

*Helms, Mulliss, McMillan & Johnston for defendants, appellees.*

MOORE, J. Plaintiff assigns as error the failure of the court to explain to the jury the provisions of the reckless driving statute, G.S. 20-140, and on the first issue apply them to the evidence with respect to defendants' conduct. This assignment is without merit for the simple reason that such evidence does not justify an inference of reckless driving. Furthermore, the complaint does not allege facts which, if proven, would constitute reckless driving on the part of the

defendants; the allegation of reckless driving is largely a conclusion of the pleader stated in almost the exact words of the statute.

Plaintiff also excepts to the failure of the court, on the first issue, to instruct the jury with respect to the provisions of G.S. 20-155(b) that a vehicle in an intersection or junction and making a left or right turn shall not be deemed to have the right of way in preference to a vehicle approaching the intersection "unless the driver of said vehicle has given a plainly visible signal of intention to turn as required in section G.S. 20-154." This exception is untenable for at least two reasons. The complaint does not allege a failure to give the signals required by statute. There is no evidence that defendants failed to give the signal; all the evidence on this subject is that the driver-defendant gave both a hand signal and mechanical signal. Where, from all the evidence before the court, the jury can draw but one inference, a new trial will not be granted for the court's failure to charge the jury upon the question. *Brannon v. Sprinkle*, 207 N.C. 398, 407, 177 S.E. 114.

Plaintiff's most serious assignment of error relates to three excerpts from the charge, applied by the court to the second and fifth issues. They are as follows:

> "The defendant further insists and contends that the plaintiff has violated Section 20-155 of the General Statutes reading in pertinent part as follows: When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right except as otherwise provided in 20-156, and except where the vehicle on the right is required to stop by a sign erected pursuant to the provisions of 20-156, and except where the vehicle on the right is required to yield the right of way by sign erected pursuant to the provisions."
>
> "The driver of a vehicle on the left has the right of way if, when he reaches an intersection, the vehicle approaching on his right is far enough away so, in the exercise of reasonable care and prudence, he is justified in the belief he can pass over the intersection in safety. In such case, upon his entering the intersection, it becomes the duty of the driver of a vehicle approaching on the right to decrease speed and to keep his car under proper control and, if necessary, to stop and yield the right of way to avoid collision."
>
> "If the defendant has satisfied you from the evidence and by its greater weight that the defendant was in the intersection

first, that the vehicle approaching, that the plaintiff's vehicle approaching on the right was far enough away that, in the exercise of reasonable care and in safety, he was justified in believing he could pass over the intersection in safety, in that event he would have had the right of way; . . ."

A portion of the challenged instructions is based on G.S. 20-155(a). It seems settled that where motorists are proceeding in opposite directions and meeting at an intersection G.S. 20-155(a) has no application. *Shoe v. Hood,* 251 N.C. 719, 726, 112 S.E. 2d 543; *Fowler v. Atlantic Co.,* 234 N.C. 542, 67 S.E. 2d 496. Where cars are meeting at an intersection and one intends to turn across the lane of travel of the other, G.S. 20-155(b) and G.S. 20-154(a) apply. In such case the driver making the turn is under duty to give a plainly visible signal of his intention to turn, G.S. 20-155(b), and ascertain that such movement can be made in safety, G.S. 20-154(a). This, without regard to which vehicle entered the intersection first.

The challenged instructions are therefore erroneous in part. But, "The burden is upon appellant not only to show error but also to make it appear that the result was materially affected thereby to his hurt." *Garland v. Penegar,* 235 N.C. 517, 519, 70 S.E. 2d 486. The court applied the instructions to the second and fifth issues. The jury did not reach the second issue. The verdict on the fifth issue was in favor of the plaintiff notwithstanding the erroneous instructions. Error in a charge on an issue is harmless if the jury answers the issue in favor of the appellant. *Lookabill v. Regan,* 247 N.C. 199, 202, 100 S.E. 2d 521; *Scenic Stages v. Lowther,* 233 N.C. 555, 557, 64 S.E. 2d 846. We do not indulge the presumption that the jury applied the questioned instructions to issues other than those directed by the court.

No error.

SOUTHERN AUTO FINANCE COMPANY, A LIMITED PARTNERSHIP BY FRANKLIN S. CLARK, SOLE GENERAL PARTNER v. T. G. PITTMAN AND JANE LASSITER AMAN,

(Filed 14 December, 1960.)

1. **Claim and Delivery § 2—**

Where defendant in claim and delivery proceedings sets up the defense of payment, the burden of proof upon such defense is upon him, and when there is no evidence of valid payment the court may properly give peremptory instructions in plaintiff's favor upon the appropriate issues.

2. **Payment § 1—**

A check does not operate as payment when the check is not paid upon presentation to the bank because of the instructions of the maker, even though the payee, upon receipt of the check, marks its records to show payment.

3. **Same —**

Where the purchaser of an automobile executes a note for the balance of the purchase price and makes no payment thereon, the fact that the dealer executes his check to the finance company does not constitute payment when the check is not paid by the drawee bank upon instructions of the dealer, the facts being insufficient to invoke the law of agency, the purchaser not having relied upon any right of the dealer to collect money in payment of the discounted notes.

4. **Chattel Mortgages and Conditional Sales § 10: Automobiles § 4—**

Where chattel mortgage on an automobile is duly registered in the county in which the mortgagor resides, G.S. 47-23, a purchaser from the mortgagor does not acquire title free of the lien, notwithstanding his reliance upon the fact that the certificate of title of the Department of Motor Vehicles failed to show any outstanding liens. G.S. 20-57(d).

5. **Constitutional Law § 10—**

The courts must declare the rights of the parties in accordance with the law established and settled by prior decisions, the question of whether public policy requires a change in the law being in the exclusive province of the legislative body.

APPEAL by defendants from *Williams, J.*, May 1960 Term, of CUMBERLAND.

On 17 September 1959 T. G. Pittman purchased from his son, Tommy Pittman, doing business under the name of Tommy's Supreme, a Buick automobile. Part of the purchase price was represented by a note for $3,400.36, payable in monthly installments beginning 28 October 1959. Payment of the note was secured by conditional sales contract on the automobile. The note and lien were for value sold to plaintiff. The conditional sales contract was, on 1 October 1959, recorded in Johnston County, where defendant Pittman resided.

The Department of Motor Vehicles issued a certificate of title to T. G. Pittman for the Buick. This certificate did not disclose the existence of any lien. Defendant Aman purchased the car from T. G. Pittman on 28 October 1959.

Plaintiff seeks judgment for the debt and the possession of the car.

Defendant Pittman pleaded payment.

Defendant Aman pleaded the failure of plaintiff to have the lien of the conditional sales contract noted on the certificate of title issued to defendant Pittman as an estoppel defeating plaintiff's right to possession of the automobile.

To determine the rights of the parties, the court formulated issues which were answered in part by consent of the parties and in part by the jury under instructions from the court as follows:

"1. Did the defendant, T. G. Pittman, execute the note and conditional sales contract, registered in Book 249, page 533, Registry of Johnston County, as set out in the complaint?

"Answer: Yes (by consent)

"2. Is the defendant, T. G. Pittman, indebted to the plaintiff?

"Answer: Yes

"3. If so, in what amount?

"Answer: $3400.36

"4. Is the plaintiff the owner and entitled to immediate possession of the automobile, as described in said contract?

"Answer: Yes

"5. Is the plaintiff estopped to claim ownership and possession of said Buick automobile by its acts and conduct, as against the defendant, Jane Lassiter Aman, as alleged in the Answer?

"Answer: No

"6. Was the property, to-wit: the automobile, described in the complaint and Writ of Claim and Delivery in this action, seized by the Sheriff of Wake County, where the automobile was situate?

"Answer: Yes (by consent)

"7. If so, what was the value of said automobile at the time it was seized as aforesaid?

"Answer: $2900 (by consent)

"8. Did the defendant, Jane Aman, execute the replevin bond in the amount of $6800.00, with Thomas E. Pittman and Gene T. Pittman as sureties thereon?

"Answer: Yes (by consent)."

Judgment was entered on the verdict and defendants appealed.

*Henry L. Anderson and Franklin S. Clark for plaintiff, appellee.*

*Wiley Narron and L. Austin Stevens for defendant appellants.*

RODMAN, J. The court gave peremptory instructions with respect to issues 2, 3, 4, and 5. Defendants assign these instructions as error.

Defendants, having admitted the execution of the note and lien, had the burden of establishing their plea of payment. *Schwabenton v. Bank*, 251 N.C. 655, 111 S.E. 2d 856; *Paving Co. v. Speedways, Inc.*, 250 N.C. 358, 108 S.E. 2d 641.

To show payment defendants rely on a check for $3,000, dated 30 September 1959, drawn by Tommy Pittman on First-Citizens Bank & Trust Co., payable to plaintiff's order. This statement appears on the check:

"This check is in payment of items as per statement following. Endorsement of Payee will constitute a receipt in full when check is paid.

"Tom G. Pittman

59 Buick 4 dr. LaSabre"

Tommy Pittman, defendants' witness, testified: "When I issued the check to Southern Auto Finance Company on the Buick, my intention was for the check to pay the account off. When I gave a check for an automobile I considered whatever lien against it would be paid. They accepted it with that understanding. When I gave the $3,000 check, I was holding the title certificate . . . This $3,000 check has not been paid in actual cash, maybe, not at the bank. The bank has not paid it . . . The car was paid off as far as I was concerned. I knew the check had not been paid. I did not get any money from my father to pay the car off. I didn't have any money . . ."

When plaintiff received the check, it made an entry on its books showing payment of the note. "It was a bookkeeping entry which was subsequently changed."

George Fisher, employee of plaintiff, witness for defendants, testified: "Tommy Pittman forwarded a check into our office to pay off said account. After we received this check, the account was paid off. We had never had a bad check on him before. The check wasn't paid. Check was marked returned at request of the maker. Tommy Pittman was a used car dealer and sold automobiles and discounted them with Southern Auto Finance Company. He received money, wrote receipts and payments and turned the money in to us. He collected a number of installment payments on various vehicles. Whenever money was collected, he sent the money into the office by check with Tommy Pittman or Tommy's Supreme Service the maker."

It is argued that Tommy Pittman was an agent with express or

implied authority to collect, and because of such authority, his worthless check given to his principal is a valid payment, releasing the maker from liability. The facts do not call for an application of the law relating to agency. The evidence completely negatives the idea that T. G. Pittman ever paid anything. He did not act in reliance upon his son's right to collect for plaintiff. He cannot benefit from the gratuitous act of a third person which was a mere colorable payment. Even a debtor cannot discharge his liability to his creditor by giving his check, which he knows to be worthless because of lack of funds, or, as in this case, because of instructions given the bank not to pay. *Paris v. Builders Corp.*, 244 N.C. 35, 92 S.E. 2d 405; *Wilson v. Finance Co.*, 239 N.C. 349, 79 S.E. 2d 908. Such worthless paper is no consideration for a release of the debt. If debts could be discharged in such manner, public confidence in all commercial paper would indeed be shaken.

The court was correct in holding there was no evidence of payment, and because there was no evidence of payment, plaintiff was entitled on the admissions to peremptory instructions on the second and third issues.

G.S. 20-50 requires the owner of a motor vehicle to be operated on the highways to be registered with the Department of Motor Vehicles. When registered, the Department issues a certificate of title showing "all liens and encumbrances upon the vehicle therein described." G.S. 20-57(d).

The title certificate endorsed to defendant Aman when she purchased from T. G. Pittman did not show any liens against the vehicle; but the lien held by plaintiff was then properly recorded in Johnston County. If, as defendants contend, G.S. 20-57 supplanted and removed motor vehicles used on the highways from the provisions of our registration statute, G.S. 47-23, the court was in error in giving peremptory instructions in plaintiff's favor on the fourth and fifth issues.

The position now taken by defendants was presented, considered, and decided adversely to their contention more than a quarter of a century ago. *Corporation v. Motor Co.*, 190 N.C. 157, 129 S.E. 414. The conclusion then reached is inherent in our subsequent decisions. *Whitehurst v. Garrett*, 196 N.C. 154, 144 S.E. 835; *Finance Corp. v. Hodges*, 230 N.C. 580, 55 S.E. 2d 201. The interpretation given in 1925 has not been rejected by the Legislature. If public policy now requires a different system of establishing ownership and encumbrances on motor vehicles, such policy must be declared by the Legislature.

It can enact laws to accomplish that purpose. We have neither the power nor the desire to usurp its prerogative.

No error.

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WALTER L. ALLRED (EMPLOYEE) v. ALLRED-GARDNER, INCORPORATED (EMPLOYER), AND FIDELITY & CASUALTY COMPANY OF N. Y. (CARRIER).

(Filed 14 December, 1960.)

**1. Master and Servant § 53—**

Whether an injury to an employee arises out of and in the course of his employment within the purview of the Compensation Act is a mixed question of law and fact.

**2. Master and Servant §§ 54, 61—**

Where an employee who has been subject to "black-outs" for a number of years is required to drive an automobile in making service calls in the performance of the duties of his employment, and while driving back to the employer's place of business after having made a service call is injured in an accident as a result of "blacking-out" and hitting a pole, the injury arises out of and in the course of his employment, since the duties of the employment placed him in a position increasing the dangerous effects of his idiopathic condition.

APPEAL by defendants from *Gwyn, J.*, April 1960 Regular Civil Term, GUILFORD Superior Court (Greensboro Division).

This proceeding originated before the North Carolina Industrial Commission as a compensation claim for injuries growing out of an industrial accident. Hearings were held before Deputy Commissioner Thomas on April 16, 1959, and before Deputy Commissioner Shuford on May 26, 1959. The parties stipulated:

"(1) That on and prior to January 4, 1959, Walter L. Allred and Allred-Gardner, Inc., were subject to and bound by the provisions of the Workmen's Compensation Act.

"(2) That at said times the employer-employee relationship existed between claimant and defendant employer.

"(3) That at said times the Fidelity & Casualty Company of New York was the compensation carrier.

"(4) That while so employed the claimant's average weekly wage was $125.00."

The deputy commissioner made the following specific findings:

"(1) Claimant, a white male, 42 years of age, owned defendant employer and served as its president since it was incorporated in 1952. Defendant employer was engaged in the plumbing and heating business and claimant's duties required him to travel in his auto to make service calls. Claimant had been subjected to 'black-outs' for about 15 years.

"(2) During the morning of January 4, 1959, claimant made a service call at the West Market Street Methodist Church in Greensboro, made a further service call at a private residence and then started to return to defendant employer's place of business and at about 11 a.m., while driving the auto south on North Elm Street, claimant 'blacked out' and collided with a pole. Claimant sustained severe injuries. At the time claimant 'blacked out' the auto was still moving and claimant was not in a place of apparent safety with the ordinary dangers of his employment suspended and in repose, but was subjected to the particular hazard of riding in an auto, which hazard was inherent in claimant's working conditions with defendant employer. Claimant's 'blackouts' in combination with his riding in an auto brought about the accident and resulting injuries.

"(3) That as above set forth claimant on January 4, 1959, sustained an injury by accident arising out of and in the course of his employment with defendant employer."

In addition to the above, the Commissioner made findings as to the injuries sustained, the duration and extent of the disability, and based thereon awarded compensation. These further findings are not here material.

The employer and the insurance carrier filed detailed exceptions to the findings, conclusions, and the award, and appealed to the full commission for review. After hearing and review, the full commission adopted as its own the findings and conclusions of the deputy commissioner and affirmed the award. Upon appeal Judge Gwyn overruled, *seriatim*, the exceptions and affirmed the findings, conclusions, and the award. The defendants appealed.

*Hoyle, Boone, Dees & Johnson, By: J. Sam Johnson, Jr., for plaintiff, appellee.*

*Smith, Moore, Smith, Schell & Hunter, By: Richmond G. Bernhardt, Jr., for defendants, appellants.*

HIGGINS, J. The essential facts are not in dispute. They are correctly stated in the findings of the deputy commissioner. The sole question presented is whether claimant sustained an injury arising out of and in the course of his employment. This is a mixed question of law and fact.

The defendants contend the cause of the accident was the claimant's loss of control of his vehicle by reason of his having blacked out; that the blackout was totally unrelated to his employment and that the use of an automobile upon the highway subjected claimant to no greater hazard than that to which the public is ordinarily subject — in short, the injury did not arise out of the employment.

*Justice Bobbitt* answered a part of the defendants' objection in *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862: "In early cases in other jurisdictions, compensation was generally denied where the injury occurred upon a public street or highway on the ground that the hazard to which the employee was exposed was not peculiar to the employment but a risk common to all persons using the public street or highway . . . In later decisions, injury on a public street or highway is generally held compensable if at the time the employee is acting in the course of his employment. . . .

"It is established in this jurisdiction that an injury caused by a highway accident is compensable if the employee at the time of the accident is acting in the course of his employment and in the performance of some duty incident thereto." (citing cases.)

Admittedly claimant's accident occurred while he was driving back to his place of business during work hours after having performed services for two of his employer's customers. At the time, he was on company business. His use of the automobile was in connection with that business. If, due to his carelessness he had driven the vehicle into the pole and received the injuries, no valid reason appears why he would have been barred from recovery. Negligence is not a defense to a compensation claim. "The negligence of the employee, however, does not debar him from compensation for an injury by accident arising out of and in the course of his employment. The only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is when the injury is occasioned by his intoxication or willful intention to injure himself or another." *Archie v. Lumber Co.,* 222 N.C. 477, 23 S.E. 2d 834.

The claimant's injury was sustained when the vehicle hit the pole. Blackout caused him to lose control of the vehicle which he was driving on an errand of his employer. His work required him to be operating the vehicle at the time and place of the blackout. The

injury followed because of the blackout and the position claimant was in at the time it occurred. Had he been in the office or walking on the street, probably no injury — certainly not this one — would have occurred. It appears, therefore, the injury was directly connected to the employment. The majority, but not all courts, seem to adopt this view. One reason for the divergence is graphically set forth in an article entitled, "Workmen's Compensation—Falls Due to Dizziness, Vertigo, Epilepsy and Like Causes," Vol. 26, p. 321, N. C. Law Review (1947-1948): "The courts, torn between a desire to construe a statute liberally in favor of the employee, and at the same time bedeviled with the common law notions of proximate cause, have not always reached uniform nor logical decisions."

Whether injury results from a fall or from an automobile out of control because of the blackout would seem to make little, if any, difference. Quoting from Larson's Workmen's Compensation Law, § 12, "The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of a fall, such as on a height, near machinery or sharp corners, or *in a moving vehicle.*" (emphasis added.)

In *Rewis v. Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97, the following appears from *Chief Justice Stacy's* opinion: "Some cases hold that, where an employee is seized with a fit and falls to his death, the employer is not liable, because the injury did not arise out of the employment (citing authorities); but a majority of the courts, American and English, hold that, if the injury was due to the fall, the employer is liable, even though the fall was caused by the pre-existing idiopathic condition."

In *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173, after citing Schneider on Workmen's Compensation, it is said: "It appears therefrom that the better considered decisions adhere to the rule that where the accident and resultant injury arise out of both the idiopathic conditioin of the workman and hazards incident to the employment, the employer is liable. But not so when the idiopathic condition is the sole cause of the injury." See annotations and cases in 19 A.L.R. 95; 28 A.L.R. 204; 60 A.L.R. 1299; 58 Am. Jur., Workmen's Compensation, § 247. Where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as "arising out of employment." *Tapp v. Tapp*, 192 Tenn. 1, 236 S.W. 2d 977; *Irby v. Republic Creosoting Co.*, 228 F. 2d 195 (5th Ct.).

Two circumstances, we think, serve to fix liability on the defend-

ants in this case: First, a blackout to which the claimant had a predisposition; second, the blackout occurred at the time and place the claimant's duties required him to be driving an automobile. The combination of these two produced the accident. In the light of our decisions, the plaintiff's injury may be said to arise out of and in the course of his employment. The judgment of the superior court is

Affirmed.

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LUCY MAY CARTER, ADMINISTRATRIX OF THE ESTATE OF JUDITH MAY CARTER v. JAMES WOODSON SHELTON.

(Filed 14 December, 1960.)

**1. Trial § 22a—**

Upon motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom.

**2. Automobiles §§ 41m, 42l—**

Evidence tending to show that defendant was traveling north some 50 to 65 miles per hour along a highway partially covered with ice and snow, that two children, one of whom was the twelve year old intestate, slid down the driveway of a house on defendant's right side of the road, across his lane of traffic, and turned north on defendant's left side of the road, where the sled was struck by defendant's vehicle, resulting in the fatal injury of intestate, *is held* to raise the issues of negligence and contributory negligence for the determination of a jury.

**3. Negligence § 16—**

A twelve year old child is presumed to be incapable of contributory negligence, although this presumption is rebuttable.

APPEAL by plaintiff from *Sink, Emergency Judge,* March Civil Term, 1960, of ROCKINGHAM.

This is a civil action to recover for the wrongful death of plaintiff's intestate, resulting from the alleged negligence of the defendant in the operation of his automobile.

Judith May Carter, a girl twelve years of age, while riding on a sled, was run over by the defendant and killed. The accident occurred on 13 December 1958 on the Lick Fork Road in the Ruffin community in Rockingham County.

An early December snow had fallen; snow plows had pushed the major portion of the snow off the traveled portion of the road, leav-

ing a ridge of snow on both sides of the road. On the above date, around 3:30 o'clock in the afternoon, ten or twelve boys and girls of the Ruffin community were gathered in the yard of the L. W. Worsham home. These children had their sleds and were playing and riding on the snow and ice. The Worsham home is situated to the east of the Lick Fork Road and is on higher ground than the road. The driveway extends from the Worsham home downgrade to Lick Fork Road. Where the driveway intersects the highway it spreads out in a fan shape and is 47 feet wide. The Lick Fork Road is a public highway which runs in front of the Worsham home in a general northerly and southerly direction. The Worsham yard is enclosed by a fence consisting of concrete posts and three horizontal railings. From the south corner of the Worsham fence to the entrance of the Worsham driveway the distance is 86 feet. Lick Fork Road is partly paved and partly unpaved. The road is paved in front of the Worsham home and northwardly as it proceeds through the village of Ruffin. The road is unpaved beginning at a point 50 feet south of the Worsham property. Approaching the Worsham home from the south, the road is upgrade and curves slightly to the right and levels off in front of the Worsham home and then proceeds a little downgrade to the north. The unpaved portion of the road was free of snow except in spots; the paved portion was frozen over and slick, but was beginning to melt in spots. Snow covered the fields on the sides of the road.

The evidence tends to show that as the defendant approached the Worsham driveway on the Lick Fork Road coming from the south, he was traveling at an estimated speed of 65 miles an hour. The lowest estimate of his speed by any witness was 50 to 60 miles an hour.

The route taken by the children on their sleds was to start near the Worsham home and go down the driveway, curving to the right on the fan-shaped entrance into the Lick Fork Road and to proceed along the road to the north.

Linda Lauder, riding on Jimmie Worsham's sled, with Judith Mae Carter (the deceased) on the back of the sled, started down the Worsham driveway, curved to the right at the intersection of the driveway with the highway, and turned north. In making the turn into the highway, the sled crossed the northbound lane of traffic and turned north into the southbound lane of traffic, and at the time of the collision, the sled on which these girls were riding was proceeding in a northerly direction on the left-hand side of the highway. The defendant's car began to veer to its left into the southbound lane

of traffic 113.93 feet south of the point of impact. From the point of impact to where the defendant's car stopped the distance was 157 feet 8 inches, and 190 feet north from the center of the driveway. The defendant's car stopped at a point only 15 or 20 feet from a group of children who were walking along the highway. The evidence further tends to show that at the time the girls came into the road the defendant's car was "sliding on the snow and ice * * *." There is also evidence tending to show that the defendant did not blow his horn.

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.

*Smith, Moore, Smith, Schell & Hunter for defendant.*
*Gwyn & Gwyn for plaintiff.*

DENNY, J. The sole question for determination on this appeal is whether or not the court below committed error in sustaining the defendant's motion for judgment as of nonsuit.

In considering the evidence adduced in the trial below, in connection with the motion for nonsuit, the plaintiff is entitled to have such evidence considered in the light most favorable to her and she is likewise entitled to the benefit of every reasonable inference to be drawn therefrom. *Pierce v. Insurance Co.*, 240 N.C. 567, 83 S.E. 2d 493; *Transport Co. v. Insurance Co.*, 236 N.C. 534, 73 S.E. 2d 481; *Hat Shops v. Insurance Co.*, 234 N.C. 698, 68 S.E. 2d 824; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251.

In the case of *Wise v. Lodge*, 247 N.C. 250, 100 S.E. 2d 677, the evidence tended to show that the defendant was driving her car at a speed of approximately 35 to 40 miles per hour on a highway covered with ice and snow. The defendant's car skidded to the left into the car of plaintiff, which was being driven in its proper lane in the opposite direction. This Court, speaking through *Parker, J.*, said: "Viewing the evidence in the light most favorable to the plaintiff, as we are required to do on a motion for judgment of nonsuit, it permits the legitimate inference that the skidding of defendants' automobile was caused by her failing to exercise due care in the operation of her automobile commensurate with the known and obvious dangerous condition of the highway, in that she was driving it without chains on a highway covered with ice at a speed of approximately 35 to 40 miles an hour, that such speed was greater than was reasonable and proper under the conditions then existing, and that

she in the exercise of reasonable care might have foreseen that the ice on the highway and the speed of her automobile without chains made the skidding of her automobile probable, and that from such skidding consequences of a generally injurious nature might be expected."

In *Hollingsworth v. Burns,* 210 N.C. 40, 185 S.E. 476, the plaintiff was 12 years of age and was engaged with other boys in a childish game, on roller skates, on or near a connecting street which was ordinarily not much used. In the excitment of play, the plaintiff skated down an inclined driveway leading into the street, with such speed that he was carried out into the street and was struck by defendant's truck, which was being operated at an excessive speed, on the wrong side of the road, and without sounding the horn. On appeal by the defendant from a verdict in favor of plaintiff, this Court held that the case was properly submitted to the jury on the issues of negligence, contributory negligence and damages.

This Court has cited with approval many times the case of *Rolin v. Tobacco Co.,* 141 N.C. 300, 53 S.E. 891, 7 L.R.A. (N.S.) 335, 8 Ann. Cas., 638, in which opinion it is said: "Within certain ages, courts hold children incapable of contributory negligence. We do not find any case, nor do we think it sound doctrine, to say that a child of 12 years comes within that class. Adopting the standard of the law in respect to criminal liability, we think that a child under 12 years of age is presumed to be incapable of so understanding and appreciating danger from the negligent act, or conditions produced by others, as to make him guilty of contributory negligence." Of course, this presumption is a rebuttable one. See *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124, where the cases on this subject are assembled and discussed in an exhaustive opinion by *Parker, J.*

The appeal before us presents an extremely close case. However, when the slick and icy condition of the road is considered, together with the speed the defendant's automobile was being operated under the conditions then existing, and the further fact that the defendant at the time of the collision was operating his car on the left side of the highway, in our opinion, it is a case for the jury, with proper instructions on the issues of negligence, contributory negligence and damages.

Reversed.

STATE v. CHARLES DEWEY PEEDEN AND MARSHALL JOSEPH JARVIS.

(Filed 14 December, 1960.)

1. **Criminal Law § 162—**

Where the record fails to show what the witness would have testified had he been permitted to answer questions asked by defendant's counsel on cross examination, the exclusion of the testimony cannot be held prejudicial.

2. **Criminal Law § 9—**

Where two or more persons aid and abet each other in the commission of a crime, all being present, each is a principal and equally guilty regardless of any conspiracy or previous confederation or design.

3. **Homicide § 20—**

Evidence that both defendants aided and abetted each other in committing the felonious assault resulting in the death of the deceased is sufficient to sustain the conviction of both, regardless of which inflicted the fatal injury.

4. **Criminal Law § 161—**

An exception to the charge cannot be sustained if it is free from legal error when construed contextually.

APPEAL by defendant Jarvis from *Sharp, Special Judge,* 8 August Special Criminal Term, 1960, of GUILFORD (Greensboro Division).

This is a criminal action tried upon a bill of indictment charging Marshall Joseph Jarvis and Charles Dewey Peeden with the murder of Walter Cary Washburn on 14 January 1960. The defendants entered a plea of not guilty and the Solicitor announced that the State would not seek a verdict of murder in the first degree but would seek conviction upon the charge of murder in the second degree or manslaughter, whichever the evidence might warrant.

The State offered evidence to the effect that the deceased and a companion, Wayne Eagle, stopped at Long's Service Station, located north of Greensboro on Highway No. 220; that Eagle went inside the service station and purchased two cans of beer and left to go to Greensboro; that the deceased, Washburn, asked Eagle if that was his wife in the car with Jarvis and Peeden. Eagle said he did not see them. Washburn asked Eagle if he wanted to go back, and Eagle told him he did not. Then Eagle decided to go back and ask about his baby. Eagle and his wife were living separate and apart at the time; their baby had been sick, and upon inquiry Eagle's wife said the baby was all right. Then Peeden, the driver of the car in which Jarvis and Eagle's wife were riding and which was parked at Long's Service Station, got out of the car and got into the Wash-

burn car with Washburn and Eagle. Peeden told Eagle that he was not with his wife and that he didn't want any trouble; he said that Jarvis was with her and if he wanted to fight Jarvis that he could get out of the car and fight.

The evidence tends to show that immediately thereafter Jarvis walked up beside Peeden, who was still in the Washburn car, and handed him (Peeden) something. Peeden held it down beside the seat and Eagle could not see what it was. According to Eagle's testimony, "Joe Jarvis said that if I wanted to fight him, to get out. I told him I didn't want any trouble with them."

Eagle and Washburn, upon leaving the service station, were followed by Jarvis and Peeden. The defendants passed Eagle and Washburn and caused their car to stop. A fight ensued and Jarvis and Washburn had Eagle down in the road and Eagle was seriously cut with a knife. Eagle testified that both Jarvis and Peeden attacked him, but he did not know which one cut him. Washburn came to Eagle's defense, armed with a bumper jack. Jarvis was scuffling with Washburn while Eagle was kept on the ground by Peeden. Washburn died from loss of blood from a wound in the seventh intercostal space.

The defendant Jarvis' evidence was in conflict with that of the State's to the effect that he and Peeden were victims of an assault by Washburn using a jack, and that he, Jarvis, did not do any cutting. Peeden admitted to the investigating officers that he cut Eagle and Washburn. Washburn never regained consciousness and, therefore, never made any statement about the fight after his arrival at the hospital where he died the next day.

From a verdict of murder in the second degree as to each defendant and judgment pronounced thereon, the defendant Peeden did not appeal, Jarvis did appeal, assigning error.

*Attorney General Bruton, Asst. Attorney General Hooper for the State.*

*T. Glenn Henderson for defendant Jarvis.*

DENNY, J. The defendant assigns as error the ruling of the court below in sustaining the State's objection to two questions propounded to the State's chief witness, Wayne Eagle, by the defendants' counsel on cross-examination. The record does not indicate what answers the witness would have given if permitted to answer. Therefore, the ruling cannot be held as prejudicial. *Westmoreland v. R. R.*, 253 N.C. 197, 116 S.E. 2d 350; *S. v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342. This assignment of error is overruled.

The defendant further assigns as error the refusal of the court below to grant his motion for judgment as of nonsuit at the close of all the evidence. G.S. 15-173.

The defendant contends that the State did not prosecute the defendants for or rely upon murder growing out of conspiracy, and, further, that there was no testimony offered in the trial below tending to show that there was any conspiracy, agreement, confederation, or understanding between the defendants that they would murder the deceased or his companion. Therefore, the defendant Jarvis insists that his motion for judgment as of nonsuit should have been allowed.

In the case of *S. v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670, this Court, speaking through *Parker, J.*, said: "It is thoroughly established law in North Carolina that without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127; *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Donnell,* 202 N.C. 782, 164 S.E. 352; *S. v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *S. v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482; *S. v. Church,* 231 N.C. 39, 55 S.E. 2d 792."

In our opinion, the evidence adduced in the trial below was sufficient to carry the case to the jury as to both defendants. This assignment of error is likewise overruled.

The defendant brings up for review excerpts from certain portions of the court's charge to the jury, but upon an examination of these assignments of error, in our opinion, no prejudicial error has been shown. Moreover, when the entire charge is considered contextually, it is free from legal error. *S. v. Werst,* 232 N.C. 330, 59 S.E. 2d 835; *S. v. Holbrook,* 228 N.C. 620, 46 S.E. 2d 843.

No error.

DOROTHY K. BRYANT, ADMINISTRATRIX OF THE ESTATE OF CLYDE JAMES BRYANT, DECEASED v. OCCIDENTAL LIFE INSURANCE COMPANY OF N. C., A CORPORATION.

(Filed 14 December, 1960.)

**1. Pleadings § 2—**

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

**2. Pleadings § 34: Insurance § 10— Causes of action asserted held not inconsistent and action of court striking one of the causes upon refusal of plaintiff to make election, was error.**

The complaint purported to allege two separate causes of action based upon the single circumstance of delay of insurer in acting upon intestate's application for life insurance, the first cause *ex contractu* upon the assertion that such delay, together with the retention of the premium, constituted an acceptance of the application, and the second in tort upon assertion that if the application had been rejected within a reasonable time intestate, being in good health, would have had sufficient time to have secured similar insurance with another insurer. *Held*: The two asserted causes of action are not repugnant and it was error for the court to strike, on motion, the allegations of the second cause of action on the ground that the two causes of action were inconsistent.

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

APPEAL by plaintiff from *Mallard, J.*, April Term, 1960, of DURHAM.

Plaintiff appeals from an order striking all allegations of the complaint (26 paragraphs) designated as plaintiff's "second cause of action."

The complaint purports to allege two separately stated causes of action. In each, plaintiff alleges that Clyde James Bryant, her intestate, on September 21, 1959, executed and delivered to defendant's agent an application for a $5,000.00 life insurance policy and delivered to said agent the amount of the first premium, and that defendant, prior to Bryant's death on November 14, 1959, had not acted upon Bryant's application.

In her (the portion so designated) first cause of action, plaintiff, in substance, alleges the receipt given Bryant for the first premium stipulated: If Bryant's application was approved by defendant, the policy "would take effect from the date of the application, or the medical examination, if required." If defendant rejected Bryant's application, "said premium would be promptly returned." Defendant did not tender or return the said premium to Bryant. After Bryant's death, defendant's agent "visited the plaintiff and attempted to return said premium to her in return for said receipt." Defendant's

"unreasonable delay" in acting upon Bryant's application, together with the retention of the premium, "constituted an acceptance of said application" by defendant. Due proof of Bryant's death was furnished defendant. Hence, plaintiff is entitled to recover $5,000.00.

In her (the portion so designated) second cause of action, plaintiff alleges, in addition to facts alleged in her first cause of action, the following: Bryant was in good health from September 21, 1959, until his last illness, which commenced November 9, 1959. Bryant had suffered in the past from tuberculosis. On September 21, 1959, his tuberculosis was "stable and inactive." Bryant's application so advised defendant and gave information as to medical sources that could supply information as to Bryant's health. Defendant, upon investigation, would have determined that Bryant's tuberculosis was "stable and inactive." Upon making such determination, defendant would not have refused to issue life insurance to Bryant solely because of such tuberculosis and would not have required Bryant to undergo a general medical examination before issuing life insurance to him. Bryant's death was not caused or related in any way to tuberculosis but by a condition "previously undetected and which would not have been detected in a general medical examination." Defendant made no effort to ascertain the status of Bryant's health prior to his death. If it had done so, it would have determined that Bryant was in good health and would have issued the policy. If defendant had rejected Bryant's application within a reasonable time, Bryant would have had sufficient opportunity to have secured similar insurance with another company. Hence, plaintiff is entitled to recover $5,000.00 on account of defendant's negligent failure to act upon Bryant's application within a reasonable time.

At the hearing on defendant's motion to strike, Judge Mallard stated he was of the opinion the first and second causes of action "were mutually repugnant and inconsistent," and gave plaintiff an opportunity to elect "which of the two alleged causes of action" plaintiff desired to retain in the complaint. It was then stated by plaintiff's counsel that "plaintiff would not make an election between the two alleged causes of action." Thereupon, Judge Mallard entered the order striking all allegations of the complaint designated as plaintiff's "second cause of action."

*Spears, Spears & Powe and Alexander H. Barnes for plaintiff, appellant.*

*Smith, Leach, Anderson & Dorsett and C. K. Brown, Jr., for defendant, appellee.*

BOBBITT, J. The question discussed in the briefs is whether the two "causes of action" are "mutually repugnant and inconsistent."

A cause of action consists of the facts alleged in the complaint. G.S. 1-122; *Lassiter v. R. R.*, 136 N.C. 89, 48 S.E. 642; *Stamey v. Membership Corp.*, 249 N.C. 90, 94, 105 S.E. 2d 282.

No fact alleged by plaintiff in one "cause of action" is inconsistent with or contradicted by any fact alleged in the other. On the contrary, the allegations in the two "causes of action" are entirely consistent, and, except as indicated, are identical.

No policy was issued by defendant. The factual allegations contained in plaintiff's "first cause of action" are that defendant "unreasonably delayed" acting upon Bryant's application from September 21, 1959, until after his death on November 14, 1959, and did not, during said period, tender or return the amount of the first premium forwarded to it with Bryant's application. Apart from such delay, no fact is alleged indicating that defendant had accepted or would accept Bryant's application.

In an exhaustive annotation in 32 A.L.R. 2d 487, at p. 493, many decisions, including *Ross v. Ins. Co.*, 124 N.C. 395, 32 S.E. 733, are cited in support of this statement: "Based on the doctrines that an application for insurance is a mere offer, which must be accepted before a contract of insurance can come into existence, and that silence and inaction do not amount to an acceptance of an offer, the overwhelming weight of authority is to the effect that, at least in the absence of additional circumstances, no inference or presumption of acceptance which would support an action *ex contractu* can be drawn from mere delay or inaction by the insurer in passing on the application." Also, see 29 Am. Jur., Insurance § 203; 44 C.J.S., Insurance § 232. In the *Ross* case, which deals with a factual situation quite similar to that alleged in plaintiff's "first cause of action," *Faircloth, C. J.*, said: "Even long delay by the defendant could not presume an acceptance. The natural and legal inference is to the contrary."

True, plaintiff, in her "first cause of action," asserts that defendant's unreasonable delay in acting upon Bryant's application, together with the retention of the premium, "constituted an acceptance of said application" by defendant; but, as indicated above, this is nothing more than an erroneous legal conclusion. Notwithstanding she purports to allege two separate causes of action, plaintiff bases her right to recover upon an alleged single wrong, to wit, the alleged negligent failure of defendant to act upon Bryant's application within a reasonable time.

No question is presented as to whether any of plaintiff's allegations should be stricken upon the ground of redundancy or otherwise upon motion made under G.S. 1-153. Nor does this appeal present any question as to whether the facts alleged are sufficient to state a cause of action. Defendant did not demur, either in the superior court or in this Court.

The decision on this appeal is simply this: It was error to strike the allegations constituting the portion of the complaint designated "second cause of action" on the ground that these allegations and the allegations constituting the portion of the complaint designated "first cause of action" were "mutually repugnant and inconsistent."

Reversed.

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

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STATE v. JADDIE (JERRY) DALLAS.

(Filed 14 December, 1960.)

**Homicide § 28—**

**An instruction which, in effect, limits a verdict of not guilty to a finding by the jury that defendant killed deceased in self-defense must be held for prejudicial error, since defendant's plea of not guilty places the burden upon the State of satisfying the jury beyond a reasonable doubt of each and every essential element of the offense.**

APPEAL by defendant from *Williams, J.*, March 1960 Criminal Term, of CUMBERLAND.

This is a criminal action. Defendant is charged in the bill of indictment with the murder of one Bobby Pate. The State elected not to prosecute defendant for the capital offense of murder in the first degree.

The evidence tends to show: Defendant was working at a drive-in cafe. Pate and companions entered the cafe and became boisterous and offensive. Defendant asked them to leave. They were armed with knives and advanced toward defendant. Defendant got a pistol and fired twice "over their heads." He fired additional shots. Pate was struck by a bullet. He was carried to a hospital and died as a result of the bullet wound. The evidence was conflicting as to whether Pate was facing defendant at the time he was shot or was in the act of leaving.

Plea: not guilty. Verdict: guilty of manslaughter. Judgment: prison sentence of 7 to 10 years.

Defendant appealed and assigned errors.

*Attorney General Bruton and Assistant Attorney General McGalliard for the State.*

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

PER CURIAM. Defendant denied that he intentionally shot deceased. The court charged the jury: ". . . (Y)ou may return one of three verdicts: a verdict of guilty of murder in the second degree, a verdict of guilty of manslaughter, or a verdict of not guilty on the grounds of self-defense." The charge as a whole limits the authority of the jury to return a verdict of not guilty to a finding of "not guilty by reason of self-defense." At no time was the jury instructed that, if upon a fair and impartial consideration of the evidence they had a reasonable doubt of defendant's guilt, it would be their duty to acquit him. In effect the court instructed the jury that defendant was not entitled to an acquittal unless he satisfied the jury that he had acted in self-defense. Defendant's plea of not guilty cast upon the State the burden of satisfying the jury from the evidence beyond a reasonable doubt of each and every essential element of the offense. In limiting the possibility of acquittal to a showing of self-defense the court erred. *State v. Baker*, 222 N.C. 428, 23 S.E. 2d 340; *State v. Howell*, 218 N.C. 280, 10 S.E. 2d 815.

New trial.

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STATE v. BEULAH T. ROGERS
AND
STATE v. EVA ALICE FOSTER.

(Filed 14 December, 1960.)

**Criminal Law § 136—**

Since a suspended sentence may not be activated upon a plea of *nolo contendere* to a subsequent offense, where the record is insufficient to show whether a charge of a subsequent offense was disposed of under a plea of *nolo contendere* or a verdict of guilty after trial, the cause must be remanded.

STATE *v.* ROGERS AND STATE *v.* FOSTER.

APPEAL by defendants from *Gambill, J.*, 25 July 1960 Criminal Term, of GUILFORD (Greensboro Division).

At the above term of court the Solicitor moved the court to invoke the suspended sentences imposed on these defendants at the November Term 1959 of said court. The defendants had been found guilty of the illegal possession and possession for sale of taxpaid whiskey. The cases had been consolidated for trial and each defendant was given a sentence of eighteen months, suspended upon certain conditions, among which each defendant was to remain of good behavior and not violate any of the laws of North Carolina for a period of three years. The defendants appealed to the Supreme Court. This Court found no error. See 252 N.C. 499, 114 S.E. 2d 355, where the facts are stated in detail.

The defendants were tried in the Municipal-County Court of Guilford, Criminal Division, in Greensboro, North Carolina upon warrants issued on 4 June 1960, charging them with gambling, in violation of G.S. 14-292.

The record in the Municipal-County Court is contradictory with respect to the plea entered by the respective defendants. The following statement appears therein: "These cases were tried in Municipal-County Court of Greensboro, North Carolina, July 7, 1960. The defendants pleaded *nolo contendere,* there was a verdict of guilty and a fine against each defendant of $5.00 and cost which was paid."

The court below held that the conviction of these defendants in the Municipal-County Court of Guilford in Greensboro on the charge of gambling is a specific violation of the terms upon which the sentences imposed at the November Term 1959 of the Superior Court of Guilford County were suspended. The court thereupon activated the suspended sentences.

The defendants appeal, assigning error.

*Attorney General Bruton, Asst. Attorney General Rountree for the State.*

*J. Kenneth Lee for the defendants.*

PER CURIAM. The State confesses error because it cannot be determined from the record whether the cases in the Municipal-County Court were disposed of on pleas of *nolo contendere* or upon verdicts of guilty after trial. For this reason the judgment entered below is set aside and the cause remanded to the Superior Court of Guilford County (Greensboro Division) for further hearing in accord with

the opinion of this Court in *S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 725.

Error and remanded.

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HIGH POINT SAVINGS AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF ROBERT WAYNE MARTIN, DECEASED v. JOHN CAMPBELL KING, BY HIS GUARDIAN AD LITEM, WILLY L. KING; BRYON CAMPBELL KING, AND UNIVERSAL C. I. T. CREDIT CORPORATION

AND

JOYCE FAYE MARTIN, BY HER GENERAL GUARDIAN, HIGH POINT SAVINGS AND TRUST COMPANY v. JOHN CAMPBELL KING, BY HIS NEXT FRIEND, WILLY L. KING; BRYON CAMPBELL KING; AND UNIVERSAL C. I. T. CREDIT CORPORATION.

(Filed 14 December, 1960.)

**Automobiles § 52—**

The holder of a chattel mortgage on an automobile, nothing else appearing, cannot be held liable for the negligent operation of the vehicle by the mortgagor or the mortgagor's agent, since the mortgagor of the vehicle is deemed the owner. G.S. 20-279.1(8).

APPEALS by plaintiffs from *Preyer, J.,* June 1960 Civil Term, GUILFORD Superior Court (High Point Division).

These civil actions were instituted to recover for the wrongful death of Robert Wayne Martin and for personal injury to Joyce Faye Martin, passengers in a Ford automobile which was involved in an accident. The complaints are identical in so far as they relate to defendant Universal C.I.T. Credit Corporation, the appellee.

The complaints allege in substance that John Campbell King and his father, Bryon Campbell King, purchased the Ford from a used car dealer; that the appellee advanced the money for the purchase and as security took a title-retaining contract on the vehicle. The appellee held the certificate of title which was not delivered to the Motor Vehicles Department for registration, though a promise to do so is alleged. The appellee permitted the delivery of the vehicle to John Campbell King and Bryon Campbell King, and the accident causing the death and injury occurred while the vehicle was being operated on the public highway by John Campbell King. Neither John Campbell King nor his father complied with the requirements of G.S. 20-309, 319, the Motor Vehicle Financial Responsibility Act of 1957. The plaintiffs demand judgment against the

defendants, including the appellee who filed a demurrer upon the ground the complaint failed to state a cause of action against it. The court sustained the demurrer and the plaintiffs appealed.

*Haworth, Riggs, & Kuhn for plaintiffs, appellants.*

*Roberson, Haworth & Reese, By: Horace S. Haworth for defendant, appellee.*

PER CURIAM. Under the Motor Vehicle Safety and Financial Responsibility Act, G.S. 20-279.1(8), a conditional vendee, lessee, or mortgagor of a motor vehicle is deemed to be the owner. Liability on the part of the appellee can arise only by application of the doctrine *respondeat superior*, that is, by showing the relationship of master and servant, or employer and employee, or principal and agent. The complaint does not allege facts showing any such relationship. The demurrer was properly sustained.

Affirmed.

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ROBERT R. CARROLL, ADMINISTRATOR OF THE ESTATE OF JIMMIE ALSON CARROLL v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 14 December, 1960.)

**Railroads § 4—**

The evidence in this case is held to show, as the only reasonable conclusion, that the negligence of the driver of the vehicle in which plaintiff's intestate was riding was the sole proximate cause of the collision with defendant's train at a grade crossing, and therefore the railroad company's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Craven, Special Judge,* May-June Special Term, 1960, of BRUNSWICK.

Action to recover damages for the death of plaintiff's intestate, allegedly caused by the negligence of defendant.

Plaintiff's intestate, a five-year old boy, was killed October 19, 1958, about 11:45 a.m., in an automobile-train collision at a grade crossing in Brunswick County where a north-south paved (State) highway crosses the east-west railroad track of defendant.

Plaintiff's intestate was a back seat passenger in the automobile, a 1956 (two-door) Ford Fairlane. His thirteen-year old sister, also

a passenger, was on the front seat. The Ford was being operated by the sixteen-year old brother of plaintiff's intestate. All occupants of the automobile were killed.

Approaching the crossing, the Ford traveled south and the train traveled east. The left front of the locomotive struck the right side of the Ford. When this occurred, the front wheel(s) of the Ford had crossed the north rail of the railroad track.

At the conclusion of plaintiff's evidence, the court entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

*Herring, Walton & Parker and Rountree & Clark for plaintiff, appellant.*

*S. Bunn Frink and Varser, McIntyre, Henry & Hedgpeth for defendant, appellee.*

PER CURIAM. The evidence discloses: (1) The Ford approached the crossing in its right highway lane at a speed of approximately forty miles per hour. Straight skid marks in this lane extended twelve feet to the crossing and there made a sharp left turn and went off the left side of the highway along the side of the railroad track. (2) A standard highway sign, located approximately six hundred feet north of the crossing, warned southbound motorists they were approaching a railroad crossing. (3) A railroad cross-arm sign, located at the crossing, was in the view of a southbound motorist as he reached and passed the highway sign. (4) A (southbound) motorist's view of the railroad track west of the crossing was obstructed by trees, weeds, a residence, shrubs, a lath house used as a nursery, etc., until he reached a point approximately fifty feet north of the crossing. Thereafter, there was no obstruction sufficient to prevent him from seeing an approaching eastbound train. (5) Defendant's eastbound train approached the crossing, with the whistle blowing and the bell ringing, at a speed of about fifty miles per hour.

Notwithstanding negligence on the part of the operator of the Ford, defendant is liable if negligence on its part was a concurring proximate cause. With this in mind, we have examined the evidence closely. Even so, consideration thereof in the light most favorable to plaintiff fails to disclose evidence sufficient to support a finding that the collision was approximately caused by negligence of defendant in any of the respects alleged.

Assignments of error directed to rulings on evidence do not disclose prejudicial error. Nor do we perceive either error or prejudice to plain-

tiff in the court's refusal to grant leave to plaintiff to amend his complaint in the manner requested.

Since the only reasonable conclusion that may be drawn from the evidence is that the negligence of the driver of the Ford was the sole proximate cause of the tragic accident, the judgment of involuntary nonsuit is affirmed.

Affirmed.

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STATE v. WAYNE BUFORD RODDY.

(Filed 14 December, 1960.)

**Criminal Law § 125—**

Findings, supported by evidence, to the effect that although witnesses had signed affidavits indicating honest mistakes in their testimony at the trial, these witnesses, upon the hearing of the motion for a new trial, testified that they were not mistaken at the time of trial but were mistaken as to the facts when they signed the affidavits, and therefore, if a new trial were awarded, would give testimony to the same effect as their testimony at the trial, support the denial of a motion for a new trial for newly discovered evidence, and the findings are conclusive on appeal.

APPEAL by defendant from *Gambill, J.*, May 1960 Term, of SURRY.

Defendant, charged with murder, was convicted at the April 1959 Term of manslaughter. Prison sentence was imposed. He appealed. The judgment of the lower court was affirmed. See 251 N.C. 463, 111 S.E. 2d 581. Defendant thereupon promptly filed in the Superior Court his motion for a new trial on the ground of newly discovered evidence.

When tried on the homicide charge, defendant contended deceased was shooting at defendant's father, and he, defendant, acted only to save his father from death or serious injury. In contradiction of defendant's claim, the sheriff and his deputy testified that while the pistol which deceased had was cocked, it was on safety and would not fire.

In support of defendant's motion for a new trial for newly discovered evidence, he filed affidavits by the sheriff and his deputy indicating an honest mistake in their testimony at the trial. In these affidavits it was stated that upon subsequent investigation affiants discovered that the pistol would fire with the safety latch

in the position when the pistol was found immediately following the killing.

At the hearing on the motion for the new trial, the sheriff and his deputy testified that further experiments with the pistol had demonstrated that the testimony given at the trial was true and their affidavits were erroneous. Based on this testimony the court found: ". . . that the officers were not mistaken at the time of the trial in their conclusion that the pistol would not fire, and were mistaken in the conclusion that it would fire when they examined it following the day of the trial and adjournment of Court for that on this occasion the officer did not use live ammunition.

"The Court therefore is of the opinion and so finds that there is not now before the Court any newly discovered evidence on which to base a new trial in this cause, since the officers would testify to the same effect with respect to the pistol at a new trial as they testified to at the first trial in this case."

*Attorney General Bruton and Assistant Attorney General Rountree for the State.*

*Barber & Gardner for defendant, appellant.*

PER CURIAM. Defendant excepts to the facts found by the court, but supported by the evidence as they are, the findings are conclusive. Based on the finding that there was no newly discovered evidence, there was no ground on which defendant's motion could be granted. *S. v. Casey,* 201 N.C. 620, 161 S.E. 81. The judgment denying the motion is

Affirmed.

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ALVIS FARMER v. EDGAR L. ALSTON.

(Filed 14 December, 1960.)

**Automobiles §§ 41h, 42g— Evidence held for jury on issue of negligence in turning left across two lanes of traffic without seeing car approaching in second lane.**

Plaintiff was traveling west in the northern lane for westbound traffic and defendant was traveling east in the northern lane for eastbound traffic on a four lane street, approaching an intersection. The evidence tended to show that when the light turned green for traffic on the four lane street, defendant gave a signal for a left turn, that the car in

the southern westbound lane stopped to permit the turn, that this car partially obstructed the vision of both plaintiff and defendant, that plaintiff approached and continued straight into the intersection with the green light and was in the intersection before he saw defendant's car, and struck defendant's car before it had cleared his lane of traffic, and that defendant did not see plaintiff's car until the moment of impact. *Held*: The evidence raises the issues of negligence and contributory negligence for the determination of the jury.

APPEAL by defendant from *Gambill, J.*, April 1960 Civil Term, of ROCKINGHAM.

This is a civil action for recovery of damages for injury to the person and property of plaintiff in a collision of automobiles. The action was instituted 3 August 1959.

The collision occurred at the intersection of West Market and Mendenhall Streets in the City of Greensboro on 30 May 1958 about 9:30 p.m. West Market is a four-lane street, with two lanes for eastbound traffic and two for westbound. Plaintiff was driving his car westwardly in the outside lane for westbound traffic. He was in a 35 mile per hour speed zone and was travelling 30 to 35 miles per hour. When he was about 75 yards from the Mendenhall intersection the traffic light changed to green. He proceeded at about the same speed, entered the intersection, and struck defendant's car which had made a left turn at the intersection and was proceeding northwardly across plaintiff's lane of travel. In the inside westbound lane there was a car which moved some distance into the intersection when the light changed. It stopped and permitted defendant to make his left turn. This car obscured somewhat the view of both plaintiff and defendant with respect to the movement of the other. Defendant had proceeded along West Market eastwardly, in the inside lane for eastbound traffic, to the intersection. He gave a hand signal for a left turn and, when the light changed to green, made his turn in front of the car in the inside westbound lane and was struck by plaintiff before he cleared plaintiff's lane of travel. In approaching the intersection, plaintiff was going upgrade. He did not see defendant's hand signal and did not see defendant's car until it was about two car lengths distance from him. Plaintiff was entering the intersection when he first saw defendant's car. Defendant did not see plaintiff's car until the moment of collision.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. From judgment in accordance with the verdict defendant appealed and assigned errors.

*Brown, Scurry, McMichael & Griffin and T. M. Rankin for plaintiff.*
*Sapp and Sapp for defendant.*

PER CURIAM. The evidence when considered in the light most favorable to plaintiff makes out a *prima facie* case of actionable negligence on the part of defendant. It does not show contributory negligence on the part of plaintiff as a matter of law. The issues of negligence and contributory negligence were for the jury. The exceptions to admission of evidence and the charge of the court do not disclose error sufficiently prejudicial to warrant a new trial.

No error.

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STATE v. ROSSIE FREEMAN.

(Filed 14 December, 1960.)

**Criminal Law § 161—**

An inadvertence in placing the burden upon the State to satisfy the jury by the greater weight of the evidence must be held for prejudicial error, notwithstanding that in other portions of the charge the burden of proof is correctly defined.

APPEAL by defendant from *Mallard, J.*, October 1959 Criminal Term, of COLUMBUS.

Defendant was charged with an assault with a deadly weapon, inflicting serious injury, not resulting in death. The jury returned a verdict of guilty as charged. Prison sentence was imposed and defendant appealed.

*Attorney General Bruton and Assistant Attorney General McGalliard for the State.*
*Hackett & Weinstein for defendant, appellant.*

PER CURIAM. The court charged the jury the defendant's plea of not guilty was a challenge to the credibility of the State's evidence, entitling defendant "to an acquittal unless and until the State has satisfied you from the evidence and by its greater weight of his guilt."

Conviction could only be had upon proof of guilt beyond a reasonable doubt. The jury was so informed in a subsequent portion of the

charge. The error in defining the degree of proof required was undoubtedly a "slip of the tongue." Nonetheless, it was prejudicial, entitling defendant to a

New trial.

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HAZEL FOSTER JORDAN v. BARBARA ELMORE BLACKWELDER, ROBERT R. BLACKWELDER AND EDITH LORENE JONES.

(Filed 14 December, 1960.)

APPEAL by defendants Blackwelder from *Johnston, J.*, at May 1960 Regular Term, of IREDELL.

Civil action for recovery of damages for personal injury alleged to have been sustained by plaintiff while riding as a guest in automobile operated by Edith Lorene Jones, on 31 August 1956.

The original defendants were the Blackwelders, and Jones was made additional defendant for contribution. She filed answer to cross-action.

Upon trial of the case at August Term 1958 judgment was rendered in favor of plaintiff against defendants Blackwelder and against defendant Jones for contribution. The latter defendant only appealed. Decision below was reversed. See opinion reported in Vol. 250 N.C. 189, 108 S.E. 2d 429.

Upon retrial of the action between the original defendants Blackwelder and the additional defendant Jones on the cross-action for contribution under G.S. 1-240 at May 1960 Term the case was submitted to the jury upon this issue, which the jury answered as shown:

"Did the negligence on the part of Edith Lorene Jones join and concur with negligence on the part of Barbara Elmore Blackwelder as a proximate cause of the collision referred to in the pleadings? Answer: No."

Defendants Blackwelder except and appeal to Supreme Court, and assign error.

*Carpenter & Webb for Edith Lorene Jones appellee.*

*Scott, Collier, Nash & Harris for defendants Blackwelder, appellants.*

PER CURIAM. Careful consideration of all assignments of error fail to show error sufficiently prejudicial to require disturbing the

verdict and judgment rendered. Hence in the judgment so rendered, there is

No error.

MARGARET LOUISE GAULDIN, ADMINISTRATRIX OF THE ESTATE OF CLIFTON WAYNE GAULDIN, DECEASED v. STOKES LUMBER COMPANY (INCORPORATED).

(Filed 14 December, 1960.)

APPEAL by plaintiff from *Gwyn, J.*, at June 11, 1960 Civil Term, GUILFORD Superior Court (Greensboro Division).

Civil action to recover for alleged wrongful death arising out of a collision between intestate of plaintiff, a child six years of age, and a truck belonging to Stokes Lumber Company.

Two issues were raised by the pleadings, — the first, as to whether plaintiff's intestate, Clifton Wayne Gauldin, was killed by the negligence of the defendant as alleged in the complaint; and the second, as to amount of damages resulting therefrom. And on trial in the Superior Court the case was submitted to the jury upon the evidence offered by the respective parties under the charge of the court. The jury answered the first issue in the negative, — thereby eliminating the necessity of answering the second. From judgment entered in accordance therewith in favor of defendant, plaintiff excepts thereto and appeals to Supreme Court, and assigns error.

*Folger & Ellington, Jordan, Wright, Henson & Nichols for plaintiff, appellant.*

*Smith, Moore, Smith, Schell & Hunter, Poteat & Franks for defendant appellee.*

PER CURIAM. The question involved on this appeal as stated by plaintiff appellant is this: "Did the trial judge adequately declare, explain and apply the law arising on the evidence given in the case in compliance with the requirment of G.S. 1-180?"

Careful perusal of the charge of the court, read contextually and in the light of the evidence before the jury, discloses that the case was adequately and understandably presented. And the verdict is in keeping with well established principles of law. Indeed, prejudicial error is not made to appear.

Hence in the judgment from which appeal is taken, there is

No error.

STATE v. JOHN THOMAS AVENT;
STATE v. LACY CARROLE STREETER;
STATE v. FRANK McGILL COLEMAN;
STATE v. SHIRLEY MAE BROWN;
STATE v. DONOVAN PHILLIPS;
STATE v. CALLIS NAPOLIS BROWN;
AND
STATE v. JOAN HARRIS NELSON.

(Filed 20 January, 1961.)

1. **Indictment and Warrant § 14—**

A motion to quash made before pleading to the indictment is made in apt time.

2. **Constitutional Law § 21—**

The right of property is a fundamental and inalienable right embracing all legal incidents appertaining, including the right to forbid trespass by others and the right to eject trespassers so long as the owner or his agent uses no more force than is reasonably necessary.

3. **Same: Innkeepers § 1—**

The operator of a privately owned restaurant operated in a privately owned building is not an innkeeper, and may accept some customers and reject others on arbitrary or personal grounds, and discriminate as to whom he will serve on the basis of race.

4. **Trespass § 9—**

The purpose of G.S. 14-134 is to protect those in possession of realty from trespassers, and the statute is concerned only with whether the land in question is in either the actual or constructive possession of one person and whether defendant intentionally entered upon the land after being forbidden to do so by the person in possession, and the statute applies to all persons coming within its purview and is not predicated upon race.

5. **Same—**

The purpose of G.S. 14-126 is to protect the person in lawful possession of realty, and under the statute a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful.

6. **Arrest and Bail § 3—**

An officer may arrest a person who commits a misdemeanor in his presence, including the offense of criminal trespass.

7. **Constitutional Law § 20—**

The Fourteenth Amendment to the Federal Constitution prohibits only action on the part of the several states in regard to its subject matter and does not apply to private conduct of individuals however discriminatory or wrongful.

**8. Same—**

G.S. 14-134 and G.S. 14-126 may not be held unconstitutional on the ground that they constitute State action, enforcing discrimination on the basis of race, since the statutes merely provide procedure for protection against trespassers in behalf of those in the peaceful possession of private property without regard to race, and the application of the statute in a particular instance for the protection of the clear legal right of racial discrimination appertaining to the ownership and possession of private property is not State action enforcing segregation.

**9. Same—**

The enforcement of the right of the owner or possessor of a privately owned restaurant in a privately owned building, in the absence of statute, to discriminate on the basis of race as to those he will permit to enter or remain on the premises violates no rights guaranteed by Article I, Section 17, of the State Constitution or by the Fourteenth Amendment to the Federal Constitution.

**10. Constitutional Law § 18—**

The right of free speech and assemblage are not absolute rights but are circumscribed as to time and place, and such rights do not obtain when the circumstances are such that their exercise involves a trespass.

**11. Constitutional Law § 30: Trespass § 9—**

The failure of G.S. 14-134 to require the person in possession of private premises to identify himself does not render the statute unconstitutional on the ground of vagueness, since the statute necessarily means that the person forbidding another to enter upon the land shall be the owner or occupier of the premises, or his agent, which essential must be established in the prosecution as a matter of proof.

**12. Criminal Law § 99—**

On motion for nonsuit, the evidence is to be considered in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom.

**13. Criminal Law § 100—**

Where defendants introduce evidence, they waive their motions for nonsuit made at the close of the State's evidence, and must rely solely on their similar motions made at the close of all the evidence. G.S. 15-173.

**14. Criminal Law § 99—**

On motion to nonsuit, only the evidence favorable to the State will be considered, and defendants' evidence will not be taken into consideration except insofar as it is not in conflict with the State's evidence and tends to explain or make clear the evidence for the State.

**15. Trespass § 10—**

Evidence tending to show that each defendant, without legal or constitutional right or *bona fide* claim of right, entered the luncheonette department of a department store after having been forbidden by the manager and agent of the store to do so, and refused to leave

after request, *is held* to show an intentional violation of G.S. 14-126 and G. S. 14-134 by each defendant, the Caucasian as well as the Negro.

**16. Criminal Law § 156—**

An assignment of error to the whole charge, without any statement as to what part appellants contend is erroneous, is a broadside exception and will not be considered.

**17. Criminal Law § 154—**

An assignment of error which is not supported by an exception in the record, but only by an exception appearing in the assignment of error, will be disregarded.

**18. Criminal Law § 159—**

An exception not discussed in the brief will be taken as abandoned. Rules of Practice in the Supreme Court, Rule 28.

**19. Trespass § 10—**

Where the State's evidence tends to show an entry on the land of another after being forbidden, the burden is on defendant to show that he entered under a license from the owner or under a *bona fide* claim of right, and he must show not only that he believed he had a right to enter but that he had reasonable grounds for such belief.

APPEAL by defendants from *Mallard, J.*, 30 June 1960 Criminal Term, of DURHAM.

Seven criminal actions, based on seven separate indictments, which were consolidated and tried together.

The indictment in the case of defendant John Thomas Avent is as follows: "The Jurors for the State upon their oath presen, that John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the county aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Company store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Company, owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he, the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The other six indictments are identical, except that each indictment names a different defendant.

The State's evidence tends to show the following facts:

On 6 May 1960 S. H. Kress and Company was operating a general variety store on Main Street in the city of Durham. Its manager, W. K. Boger, had complete control and authority over this store. The store has two selling floors and three stockroom floors, and is operated to make a profit. On the first floor the store has a stand-up counter, where it serves food and drinks to Negroes and White people. The luncheonette department serving food is in the rear of the basement on the basement floor. On 6 May 1960 S. H. Kress and Company had iron railings, with chained entrances, separating the luncheonette department from other departments in the store, and had signs posted over that department stating the luncheonette department was operated for employees and invited guests only. Customers on that date in the luncheonette department were invited guests and employees.

On 6 May 1960 these seven defendants, five of whom are Negroes and two of whom (Joan Harris Nelson and Frank McGill Coleman) are members of the White race, were in the store. Before the seven defendants seated themselves in the luncheonette department, and after they seated themselves there, W. K. Boger had a conversation with each one of them. He told them that the luncheonette department was open for employees and invited guests only, and asked them not to take seats there. When they seated themselves there, he asked them to leave. They refused to leave until after they were served. He called an officer of the city police department. The officer asked them to leave. They did not do so, and he arrested them, and charged them with trespassing. The seven defendants were not employees of the store. They had no authority or permission to be in the luncheonette department.

On cross-examination W. K. Boger testified in substance: S. H. Kress and Company has 50 counters in the store, and it accepts patronage of Negroes at those 50 counters. White people are considered guests. Had the two White defendants come into the store on 4 May 1960, I would not have served them in the luncheonette department for the reason they had made every effort to boycott the store. He would have served the White woman defendant, but he asked her to leave when she gave her food to a Negro. The object of operating our store in Durham is definitely to make a profit. It is the policy of our store to operate all counters dependent upon the customs of the community. It is our policy in Durham to refuse

to serve Negroes at the luncheonette department downstairs in our seating arrangement. It is also our policy there to refuse to serve White people in the company of Negroes. We had signs all over the luncheonette department to the effect that it was open for employees and invited guests.

Captain Cannady of the Durham Police Department testified in substance: As a result of a call to the department he went to S. H. Kress and Company's store. He saw on 6 May 1960 all the defendants, except Coleman, seated at the counter in the luncheonette department. He heard W. K. Boger ask each one of them to leave, and all refused. He asked them to leave, and told them they could either leave or be arrested for trespassing. They refused to leave, and he charged them with trespassing. He knew W. K. Boger was manager of the store. He makes an arrest when an offense is committed in his presence, and the defendants were trespassing in his presence.

When the State rested its case, all seven defendants testified. The five Negro defendants testified in substance: All are students at North Carolina College for Negroes in Durham. Prior to 6 May 1960, Negroes, including some of the Negro defendants, had been refused service by S. H. Kress and Company in its luncheonette department. All are members of a student organization, which met on the night of 5 May 1960, and planned to go the following day to Kress' store, make a purchase, and then to go to the luncheonette department, take seats, and request service. The following day the five Negro defendants did what they planned.

The White woman defendant, Joan Harris Nelson, is a student at Duke University. Prior to 6 May 1960 she had not attended the meetings at the North Carolina College for Negroes for the purpose of securing service at the luncheonette department of the Kress store, though she has attended some of the meetings since then. She had been on the picket lines in front of the store. On 6 May 1960 she went into the Kress store, bought a ball-point pen, went to the luncheonette department, and took a seat. She was served, and while eating she offered to buy some food for Negroes from the North Carolina College, who were sitting on each side of her. When she was served food, no Negroes were in the luncheonette department. Mr. W. K. Boger asked her to leave because she was not invited, and was antagonizing customers. She did not leave, and was arrested.

The White male defendant, Frank McGill Coleman, is a student at Duke University. On 6 May 1960 he went into the Kress store, bought a mother's day card, joined his friend, Bob Markham, a

Negro, and they went to the luncheonette department, and seated themselves. He asked for service, and was refused. Mr. W. K. Boger asked them to leave, telling them they were not invited guests, and he refused to do so, and was arrested. Prior to this date he had carried signs in front of the Kress store and other stores discouraging people to trade with them.

Some, if not all, of the defendants had been engaged previously in picketing the Kress store, and in urging a boycott of it, unless their demands for service in the luncheonette department were acceded to.

Jury Verdict: All the defendants, and each one of them, are guilty as charged.

From judgments against each defendant, each defendant appeals.

*T. W. Bruton, Attorney General, and Ralph Moody, Assistant Attorney General, for the State.*

*William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, F. B. McKissick and L. C. Berry, Jr., for Defendants, Appellants.*

PARKER, J. Each defendant — five of whom are Negroes and two members of the White race — before pleading to the indictment against him or her made a motion to quash the indictment. The court overruled each motion, and each defendant excepted. The motions were made in apt time. *S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *Carter v. Texas,* 177 U.S. 442, 44 L. Ed. 839; 27 Am. Jur., Indictments and Information, § 141.

At the close of all the evidence each defendant made a motion for judgment of compulsory nonsuit. Each motion was overruled, and each defendant excepted.

S. H. Kress and Company is a privately owned corporation, and in the conduct of its store in Durham is acting in a purely private capacity to make a profit for its shareholders. There is nothing in the evidence before us, or in the briefs of counsel to suggest that the store building in which it operates is not privately owned. In its basement in the luncheonette department it operates a restaurant. "While the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating-house and cookshop, to any other place where eatables are furnished to be consumed on the premises. Citing authority. It has been defined as a place to which a person resorts for the temporary purpose of obtaining a

meal or something to eat." *S. v. Shoaf*, 179 N.C. 744, 102 S.E. 705. To the same effect see, 29 Am. Jur., (1960), Innkeepers, § 9, p. 12. In *Richards v. Washington F. & M. Ins. Co.*, 60 Mich. 420, 27 N.W. 586, the Court said: "A 'restaurant' has no more defined meaning, (than the English word shop), and is used indiscriminately for all places where refreshments can be had, from the mere eating-house or cookshop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate." Quoted with approval in *Michigan Packing Co. v. Messaris*, 257 Mich. 422, 241 N.W. 236, and restated in substance in 43 C. J. S., Innkeepers, § 1, subsection b, p. 1132.

No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. *S. v. Clyburn*, 247 N.C. 455, 101 S.E. 2d 295; *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845; *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, affirmed by the U. S. Court of Appeals for the 4th Circuit 27 December 1960, 284 F. 2d. 746; *Alpaugh v. Wolverton*, 184 Va. 943, 36 S.E. 2d 906; *Wilmington Parking Authority v. Burton (Del.)*, 157 A. 2d 894; *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773. See 10 Am. Jur., Civil Rights, § 21; *Powell v. Utz*, 87 F. Supp. 811; and Annotation 9 Am. & Eng. Ann. Cas. 69 — statutes securing equal rights in places of public accommodation. We have found no case to the contrary after diligent search, and counsel for defendants have referred us to none.

In *Alpaugh v. Wolverton, supra*, the Court said: "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. Citing authority. His rights and responsibilities are more like those of a shopkeeper. Citing authority. He is under no common-law duty to serve every one who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. Citing authority."

In *Boynton v. Virginia,* 5 December 1960, 81 S. Ct. 182, 188, the Court held that a Negro passenger in transit on a paid Interstate Trailways' journey had a right to food service under the Interstate Commerce Act in a Bus Terminal Restaurant situate in the Bus Station, and operated under a lease by a company not affiliated with the Trailways Bus Company. Then the Court in the majority opinion deliberately stated: "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

In *S. v. Clyburn, supra,* the defendants were tried on similar warrants charging that each defendant unlawfully entered upon the land of L. A. Coletta and C. V. Porcelli after being forbidden to do so and did "unlawfully refuse to leave that portion of said premises reserved for members of the White Race knowing or having reason to know that she had no license therefor." Coletta and Porcelli did business under the trade name of Royal Ice Cream Company retailing ice cream and sandwiches. The building in which they did business is separated by partition into two parts. One part has a door opening on Dowd Street, the other a door opening on Roxboro Street. Each portion is equipped with booths, a counter and stools. Over the Dowd Street door is a large sign marked Colored, over the Roxboro Street door is a similar sign marked White. Sales are made to different races only in the portions of the building as marked. Defendants, all Negroes, went into the building set apart for White patrons, and requested service. Coletta asked them to leave. They refused to do so, and they were arrested by a police officer of the City of Durham. All were convicted, and from judgments imposed, all appealed to the Supreme Court. We found No Error in the trial. The Court in its opinion said: "The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. *Madden v. Queens County Jockey Club,* 72 N.E. 2d 697 (N.Y.); *Terrell Wells Swimming Pool v. Rodriguez,* 182 S.W. 2d 824 (Tex.); *Booker v. Grand Rapids Medical College,* 120 N.W. 589 (Mich.); *Younger v. Judah,* 19 S.W. 1109 (Mo.); *Goff v. Savage,* 210 P. 374 (Wash.); *De La Ysla v. Publix Theatres Corporation,* 26 P. 2d 818 (Utah); *Brown v. Meyer Sanitary Milk Co.,* 96 P. 2d 651 (Kan.); *Horn v. Illinois Cent. R. Co.,* 64 N.E. 2d 574 (Ill.); *Coleman v. Middlestaff,* 305 P. 2d. 1020 (Cal.); *Fletcher v. Coney Island,* 136 N.E. 2d 344 (Ohio); *Alpaugh v. Wolverton,* 36 S.E. 2d 906 (Va.). The owner-

operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants."

In an Annotation in 9 A.L.R., p. 379, it is said: "It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." The Annotation cites cases from eight states supporting the statement. See to the same effect, *Brookside-Pratt Min. Co. v. Booth,* 211 Ala. 268, 100 So. 240, 33 A.L.R. 417, and Annotation in 33 A.L.R. 421.

This is said by *Holmes, J.,* for the Court in *Terminal Taxicab Co. v. Kutz,* 241 U.S. 252, 256, 60 L. Ed. 984, 987, a suit to restrain the Public Utilities Commission from exercising jurisdiction over the business of a taxicab company: "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes. . . ."

None of the cases cited in defendants' brief are applicable to the situation which obtains in the instant cases. For instance, *Cooper v. Aaron,* 358 U.S. 1, 3 L. Ed. 2d 5 — public education; *Boman v. Birmingham Transit Co.,* 280 F. 2d 531 — public transportation; *Valle v. Stengel,* 176 F. 2d 697 — a case in respect to an amusement park in the State of New Jersey, which State has a statute, R.S. 10: 1-3, N.J.S.A., providing that no proprietor of a place of public resort or amusement. ". . . shall directly or indirectly refuse, withhold from, or deny to, any person any of the accommodations, advantages, facilities or privileges thereof . . . on account of race, creed or color," R.S. 10: 1-6, N.J.S.A.

"The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." 11 Am. Jur., Constitutional Law, § 335.

G.S. 14-134 has been the statute law of this State for nearly a hundred years. It reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days." Then follows a proviso as to obtaining a license to go upon land of another to look for estrays. This statute is color blind. Its sole purpose is to protect people from trespassers on their lands. It is concerned with only three questions. One, was the land in either the actual or constructive possession of another? Two, did the accused intentionally enter upon the land of another? Three, did the accused so enter upon the land of another after being forbidden to do so by the person in possession? *S. v. Baker*, 231 N.C. 136, 56 S.E. 2d 424.

G.S. 14-126 has been the statute law of this State for many years, and reads: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor." This statute is also color blind. Its purpose is "to protect actual possession only." *S. v. Baker, supra.* We have repeatedly held in applying G.S. 14-126 that a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful. The word "entry" as used in each of these statutes is synonomous with the word "trespass." *S. v. Clyburn, supra.*

The officer of the city of Durham had a right and duty to arrest all seven defendants in the luncheonette department of the Kress store, because all of them were committing misdemeanors in his presence. G.S. 15-41. There is no merit in their contention that this constituted State action denying them rights guaranteed to them by the 14th Amendment to the Federal Constitution and by Article I, § 17, of the State Constitution. *S. v. Clyburn, supra.*

Defendants in essence contend that the indictments should be quashed and the cases nonsuited because the judicial process here constitutes State action to enforce racial segregation in violation of their rights under the due process clause and under the equal protection of the laws clause of the 14th Amendment to the Federal Constitution, and in violation of their rights under Article I, § 17, of the State Constitution, and further that G.S. 14-134 and G.S. 14-126 are being unconstitutionally applied for the same purpose. Defendants misconceive the purpose of the judicial process here.

It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner. There is no merit to this contention.

The Court said in *Shelley v. Kraemer,* 334 U.S. 1, 92 L. Ed. 1161, 3 A.L.R. 2d 441: "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3, 27 L ed 835, 3 S Ct 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This interpretation has not been modified: *Collins v. Hardyman,* 341 U.S. 651, 95 L. Ed. 1253; *District of Columbia v. Thompson Co.,* 346 U.S. 100, 97 L. Ed. 1480.

Private rights and privileges in a peaceful society living under a constitutional form of government *like ours* are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them — even refusal to act is a positive declaration of law — , and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G.S. 14-134 and G.S. 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the clear legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G.S. 14-134 and G.S. 14-126, and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such judicial process violates no rights of the defendants guaranteed to them by Article I, § 17, of the State Constitution. To rule as contended by defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone,

but not against Negro trespassers and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law, for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by Negro and White trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A.L.R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, § 76, p. 167; 6 C.J.S., Assault and Battery, § 20, (2). This is said in 4 Am. Jur., Assault and Battery, § 76, p. 168: "Even though the nature of the business of the owner of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful." It is further said in the same work, same article, § 78: "The right lawfully to eject trespassers is not limited to the owner or occupier of the premises, but may be exercised by his agent in any case where the principal might exercise the right." The motive of the owner of land in ejecting trespassers from his premises is immaterial so long as he uses no more force than is necessary to accomplish his purpose. 6 C.J.S., Assault and Battery, p. 821. White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth.

This is said in an article designated "The Meaning of State Action" by Thomas P. Lewis, Associate Professor of Law, University of Kentucky, and appearing in Columbia Law Review, December 1960, Vol. 60, No. 8, in note 134, page 1122: "State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (*Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, *supra*, note 92 (Racial Restrictions and the Fourteenth Amendment: The restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case."

In *Slack v. Atlantic White Tower System, Inc., supra*, the Court said: "No doubt defendant might have had plaintiff arrested if

she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency."

In *S. v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846, the defendants were convicted and sentenced on a charge that they did "unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises." We found no error. Their appeal was dismissed by a divided court by the United States Supreme Court. *Wolfe v. North Carolina,* 364 U.S. 177, 4 L. Ed. 2d 1650. In neither the majority opinion nor in the minority opinion was the question of State action referred to. It seems that if the United States Supreme Court had thought that the arrest and prosecution was State action, it would have reversed our decision. It seems further that the action of that Court in dismissing the appeal means that a state has the power to enforce through arrest and an action for trespass the discrimination of a private owner of a private business operated on premises privately owned.

There is no merit in defendants' contention that all the cases should be nonsuited, because the demands that they leave Kress' store, their arrest by an officer of the city of Durham, and the judicial process here, is an unconstitutional interference with their constitutional rights of free speech, and of assembly to advocate and persuade for a termination of racial discrimination.

No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right. The answer to this contention is given by the Court in *Kovacs v. Cooper,* 336 U.S. 77, 93 L. Ed. 513, 10 A.L.R. 2d 608: "Of course, even the fundamental rights of the Bill of Rights are not absolute. The *Saia* case recognized that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by *Mr. Justice Holmes, Schenck v. United States,* 249 U.S. 47, 52, 63 L ed 470, 473, 39 S Ct 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.' Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The

right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

The evidence in these cases shows that the White defendants, and most, if not all, of the Negro defendants were freely and without molestation exercising these rights upon the streets of the city of Durham. However, they had no constitutional right to exercise these rights as trespassers in Kress' store in violation of G.S. 14-134 and G.S. 14-126.

There is no merit in defendants' contention that the indictments should be quashed, and the cases nonsuited, because S. H. Kress and Company is licensed by the city of Durham to operate a retail store, and therefore racial discrimination in the store cannot be enforced. The license is not in the record before us, and there is no suggestion by defendants that the license issued to S. H. Kress and Company contained any restrictions as to whom S. H. Kress and Company should serve. The answer to this contention, showing it is without merit, is set forth in *S. v. Clyburn, supra,* in *Slack v. Atlantic White Tower System, Inc., supra,* and in *Williams v. Howard Johnson's Restaurant, supra,* and defendants' contention is overruled upon authority of those cases. In the last case the Court said: "The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment."

Defendants further contend that the indictments should be quashed, and the cases nonsuited, because G.S. 14-134 is too indefinite and vague to be enforceable under the due process clause of the 14th Amendment and under Article I, § 17, of the State Constitution, in that the statute does not require the person in charge of the premises to identify himself, and in that W. K. Boger did not identify himself when he asked them not to enter the luncheonette department, and when he asked them to leave after they seated themselves. This contention is not tenable.

G.S. 14-134 necessarily means that the person forbidding a person to go or enter upon the lands of another shall be the owner or occupier of the premises or his agent, and that is an essential element of the offense to be proved by the State beyond a reasonable doubt. The statute is not too vague and indefinite to be enforceable as challenged by defendants, because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof.

On a motion for judgment of compulsory nonsuit the State's evidence is to be considered in the light most favorable to the State,

and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. *S. v. Corl,* 250 N.C. 252, 108 S.E. 2d 608. In our opinion, when the State's evidence is so considered, it permits the reasonable inference that all the defendants knew when W. K. Boger forbade them to go upon or enter the luncheonette department, and requested them to leave after they had seated themselves there, he was the agent of S. H. Kress and Company in charge of the store, and we so hold.

Defendants contend that all the cases should be nonsuited because the evidence is insufficient to carry the case to the jury. All defendants introduced evidence. Having done so, they waived their motions for judgment of involuntary nonsuit which they had made at the close of the State's case, and must rely on their similar motions made at the close of all the evidence. G.S. 15-173.

Considering the State's evidence in the light most favorable to the State, and not taking defendants' evidence into consideration unless favorable to the State, or except when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence, (*S. v. Nall,* 239 N.C. 60, 79 S.E. 2d 354), as we are required to do in passing upon defendants' motions made at the close of all the evidence, it tends to show that all the defendants without legal or constitutional right or *bona fide* claim of right entered the luncheonette department of S. H. Kress and Company after having been forbidden by W. K. Boger, the manager and agent of S. H. Kress and Company there, to do so, and after they had been requested by him to leave, refused to do so. The fact, that the violations by all defendants of G.S. 14-126 and G.S. 14-134 were intentional, is shown clearly by their acts, by the two White defendants and by most, if not all of the Negro defendants in urging people to boycott the Kress store, and further by the plan entered into by the Negro defendants on the night of 5 May 1960 to go the following day to the Kress store, enter the luncheonette department there, take seats, and demand service. The evidence was sufficient to carry the cases to the jury, and we so hold.

The motions to quash the indictments raise most, if not all, of the constitutional questions raised by the motions for judgments of compulsory nonsuit made at the close of all the evidence. All these questions have been considered by the Court and most, if not all, discussed in the opinion. In our opinion, and we so hold, the trial court properly overruled the motions to quash the indictments, and correctly submitted all the cases to the jury.

Defendants' assignments of error relating to the evidence are without merit, and do not justify discussion.

Defendants' assignment of error to the charge of the court to the jury is to the whole charge, without any statement as to what part of it is, as they contend, error. Such an assignment of error is too general and indefinite to present any question for decision. *S. v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85, and cases there cited. In that case the Court said: "Unpointed, broadside exceptions will not be considered. Citing authority. The Court will not go on a voyage of discovery to ascertain wherein the judge failed to explain adequately the law in the case. Citing authority. The assignment must particularize and point out specifically wherein the court failed to charge the law arising on the evidence." Further, defendants in their brief make no mention of the charge, and no exception to the charge appears in the record, except in the assignment of error. An assignment of error will be disregarded when 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; *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1. The assignment of error as to the charge as a whole, not being mentioned, in defendants' brief is taken as abandoned by defendants. Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 544; *S. v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507. However, a reading of the charge, which is in the record, shows that the trial judge correctly declared and explained the law arising on the evidence given in the cases, as required by G.S. 1-180, and in particular instructed the jury to the effect that if the defendants entered the luncheonette department of the Kress store after being forbidden under a *bona fide* claim of right and if they had reasonable grounds for such belief, and refused to leave after they had been requested to do so under such claim, as they contend their evidence tended to show, then there would be no criminal responsibility, and it would be the duty of the jury to acquit all defendants. *S. v. Clyburn, supra; S. v. Fisher,* 109 N.C. 817, 13 S.E. 878. This Court said in *S. v. Crawley,* 103 N.C. 353, 9 S.E. 409, which was a criminal action for entry upon land after being forbidden: "A mere *belief* on his part that he had such claim would not be sufficient — he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the court. *S. v. Bryson,* 81 N.C. 595." This Court said in *S. v. Wells,* 142 N.C. 590, 55 S.E. 210: "True we have held in several well-considered decisions, that when the State proves there has been an entry on another's land, after being forbidden, the burden is on

the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question of *bona fides* of such claim, the defendant must show that he not only believed he had a right to enter, but that he had reasonable grounds for such belief. *S. v. Glenn,* 118 N.C., 1194; *S. v. Durham,* 121 N.C., 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right, the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted." Defendants have nothing to complain of in respect to the charge, and their counsel evidently thought so by not mentioning the charge in their joint brief filed with us.

Defendants' motions in arrest of judgment, which the court overruled, and which defendants assign as error, are not mentioned in defendants' brief, and are taken as abandoned by defendants.

All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, § 17, of the North Carolina Constitution.

No error.

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## DUKE POWER COMPANY AND THE TOWN OF HUDSON v. BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION

(Filed 20 January, 1961.)

**1. Contracts § 12—**

A contract will be construed to effect the intent of the parties unless such intent is contrary to law.

**2. Same**

The interpretation placed upon a contract by the parties themselves will ordinarily be followed by the courts.

**3. Electricity § 2— Contract held not to preclude membership corporation from serving customers within corporate limits of municipality.**

A contract between a power company and an electric membership corporation, implementing State and Federal legislation in regard to rural electrification, which contract requires the corporation to purchase electricity solely from the power company for the purpose of resale "primarily" to rural homes and farm consumers who are members of the corporation and who are not located in any incorporated

city or town, *is held* not to preclude the corporation from selling to its members current purchased from the power company merely because such members reside within the corporate limits of a village, this being the intent of the parties as gathered from a construction of the contract as a whole and being consonant with the interpretation of the parties themselves, the company having served customers residing within the corporate limits of the municipality from the inception of the contract until two years prior to the institution of this action, and some several years after the municipality had annexed additional territory and ceased to be a rural area as defined by the Federal statute, USCA Title VII, § 913.

**4. Same: Utilities Commission § 3—**

The approval by the Utilities Commission of a contract between public utilities gives the contract the force and effect of an order of the Commission.

**5. Municipal Corporations § 2—**

Municipal corporations have the power to enlarge their corporate limits, and when they do so the annexed territory and its citizens are subject to all ordinances and regulations in force in the municipality. G.S. 160-453.5(f).

**6. Municipal Corporations § 18—**

A municipal corporation has power to grant franchises to public utilities, G.S. 160-2(6). The right to franchise implies the power to control for public benefit, including among other things, the right to fix reasonable rates and to specify where the franchise may be exercised to afford adequate service to the public.

**7. Same: Utilities Commission § 2—**

By delegating the power to municipalities to grant franchises to public utilities, the General Assembly did not deprive itself of the power to control specific utilities in whole or in part, or the right to delegate such authority to another agency. The right to regulate electric power companies except those municipally owned has been delegated to the Utilities Commission. G.S. 62-30.

**8. Same: Municipal Corporations § 18— Membership in electric membership corporation is not terminated by annexation by municipality.**

Where a contract between an electric membership corporation and a power company provides that the corporation should serve only its members and that neither the corporation nor the power company should acquire customers from the other, and the contract does not preclude the corporation from serving its members merely because of their residence within an incorporated village, the right of the corporation to sell current to its members who are inhabitants of the incorporated village, or who come within the corporate limits by annexation, is not prohibited by law, their membership in the corporation not being terminated by the change in character of the community from rural to urban, and the contract between the corporation and the power company having

been approved by the Utilities Commisison and thus having been given the effect of an order of the Commission.

PARKER, J., concurring.

MOORE, J., joins in concurring opinion.

APPEAL by defendant from *Farthing, J.* June 1960 Term, of CALDWELL.

This action was begun by Duke Power Company by the issuance of summons from the Superior Court of Mecklenburg County on 17 August 1959. It was, on motion of defendant, removed to Caldwell County. Plaintiff sought injunctive relief to prohibit defendant from selling electric current or power to any inhabitant of the Town of Hudson. As a basis for the relief sought, it alleged it had a franchise from Hudson to serve that municipality and its inhabitants; it had been selling current to defendant for approximately twenty years, and was, at the institution of the action, selling current to defendant pursuant to a written contract for resale to members of defendant; current could not, by the terms of the contract, be resold in any incorporated city or town; defendant had violated and was continuing to violate the contract and interfering with it in the performance of its duties imposed by this franchise; only by injunction could plaintiff's rights be protected.

Defendant denied violation of the contract. It alleged sales only to its members, some of whom resided in Hudson; they had been receiving current from defendant for many years; the sales so made were permissive under its contract with Duke. It alleged violation of the contract by plaintiff and, because of the asserted breach, sought injunctive relief.

In January 1960 Hudson was permitted to intervene and become a party plaintiff. It alleged it was a municipality created by legislative act; that it had granted a franchise to Duke Power Company in 1950 for sixty years to supply the town and its inhabitants with electricity; it had granted no franchise to defendant; defendant was furnishing electric current to inhabitants of the town residing within the corporate limits fixed when it was created in 1905; and in addition to such service was providing electric service to citizens of the town who became citizens by extension of the corporate boundaries. It prayed that the court compel defendant to remove its property which is within its corporate limits; that defendant be permanently enjoined from constructing or maintaining electric lines within the town or from serving residents of the town.

For brevity the parties are hereafter referred to as Duke, Hudson, and Blue Ridge.

A jury trial was waived. The court found Duke was supplying Blue Ridge with current for resale, and Blue Ridge was selling current to its members residing within the corporate limits of Hudson. Some of these members were citizens of Hudson when Blue Ridge first began to supply them. Some were made citizens by annexation after they began to receive current. Duke had, but Blue Ridge did not have a franchise from Hudson. Based on the facts found as here summarized and as amplified in the opinion, the court enjoined Blue Ridge from providing electric service to any person residing inside the corporate limits of Hudson, including the annexed areas. It granted Blue Ridge permission, with approval of Hudson, to sell all of its properties inside of Hudson. It required Blue Ridge to remove, within twelve months, all its wires, poles, and appliances from the streets and all buildings situate in any portion of Hudson unless sold with the assent of Hudson. It also enjoined Blue Ridge from serving any of the citizens of Hudson so long as the present contract between Duke and Blue Ridge continued in effect.

North Carolina Electric Membership Corporation, acting on behalf of all membership corporations created pursuant to c. 117 of the General Statutes, was, upon its petition, granted permission to appear *amicus curiae.*

Defendant, having excepted to the judgment, appealed.

*L. H. Wall for Town of Hudson, plaintiff appellee.*

*Carl Horn, Jr., William I. Ward, Jr., and Townsend & Todd for Duke Power Company, plaintiff appellee.*

*Williams and Whisnant and Claude F. Seila for defendant appellant.*

*William T. Crisp for amicus curiae, North Carolina Electric Membership Corporation.*

RODMAN, J. The contract between Duke and Blue Ridge lies at the threshold of the controversy. (Actually there are two contracts, each designating a place where Duke will connect with Blue Ridge lines to furnish current, but they are identical so far as material to a decision of this case. Hence they are treated as a single instrument.) Each of these parties bases its right to relief on its interpretation of the contract, which is dated 21 December 1957. The contract obligates Duke to deliver and Blue Ridge to purchase current for a term of one year and continuing annual terms until terminated at

the end of an annual period by sixty days notice from one party to the other.

The provisions pertinent to the decision of this case read:

"FOURTH: The electric power delivered hereunder is and shall be delivered for the purpose of resale primarily to rural homes and farm consumers who are members of the 'Consumer' in Caldwell County, North Carolina and who are not located in any incorporated city or town. Neither party shall furnish or offer to furnish electric energy to anyone who, at the time of the proposed service, is receiving electric service from the other, or whose premises are capable of being served by the existing facilities of the other without extension of its distribution system other than by the construction of secondary lines not exceeding 300 feet in length, nor shall either party unless ordered so to do by a properly constituted authority, duplicate the other's facilities, except insofar as such duplication shall be necessary in order to transmit electric energy between unconnected points on its lines. The electric power delivered hereunder shall be distributed by the Consumer solely to ultimate users, and shall not be sold or offered for sale by the Consumer to any person, firm, municipal or other corporation or association for resale, or sold or offered for sale by the Consumer to anyone who is receiving electric service or whose premises are capable of being served by the existing facilities (including additional secondary lines not exceeding 300 feet in length) of any municipal or other distribution system to which the Power Company sells electric power for resale, except where such municipality or other distributor refuses to furnish such service. The Consumer shall not, during the continuance of this contract, cause or permit electric power, from any source other than the Power Company, to be distributed over that portion of its system supplied with electric power delivered hereunder, without the written consent of the Power Company."

"SEVENTH: All such electric power which shall be sold or otherwise disposed of by the Consumer to any person, firm or corporation shall be sold or disposed of subject to this contract."

"TWENTY-THIRD: This contract is subject to the rates, rules, regulations and conditions of the Power Company as the same are now on file with the Utilities Commission of the State of North Carolina, and as the same may be lawfully changed or modified from time to time, and such rates, rules, regulations and conditions are made a part of this contract to the same effect as if fully set forth herein."

The contract provided that it should not be binding until approved

by Duke's Board of Directors and the Administrator of the Rural Electrification Administration of the United States.

The contract, including all of its terms and conditions, has been formally approved by the North Carolina Utilities Commission.

This is the factual background presented for interpreting the contract: Blue Ridge came into existence by virtue of provisions of c. 117 of the General Statutes. For more than eighteen years it has been purchasing electric power from Duke for resale in Caldwell County, including the Hudson area. Caldwell County with an area of 476 square miles had, according to the 1950 census, only 7,888 urban citizens, all of whom lived in the town of Lenoir. The remaining inhabitants are listed in that census as rural. Hudson, incorporated by legislative act in 1905, had, in 1950, a population of 922. The 1960 census gives it a population of 1536.

Between March 1942 and June 1954 six homes near the western boundary of Hudson within its corporate limits connected to Blue Ridge lines and have been receiving current from Blue Ridge. Duke did not at that time have a power line within 300 feet of these homes. Blue Ridge did have such a line.

In July 1956 Hudson changed a portion of its western boundary so as to include a home connected with Blue Ridge lines in October 1956.

In September 1957 Hudson changed its boundaries to include an area at its southeast corner. This action brought within its corporate limits two homes which were and had been receiving current from Blue Ridge since 1941. It also brought within the corporate limits the Hudson High School which had been receiving current from Blue Ridge since October 1955. So far as appears, Duke does not have a transmission line in this area.

In April 1959 Hudson changed its western boundary so as to bring within its corporate limits eleven homes, members of and receiving current from Blue Ridge.

The contract between Duke and Blue Ridge is headed "RURAL RESALE." Duke had a franchise from Hudson as early as 1927. This franchise was renewed in 1950.

Notwithstanding its franchise rights, Duke furnished current to Blue Ridge, which resold to its members, inhabitants of Hudson, as early as 1941. The contract between the parties made in June 1952 contained a provision identical with section FOURTH of the present contract. Notwithstanding this contract provision, Duke continued to sell to Blue Ridge for resale to its members, inhabitants of Hudson, from June 1952 until the institution of this action in August 1959.

When called upon to interpret a contract, courts seek to ascertain and give effect to the intent of the parties if that intent does not require the performance of an act prohibited by law. To interpret, we must ascertain the result which the parties intended to accomplish. Manifestly, the purpose of Duke, a private corporation, was to sell its wares (electricity) at a profit. The purpose of Blue Ridge, a nonprofit cooperative, was to promote and encourage "the fullest possibly use of electric energy in the rural section of the State by making electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management . . ." G.S. 117-10.

The contract declares the current is sold "for the purpose of resale primarily to rural homes and farm consumers who are members of the 'Consumer' in Caldwell County, North Carolina and who are not located in any incorporated city or town."

Manifestly this is a mere rephrasing of the statutory purpose for which the cooperative was created. The contract does not define a rural home or a farm consumer, nor does our statute (c. 117 of the General Statutes) authorizing the creation of electric membership corporations contain a definition of a rural home or rural area. The Federal statute providing for rural electrification, Title VII, USCA, sec. 913, defines a rural area as "any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants." Hudson and all of Caldwell County except the town of Lenoir were, when this contract was made, rural areas within the Federal definition.

It is, we think, manifest that the contracting parties intended to implement both State and Federal legislation relating to rural electrification. *Denny, J.*, had, prior to the execution of this contract, said: "The North Carolina legislation with respect to Electric Membership Corporations was enacted to implement the Act of Congress creating the Rural Electrification Administration . . ." *Utilities Commission v. Municipal Corporations*, 243 N.C. 193, 90 S.E. 2d 519.

The parties themselves pointedly called attention to the Federal Act by requiring approval by the Federal Administrator to make the contract binding. To hold that the phrase "who are not located in any incorporated city or town" was intended to prohibit it from serving its members residing in the village of Hudson who had been receiving current for many years would, in our opinion, do violence to the declared intention of the parties. It would leave these members without service. By express language of the contract Duke was Blue Ridge's sole source of supply. It would produce a prohibited dis-

crimination between members of the cooperative. We think it certain the Federal Administrator would not have given his approval to such a discrimination. It would give the same meaning to the words "primarily" and "solely," when it is manifest they were used as having different meanings.

Although this phrase had been in contracts between the parties for more than five years prior to the execution of the present contract, no such interpretation had been put on the language at the time this contract was executed, nor was such interpretation placed thereon until nearly two years had elapsed after its execution. As said by *Stacy, C. J.*, in *Cole v. Fibre Co.*, 200 N.C. 484, 157 S.E. 857; "The general rule is, that where, from the language employed in a contract, a question of doubtful meaning arises, and it appears that the parties themselves have interpreted their contract, practically or otherwise, the courts will ordinarily follow such interpretation, for it is to be presumed that the parties to a contract know best what was meant by its terms, and are less liable to be mistaken as to its purpose and intent."

We conclude the contract does not prohibit Blue Ridge from selling to its members current purchased from Duke merely because they reside within the corporate limits of Hudson.

This conclusion brings us to this question: Is the contract right of Blue Ridge to sell to its members who are inhabitants of Hudson invalid because legally prohibited?

The facts on which the asserted invalidity is based are summarized in Findings 6 and 7 as follows:

"6. Blue Ridge Electric Membership Corporation has been operating in areas near or adjacent to the corporate limits of the Town of Hudson for more than twenty years and has had several lines within the corporate limits of Hudson at the places, and constructed on the dates, shown on the attached Map Number 1. Prior to the institution of this action Blue Ridge Electric Membership Corporation supplied electricity to six consumers within the original corporate limits of Hudson. When Blue Ridge was advised and notified by Duke that it was supplying electricity inside the Town of Hudson it refused to withdraw from the town and still refuses to withdraw.

"7. Blue Ridge does not have and has never had a franchise from the Town of Hudson to operate within its boundaries, nor has it sought a franchise from the Town of Hudson."

The contract, having been formally approved by the Utilities Commission, is in effect an order of the Commission, binding on each of the parties. Section FOURTH of the contract in substance and effect

prevents unbridled competition between Duke and Blue Ridge, making the Utilities Commission the final authority with respect to the extension of transmission and service lines by each of the contracting parties.

Blue Ridge's right to sell in the village of Hudson electricity which Duke contracted to sell depends on the power of control delegated by the Legislature to (a) municipal corporations, (b) the Utilities Commission, (c) the North Carolina Rural Electrification Authority and membership corporations created with its approval.

Municipal corporations are permitted to expand and enlarge their corporate limits. Art. 36, c. 160, General Statutes. When so enlarged the annexed territory and its citizens are subject to all ordinances and regulations in force in the municipality. G.S. 160-453.5(f).

Every town has by statute, G.S. 160-2(6), the power to grant franchises to public utilities, that is, the right to engage within the corporate boundaries in business of a public nature. Businesses requiring sovereign permission to operate are multitudinous: transportation of goods and persons by railroad or by motor carrier, transmission of telegrams, transmission and distribution of electric power, water and sewerage systems, telephone systems, public milling, banking, transmission of gas and petroleum products by pipeline, and street railways are but illustrative of the many kinds of businesses which may require sovereign approval.

The sovereign right to franchise implies the power to control for public benefit, including among other things, the right to fix reasonable rates and to specify where the franchise may or may not be exercised so as to afford adequate service to the public. *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896.

The Legislature, by granting to municipalities the right to franchise, did not deprive itself of the power to control or to delegate to other public agencies the right to control specific utilities in whole or in part. That it did not intend to give exclusive or unlimited control to municipalities by grant of the right to franchise is, we think, apparent from other legislative acts.

The power to regulate many public utilities is, broadly speaking, delegated to the Utilities Commission. Electric power companies other than those municipally owned or controlled are by express language placed under the supervision of the Utilities Commission. G.S. 62-30. This section expressly declares the Commission is vested "with all power necessary to require and compel any public utility or public service corporation . . . to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish . . ."

Similar directives are found in G.S. 62-27. The Commission is expressly empowered by G.S. 62-36 to prescribe rates for services in a municipality and the rates so fixed supersede those fixed by a municipal franchise. *Corp. Comm. v. Henderson Water Co.*, 190 N.C. 70, 128 S.E. 465; *Griffin v. Water Co.*, 122 N.C. 206.

G.S. 62-37 gives the Commission the power "to require such improvements and extensions to the service of public service corporations mentioned in § 62-36 as it may deem necessary . . ." It is given the power "to order the lines and right of way of any utility, railroad or electric membership corporation . . . to be crossed by any other utility or electric membership corporation . . ." G.S. 62-54. It is given the power to fix the speed of trains passing through towns at a rate different from that prescribed by municipal ordinance. G.S. 62-60. It may compel telephone and telegraph companies to make connections for continuous service, G.S. 62-73, and to furnish service to any not served, G.S. 62-74.

A utility cannot begin operation unless and until it has obtained a certificate of public convenience and necessity from the Utilities Commission. G.S. 62-101.

The cited sections of our statute law clearly indicate, we think, a legislative delegation of power to the Utilities Commission to say when and under what conditions power companies shall furnish service, and this authority relates to service inside of as well as outside of municipalities. The reason for such legislative action is, we think, readily apparent. Except for those areas served by municipally owned plants or electric membership corporations, the citizens of the State depend primarily on four power companies, Duke, Carolina Power & Light, Virginia Electric & Power, and Nantahala Power & Light, to supply them with current. To invest each of the towns served by these companies with the power to regulate and prescribe the manner in which service may be rendered inhabitants of the town might well lead to a chaotic condition seriously interfering with the ability of the utility to render equal service to all residing in the area served by it.

In *Utilities Commission v. Casey*, 245 N.C. 297, 96 S.E. 2d 8, we were called upon to decide whether the power company could sell a portion of its transmission line to Kinston, owner and operator of its own electric system, thereby depriving customers residing in an area annexed by Kinston of the power company's services. The power company had no franchise from Kinston. The power company applied to the Utilities Commission for permission to sell, asserting public convenience no longer required it to furnish service. The Com-

mission found this to be a fact over the protest of customers of the power company residing in the annexed area. *Denny, J.*, after referring to G.S. 62-27 and other sections of c. 62 of the General Statutes, said: "In our opinion, these statutes give the Commission not only the authority *but impose upon it the duty to pass upon such contracts as the one under consideration and to determine whether or not it is in the public interest to permit their consummation.*" (Emphasis supplied.) The pertinency of this language to the contract between Duke and Blue Ridge is apparent. It would be difficult to find more positive language with respect to the authority of the Utilities Commission over companies selling electricity in an area annexed by a municipality.

We held in *Utilities Commission v. Wilson*, 252 N.C. 640, that a municipality could not, by the device of a franchise, procure favored treatment for itself to the detriment of other customers of a telephone company. We upheld an order of the Utilities Commission prohibiting such favored treatment.

Courts called upon to determine final authority as between municipalities and State utilities commissions over the operation of public utilities have generally interpreted the statutes in favor of utilities commissions. The reasons are manifest. *Willits v. Pennsylvania Utilities Com'n.*, 128 A 2d 105; *Jennings v. Connecticut Light & Power Co.*, 103 A 2d 535; *City of Geneseo v. Ill. Northern Utilities Co.*, 1 N.E. 2d 392; Annotation, 39 A.L.R. 1519. "Generally, however, the power given by statute to public service commissions to supervise and regulate public utilities supersedes the power of municipalities to regulate such utilities, except where the power is specifically reserved to the municipalities." 43 Am. Jur. 702.

Any person operating electric power lines has the right to construct such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual traffic on such railroad or other highway. G.S. 56-1. We need not now determine whether the word "highway" as used in that statute includes streets within municipal boundaries. This case does not raise any question with respect to the right of Hudson to require Blue Ridge to maintain its lines so as not to interfere with other rightful uses of its streets. Blue Ridge concedes Hudson's right under the police power to prescribe standards governing the erection and maintenance of poles and wires.

The North Carolina Rural Electrification Authority, a State agency, was created to secure electrical service for the rural districts of

the State. G.S. 117-2. It could not require power companies to extend their lines for that purpose. That power was expressly reserved to the Utilities Commission. 117-13. To accomplish its purpose, when unable to persuade power companies to extend their lines and to provide service, the Electrification Authority could authorize the creation of electric membership corporations. Every corporation so created is "vested with all power necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the legislature . . ." G.S. 117-17.

In addition to the general power so delegated, these corporations were given by G.S. 117-18(6) the specific power, upon approval by the North Carolina Rural Electrification Authority, "to construct or place any parts of its system or lines in and along any State highway or over any lands which are now, or may be, the property of this State, or any political subdivision thereof." These membership corporations are also given express power "to make any and all contracts necessary or convenient for the full exercise of the powers in this article granted, including, but not limited to, contracts with any person or federal agency, for the purchase or sale of energy." G.S. 117-18(8).

The Legislature, by this section, made certain that when necessary to create membership corporations to provide citizens of rural areas with electricity, the corporation so created would not be hampered by having to obtain permission to function from some other agency. *Light Co. v. Membership Corp.*, 211 N.C. 717, 192 S.E. 105.

It would indeed be illogical to conclude that the Utilities Commission with its broad powers over public utilities could not require a certificate of public convenience and necessity as a condition to service, but a rural community, such as Hudson, created for general municipal purposes, could thwart legislative will and deprive its citizens of the benefits of electric service merely because the Legislature had given it the general power to franchise public utilities.

In deciding the case, we cannot overlook the fact that Duke had a franchise from Hudson as early as 1927. Notwithstanding this fact, Hudson had taken no action to compel service to all of its inhabitants, or if it had sought to force service for their benefit, the Utilities Commission in its discretion had refused to require the service, thus compelling some of its inhabitants to turn to Blue Ridge as the only source of service. Blue Ridge was, because of this failure of Hudson and Duke to provide service, rightfully serving the inhabitants of this rural community. Hudson's action in expanding its boundaries so as to remove it from the category of a rural community did not

make the original entry or its continued operation unlawful. *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E. 2d 411.

The right of electric membership corporations to continue to provide service to those members who by annexation become citizens of a municipality has been considered by the Supreme Courts of Arkansas, Georgia, and Texas. The right to serve was in each case made to depend on proper construction of the statutes of the States in which the question was presented.

The Supreme Court of Arkansas, in *Farmers Electric Coop. Corp. v. Arkansas Power & L. Co.*, 249 S.W. 2d 837, concluded that the right of a membership corporation to serve its members terminated when they became citizens of a nonrural area by annexation.

In *City of Moultrie v. Colquitt County Rural Elec. Co.*, 89 S.E. 2d 657, the Supreme Court of Georgia held defendant had no right to serve applicants for membership who were at the time of the application citizens by annexation of a municipality which did not meet the statutory definition of a rural area. As determinative of the controversy, the Court said:

"The first requisite of a valid contract is that there shall be parties able to contract. Code, § 20-107. The Electric Membership Corporation Act, Ga. L. 1937, pp. 644, 645, Code Ann. Supp. §§ 34A-102, 34A-103, provides that such corporations can not operate within the boundaries of an incorporated city having a population in excess of 1,500 inhabitants. Whether calculated by the census of 1930 or of 1950, the City of Moultrie had in excess of 1,500 inhabitants prior to and at the time written applications were made to the petitioner for electric service. The limitation imposed by the Electric Membership Corporation Act, that corporations created under that act may operate electric lines in rural areas not receiving service from a municipal corporation or a corporation regulated by the Public Service Commission, is a limitation to be determined at the time the application for service is made."

It is interesting to note that the Georgia Legislature has enacted a law dealing with the question here under consideration. This statute is, in substance, the same as the fourth section of the contract between Blue Ridge and Duke. See c. 430, Georgia Session Laws 1960.

In *State v. Upshur Rural Electric Cooperative Corp.*, 298 S.W. 2d 805, the power company having a franchise from Gilmer, a municipality with a population in excess of 1,500, challenged the right of defendant to sell current in the municipality. With respect to those made citizens by annexation, the Court said:

"The question which we have experienced most difficulty in de-

ciding is whether the Cooperative may continue to service those persons who now reside in areas annexed to the City of Gilmer who were lawful members of the Cooperative at the time such areas were annexed to the city. The trial court held that it has that right. The cases above cited, particularly the cases from the Supreme Court of Arkansas, deny that right. While we recognize that the Act is susceptible of the construction placed upon it by the Arkansas court, still we are constrained to agree with the trial court that lawful membership once acquired is not terminated by annexation by a city of the area in which the member resides. The Act provides that membership is terminated by the resignation, expulsion, or death of the member. There is no provision that it is terminated by annexation. Since members retain that status after annexation, and since the Cooperative is expressly authorized to supply electric energy to its members, it is our view that it is authorized to continue that service to them after annexation."

Duke has by contract agreed to a limitation of the area which it may serve. This contract has been approved by the Utilities Commission. The contract may not be ignored by Duke. It contains a provision by which Duke may be permitted to provide service contrary to the cantractual restrictions. Blue Ridge has voluntarily agreed to a restriction of the area which it might otherwise lawfully serve. Blue Ridge can only provide service to its members. G.S. 117-16. Membership is not terminated by a change in the character of the community from rural to urban. Blue Ridge has the right and the duty to serve its members. The court erred in requiring it to remove or otherwise dispose of its properties within the corporate limits of Hudson.

Error and remanded.

PARKER, J., concurring. The trial court required defendant to remove within twelve months all of its wires, poles, and appliances from the streets and all buildings situate in any portion of the town of Hudson, unless sold with the assent of the town of Hudson. The Court holds this to be error. I agree upon the facts in the record before us.

However, on this question I hold the same view as expressed in my concurring opinion in *Pee Dee Electric Membership Corporation v. Carolina Power & Light Co.*, original defendant, and *Town of Rockingham, et al.*, additional defendants, 253 N.C. 610, 117 S.E. 2d 764.

MOORE, J., joins in concurring opinion.

PEE DEE ELECTRIC MEMBERSHIP CORPORATION v. CAROLINA POWER & LIGHT COMPANY, ORIGINAL DEFENDANT; AND THE TOWN OF ROCKINGHAM, BELER DIXON AND RAYMOND TREECE, ADDITIONAL DEFENDANTS.

(Filed 20 January, 1961.)

**1. Municipal Corporations § 18: Electricity § 2—**

Where a power company has a franchise with a municipality to provide street lights and sell electricity to citizens of the municipality, upon the annexation of territory by the municipality the power company has the legal right and duty to serve the customers within the territory annexed except to the extent it is precluded from doing so by valid contract with another public utility in the area.

**2. Electricity § 2— Membership in electric membership corporation is not terminated by annexation by municipality.**

Although, under Federal and State legislation relating to rural electrification, an electric membership corporation is created to operate only in rural areas and to serve members who are residents of such areas, when an area served by a membership corporation becomes an urban area by reason of annexation by a municipality, the electric membership corporation may continue to serve from its distribution lines constructed prior to the annexation persons who were theretofore members and decide to continue their membership and to receive service from such corporation, but persons in the annexed area who were not members prior to the annexation are not eligible for membership, since eligibility for membership is to be determined as of the date application for membership is made.

**3. Same: Municipal Corporations § 18—**

Upon annexation by a municipality of a part of the territory served by an electric membership corporation, such corporation is entitled to continue service to its customers living within the annexed area, and may continue to maintain for this purpose its lines constructed in the area prior to the annexation, and neither the municipality nor the power company having a franchise from it is entitled to restrain the membership corporation from continuing to provide such service or to enjoin it from maintaining lines theretofore constructed and necessary for this purpose or to require it to dispose of or dismantle such lines.

PARKER, J., concurring.

MOORE, J., joins in concurring opinion.

APPEAL by plaintiff from *Fountain, Special Judge,* May-June Civil Term, 1960, of RICHMOND.

Plaintiff (Pee Dee) instituted this action May 27, 1958, against the Carolina Power & Light Company (Power Company). Thereafter, the Town of Rockingham (Rockingham), a municipal corporation, and the individual defendants, Dixon and Treece, were permitted to intervene as additional parties defendant.

North Carolina Electric Membership Corporation, of which Pee Dee is a member, was granted leave to appear as *amicus curiae.*

Pee Dee seeks to enjoin the Power Company, and the Power Company and the Town of Rockingham seek to enjoin Pee Dee, from distributing electric power in a portion of an area (Richmond County) known as Knob Hill, which, by annexation on January 9, 1957, was included within the corporate limits of Rockingham. Dixon and Treece, who own residences in Knob Hill, demand service by the Power Company.

The court based its judgment on stipulated facts.

The charter (1940) of Pee Dee, an electric membership corporation, provides that its operations "shall be principally conducted in those parts of the county or counties of Anson, Union, Stanly, Montgomery, Richmond, and Scotland, State of North Carolina, which are not now served or which are inadequately served with electric energy, or which are now served by the Anson Mutual Electric Corporation." In 1945, this charter provision was amended so as to add Moore County to Pee Dee's territory.

In 1940, Pee Dee constructed distribution lines in Knob Hill to serve four residences. All of Knob Hill was within one mile of the original city limits of Rockingham. There were sixty-six residences in Knob Hill on January 9, 1957, when Knob Hill was annexed to and became a part of Rockingham. All of these residences were then served by Pee Dee.

Pee Dee's distribution lines, constructed prior to January 9, 1957, are located along, and at some places cross, what are now public streets of Rockingham. Where Pee Dee's lines cross private property, the construction thereof was permitted by the owner or owners.

Rockingham has not granted, and refuses to grant, to Pee Dee a franchise permitting it to operate within its corporate limits or to construct or maintain its lines along or across what are now public streets of Rockingham.

Prior to January 9, 1957, the Power Company did not supply electricity to any residence in Knob Hill and had no lines or facilities therein. By merger, on or about February 24, 1926, the Power Company acquired the franchise granted by Rockingham to Yadkin River Power Company on November 23, 1911, which, for the term of sixty years, granted permission "to construct and maintain its lines for the transmission of electricity along, over and under the highway of the Town of Rockingham, . . . and to conduct and carry on within the said Town of Rockingham, the business authorized by and under the terms of" its charter. Pursuant to this franchise, the Power Com-

pany (and its said predecessor) supplied electricity to residences within the corporate limits of Rockingham; and, under successive contracts, supplied electricity for various municipal functions, including street lighting.

On January 16, 1957, Rockingham requested Pee Dee, within thirty days, to work out an arrangement for the transfer of its facilities to the Power Company. Pee Dee refused to comply with this request. On February 5, 1957, Pee Dee proposed that it be permitted to provide street lighting in Knob Hill. Upon rejection by Rockingham, this proposal was "withdrawn and nullified" by Pee Dee. On August 6, 1957, Rockingham instructed the Power Company to install street lights and a fire alarm system in Knob Hill.

Prior to August 28, 1957, the Power Company, through its contractor, Utilities Construction Company, "began the work of installing poles and lines to furnish street lighting in the Knob Hill area"; and on that date Pee Dee instituted an action in the Superior Court of Richmond County for injunctive relief. An *ex parte* temporary restraining order issued August 28, 1957, was dissolved by an order of September 11, 1957. Pee Dee then took a voluntary nonsuit in said action. Thereafter, the "Power Company constructed in said Knob Hill area distribution lines and facilities adequate to supply said street lighting and all other electrical needs of the inhabitants of said area."

The distribution lines constructed by Pee Dee in Knob Hill prior to January 9, 1957, are also "adequate in capacity to supply all the electricity presently needed in said Knob Hill area, by merely adding extensions, transformers, etc., as may be required."

In some places, the Power Company's distribution lines are parallel to and within three hundred feet of the lines Pee Dee had constructed prior to January 9, 1957. The residences of Dixon and Treece are within three hundred feet of the distribution lines of Pee Dee and are within three hundred feet of the distribution lines of the Power Company.

On or about September 20, 1941, Dixon became a member of Pee Dee; and from then until July 22, 1958, Dixon's residence was served by Pee Dee. On May 20, 1958, Dixon applied to the Power Company for electrical service to his residence; and, upon the Power Company's acceptance of said application, Dixon notified Pee Dee to discontinue its service to his residence.

On May 15, 1958, Treece, who was then constructing a residence in Knob Hill, applied to the Power Company to supply his residence with electrical service. His application was accepted.

The Power Company was restrained from supplying electrical service to the Dixon and Treece residences by an *ex parte* order issued herein on May 27, 1958. This was modified by order of July 21, 1958. Since July 22, 1958, the Power Company has been serving the Dixon and Treece residences. (Note: The order of July 21, 1958, dissolved the temporary restraining order except as to persons who were *then* members of Pee Dee.)

A contract entered into under date of January 5, 1956, provides for the sale by the Power Company to Pee Dee of all power and energy required for its electric system in excess of that purchased by Pee Dee from the United States of America (generated in the Government's plant at John H. Kerr Dam Reservoir), at rates set forth on an attached schedule relating to the sale of electricity "to a nonprofit rural electric membership corporation for sale to ultimate consumers." Article 8 of this contract contains these provisions:

> "(a) Neither party, unless ordered so to do by a lawful order issued by a properly constituted authority, shall distribute or furnish electric energy to anyone who, at the time of the proposed service, is receiving electric service from the other, or whose premises are capable of being served by the existing facilities of the other without extension of its distribution system other than by the construction of lines not exceeding three hundred feet in length.
>
> "(b) Neither party, unless ordered so to do by a lawful order issued by a properly constituted authority, shall duplicate the other's facilities, except insofar as such duplication shall be necessary in order to transmit electric energy between unconnected points on its lines, but no service shall be rendered from such interconnecting facilities in competition with the other party."

Prior contracts of November 3, 1950, and July 1, 1951, superseded by said contract of January 5, 1956, had contained provisions similar to those set forth in said Article 8. The record is silent as to whether said contract of January 5, 1956, was submitted to and approved by the North Carolina Utilities Commission. The prior contract of July 1, 1951, was drafted in accordance with a form contract theretofore formally approved, without notice or hearing, by the Utilities Commission.

When said contracts were executed, Pee Dee did not have any lines or facilities or any members within the corporate limits of any municipality.

The court entered judgment in complete accord with defendants' contentions. Pee Dee's prayer for injunctive relief was denied. Pee Dee was enjoined from supplying electric service within the corporate limits of Rockingham, including Knob Hill, and from interfering in any manner with the activities of the Power Company in supplying such service. Pee Dee was enjoined from maintaining its lines and facilities "upon, along or over the streets, roads and public ways of the Town of Rockingham," and ordered to dispose of or dismantle and remove its lines and facilities within a specified time. The Power Company was ordered to perform "its franchise duty" by supplying electricity to the residences of Dixon and Treece in accordance with its contracts with these individuals. (Note: The court entered a further order staying designated provisions of said judgment pending final disposition of Pee Dee's appeal therefrom.)

Pee Dee, appealing from said judgment, sets forth 35 assignments of error based on 121 exceptions.

*Branch & Hux, W. G. Pittman and Brock & McLendon for plaintiff, appellant.*

*W. Reid Thompson, A. Y. Arledge and Bynum & Bynum for defendant Carolina Power & Light Company, appellee.*

*A. A. Webb and C. B. Deane for additional defendant Town of Rockingham, appellee.*

*Leath & Blount for additional defendants Dixon and Treece, appellees.*

*William T. Crisp for North Carolina Electric Membership Corporation, amicus curiae.*

BOBBITT, J. The basic contentions of the respective parties may be stated as follows:

Pee Dee contends: (1) The provisions of Article 8 of the contract of January 5, 1956, are applicable to Knob Hill. (2) In accordance therewith, it is entitled to enjoin the Power Company from serving residences within three hundred feet of the distribution lines constructed by Pee Dee prior to January 9, 1957. (3) It is entitled to serve all residences within three hundred feet of its said lines notwithstanding the annexation of Knob Hill by Rockingham and the refusal of Rockingham to grant it permission (franchise) to operate within its corporate limits and construct and maintain its lines over what are now public streets of Rockingham.

The Power Company contends: (1) The provisions of Article 8 of the contract of January 5, 1956, do not apply to Knob Hill but

are applicable only to areas in which Pee Dee is authorized to operate, namely, rural areas. (2) Upon annexation by Rockingham, Knob Hill ceased to be a rural area and became an integral part of a municipality which, at all times since 1930, has had a population in excess of twenty-five hundred. (3) Upon annexation, the Power Company became obligated under its franchise to provide service throughout the enlarged corporate limits to all who applied therefor, including Dixon and Treece.

Rockingham contends: (1) Upon annexation, the Power Company is obligated by its franchise to provide service throughout the enlarged corporate limits to all who applied therefor. (2) Pee Dee has no right to operate within its corporate limits or to construct or maintain distribution lines over what are now public streets of Rockingham.

Dixon and Treece contend: They are entitled, as owners of residences in Rockingham, to apply for and receive the same service the Power Company provides the owners of residential property located elsewhere within the corporate limits.

Pee Dee does not seek herein to enjoin the Power Company from constructing and maintaining in Knob Hill such distribution lines as may be necessary to provide street lighting and fire alarm systems. Nor does Pee Dee now challenge the Power Company's right to serve residences in Knob Hill elsewhere than within three hundred feet of distribution lines constructed by Pee Dee prior to January 9, 1957.

Significant differences between the factual situation here considered and that considered in *Power Co. v. Membership Corp., ante,* 596, include the following: (1) The record is silent as to whether said contract of January 5, 1956, was submitted to and approved by the Utilities Commission. (2) Pee Dee had no distribution lines or facilities and rendered no service within the corporate limits of Rockingham before its boundaries were extended so as to include Knob Hill. (3) The said contract contains no provision similar to paragraph "TWENTY-THIRD" of the contract between Duke and Blue Ridge, quoted in the cited case.

Under the provisions of Article 8 of said contract of January 5, 1956, each party is barred as provided therein unless ordered to provide service in the restricted area "by a lawful order issued by a properly constituted authority." The Power Company, a public utility corporation, is subject to the jurisdiction of the Utilities Commission. To what extent, if any, Pee Dee is subject to the jurisdiction of the Utilities Commission need not be presently determined. This Court has held that an electric membership corporation is not required (by

G.S. 62-101), "before beginning the construction or operation of its facilities for serving its members by furnishing them electricity for lights and power, to obtain from the Utilities Commissioner of North Carolina a certificate that public convenience and necessity requires or will require the construction and operation" of such facilities. *Light Co. v. Electric Membership Corp.*, 211 N.C. 717, 720, 192 S.E. 105; *McGuinn v. High Point*, 219 N.C. 56, 77, 13 S.E. 2d 48; *Grimesland v. Washington*, 234 N.C. 117, 125, 66 S.E. 2d 794. However, it would seem that the Utilities Commission has jurisdiction in respect of the rates and terms under which a power company may sell and supply power to Pee Dee for resale. *Utilities Commission v. Municipal Corporations*, 243 N.C. 193, 90 S.E. 2d 519.

Relevant statutory provisions relating to the authority of the Utilities Commission are cited in *Power Co. v. Membership Corp., supra.* Suffice to say, nothing in the record indicates that the Utilities Commission has made any order relevant to the service to be provided by Pee Dee or by the Power Company in the Knob Hill area. Unless and until such order is made, decision must be based on the factual situation as of now.

It is clear, and apparently conceded, that the Power Company, under its said franchise, has the legal right and duty to serve Knob Hill except to the extent it is barred from so doing by the provisions of Article 8 of said contract of January 5, 1956.

It is presumed that both Pee Dee and the Power Company, when they executed said contract of January 5, 1956, were advertent to statutory provisions relating to the extension of the boundaries of a municipality, G.S. 160-445 *et seq.*, and relating to powers conferred upon the governing body of a municipality in respect of territory outside, but within a mile of, its corporate limits, G.S. 160-226, G.S. 160-203. However, Article 8 of the contract of January 5, 1956, contains no provision purporting to render it inapplicable as to territory subsequently included within the corporate limits of a municipality.

The applicability of the provisions of Article 8 of said contract of January 5, 1956, depends upon the right of Pee Dee after January 9, 1957, to render service in the defined area. We are of opinion, and so hold, that the Power Company is not barred from serving a customer Pee Dee may not lawfully serve.

The "Rural Electrification Act of 1936," USCA, Title 7, § 901 *et seq.*, the Act creating the North Carolina Rural Electrification Authority, G.S., Ch. 117, Art. 1, and the Act providing for the formation of nonprofit membership corporations, G.S., Ch. 117, Art. 2, es-

tablished a Federal-State policy to provide the benefits of electric service in *rural areas* not served or inadequately served with electricity. *Utilities Commission v. Municipal Corporations, supra,* p. 202.

Congress defined "rural area" as "any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof." USCA, Title 7, § 913. The North Carolina legislation does not define "rural area."

To form an electric membership corporation, interested persons must first obtain the approval of the North Carolina Rural Electrification Authority. G.S. 117-9. If such approval is obtained, "(a)ny number of natural persons not less than three may . . . form a corporation not organized for pecuniary profit (but) for the purpose of promoting and encouraging the fullest possible use of electric energy in the *rural section* of the State by making electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management of the business of such corporations." (Our italics.) G.S. 117-10.

G.S. 117-16 provides that the corporate purpose of such membership corporation is "to render service to its members only," and "no person shall become or remain a member unless such person shall use energy supplied by such corporation and shall have complied with the terms and conditions in respect to membership contained in the bylaws of such corporation." G.S. 117-16 was amended in 1959 (S.L. 1959, c. 387, s. 2) by adding the following: "Provided, that such terms and conditions of membership shall be reasonable; and provided further, that no bona fide applicant for membership, who is able and willing to satisfy and abide by all such terms and conditions of membership, shall be denied arbitrarily, or capriciously, or without good cause." Consideration of the Federal-State legislation impels the conclusion that an electric membership corporation is authorized to operate only in a "rural area" to serve members who are residents of such "rural area."

Knob Hill was a "rural area" when Pee Dee's distribution lines were constructed. It is no longer a "rural area." This is true if the definition of "rural area" in the Federal legislation is adopted. Be that as it may, it was stipulated that Knob Hill is now a "residential section" of Rockingham. Rockingham, the county seat of Richmond County since 1785, has a population, according to the 1960 census, of 5,512.

The crucial question, fraught with considerable difficulty, relates to the authority of Pee Dee *to continue to operate* in an area which was a "rural area" when its distribution lines were constructed but is now an integral part of Rockingham. Present statutes provide no answer. As stated by *Wyatt, Presiding Justice,* in his dissenting opinion in *City of Moultrie v. Colquitt County Rural Elec. Co. (Ga.),* 89 S.E. 2d 657, 666: "It therefore becomes the duty of a court of equity to fill in the vacuum created by the law and do justice and equity to all parties concerned." In so doing, we must keep in mind the basic statutory purpose of Pee Dee.

Consideration of all relevant factors leads to these conclusions: Pee Dee may continue to serve from distribution lines constructed in Knob Hill prior to January 9, 1957, persons who were its members on that date and who desire to continue their membership and to receive service from Pee Dee. Persons in the annexed area who did not become members of Pee Dee prior to January 9, 1957, are not eligible for such membership. Eligibility for membership is to be determined as of the date application therefor is made. *City of Moultrie v. Colquitt County Rural Elec. Co., supra,* p. 665; *State v. Upshur Rural Electric Cooperative Corp. (Texas),* 298 S.W. 2d 805.

In *Farmers Electric Coop. Corp. v. Arkansas Power & L. Co. (Ark.)* 249 S.W. 2d 837, the court enjoined the cooperative (membership corporation) from continuing its service in an area which, by annexation, had become a part of a municipality. Our conclusion is in substantial accord with that reached in *State v. Upshur Rural Electric Cooperative Corp., supra,* and in substantial accord with the views expressed by *Wyatt, P. J.,* in his dissenting opinion in the cited Georgia case. Factual differences in these three cases are noted in *Power Co. v. Membership Corp., supra.*

We are advertent to the legal consequences ordinarily resulting when additional territory is lawfully annexed by a municipality, G.S. 160-449, and to the powers of a municipality with reference to control of its streets, G.S. 160-222. But where Pee Dee, in accordance with express statutory authority, lawfully constructed its distribution lines in Knob Hill prior to its annexation on January 9, 1957, the Town of Rockingham may not force Pee Dee to discontinue service from said lines to those persons who were members of Pee Dee prior to January 9, 1957, so long as they continue members of Pee Dee and desire continuance of its service. However, Pee Dee, on and after January 9, 1957, had no right to extend its then existing facilities or to serve persons other than members whom it was serving when Knob Hill became a part of Rockingham.

It was error to enjoin Pee Dee from maintaining "upon, along or over the streets, roads and public ways of the Town of Rockingham," distribution lines it had constructed prior to January 9, 1957, and to order Pee Dee to dispose of and dismantle such lines and facilities within a specified time. It was also error to enjoin Pee Dee from continuing to provide service from distribution lines and facilities constructed by it prior to January 9, 1957, to persons who were then members of Pee Dee and who continued their membership and desire a continuance of its service. On account thereof, the judgment of the court below is vacated and the cause remanded for judgment in accordance with the law as stated herein.

It is noted: The Power Company, in its answer, offered to purchase at fair value "the useful portion" of Pee Dee's lines and facilities in Knob Hill. Its brief indicates it is still willing to do so. Such offer is significant only in relation to a negotiated adjustment of the matters in controversy. It is not relevant to an adjudication of the legal rights of the respective parties.

If it be considered undesirable that both Pee Dee and the Power Company should serve (different) customers in that part of Rockingham within three hundred feet of the distribution lines constructed by Pee Dee prior to January 9, 1957, as contemplated by this decision, this suggests the need for legislation defining the public policy in a situation such as that here under review.

The costs on this appeal will be taxed as follows: One-third to Pee Dee, one-third to the Power Company and one-third to the Town of Rockingham.

Error and remanded.

PARKER, J., concurring. The trial court enjoined Pee Dee Electric Membership Corporation from maintaining its lines and facilities "upon, along or over the streets, roads and public ways of the town of Rockingham," and ordered it to dispose of or dismantle and remove its lines and facilities within a specified time. The Court holds that this is error.

I agree with the opinion of the Court on the facts in the present record.

However, I desire to put on record my views in respect to this question. N.C.G.S., § 160-222 provides: "The governing body of the city shall have power to control, . . . the streets and sidewalks of the city . . . , and regulate, control, license, prohibit, and prevent digging in said streets and sidewalks, or placing therein of pipes, poles, wires, fixtures, and appliances of every kind, whether on, above, or

below the surface thereof, and regulate and control the use thereof by persons . . . ; to prevent, abate, and remove obstructions, encroachments, pollution or litter therein. . . ."

This is said in McQuillin, The Law of Municipal Corporations, 3rd Ed., Vol. 7, § 24.588: "Municipal corporations ordinarily may and do exercise police control over the erection and maintenance of poles, wires, pipes and similar apparatus of utility companies or others in streets, alleys and public ways. They can, in this respect, where they act reasonably, compel all generally accepted improvements which tend to decrease the obstruction of the streets or increase the safety or convenience of the public in their use. Municipal police power in this respect and for these purposes is not precluded by the fact that such structures have been erected and maintained under franchise or permission, the fact that the power to grant the franchise is vested in the legislature or the fact that the utility company has a sole and exclusive privilege, *e.g.*, street lighting in part of the city. A municipality on incorporation becomes vested with police power over existing poles, wires, pipes, underground conduits and other apparatus of utility companies or others, located on, in or over streets and public ways within the municipality, irrespective of franchises or permits under which these structures have been erected and are maintained."

In my opinion, the town of Rockingham in the exercise of its police control has the power vested in it by N.C.G.S. § 160-222, and by the general law set forth in the quoted extract from McQuillin, over plaintiff's operations, equipment, and property in its streets, alleys and public ways.

MOORE, J., joins in concurring opinion.

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HARRY R. STANLEY AND WIFE, MAE K. STANLEY v. MERLE D. COX.

(Filed 20 January, 1961.)

**1. Divorce and Alimony § 20: Husband and Wife § 12—**

Provisions in a deed of separation for the payment of a designated sum monthly to the wife and for division of their property do not constitute "alimony" or a contract for alimony, and the executed provisions of such deed of separation, in the absence of a stipulation to the contrary therein contained, are not affected by their subsequent divorce.

**2. Mortgages § 1—**

Liens may be created by agreement, and every executory agreement

in writing that sufficiently describes certain property, and expresses the intent that the property should be security for a debt or other obligation, creates an equitable lien enforceable against all except those having a superior title or claim or who take without notice.

**3. Divorce and Alimony § 21: Husband and Wife § 11: Judgments § 10: Mortgages § 1—**

Where, upon the jury's verdict upon appropriate issues, the court enters judgment decreeing divorce and providing that by consent of the husband it was decreed that he should make the payments specified in the deed of separation theretofore executed by the parties, and referred to in the judgment, and that such payments should constitute a lien upon the real property of the husband, the consent provisions constitute an equitable lien upon the husband's realty.

**4. Judgments § 8—**

A consent judgment is a contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and depends for its validity upon the consent of both parties.

**5. Same— Record held to disclose that portions of judgment in question were entered by the consent of both parties.**

Where a divorce decree entered upon verdict of a jury refers to a prior deed of separation executed by the parties and stipulates that by consent of the husband it is decreed that the husband should make the payments specified in the deed of separation and that such payments should constitute a lien on his realty, and the consent decree is signed in behalf of the husband by his attorneys, *held*, the consent portions of the decree constitute a valid consent judgment even though not signed by the wife or her attorneys, since the signature of the parties is not necessarily essential to the validity of a contract, and it being apparent from the record that the consent provisions were in fact a contract and agreement between the husband and wife.

**6. Same—**

It will be presumed that the attorneys for a party signing a consent judgment acted in good faith and had the authority to sign it in behalf of their client.

**7. Judgments § 10: Husband and Wife § 11: Contracts § 19—**

Provision in a deed of separation that each of the parties might thereafter convey the realty allotted to him or her, respectively, without the signature of the other and free from any claims of the other, is superseded by a later consent judgment which stipulates that the payments to the wife provided for in the consent judgment should constitute a lien on the husband's realty, since the consent judgment constitutes a new agreement entered into after the execution of the deed of separation and before the rights of third party have intervened.

**8. Quieting Title § 2—**

Where plaintiff's pleadings affirmatively disclose that defendant's claim constitutes a valid and subsisting lien on the property, demurrer is

properly allowed in plaintiff's action to remove such claim as a cloud on title.

**9. Husband and Wife § 11—**

Where a separation agreement provides in specific and unambiguous terms that the wife should have the right to sole possession and occupancy of the home owned by the parties, other provisions of the agreement giving her the option to surrender possession upon certain contingencies and receive larger monthly payments from him, etc., does not render her right to sole possession and occupancy of the realty uncertain or indefinite or constitute her a mere tenant at will, the separation agreement being construed as a whole to effectuate the intention of the parties, and her right to possession is valid and enforceable between them and their assigns with notice.

**10. Tenants in Common § 4—**

An agreement between two tenants in common for the use and occupancy solely by one tenant is valid and enforceable as between them and their representatives and assigns with notice.

**11. Contracts § 12—**

An agreement will be construed as a whole and detached portions will be reconciled with the dominant intent as gathered from the entire instrument if possible, or if this cannot be done, will be rejected as repugnant to such intent.

**12. Same—**

An agreement must receive a reasonable interpretation in accordance with the intention of the parties at the time the agreement is executed, which intent is to be gathered from the language employed by them, taking into consideration the character of the contract and its objects and purposes.

**13. Same—**

Where a contract is susceptible to two constructions, one fair and reasonable and the other inequitable or under which it would operate as a snare, the courts will adopt that construction which makes the agreement rational and such as a prudent man would naturally execute.

APPEAL by plaintiffs from *Gwyn, J.*, 13 June 1960 Regular Civil Term, of GUILFORD — Greensboro Division.

Statutory action, by virtue of G.S. 41-10, to quiet title to realty against adverse claims, heard upon a demurrer to the complaint and the amendment thereto.

The complaint and the amendment thereto allege in substance these facts:

All the parties reside in Guilford County, and the realty, which is the subject matter of this action, is situate in the city of Greensboro in the same county. Truitt V. Cox and Merle D. Cox, the present de-

fendant, were married on 14 November 1943. Prior to May 1948 they occupied this realty as their home. In May 1948 they separated, and since that time have lived separate and apart. Since such separation Merle D. Cox has continuously been in possession of this realty.

On 8 June 1950 Truitt V. Cox instituted an action for absolute divorce against Merle D. Cox, pursuant to G.S. 50-6, on the ground that they had lived separate and apart for two years. Merle D. Cox filed answer admitting the separation for two years, averring that such separation was the fault of her husband, and set up a cross-action for divorce from bed and board, pursuant to G.S. 50-7, and prayed, pursuant to G.S. 50-14, that the court enter a decree awarding her alimony.

Prior to the entry of the judgment in this divorce action, there was pending and at issue on the civil issue docket of Guilford County Superior Court a civil action brought by Truitt V. Cox against Merle D. Cox, which was commenced on 12 April 1950, wherein Truitt V. Cox seeks to have title to the realty here vested in the parties as tenants by the entirety. Apparently, Merle D. Cox held title to the realty.

During the pendency of these two civil actions Truitt V. Cox and Merle D. Cox entered into a separation agreement on 19 January 1951, which was duly recorded on the same day, and is attached to the complaint as Exhibit A, and made a part thereof. It appears on pages 9-22 in the record. This contract and agreement sets forth in great detail the rights and obligations of the parties thereto as agreed upon by them. In consideration of the sum of one dollar paid to each of the parties, and in further consideration of the agreements, stipulations and covenants therein contained, the parties mutually stipulated, agreed and covenanted with each other in substance as follows, except when the exact words are quoted:

One. Merle D. Cox shall have the right to live separate and apart from her husband and free from his authority, as if she were unmarried, and to make contracts, engage in business, etc., as if she were unmarried. Truitt V. Cox shall have the same rights.

Two and Three. Merle D. Cox conveyed, released and quitclaimed unto her husband all rights, estate or property, including dower, in any property real or personal which her husband owned or may hereafter acquire. Truitt V. Cox did likewise in respect to any property owned or hereafter acquired by his wife, including all rights of curtesy.

Four. It is covenanted and agreed that this paragraph shall be construed and considered as a bill of sale from Truitt V. Cox to Merle D. Cox, and Truitt V. Cox hereby grants, conveys, assigns and de-

livers unto Merle D. Cox all furnishings and equipment in the dwelling house and garage apartment, which was formerly occupied by them as husband and wife and is the realty here, to be her sole, separate, absolute and unconditional property.

Five. The civil action now pending between them on the civil issue docket of Guilford Superior Court, wherein Truitt V. Cox seeks to have title to the realty here vested in the parties as tenants by the entirety, shall be terminated by a consent judgment of dismissal, and there shall be simultaneously with the execution of this separation agreement an exchange of deeds so as to constitute the parties tenants in common of the realty here.

Six. Truitt V. Cox covenants, contracts and agrees to keep up the payments due on the mortgage on the realty here until the mortgage debt is paid in full. In the event of Merle D. Cox's death before the mortgage debt is paid in full, Truitt V. Cox shall pay off immediately the mortgage debt so that her heirs may receive her one-half undivided interest in the realty free from encumbrance. In the event Truitt V. Cox dies before the mortgage debt is paid in full, his estate shall be liable for the balance due on the mortgage debt, and it shall constitute a lien upon his one-half undivided interest on the realty, so that Merle D. Cox's one-half undivided interest in the realty shall be free from encumbrance. Truitt V. Cox covenants and agrees to pay all *ad valorem* taxes and hazard insurance premiums on the realty so long as both of the parties hereto are living, to pay for major repairs and structural maintenance on the realty during Merle D. Cox's life, except where such replacement is made necessary by reason of damage caused by the negligence of Merle D. Cox, her tenants or lessees, and to be responsible for all necessary painting on the outside of the buildings on the realty. Merle D. Cox is to take care of ordinary maintenance, which is specified in detail. Provision in detail is made as to notice for major repairs, and how such repairs may be determined, if not agreed upon.

Seven. Merle D. Cox "shall have the right to sole possession and occupancy of the home and garage apartment on the High Point Road (the realty here) so long as she lives, except as provided below." While she has possesion of this property, she is to retain all rents if she rents any portion of it, and in addition Truitt V. Cox shall pay to her for her sole use and benefit $100.00 a month. In the event Merle D. Cox shall decide to enter a nursing home or change her place of residence, she shall have the option of retaining possession of the property and receiving the rentals therefrom, or she may surrender possession to Truitt V. Cox upon such terms with reference to rentals

therefrom as he may deem proper. In the event Merle D. Cox enters a nursing home or changes her place of residence, and elects to retain possesion of the property and receive for her use the rents therefrom, then Truitt V. Cox shall pay to her $50.00 a month instead of $100.00 a month. In the event Merle D. Cox elects to surrender the property to Truitt V. Cox for rental, then he shall pay to her $250.00 a month, so long as he retains possession of the property and receives the rentals therefrom. Provision is made that Merle D. Cox, if she surrenders possession of the property to Truitt V. Cox, shall have the option of repossessing said property if she so desires, and receiving the rentals therefrom, and if she does so, he shall pay her $100.00 a month so long as she actually lives on the property. However, if she lives elsewhere, and repossesses the property to obtain the rents for her use, then he shall pay her $50.00 a month during such time.

Eight. If Merle D. Cox exercises the option of surrendering possession of the High Point Road property to Truitt V. Cox for rental by him, then he shall have the option of taking over the property furnished or not as he may elect. However, if he elects to take over the property furnished, then she shall be entitled to remove therefrom her cedar chest, electric ironer and mangle, all silverware and china, handpainted pictures, radios and sewing machine. If he takes over the premises furnished, he shall be liable for all damage to the furniture and fixtures, ordinary wear and tear excepted, for the payment of all *ad valorem* taxes, and of insurance premiums on the furniture and fixtures, while the property is in his possession or that of his tenants. If he is in possession of the premises at Merle D. Cox's death, his right to possession of the furniture and fixtures shall terminate at once.

Nine. All payments required by this agreement to be made by Truitt V. Cox to Merle D. Cox shall be paid monthly in advance or on or before the 10th day of each month.

Ten. Truitt V. Cox so long as Merle D. Cox lives shall pay all her reasonable and necessary local doctor's and medical bills.

Eleven. Merle D. Cox agrees that her cross-action for divorce from bed and board alleged in her answer to Truitt V. Cox's complaint in his divorce action against her shall be dismissed, and she acknowledges that they separated in May 1948, and have not lived together since.

Twelve. At no time hereafter shall Merle D. Cox be entitled to receive from Truitt V. Cox any other support, maintenance or

thing, except as provided for her benefit in the separation agreement.

Thirteen. "It is the understanding, agreement and covenant, on the part of each of the parties hereto, that in the sale, transfer and conveyance of any property hereafter, whether real, personal or mixed, that it shall not be necessary, in order that the grantee obtain a good title, that either of the parties hereto shall sign and execute any deed, conveyance or bill of sale of the other party owning the same, it being the understanding, contract and covenant between the parties hereto that in all respects each of the parties hereto has forever discharged the property of the other from any and all claims, interests and easements on his or her part, and each of the parties hereto shall be in the same position as a free trader, as if the said parties were single and unmarried and as if the intermarriage between the parties hereto had never taken place. However, it is agreed and covenanted between the parties hereto, and each party for himself and herself covenants, contracts and agrees with the other and with each other, and all persons interested herein, that each shall and will at any times hereafter, make, execute and deliver any and all further assurances of title by joining in the execution of deeds or other instruments required by the purchaser, or which either of the parties hereto shall reasonably require in order to give effect to such instruments and to the covenants, provisions and agreements hereof."

Fourteen. It is mutually covenanted and agreed that all the covenants, stipulations, promises and agreements contained in the separation agreement shall bind the heirs, executors, administrators, personal representatives and assigns of the parties to the separation agreement.

Fifteen. Not pertinent on this appeal.

Truitt V. Cox and Merle D. Cox signed the separation agreement, and they acknowledged the signing and execution of the same before the clerk of the Superior Court of Guilford County. The clerk's certificate of the acknowledgment of the execution of the separation agreement by Merle D. Cox complies with the provisions of G.S. 52-12.

Simultaneously with the execution of the separation agreement Truitt V. Cox and Merle D. Cox executed and delivered to Mary L. Clapp a warranty deed conveying to her the realty here in fee simple. On 19 January 1951 the grantors acknowledged the execution of the deed before the clerk of the Superior Court of Guilford County, and the clerk's certificate as to the acknowledgment of the execution of the deed by Merle D. Cox complies with the provisions of G.S. 52-12. This deed is properly recorded. Simultaneously therewith Mary L.

Clapp, unmarried, executed a warranty deed conveying the realty here to Truitt V. Cox and Merle D. Cox in fee simple as tenants in common. This deed is properly recorded.

On 22 January 1951 at the January Term of court the divorce action of Truitt V. Cox against Merle D. Cox was tried, and the jury answered the issues in favor of the plaintiff. The judgment entered therein recites that Merle D. Cox's cross-action for divorce from bed and board was dismissed as of voluntary nonsuit for the reason that the parties entered into a separation agreement on 19 January 1951 in which Truitt V. Cox agreed to make certain payments for the use and benefit of Merle D. Cox as set forth in the separation agreement, which is duly recorded. The judgment then sets forth the issues and the jury's answers thereto, and decrees that Truitt V. Cox is granted an absolute divorce from Merle D. Cox. Then the following paragraph appears at the end of the judgment:

> "By consent of the plaintiff, IT IS FURTHER ORDERED AND DECREED that the plaintiff shall pay to the defendant each, every and all the payments specified in the aforesaid agreement dated January 19, 1951, as the same shall fall due and become payable from time to time, the defendant to have the right to move the court for attachment of the plaintiff as for civil contempt in the event the plaintiff shall fail to make any of said payments which are specified in said agreement, and IT IS FURTHER ORDERED AND ADJUDGED that said payments shall be and remain a lien upon the estate and property of the plaintiff; and that the costs of this action shall be paid by the plaintiff.
>
> This, the 22nd day of January, 1951.
>
> DAN K. MOORE,
> Judge Presiding.
>
> Plaintiff consents to the last paragraph of the foregoing decree:
>
> HARRY R. STANLEY
> NORMAN A. BOREN
> Attorneys for the Plaintiff."

Harry R. Stanley, one of the attorneys for Truitt V. Cox, is one of the plaintiffs in the instant case. Merle D. Cox did not give her consent to the divorce judgment, either in person or by her attorney. The divorce judgment was duly recorded.

On 22 January 1951 Truitt V. Cox, unmarried, executed and delivered to the plaintiffs in this action a warranty deed conveying to

them a fee simple title to a one-fourth undivided interest in the realty here, which is duly recorded.

On 16 August 1957 Truitt V. Cox, Merle D. Cox and the plaintiffs here as tenants in common of the realty here instituted an action in the Superior Court of Guilford County to correct an error in a call describing the realty here, and in the complaint therein, which was signed and verified by Merle D. Cox, it was stated that the plaintiffs here owned a one-fourth undivided interest in the realty here by a properly recorded deed from Truitt V. Cox. Merle D. Cox has had actual knowledge of the deed from Truitt V. Cox to plaintiffs at least since August 1957.

Merle D. Cox claims that the terms of the divorce judgment create a lien on plaintiffs' one-fourth undivided interest in the realty here to secure the payments by Truitt V. Cox to Merle D. Cox as provided in the separation agreement.

Merle D. Cox further claims that by the terms of Article 7 of the separation agreement she acquired the right of sole possession and occupancy of Truitt V. Cox's one-half undivided interest in the realty here so long as she lives, and this right is superior to plaintiffs' title.

That these adverse claims of Merle D. Cox in respect to plaintiffs' one-fourth undivided interest in the realty here burden plaintiffs in the full enjoyment of their realty, including the right to dispose of it at its fair market price. Merle D. Cox is now in possession of the one-half undivided interest of Truitt V. Cox in the realty here asserting her claims as above set forth, and excluding plaintiffs therefrom, and claiming that plaintiffs may not sell their interest in the realty here except that a purchaser take a conveyance subject to her claims.

The defendant demurred to the complaint and the amendment thereto for the reason that it does not state facts sufficient to constitute a cause of action in that it appears from the face thereof and the separation agreement attached thereto as an exhibit and made a part thereof, that there is no cloud on plaintiffs' title, and that defendant's interest in the realty here was created and made of record prior to any conveyance of a one-fourth undivided interest therein to plaintiffs, and that this was done with the knowledge and participation of the plaintiff Harry R. Stanley, attorney of record for Truitt V. Cox.

The court entered an order sustaining the demurrer, and as the plaintiffs announced they did not wish to amend the complaint because there were no further facts they could allege, the court dismissed the action and taxed plaintiffs with the costs.

From the judgment, plaintiffs appealed.

*Adam Younce for plaintiffs, appellants.*

*Smith, Moore, Smith, Schell & Hunter By: Charles E. Melvin, Jr., for defendant, appellee.*

PARKER, J. Plaintiffs state in their brief, "the validity of defendant's claim of lien is governed by the state of the law in 1951, and involves the validity of the court's decree as a consent judgment for a lien to secure alimony in the divorce action of that year. G.S. 50-11. . . . In 1951 a consent judgment for alimony entered in an action for divorce *a vinculo* was unenforceable as a decree of court."

*Ruffin, C. J.*, said for the Court in *Rogers v. Vines*, 28 N.C. 293: "Now, 'alimony' in its legal sense may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to a wife for her subsistence and livelihood during the period of their separation." This has been quoted with approval in *Hester v. Hester*, 239 N.C. 97, 79 S.E. 2d 248, and in *Taylor v. Taylor*, 93 N.C. 418.

The divorce judgment recites, "by consent of the plaintiff, IT IS FURTHER ORDERED AND DECREED that the plaintiff shall pay to the defendant each, every and all the payments specified in the aforesaid agreement dated January 19, 1951." The agreement referred to in the divorce judgment is an executed separation agreement and property settlement, and is not alimony or a contract for alimony. For a discussion of the clear distinction between the provisions and considerations for a property settlement and those for alimony see 17A Am. Jur., Divorce and Separation, § 883 *et seq.* In the absence of a provision in the executed separation agreement and property settlement here to the contrary, it is not avoided or nullified by the subsequent divorce of the parties. *Jenkins v. Jenkins*, 225 N.C. 681, 36 S.E. 2d 233, and cases cited; 42 C.J.S., Husband and Wife, p. 188. See *Jones v. Lewis*, 243 N.C. 259, 90 S.E. 2d 547, to the effect that an executed property settlement is not affected by a mere reconciliation and resumption of cohabitation.

Plaintiffs state further on in their brief, "plaintiffs do not attack the validity of the judgment as an approval of the contract for alimony. They attack only the lien of the judgment and seek to remove it as a cloud on title." Plaintiffs contend that the lien upon the estate and property of plaintiff to make the payments to Merle D. Cox set forth in the separation agreement and property settlement cannot be enforced as a contract for the reason that Merle D. Cox did not consent to the lien of the judgment, and they so allege.

The judgment recites, "by consent of the plaintiff . . . IT IS

FURTHER ORDERED AND ADJUDGED that said payments shall be and remain a lien upon the estate and property of the plaintiff." There appears on the face of the judgment the following: "Plaintiff consents to the last paragraph of the foregoing decree: Harry R. Stanley, Norman A. Boren, Attorneys for the Plaintiff."

It seems settled beyond question that liens can be created by agreement. 33 Am. Jur., Liens, p. 421. Generally, a lien can be created only by the owner, or by some person authorized by him. 33 Am. Jur., Liens, p. 423.

This Court said in *Winborne v. Guy*, 222 N.C. 128, 22 S.E. 2d 220: "The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, . . . , creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice. . . . Where there is an intention coupled with a power to create a charge on property, equity will enforce such charge against all except those having a superior claim. Such liens are simply a right of a special nature over the thing which constitutes a charge or encumbrance upon the thing itself." The first sentence quoted also appears in *Godwin v. Bank*, 145 N.C. 320, 59 S.E. 154, and is taken from what now appears in Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 4, p. 696, and also in earlier editions of Pomeroy. This language of Pomeroy has been approved by the Supreme Court of the United States in *Walker v. Brown*, 165 U.S. 654, 41 L. Ed. 865, and in *United States v. Butterworth — Judson Corp.*, 267 U.S. 387, 69 L. Ed. 672. The doctrine clearly indicates an application of the maxim, equity regards as done that which ought to be done.

"In equity, any agreement in writing, however informal, made by the owner of land, upon a valid consideration, by which an intention is shown that the land shall be security for the payment of money by him, creates an equitable lien upon the land." Tiffany, Real Property, 3rd Ed., Vol. 5, § 1563, p. 659.

"The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose rather than at the form; and if the intent appear to give, or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal

things intended to be given or charged can be sufficiently identified, the lien follows. Among the kinds of agreement from which liens have been held to arise, the following are some important examples: Executory agreements which do not convey or transfer any legal estate in the property, but which stipulate that the property shall be security, or which pledge it, for the performance of an obligation." Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 4, § 1237, pp. 702-703.

This is said in 33 Am. Jur., Liens, p. 428: "An equitable lien on particular property, real or personal, enforceable against the owner, his heirs, personal representatives, or transferees, except bona fide purchasers for value, may be created by an express agreement by such owner that such property shall stand or be held as security for the payment of a specified debt or other obligation."

A good example of an equitable lien is found in *Walker v. Brown, supra.* In that case, one T. E. Brown addressed to Walker & Co. a letter advising them that a loan of bonds, to the face value of fifteen thousand dollars, previously made by him to one Lloyd, for the use of the latter's firm, was "with the understanding that any indebtedness that they may be owing you at any time, shall be paid before the return to me of these bonds, or the value thereof, and that these bonds or the value thereof are at the risk of the business of Lloyd & Co., so far as any claim you may have against said Lloyd & Co. is concerned." Upon the faith of this letter Walker & Co. made sales to Lloyd & Co., and the latter firm subsequently failed. Shortly after the letter was written, and before the failure, Brown induced Lloyd & Co. to return to him the bonds, which he thereupon settled upon his wife. On a bill filed by Walker & Co., the Supreme Court of the United States held that the letter gave them an equitable lien on the bonds which could be asserted as against Brown's wife, who was a mere volunteer.

Webster, New International Dictionary, 2nd Ed., defines the word consent: "4. Law. Capable, deliberate, and voluntary assent or agreement to, or concurrence in, some act or purpose, implying physical and mental power and free action." Black's Law Dictionary, 4th Ed., defines the term consent: "A concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith."

The divorce judgment recites that the lien was created by consent of the plaintiff, and his consent is shown by the signature of his attorneys to the judgment. Considering the consent part of the divorce judgment to ascertain the intent of the parties, it seems manifest that the consent of plaintiff to the provision creating a lien to secure

the payments specified in the separation agreement and property settlement between him and his wife was a concurrence of wills and agreement and contract between him and Merle D. Cox. Certainly, it was not an agreement or contract with anyone else. This Court said in *Coppersmith v. Ins. Co.*, 222 N.C. 14, 21 S.E. 2d 838: "The signing of a written contract is not necessarily essential to its validity." The fact that Merle D. Cox by herself or by her attorney did not sign the consent part of the divorce judgment does not affect its validity as a consent part of the judgment. *LaLonde v. Hubbard*, 202 N.C. 771, 164 S.E. 359.

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction. *In re Will of Pendergrass*, 251 N.C. 737, 112 S.E. 2d 562. It depends for its validity upon the consent of both parties, without which it is void. *Ledford v. Ledford*, 229 N.C. 373, 49 S.E. 2d 794.

The attorneys for plaintiff, one of whom is a plaintiff in the instant case, having signed the consent part of the divorce judgment creating the lien plaintiffs assail, are presumed to have acted in good faith, and to have had the necessary authority from their client, and not to have betrayed his confidence or to have sacrificed his rights. *Gardiner v. May*, 172 N.C. 192, 89 S.E. 955. No lack of authority on their part is averred in plaintiffs' complaint. The consent of Merle D. Cox to the divorce part of the divorce judgment creating the lien in effect is alleged in the complaint as follows: "Merle D. Cox claims that the terms of the divorce judgment, as recorded . . . , creates a lien on plaintiffs' one-fourth undivided interest in the land and that such lien is security for the payment of alimony provided for her in said divorce decree and the separation agreement attached hereto."

The consent part of the divorce judgment creating the lien was not predicated upon the pleadings in the divorce action, but the court had jurisdiction and the parties had power to consent, which they did. That makes the consent part of the judgment creating the lien conclusive and enforceable. *Keen v. Parker*, 217 N.C. 378, 8 S.E. 2d 209.

It is true that the complaint alleges, Merle D. Cox did not give her consent to the divorce judgment, either in person or by her attorney. However, the divorce decree is alleged in the complaint, and the court will look to its provisions rather than the general allegations in the complaint or the conclusions of the pleader to ascertain as to whether the consent part of the divorce judgment is a consent judgment. *Yeager v. Dobbins*, 252 N.C. 824, 114 S.E. 2d 820.

There is no merit in plaintiffs' contention that the mutual cove-

nants in Article 13 of the separation agreement, copied verbatim in the statement of facts above, operate to discharge plaintiffs' land from the lien created by consent of the parties in the divorce judgment, for the reason, *inter alia*, that the new contract and agreement set forth in the divorce decree creating such lien by consent was entered into after the separation agreement was executed, and before rights of third parties had intervened. It is manifest that this was the clear intention of the parties. "A contract may be discharged by the substitution of a new contract, and this results: . . . ; (3) where new terms are agreed upon, in which case a new contract is formed, consisting of the new terms and of the terms of the old contract which are consistent with them." *Redding v. Vogt,* 140 N.C. 562, 53 S.E. 337, 6 Anno. Cas. 312.

The consent part of the divorce judgment creating the lien assailed shows a specific intention to create such lien, a description and identification of the property of plaintiff intended to be charged so it can be identified, which property is distinctly appropriated or dedicated to or as security for the payment of the amounts specified in the separation agreement and property settlement entered into by and between Truitt V. Cox and Merle D. Cox, his wife, and a valid consideration. The property sold by Truitt V. Cox to plaintiffs had been acquired by him three days before the trial of the divorce action and the rendition of the judgment therein. Whether the lien provided for by consent in the divorce judgment covers property subsequently acquired by Truitt V. Cox is not before us for decision, and upon that we express no opinion.

In brief, the allegations of the complaint affimatively show the existence of a valid equitable lien in favor of Merle D. Cox upon the property plaintiffs purchased with notice from Truitt V. Cox, and such lien is not a cloud upon their title.

Plaintiffs allege that Merle D. Cox claims that by the terms of Article 7 of the separation agreement she acquired from Truitt V. Cox. who was then the owner of a one-half undivided interest in the land, the right of sole possession and occupancy of his one-half interest so long as she lives and that such claim is superior to their title and constitutes a cloud upon their title. In their brief plaintiffs state: "Plaintiffs make no contention that the separation agreement is unenforceable as a contract." Plaintiffs state further in their brief: they "do not seek relief in the complaint for possession of the premises. They seek only to quiet her adverse claims while she is in possession."

Plaintiffs' contention is: "(A) Articles 7 and 8 of the agreement

create a tenancy at will, terminable at the pleasure of the defendant. (B.) And Article 13 of the agreement confers upon the landlord a power to terminate the tenancy by a sale of the premises." Plaintiffs further contend: "It is a contract by one tenant in common with another for the use and occupancy of the other's one-half undivided interest in the land. The relationship of landlord and tenant is created. The defendant is the tenant and Truitt V. Cox is the landlord."

The separation agreement and property settlement, Article 7, provides that Merle D. Cox "shall have the right to sole possession and occupancy of the home and garage apartment on the High Point Road so long as she lives, except as provided below." Such an agreement between tenants in common is valid and enforceable, and binding on them, their heirs, personal representatives, and assigns with notice. *Harper v. Rivenbark,* 165 N.C. 180, 80 S.E. 1057; 86 C.J.S., Tenancy in Common, § 25, p. 384, and § 71; Powell on Real Property, 1960 Cumulative Supplement, Vol. 4, p. 603.

The provisions of the instrument set forth in Article 7 after the words "except as provided below" to the effect that if Merle D. Cox enters a nursing home or changes her place of residence, she shall have the option of either retaining possession of the property and receiving the rentals therefrom, or of surrendering possession of it to Truitt V. Cox for rental by him or his agent, and if she does surrender such possession Truitt V. Cox shall pay her $250.00 a month so long as he retains possesion of the property and receives the rents, and that Merle D. Cox can repossess the property and receive the rentals and then Truitt V. Cox shall pay her only $100.00 a month if she lives on the premises and $50.00 a month if she does not live on the premises but collects the rent, and the provisions of Article 8 of the agreement do not, in our opinion, make her right to the sole possession and occupancy of the High Point Road property so long as she lives uncertain and indefinite, do not create an estate merely terminable at her will, and do not create as between them the relationship of landlord and tenant. See *Stancel v. Calvert,* 60 N.C. 104. Considering Articles 7 and 8 of the separation agreement and property settlement, it is our opinion that it was the clear intent of the parties that Merle D. Cox should have the rights specifically set forth in those Articles so long as she lives, and that such intent is expressed in the instrument in plain and unmistakable words. The cases relied on by plaintiffs are distinguishable.

The separation agreement and property settlement must be read as a whole, and in doing so Article 13 thereof must be considered in

context with the rest of it, and not as a detached fragment, for the real intent of the parties as expressed in the instrument is the dominant object. *Electric Supply Co. v. Burgess,* 223 N.C. 97, 25 S.E. 2d 390. "The heart of a contract is the intention of the parties." *Jones v. Realty Co.,* 226 N.C. 303, 37 S.E. 2d 906.

Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, gathered from the language employed by them, and in ascertaining that intention we are to consider the character of the contract and its objects and purpose. *First National Bank v. Maryland Casualty Co.,* 142 Md. 454, 121 A. 379, 30 A.L.R. 618.

*Davis v. Frazier,* 150 N.C. 447, 64 S.E. 200, quotes from Bishop on Contracts, § 387, as follows: " 'If the main body of the writing is followed by a proviso wholly repugnant thereto, it must necessarily be rejected, because otherwise the entire contract will be rendered null; but where it can be construed to qualify the main provisions, so that all may stand together, it will be retained.' " This is restated in summary in *Electric Supply Co. v. Burgess, supra.*

"Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred." 12 Am. Jur., Contracts, p. 792.

*Utely v. Donaldson,* 94 U.S. 29, 24 L. Ed. 54, states: " 'Every intendment is to be made against the construction of a contract under which it would operate as a snare. *Hoffman v. Aetna Ins. Co.,* 32 N.Y. 405.' "

Truitt V. Cox and wife, Merle D. Cox, prior to their separation had lived in the home on the High Point Road. After their separation in May 1948 he instituted an action against her seeking to have title to this property vested in him and his wife as tenants by the entirety. This action was pending for trial when the separation agreement and property settlement was entered into between them. Article 5 of the separation agreement and property settlement between them entered into on 19 January 1951 and duly recorded, provides it has been covenanted, contracted and agreed that this pending action shall be terminated by a consent judgment of dismissal, and there shall be simultaneously with the execution of this agreement an exchange of deeds so as to constitute Truitt V. Cox and Merle D. Cox tenants in common of this property. Apparently, title to the property

was vested in Merle D. Cox, which accounts for the action and this provision of the instrument. The complaint alleges the simultaneous consummation of this part of the separation agreement and property settlement by deeds as specified in the instrument.

Article 13 of the separation agreement and property settlement following the main body of the instrument providing in effect that Truitt V. Cox can sell, transfer and convey his one-half undivided interest in this property, and it shall not be necessary in order that his grantee obtain a good title that Merle D. Cox shall sign the deed of conveyance, is wholly repugnant to Article 7 of the instrument. It is also wholly repugnant to these provisions of Article 6 of the separation agreement and property settlement: "The party of the first part (Truitt V. Cox) covenants, contracts and agrees to pay the mortgage loan payments, both principal and interest, now remaining unpaid upon the mortgage loan which encumbers the High Point Road property until the mortgage debt is paid in full. . . . In the event of the death of the party of the first part before the mortgage is paid in full, his estate shall be and become liable for the payment of the balance then due on said mortgage and the entire amount of said debt, both principal and interest, remaining unpaid shall be a charge and lien upon his one-half in said property so that the one-half interest of the party of the second part (Merle D. Cox) shall be free and clear of all encumbrances." If Article 13 is construed as plaintiffs contend, it would permit Truitt V. Cox to sell and convey one-half or the whole of his undivided interest in the property, and thereby in spite of Article 7 deprive Merle D. Cox of her right of sole occupancy and possession of the property so long as she lives, or of her right if she surrenders the possession to Truitt V. Cox to receive from him $250.00 a month so long as he receives the rentals therefrom, and of her option to repossess it, and receive the rents, and would also deprive her of her rights under Article 6 of the separation agreement and property settlement as quoted above. Under such a construction as contended for by plaintiffs, the instrument would be made inequitable and a snare to Merle D. Cox. Article 13 of the instrument will be rejected insofar as it purports to provide that Truitt V. Cox can sell and transfer his one-half undivided interest or any part thereof, in the home place on the High Point Road owned by himself and Merle D. Cox as tenants in common without the signature and approval of Merle D. Cox, and thereby deprive her of her rights so long as she lives as specified in Article 7 of the separation agreement and property settlement, and of her rights under Article 6 of the same instrument.

Plaintiffs' complaint affirmatively shows that Merle D. Cox's claim of right to sole occupancy and possession of the property on the High Point Road formerly owned by Truitt V. Cox and herself as tenants in common so long as she lives is not a cloud on plaintiffs' title, who purchased with constructive notice, if not actual notice, of her rights under the recorded separation agreement and property settlement.

The judgment below sustaining the demurrer is affirmed, and the part of the judgment dismissing the action is affirmed, as plaintiffs stated to the court that they did not wish to amend their complaint because there were no other facts they could allege.

Affirmed.

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IN RE: ANNEXATION ORDINANCE NO. 866, ADOPTED BY CITY OF RALEIGH, N. C., MARCH 31, 1960 — AREA #1.
IN RE: ANNEXATION ORDINANCE NO. 867, ADOPTED BY CITY OF RALEIGH, N. C., MARCH 31, 1960 — AREA #2.
IN RE: ANNEXATION ORDINANCE NO. 868, ADOPTED BY CITY OF RALEIGH, N. C., MARCH 31, 1960 — AREA #3.
IN RE: ANNEXATION ORDINANCE NO. 869, ADOPTED BY CITY OF RALEIGH, N. C., MARCH 31, 1960 — AREA #4.
IN RE: ANNEXATION ORDINANCE NO. 870, ADOPTED BY CITY OF RALEIGH, N. C., MARCH 31, 1960 — AREA #5.

(Filed 20 January, 1961.)

**1. Appeal and Error § 49—**

The findings of fact of the trial court, upon review of municipal annexation ordinances, that the statutory procedure had been substantially and sufficiently complied with, are conclusive and binding on appeal when supported by competent evidence. G.S. 160-453.13 *et seq.*

**2. Municipal Corporations § 2: Constitutional Law § 8—**

The constitutional restriction against delegation of power by the General Assembly to make law does not apply to municipalities or counties, and the General Assembly has the power, unhampered by constitutional restrictions, to provide statutory procedure for the annexation of territory by municipalities.

**3. Same—**

G.S. 160-453.13 *et seq.* declares the policy of the State in regard to the annexation of territory by municipalities having a population of five thousand or more and provides in detail the procedure, guiding standards and requirements of annexation under the statute, and delegates to the governing boards of such municipalities only the discretionary right to employ the procedure outlined in the statute provided that the

requirements and guiding standards of the Act are complied with, and therefore the statute does not contravene either Article I, section 8, or Article II, section 1, of the Constitution of North Carolina.

**4. Municipal Corporations § 2—**

Where the governing body of a municipality in good faith obtains all of the information required by the annexation statute with respect to the character of the area or areas to be annexed, the density of the residential population therein, the boundaries thereof and the percentage of such boundaries which are contiguous to the municipality's boundaries, and provides or makes provision to extend all governmental services to the annexed areas, the compliance with the statute is substantial and real and cannot be considered a mere ritual of conformity.

**5. Constitutional Law § 24—**

The fact that a statute providing for the annexation of territory by municipalities fails to provide for trial by jury in cases arising under the Act does not render the Act unconstitutional, the right to trial by jury in such instances not being required. Constitution of North Carolina, Article I, section 19.

**6. Constitutional Law § 24—**

The constitutional right to trial by jury applies only to cases in which the prerogative existed at common law or was secured by statute at the time the Constitution was adopted.

**7. Constitutional Law § 20: Statutes § 2—**

A statute is a public law notwithstanding that it is not applicable to all parts of the State, it being sufficient to constitute it a public law if it applies equally to all persons within the territorial limits described in the Act.

**8. Same**

G.S. 160-453.13 *et seq.* is a public law, notwithstanding twelve counties of the State are excluded from its provisions, and the statute does not violate Article VIII, section 4, of the State Constitution, since that constitutional limitation does not preclude the General Assembly from conferring particular powers on municipalities by special acts and since Article VIII, section 1, of the State Constitution does not refer to public or quasi-public corporations acting as governmental agencies.

**9. Constitutional Law § 24: Municipal Corporations § 2—**

The fact that the resident of territory annexed by a municipality are brought within the city without their consent and their property made subject to future city taxes does not deprive such residents of their liberty or property without due process of law. Article 1, section 17, of the Constitution of North Carolina; Fourteenth Amendment to the Constitution of the United States.

APPEAL by petitioners from *McKinnon, J.*, 1 August Civil Term, 1960, of WAKE.

The General Assembly enacted Chapter 1009 of the 1959 Session

Laws of North Carolina, now codified as General Statutes 160-453.13 through 160-453.24, providing a new method for the extension of the corporate limits of municipalities having populations of five thousand or more. The Act is a meticulously drafted statute, providing for the annexation of areas by such municipalities, including prerequisites to annexation, description of the character of the area to be annexed, the required density of resident population, the procedure for annexation, and a provision for judicial review.

On or about 1 February 1960 the governing body of the City of Raleigh, pursuant to authority contained in G.S. 160-453.17, adopted a series of five Resolutions of Intent to consider the annexation of five defined areas, numbered 1, 2, 3, 4 and 5 respectively, as set out in the respective resolutions, and fixed the 7th day of March 1960, at 2:15 p.m., in the City Courtroom in the City Hall of the City of Raleigh for a public hearing in connection with the proposed annexations, as required by G.S. 160-453.17 (a) (b).

The annexation report required by G.S. 160-453.15 was made public on 15 February 1960 and contained the required detailed information as to each of the five areas proposed to be annexed.

The public hearing was held as scheduled and the annexation report was explained in detail at the hearing by a representative of the City of Raleigh as required by G.S. 160-453.17 (d), after which all persons present and desiring to be heard, according to the minutes of the City Council of the City of Raleigh, were heard.

On 31 March 1960 the City Council of the City of Raleigh adopted Annexation Ordinances Nos. 866, 867, 868, 869 and 870, annexing areas Nos. 1, 2, 3, 4 and 5 respectively as set out by metes and bounds in the respective Annexation Ordinances, and providing that the annexations should be effective from the date of their adoption.

Residents in each of the five annexed areas filed a petition for review, as authorized by G. S. 160-453.18, alleging noncompliance on the part of the City of Raleigh with the statutory requirements of Chapter 1009 of the Session Laws of 1959, and attacking the constitutionality of the Act on the grounds that it violated Article I, sections 8, 17 and 19, Article II, section 1, and Article VIII, section 4 of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. These five petitions were heard and considered together in the Superior Court by the trial judge without a jury as provided in G.S. 160-453.18 (d) and (f).

The findings of fact, the conclusions of law and the judgments of the court in each of the five proceedings were in every material aspect as hereinafter set out with respect to area No. 1. The num-

bering of paragraphs and the exceptions set out in the respective petitions vary in a few instances but there is no variation of any factual significance in the contents of the respective petitions. The findings of fact and the conclusions of law are set out in each judgment involving the respective areas; the exceptions to the findings of fact and the respective judgments are identical in purpose but the numbering of the exceptions differ in each of the respective proceedings.

"This matter coming on to be heard, without the intervention of a jury, before the undersigned Judge of Superior Court at the August First Regular 1960 Civil Term of Superior Court of Wake County was, by consent of the attorneys for the parties, consolidated for trial upon appeals from adoption by the City of Raleigh of annexation ordinances Nos. 866, 867, 868, 869, and 870, involving similar annexations.

"At the conclusion of the evidence offered by both petitioners and respondent, it was agreed by the parties that the court could render judgment out of term and out of the district.

"The questions of fact raised by the pleadings are as follows:

"Has the City of Raleigh failed to provide the services enumerated below or to make plans for the extension of utilities to the annexed area in conformity with Part 3, Article 36, Chapter 160, of the General Statutes of North Carolina, in any of the following respects?

"(a) Police protection

(b) Park and recreational facilities

(c) Street lighting

(d) Water main extensions

(e) Sewer main extensions.

"Or does the population of the annexed area fail to meet the requirements of G.S. 160-453.16 and G.S. 160-453.22?

"The only questions of law raised by the pleadings are as follows:

"Is Chapter 1009, Session Laws of North Carolina 1959, invalid as violative of any of the following constitutional provisions?

"(a) Article I, section 8, and Article II, section 1, of the North Carolina Constitution in that it unlawfully delegates legislative authority.

"(b) Article I, section 17, of the North Carolina Constitution and the 14th Amendment to the U. S. Constitution as depriving petitioners of their liberty and property without due process or against the law of the land.

"(c) Article VIII, section 4, of the North Carolina Constitution because twelve counties were excluded from the Act.

"(d) Article I, section 19, of the North Carolina Constitution by denying trial by jury.

"The court having given due consideration to the contentions of the parties, the pleadings, the record and oral evidence, and the argument of counsel, finds the following facts and makes the following conclusions of law: • • •

"1. That on March 31, 1960, the City of Raleigh annexed five separate contiguous areas described in annexation ordinances Nos. 866, 867, 868, 869 and 870, and the annexation report hereinafter referred to.

"2. That the owners of land in the annexed area filed, within the time required by law, petitions for review of the annexation ordinances and the proceedings leading up to their adoption in the Superior Court of Wake County.

"3. That the City of Raleigh, within the time required by law, transmitted to the Superior Court a transcript of the portion of the City's journal or minute book in which the procedure for annexation had been set out and a copy of the report setting forth the plans for extending services to the annexed area as required by G.S. 160-453.18 (c). The report of the proceedings so certified was considered by the court as a part of the record.

"4. That the petitioners concede and the court finds that the questions raised by paragraph 4 and exceptions 3(b), 5(a) and 6(a) of paragraph 7 of the petition for review have been determined adversely to petitioners by decisions of the Supreme Court in *EAKLEY v. CITY OF RALEIGH*, 252 N.C. 683, and *UPCHURCH v. CITY OF RALEIGH*, 252 N.C. 676.

"5. That there is no exception and no evidence tending to show:

"(a) That the respondent failed to make plans and prepare and adopt a report as required by G.S. 160-453.15; that the report setting forth plans of the City of Raleigh for extending to the area to be annexed the major municipal services performed within the City at the time of annexation did not provide for extending fire protection, garbage collection and street maintenance service to the area to be annexed substantially on the same basis and in the same manner as such services were provided within the rest of the municipality prior to annexation.

"(b) That the entire area did not meet the standards of G.S. 160-453.16 (b).

"(c) That the area which did not meet the requirements of G.S. 160-453.16 (c) did not meet the standards of G.S. 160-453.16 (d).

"(d) That the procedure followed by the City did not in form com-

ply with the provisions of the law, particularly G.S. 160-453.17, except that petitioners did raise a question as to the openness and fairness of the public hearing held to consider annexation in conformity with G.S. 160-453.17.

"6. With respect to the specific exceptions set out in paragraph 7, the court finds:

"(a) *Exceptions 1 and 7.* That the evidence does not show that annexation ordinance No. 866 is not in promotion of sound urban development or that the area annexed is not being intensively used for residential, commercial, industrial, institutional and governmental purposes, or that the area is not undergoing such development; that the evidence does not show that the respondent, in seeking annexation, was not motivated by promotion of sound urban development or that its plans and actions were contrary to the purposes and authority granted by the statute.

"(b) *Exception No. 2.* That the evidence does not show the provisions of the annexation report setting forth plans for extending police protection to the annexed area do not comply with the provisions of G.S. 160-453.15 (3). The court finds as a fact that the provisions of the report for extending police protection do sufficiently comply with the statute.

"(c) *Exception No. 3.* The court finds that the report setting forth the plans for providing recreational facilities to the annexed area is adequate to provide such facilities on substantially the same basis and in the same manner as such services were provided within the rest of the municipality prior to annexation.

"(d) *Exception No. 4.* The court finds that the report setting forth the plans for providing street lighting for the annexed area is adequate to provide such facilities on substantially the same basis and in the same manner as such facilities were provided within the rest of the municipality prior to annexation.

"(e) *Exceptions Nos. 5 and 6.* That the plan in the report for the extension of major water trunk mains and sewer outfall lines into the area annexed met the requirements of G.S. 160-453.15 (3) (b) (c), so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service according to the policies in effect in the City for extending water and sewer lines to individual lots or subdivisions. While the plan in the report does not set forth a timetable, it does provide to let contracts for the construction of the required water and sewer mains within twelve months from the date of annexation, and sufficiently complies with the statute. That the policy of the

respondent in effect in the City for extending water and sewer lines to individual lots and subdivisions is contained in Resolution No. 832 adopted June 1, 1959; Resolution No. 861 adopted July 6, 1959; and the plan contained in the report sufficiently provides for extending the same policy to the annexed area.

"(f) *Exception No. 8, Amended Petition.* That the petitioners have failed to show that the area did not qualify under G.S. 160-453.16 (c) or (d) in the manner set forth in the report, and the court finds as a fact that the area did so qualify.

"7. That the public hearing to consider annexation held on March 7, 1960, was held after publication of notice as required by statute; that explanation was made of the annexation report in detail; that thereafter all persons present and desiring to be heard were heard; that the conduct of the meeting and the actions of the Mayor and City Council were not contrary to or in violation of the requirements of the statute; and that the conduct of the public hearing sufficiently complied with the statue.

"8. That none of the petitioners have shown that they will suffer material injury by reason of the failure of the respondent to comply with the procedure set forth in the statute or to meet the requirements set forth in G.S. 160-453.16 as applied to the property of petitioners or any of them.

"9. That the petitioners have failed to show that the statutory procedure was not followed, as required by G.S. 160-453.17 and other sections of the annexation statute, and the court finds that such procedure was complied with.

"10. That the petitioners have failed to show that the provisions of G.S. 160-453.15 were not met and the court finds that such provisions were met.

"11. That the petitioners have failed to show that the provisions of G.S. 160-453.16 have not been met and the court finds that such provisions were met.

"That petitioners have failed to show material injury to themselves or their property as a result of the annexation of the area designated as Area No. 1.

"That Chapter 1009, Session Laws of North Carolina 1959, is not unconstitutional in its application to petitioners and their property as violative of any of the provisions of the North Carolina Constitution or the United States Constitution referred to in the petition.

"Upon the foregoing findings of fact and conclusions of law, it is adjudged by the court that the action of the City Council of the City of Raleigh in the adoption of annexation (ordinance) No.

866 is affirmed without change. This judgment is rendered at chambers in the City of Raleigh, August 25, 1960, in the presence of the attorneys for petitioners and respondent."

The petitioners in each of the five proceedings excepted to subsection (d) paragraph 5; subsections (a) (b) (c) (d) (e) and (f) of paragraph 6; and to paragraphs 7, 8, 9, 10 and 11 of the findings of fact; to the conclusions of law and to the judgments, and appeal to this Court, assigning error.

*Emanuel & Emanuel for petitioner appellants.*

*Paul F. Smith; Manning, Fulton & Skinner; William Joslin for respondent appellee.*

DENNY, J. The record in these five proceedings, consolidated for hearing in the court below, contains 115 assignments of error based on 148 exceptions. Obviously, it is neither practical nor necessary to discuss each of these assignments *seriatim*.

We have carefully examined the pleadings, the documentary and oral evidence introduced in the hearing below, and in our opinion each finding of fact to which the petitioners have excepted is supported by competent evidence, and we so hold. Consequently, such findings have the force and effect of a jury verdict upon the issues involved and they are conclusive on appeal. *Goldsboro v. R.R.*, 246 N.C. 101, 97 S.E. 2d 486; *St. George v. Hanson*, 239 N.C. 259, 78 S.E. 2d 885; *Trust Co. v. Finance Corp.*, 238 N.C. 478, 78 S.E. 2d 327; *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351; *Poole v. Gentry*, 229 N.C. 266, 49 S.E. 2d 464. Therefore, it is only necessary for us to consider the legal questions raised by the pleadings, challenging the constitutionality of Chapter 1009 of the 1959 Session Laws of North Carolina.

The appellants contend that the Act under consideration is unconstitutional; that it is contrary to and in violation of Article I, section 8, and Article II, section 1 of the Constitution of North Carolina in that it constitutes an unlawful delegation of legislative power to a municipal governing body and vests such body with the discretion to act or not to act as it may deem expedient. They further contend that such discretion cannot be delegated to a subordinate agency of the State, citing *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310, and quoting therefrom as follows: "It is a settled principle of fundamental law, inherent in our constitutional separation of government into three departments and the assignment of the lawmaking function exclusively to the legislative

department, that (*except when authorized by the constitution, as is the case in reference to certain lawmaking powers conferred upon municipal corporations usually relating to matters of local self-government,* Const., Articles VII, VIII, and IX; *Provision Company v. Daves,* 190 N.C. 7, 128 S.E. 593), the Legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body. • • • Here we pause to note the distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, *and the conferring of authority or discretion as to its execution.* The first may not be done, whereas the latter, *if adequate guiding standards are laid down, is permissible under certain circumstances.* 11 Am. Jur., Constitutional Law, Sec. 234. See also *Pue v. Hood,* Comr. of Banks, 222 N.C. 310, 22 S.E. 2d 896." (Emphasis added.)

This Court further said in the above case: " • • • (T)he legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. This principle is implicit in the general rule prohibiting the delegation of legislative power, and is affirmed by numerous authoritative decisions of this Court. *Motsinger v. Perryman, supra* (218 N.C. 15, 20, 9 S.E. 2d 511); *Provision Company v. Daves, supra; S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; *S. v. Curtis, supra* (230 N.C. 169, 52 S.E. 2d 364). See also Annotation, 79 L. Ed. 474, 487.

"In short, while the Legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion, 11 Am. Jur., Constitutional Law, Sec. 234."

The statute under attack in the foregoing case was held unconstitutional because the General Assembly had not determined the policy of the State with respect to the creation of a municipal corporation to be created by the Municipal Board of Controls for the purpose of constructing and operating a toll road and a toll bridge, and the Legislature had further failed to lay down adequate standards for the guidance of such agency when created.

The Act now under consideration is not defective in either respect. The policy of the State with respect to the annexation of additional

territory by a municipality having a population of 5,000 or more, is set forth in Part 3 of the Act, G.S. 160-453.13, as follows: "It is hereby declared as a matter of State policy:

"(1) That sound urban development is essential to the continued economic development of North Carolina;

"(2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development;

"(3) That municipal boundaries should be extended in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for the public health, safety and welfare;

"(4) That new urban development in and around municipalities having a population of five thousand (5,000) or more persons is more scattered than in and around smaller municipalities, and that such larger municipalities have greater difficulty in expanding municipal utility systems and other service facilities to serve such scattered development, so that the legislative standards governing annexation by larger municipalities must take these facts into account if the obectives set forth in this section are to be attained;

"(5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality as soon as possible following annexation."

With respect to the completeness of the Act now under consideration, the appellants quote from 11 Am. Jur., Constitutional Law, section 215, page 924, as follows: "One of the most important tests as to whether particular laws amount to an invalid delegation of legislative power is found in the completeness of the statute as it appears when it leaves the hands of the legislature. The generally recognized principle is that a law must be so complete in all its terms and provisions when it leaves the legislative branch of the government that nothing is left to the judgment of the electors or other appointee or delegate of the legislature. * * * The law must be perfect, final and decisive in all of its parts, and the discretion which is given must relate only to execution."

The petitioners then say in their brief: "We are fully confident that the drafters of Chapter 1009, Session Laws of 1959, and the respondent in this case, were aware of the principle enunciated above. *Their workmanship and execution give every appearance of con-*

*formity with the requirements.* (Emphasis added.) We are equally confident, however, that in their zeal and determination to place into the hands of the municipalities, the unhampered power of annexation, they did violence to the substance and essence of these principles, leaving a mere shell or ritual of conformity therewith."

It is provided in this new method of annexation that the governing board of any municipality having a population of 5,000 or more, may extend its corporate limits under the procedure set forth in the Act. G.S. 160-453.14. Therefore, it is clear that by the enactment of Chapter 1009 of the 1959 Session Laws of North Carolina, the General Assembly did not delegate to the municipalities of the State having a population of 5,000 or more, any discretion with respect to the provisions of the law. The guiding standards and requirements of the Act are set out in great detail. The only discretion given to the governing boards of such municipalities is the permissive or discretionary right to use this new method of annexation provided such boards conform to the procedure and meet the requirements set out in the Act as a condition precedent to the right to annex.

It certainly cannot be considered a mere shell or ritual of conformity when the governing body of a municipality, in good faith, obtains all the information required by the Act, with respect to the character of the area or areas to be annexed, the density of the resident population therein, the extreme boundaries thereof, and the percentage of such boundaries which are adjacent or contiguous to the municipality's boundaries, which must be at least one-eighth; and further provides or makes provision to extend all the governmental services to the newly annexed area or areas, comparable to the services provided for the residents within the city prior to annexation of the new area or areas.

The General Assembly of North Carolina is vested with complete authority over municipalities, except in certain specified matters which are not related to this litigation. *Sanitary District v. Lenoir,* 249 N.C. 96, 105 S.E. 2d 411, and the authorities cited therein.

In *Lutterloh v. Fayetteville,* 149 N.C. 65, 62 S.E. 758, this Court said: "We have held in common with all the courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion. *Dorsey v. Henderson,* 148 N.C. 423, and *Perry v. Comrs., ibid.,* 521; *Manly v. Raleigh,* 57 N.C. 370.

"Consequently, it follows that the enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety or justice we have naught to do.

"It has, therefore, been held that an act of annexation is valid which authorized the annexation of territory, *without the consent of its inhabitants,* to a municipal corporation, having a large unprovided for indebtedness, for the payment of which property included within the territory annexed became subject to taxation." *Matthews v. Blowing Rock,* 207 N.C. 450, 177 S.E. 429; *Dunn v. Tew,* 219 N.C. 286, 13 S.E. 2d 536.

In *Highlands v. Hickory,* 202 N.C. 167, 162 S.E. 471, the General Assembly had enacted Chapter 41, Private Laws 1931, an Act entitled, "An act for the extension of the corporate limits of the city of Hickory, for an election in furtherance thereof, for the repeal of the charters of other towns within the extended limits, and for other purposes." The validity of the Act was challenged on the ground that the General Assembly was without power, because of constitutional limitations, to enact the same. On appeal, this Court said: "This challenge cannot be sustained. There are no limitations in the Constitution of this State or of the United States upon the power of the General Assembly to provide by statute for the extension of the corporate limits of a municipal corporation organized and existing under the laws of this State, or for the repeal of a statute under which a municipal corporation in this State was organized." *Chimney Rock Co. v. Lake Lure,* 200 N.C. 171, 156 S.E. 542.

It is said in 37 Am. Jur., Municipal Corporations, section 24, page 640, "A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it. The legislature may also prescribe and fix the terms and conditions on which such a law may come into operation. *The determination of the requisite facts or expediencies, or of acceptance or assent to the annexation, may be given by the legislature to the municipal council,* or to county commissioners, boards of supervisors,

or other public body * * * *without violating constitutional provisions against delegation of legislative functions.* * *" (Emphasis added.)

"It is a cardinal principle of our system of government that local affairs shall be managed by local authorities and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule." *Stoutenburgh v. Hennick,* 129 U.S. 141, 32 L. Ed. 637.

In *S. v. Dudley,* 182 N.C. 822, 109 S.E. 63, this Court, speaking through *Hoke, J.,* later *C.J.,* said: "It is well recognized that except in the case of municipal corporations when in the exercise of governmental functions on local matters, legislative power may not be delegated." *Provision Co. v. Daves,* 190 N.C. 7, 128 S.E. 593, *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252.

The decisions of this Court support the view that ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties. The Legislature had the right, unhampered by constitutional restrictions, to grant the power given in the Act under consideration to municipalities having a population of 5,000 or more since the power granted is incidental to municipal government in matters of purely local concern. Hence, the contention that Chapter 1009 of the Session Laws of 1959 of North Carolina is unconstitutional on the grounds assigned, cannot be sustained.

The appellants contend that this Act is unconstitutional for that it denies to them the right of trial by jury in violation of Article I, section 19 of the Constitution of North Carolina. The procedure and requirements contained in the Act under consideration being solely a legislative matter, the right of trial by jury is not guaranteed, and the fact that the General Assembly did not see fit to provide for trial by jury in cases arising under the Act, does not render the Act unconstitutional.

The right to a trial by jury, guaranteed under our Constitution, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted. The right to a trial by jury is not guaranteed in those cases where the right and the remedy have been created by statute since the adoption of the Constitution. *Groves v. Ware,* 182 N.C. 553, 109 S.E. 568; *McInnish v. Bd. of Education,* 187 N.C. 494, 122 S.E. 182; *Hagler v. Highway Commission,* 200 N.C. 733, 158 S.E. 383; *Unemployment Comp. Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4;

*Belk's Dept. Store, Inc. v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897; *Utilities Commission v. Trucking Co.,* 223 N.C. 687, 28 S.E. 2d 201. This contention of petitioners is without merit.

These petitioners likewise contend that the Act under consideration is invalid because twelve counties were excluded from the Act; that such exclusion prevents the Act from being general in character within the purview of Article VIII, section 4 of our Constitution.

This Court has uniformly held that the requirement in Article VIII, section 1 of our Constitution, with respect to general laws, refers to private or business corporations, and does not refer to public or quasi-public corporations acting as governmental agencies. *Mills v. Com'rs.,* 175 N.C. 215, 95 S.E. 481; *Dickson v. Brewer,* 180 N.C. 403, 104 S.E. 887; *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187.

In the last cited case the appeal involved the constitutionality of an act authorizing cities, towns, townships and school districts in Wayne County to sell bonds at less than par. The question presented was identical to that now before us. In considering Article VIII, section 4 of our Constitution, the Court said: "It contains no prohibition on the exercise of legislative power, and has in it no declaration that private, local, or special acts shall not be passed relating to the organization of cities and towns, and conferring particular powers, and this ommission, when considered in connection with the history of the recent amendments to the Constitution, is fatal to the claim that local or special acts may not be legally enacted, conferring special authority on municipal corporations."

Judge Cooley, in his work on Constitutional Limitations (7th Ed.), page 554, Note 2, said: "To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act," citing *S. v. County Commissioners of Baltimore,* 29 Md. 516; *Pollock v. McClurken,* 42 Ill. 370; *Haskel v. Burlington,* 30 Iowa 232; *Unity v. Burrage,* 103 U.S. 447.

The foregoing statement was quoted with approval by this Court in *Power Co. v. Power Co.,* 175 N.C. 668, 96 S.E. 99, and in *Kornegay v. Goldsboro, supra.* In the *Kornegay* case this Court upheld the validity of the challenged Act.

In *Holton v. Mocksville,* 189 N.C. 144, 126 S.E. 326, the constitutionality of Chapter 86, Private Laws of 1923, an act relating to the financing of street improvements in the Town of Mocksville was attacked. This Court in upholding the private act said: "Section 4 of Article VIII of the Constitution imposes upon the General As-

sembly the duty to provide by general laws for the improvement of cities, towns and incorporated villages. It does not, however, forbid altering or amending charters of cities, towns and incorporated villages or conferring upon municipal corporations *additional powers* or restricting the powers theretofore vested in them. We find nothing in section 4, Article VIII of the Constitution rendering this act unconstitutional, nor does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate. *Kornegay v. Goldsboro,* 180 N.C. 441." (Emphasis added.)

Among the cases which have followed the decisions in the *Kornegay* and *Holton* cases are *Gallimore v. Thomasville,* 191 N.C. 648, 132 S.E. 657; *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624; *Webb v. Port Commission,* 205 N.C. 663, 172 S.E. 377; *In re Assessments,* 243 N.C. 494, 91 S.E. 2d 171; and *Candler v. Asheville,* 247 N.C. 398, 101 S.E. 2d 470.

In view of the construction placed on Article VIII, section 4 of the Constitution of North Carolina by this Court in previous decisions, we hold that the Act under consideration is not unconstitutional because it applies only to eighty-eight counties in the State. Under our Constitution, the Legislature may grant additional powers to a single municipality or to municipalities within one or more counties.

As evidence of the urban character of the five areas annexed by the City of Raleigh, the petitioners' evidence reveals the fact that there are 68.4 miles of paved streets and 31.1 miles of unpaved streets, a total of 99.5 miles of streets in the five annexed areas. Moreover, they contain a resident population in excess of 14,500. The petitioners' evidence is to the further effect that the total population in these five areas, based on the 1960 preliminary census data, is about 16,922, including residents who reside on land in the area which is not urban in character but was subject to annexation under the provisions set forth in G.S. 160-453.16 (d) (1).

The petitioners contend that by reason of these annexations in the manner in which they have been brought about, they have been deprived of their liberty and property without due process of law, in violation of Article I, section 17 of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. The record in these proceedings does not support the petitioners' contention in this respect. Certainly it would seem that they do not desire to have their respective properties subject to the levy of city taxes. Even so, where additional territory is annexed in accordance with the law, the fact that the property of the residents

in such area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process clause of the State and Federal Constitutions.

The appellants by their exceptions and assignments of error have shown no prejudicial error in the hearing below that would justify disturbing the result thereof.

Each judgment entered below pertaining to the respective five annexed areas, is upheld.

Affirmed.

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LOUISE C. WATKINS, GUARDIAN FOR JERRY MITCHELL WATKINS, INCOMPETENT v. CLYDE MURROW, D/B/A TRANSFER AND RENTAL COMPANY, TEXTILE INSURANCE COMPANY AND BYRD MOTOR LINES, INC. AND IOWA MUTUAL INSURANCE COMPANY.

(Filed 20 January, 1961.)

**1. Master and Servant § 3—**

A contractual declaration that one of the contracting parties should have exclusive direction and control in the performance of the work is not conclusive as to whether such party is an independent contractor, but it is also necessary that the evidence disclose that the work was in fact performed pursuant to that contract.

**2. Same: Master and Servant §§ 48, 51—**

Where the evidence discloses that the lessor of vehicles for trips in interstate commerce under lessee's franchise employed and paid the drivers of such vehicles and did in fact exercise direction and control over the drivers on such trips, the lessor is the employer of such drivers, notwithstanding provision in the trip-lease agreement that the drivers should be under the exclusive direction and control of lessee, and lessor is liable for compensation to one of such drivers for injuries received in an accident arising out of and in the course of his employment.

**3. Same—**

The lessee of vehicles, with drivers furnished by lessor, for trips in interstate commerce under lessee's franchise will be held liable as a matter of public policy for compensation for injury to such drivers by accident arising out of and in the course of their employment.

**4. Same—**

While the lessee of a vehicle for a trip in interstate commerce may, as a matter of public policy, be held liable by a driver for injuries received by accident arising out of and in the course of the employment, as between lessor and lessee the contractual provisions between them as to liability may be enforced when the rights of the employee are not

adversely affected, and under provisions of the contract obligating lessor to indemnify lessee against any loss resulting from injury or death of such driver, the Industrial Commission may hold lessor and its insurance carrier primarily liable.

**5. Master and Servant §§ 53, 66—**

Where a driver is responsible for the care and safekeeping of the vehicle while being driven on a trip, and customarily sleeps in the cab while on a trip, injury to the driver from carbon monoxide poisoning while he was sitting in the cab at his destination awaiting the opening of the business of the consignee, is an injury by accident, and such poisoning is not an occupational disease.

APPEALS by plaintiff and defendants Clyde Murrow, d/b/a Transfer and Rental Company, and Textile Insurance Company from *Preyer, J.*, December 14, 1959 Special Term, of GUILFORD.

These appeals are from a judgment affirming in part and reversing in part findings of fact and conclusions of law and an award based thereon made by the Industrial Commission which directed payment of compensation to Jerry Mitchell Watkins for injuries sustained in the course of his employment.

Jerry Mitchell Watkins, hereafter designated as claimant, was, on 9 March 1957, the driver of a tractor-trailer owned by Clyde Murrow, d/b/a Transfer and Rental Company, hereafter designated as Murrow. This vehicle and other vehicles, with operators, were leased by Murrow to Byrd Motor Lines, Inc., hereafter designated as Byrd, for use in its franchise business of hauling furniture from High Point and other points in North Carolina in interstate commerce. Murrow and Byrd were subject to the provisions of the North Carolina Workmen's Compensation Act. Textile Insurance Company, hereafter designated at Textile, was the statutory insurance carrier for Murrow. Iowa Mutual Insurance Company, hereafter designated as Iowa, was the statutory insurance carrier for Byrd.

The Commission, finding claimant, an employee of Murrow and of Byrd, had sustained an injury, awarded compensation to be paid by their insurance carriers. Defendants, having excepted to the findings and conclusions made by the Commission, appealed to the Superior Court. Judge Preyer affirmed the findings and conclusions in part but sustained Byrd's exception to the finding that claimant was a joint employee of Byrd and Murrow. He concluded that claimant was an employee of Murrow, and liability for compensation awarded was primarily the obligation of Murrow and his insurance carrier. He remanded the cause to the Commission to amend its award to conform with his conclusions. Claimant and defendants Murrow

and Textile excepted to the court's rulings and appealed. Additional facts determinative of the appeal appear in the opinion.

*Walser & Brinkley for plaintiff.*
*Smith, Moore, Smith, Schell & Hunter for defendant appellants.*
*Jordan, Wright, Henson & Nichols for defendant appellees.*

RODMAN, J. We have read with care the testimony and the exhibits. We find no factual conflict in the evidence. The facts found by the Commission are amply supported by the evidence. The parties disagree as to the conclusion drawn from and the legal effect of the undisputed evidence. The facts found by the Commission may be summarized as follows: Byrd was a duly franchised interstate motor carrier of furniture from designated points in North Carolina. Murrow had no right or authority to transport freight in interstate commerce in his own name. Claimant was hired by Murrow in December 1956 as a truck driver to drive Murrow's trucks in the transportation of goods in interstate commerce as permitted by Byrd's franchise. Prior to 1 January 1957 Murrow hauled for Byrd in interstate commerce. On that date a written agreement was executed in which Byrd "(a) Agrees that during the term of this lease, the said vehicle(s) shall be solely and exclusively under the direction and control of the Lessee who shall assume full common carrier responsibility (1) for loss or damage to cargo transported in such motor vehicle and (2) for the operation of such vehicle." In addition to the foregoing provision quoted by the Commission, the agreement designated Murrow as lessor provides: "LESSOR HEREBY . . . (b) Agrees that during the term of this agreement, the Lessor shall fully maintain, service and keep the vehicle(s) above described in good repair, provide all gas, oil, tires and other equipment necessary and pay driver'(s) salary . . . (e) Agrees to indemnify Lessee against (1) any loss resulting from the injury or death of such driver(s) and (2) any loss or damage resulting from the negligence, incompetence or dishonesty of such driver(s) . . ." Textile insured Murrow's liability under the Workmen's Compensation Act from 14 May 1956 to 14 May 1957. Before Textile issued its policy to Murrow, Murrow's employees, including claimant and other drivers hired by Murrow, were protected by compensation insurance carried by Byrd with Iowa. Prior to 14 May 1956, Murrow reimbursed Byrd for the premiums paid for insurance on the drivers hired by Murrow. Subsequent to that date, Murrow, by agreement with Byrd, paid these premiums directly to the insurance carrier selected by him.

When Textile issued its compensation policy to Murrow, it collected premiums based on the wages paid Murrow's drivers, including the wages paid to claimant for hauling under Byrd's franchise.

Textile furnished Byrd a certificate that Murrow was insured by it under the Workmen's Compensation Act. This was required by Byrd in his negotiations with Murrow and was an effort to protect Byrd from liability for injuries to drivers of Murrow's trucks. Prior to the time Textile issued its policy to Murrow and during the life of the policy, Textile was aware that Murrow was operating at least in part under the Interstate Commerce Commission rights of Byrd.

Murrow's terminal in High Point was the point of origin and return on all trips which claimant made in interstate commerce. Upon returning from a trip, claimant would account to Murrow for freight collected by claimant in the form of cash and checks. Murrow made an accounting to Byrd at the end of each week. Murrow solicited business in Byrd's name. The goods to be transported by Murrow for Byrd would be collected at Murrow's terminal, then loaded in the truck. Murrow's office typed and prepared statements, planned the trip, designated the route, consignees, and the several destinations. Byrd never gave instructions to the drivers of Murrow's trucks and never hired or discharged any of Murrow's drivers. He did not know their names or identities. Murrow made social security and income tax deductions from claimant's pay.

On 7 March 1957 claimant and his brother, driving a tractor-trailer owned by Murrow, left Murrow's terminal in High Point. They were hauling a load of furniture under and pursuant to the contract agreement entered into by Byrd and Murrow effective 1 January 1957. The vehicle carried a sign showing Byrd's interstate certificate number. After making deliveries of furniture in Ocala and Gainesville, Florida, claimant and his brother proceeded towards Jacksonville. Before arrival there, the exhaust pipe on the vehicle came loose from the engine manifold. They undertook to make repairs but were unable to make a tight connection because the exhaust pipe and gasket were burned. They arrived at Ferguson's Furniture Company, about seven miles from Jacksonville, the afternoon of 8 March after the store had closed. They parked the trailer on Ferguson's lot, adjacent to his loading platform. After supper they drove to Jacksonville where they worked about two hours attempting to repair the exhaust. They were not able to make a tight connection. After driving around Jacksonville to locate other stores at which they expected to make deliveries the following day, they returned to Ferguson's lot about midnight and parked the tractor beside the

trailer. Claimant's brother got into the trailer, used quilts to keep warm, and immediately went to sleep. Claimant got into the cab of the tractor and ran the motor to heat the cab. The windows and doors were closed except for a small opening in the right window. There were openings in the floor board of the cab around the clutch, brake, and accelerator sufficient to permit the entry of carbon monoxide in gaseous form, which is slightly lighter than air. About 1:00 a.m. on 9 March claimant was observed in the cab, at which time the motor was running and white fumes coming from the motor could be seen under the tractor. About 8:00 a.m. on 9 March, claimant's brother was awakened by an employee of Ferguson. He observed claimant sitting slumped over the steering wheel. He called but was unable to arouse claimant. When he succeeded in opening the door, he found claimant unconscious. The motor of the tractor was not running. The ignition switch was in the on position, and the heater fan was running. Continued efforts to awaken and revive claimant failed. About noon he was taken to St. Vincent's Hospital, unconscious and in shock. There was no evidence of traumatic injury. A diagnosis of carbon monoxide poisoning was made two or three days after 9 March. Claimant remained in St. Vincent's Hospital until 30 May 1957. He was then taken to North Carolina Baptist Hospital in Winston-Salem where he remained until 1 May 1958, when he was transferred to Maple Grove Rest Home at Walkertown, where he is still a patient. Some slight improvement was noted while in the hospital. He regained some ability to speak, but not in an intelligent manner. His condition has remained substantially the same since removal to the rest home. Claimant had sustained an injury to the brain resulting in loss of mental capacity and paralysis. The disability is total and permanent.

Claimant and other drivers of Murrow's trucks customarily slept in the cab of the tractor or in the trailer at night. This fact was known by Murrow and could have been ascertained by Byrd upon inquiry. Claimant's sleeping in Murrow's tractor on 8 and 9 March 1957 served to protect the tractor, the trailer, the contents of the trailer, and would have enabled claimant to be available to unload the trailer immediately upon Ferguson's being opened on 9 March. Claimant was responsible for the care and safekeeping of the vehicle and its contents at all times when away from High Point.

In addition to the facts found as summarized above, the Commission found: "At all times between December 10, 1956, to and including March 9, 1957, when operating one of Murrow's trucks, claimant was an employee of Murrow and Byrd." "On March 9,

1957, claimant received an injury by accident arising out of and in the course of his employment with the defendant employers Murrow and Byrd when he breathed carbon monoxide gas."

Murrow and Textile assign as error the factual conclusion made by the Commission and affirmed by Judge Preyer that claimant was an employee of Murrow. They contend the provision in the lease which gave Byrd the exclusive direction and control of the vehicle operated by claimant made Byrd the sole employer, relieving Murrow of liability for claimant's injury.

The answer to this contention is twofold: First, the liability or nonliability of Byrd to claimant does not necessarily determine Murrow's relationship to claimant and the resulting liability or nonliability for the injuries sustained. As said by *Bobbitt, J.*: "The hybrid nature of these trip-lease agreements has caused much litigation. In reality, contrary to the Biblical admonition, a driver, employed and furnished by the lessor, must serve two masters." *Employment Security Comm. v. Freight Lines,* 248 N.C. 496, 103 S.E. 2d 829. Second, a mere contractual declaration is not determinative of the relationship and the rights of the parties. A contract declaring one an independent contractor free from control and direction by the owner does not in fact establish that relationship. There must be further evidence to show that the work was in fact performed pursuant to that contract. If not so performed, a contractual provision vesting or forbidding the owner to exercise control is immaterial. *Young v. Lumber Co.,* 147 N.C. 26; *Leonard v. Transfer Co.,* 218 N.C. 667, 12 S.E. 2d 729.

A contention similar to that advanced by Murrow and Textile was made in *War Emergency Co-op. Ass'n. v. Widenhouse,* 169 F 2d 403. *Judge Parker,* in disposing of the contention, said: "It is argued that the driver of the truck should be held the employee of defendant and not of Widenhouse because the rules of the Interstate Commerce Commission require that leased vehicles be operated by employees of the licensed operator, because the written contract between Widenhouse and defendant provides that defendant shall direct, control and manage the use of the truck and because liability insurance was carried by the defendant. None of these things, however, nor all of them taken together, furnish any reason for ignoring the true relationship existing between the parties . . . As for the contract provision, it was not observed, and manifestly cannot affect the question of liability, which is to be determined by the real relationship of the parties."

The findings made by the Commission, based on and supported by the testimony of Murrow himself, clearly established that, notwithstanding the contract provision, Murrow exercised control of the drivers he placed on his vehicle operated under Byrd's franchise, that Byrd did not exercise and was not in fact expected to exercise control over them.

On the findings, supported as they are by the evidence, Judge Preyer correctly held that claimant was an employee of Murrow.

The Commission concluded that claimant was an employee of both Murrow and Byrd, thereby placing joint liability on Murrow and Byrd for claimant's injuries. Byrd's exceptions and assignments of error to this finding and conclusion were sustained by Judge Preyer. Murrow and Textile assign that ruling as error. This assignment requires an examination of the evidence on which the Commission based its factual conclusion.

The only evidence tending to establish the relationship of employer and employee between Byrd and claimant is the agreement by which Murrow leased his trucks and furnished drivers to Byrd, thereby vesting Byrd with complete direction and control of the vehicle.

Most of the cases involving the liability of a franchise carrier arise out of injuries to a third person in no way related to or connected with the operation of the business of the franchise carrier. In cases of that character it is uniformly held that the franchise carrier cannot escape liability even though he in fact exercises no control over the driver. *Wood v. Miller,* 226 N.C. 567, 39 S.E. 2d 608; *Motor Lines v. Johnson,* 231 N.C. 367, 57 S.E. 2d 388; *Hill v. Freight Carriers Corp.,* 235 N.C. 705, 71 S.E. 2d 133.

We have not only held the franchise carrier liable for injuries sustained by third persons but have held it liable for compensation as provided in our Workmen's Compensation Act to drivers transporting goods under its franchise.

This was first decided in *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71. A careful reading of that case will show that imposition of liability was based on public policy. The public policy which led to the enactment of the Workmen's Compensation Act likewise required drivers to be classified with the public and entitled to protection from injuries resulting from the interstate operation. The Court expressly declared the franchise carrier could not evade the provision of G.S. 97-6, and, in concluding its opinion, said: "The defendant corporation having been given a franchise for the operation of motor trucks on the highway as a carrier of goods in interstate commerce, cannot evade its responsibility by delegating its authority

to others. (Citation.) Nor may an employer, by leasing the truck of one not authorized to transport goods in interstate commerce and causing its operation under its own franchise and license plates for interstate transportation avoid legal responsibility therefor."

The conclusion there reached was merely an enlargement of the class entitled to protection when injured by an unlicensed assignee of a franchise carrier. *Hough-Wylie Co. v. Lucas,* 236 N.C. 90, 72 S.E. 2d 11; *Bryant v. Lumber Co.,* 174 N.C. 360, 93 S.E. 926; *Logan* v. R.R., 116 N.C. 940; *Aycock v. R.R.,* 89 N.C. 321.

The result reached in *Brown v. Truck Lines, supra,* was reaffirmed in *Roth v. McCord,* 232 N.C. 678, 62 S.E. 2d 64. The Court limited its holding to the right of the driver to recover from a franchise carrier.

In discussing the relationship and the respective rights and obligations between lessor, lessee, and driver, *Barnhill, J.,* (later *C.J.*) said in *Hill v. Freight Carriers, supra:* "Hence, as between the plaintiff and the defendant, purely in respect to their mutual contractual rights and liabilities, one to the other, the owner of the vehicle occupied the position of independent contractor. (Citations.)

"On the other hand, the vehicle was to be operated in interstate commerce in furtherance of the business of the lessee as a franchise carrier of freight. It was to be operated under the franchise and license plates of the lessee in fulfillment of its contracts for transportation of freight in interstate commerce. Therefore, the person who actually operated the vehicle (whether the owner or a third party hired by him) was, as between the franchise carrier and the consignor, the consignee, and third parties generally, a servant or employee of the defendant. This is true in fact for he transported cargoes in behalf of the franchise carrier and dealt with the consignors, consignees, and the public generally as agent of the franchise carrier. Furthermore, public policy requires it to be so held.

"As plaintiff elected to operate his own tractor, he was, as operator, a servant of defendant. (Citations).

"That is to say, the relation of independent contractor was created by the contract. The master-servant relation arose when plaintiff—in lieu of employing someone else—undertook to operate the tractor-trailer for defendant in fulfillment of his contract. One is entirely dependent upon, and the other is entirely independent of, the contract."

*Brown v. Truck Lines, supra,* and *Roth v. McCord, supra,* were cited and made the basis for holding a driver entitled to compensation

payments for injuries sustained when driving for the franchise carrier. *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438.

The conclusion reached in *Brown v. Truck Lines* was last declared the law of this State in *Suggs v. Truck Lines,* 253 N.C. 148, decided in October 1960. No sound reason has been advanced which would justify us in reversing the conclusion originally reached in *Brown v. Truck Lines, supra,* and consistently followed since that decision. It follows that Byrd and his carrier are liable to claimant.

Having reached the conclusion that Byrd and Murrow are each responsible to claimant, we must, because of the holding by the Commission that they are jointly liable, which conclusion was reversed by Judge Preyer, determine what are the relative rights and obligations of the parties.

The question now presented was not answered in *Roth v. McCord, supra.* It was put aside to be answered in another action. Nor was it determined in *McGill v. Freight, supra. Bobbitt, J.,* there said: "No question is involved here as to the rights and liabilities of Bison and Matthews *inter se,* by reason of the terms of the lease agreement or otherwise. Compare: *Hill v. Freight Carriers Corp.,* 235 N.C. 705, 71 S.E. 2d 133; *Newsome v. Surratt, supra.*

"It appears here that Matthews had no compensation insurance coverage; and, unless decedent is so considered, Matthews had no employees. Hence, if Matthews were considered an independent contractor, as defendants contend, it would seem that Bison would be liable for the payment of compensation under the Act. G.S. 97-19."

The right of a franchise carrier to lease equipment to be operated by a driver furnished by the owner is permissible under regulations promulgated by the ICC. The contract between Byrd and Murrow was prepared to meet ICC requirements. It was put in evidence by Murrow and Textile. It expressly obligated Murrow to indemnify Byrd against "any loss resulting from the injury or death of such driver." This contractual obligation in no way conflicts with public policy. No sound reason has been advanced why it should not be enforced. Its enforcement will in no way prejudice claimant.

To assure compliance with the quoted provision, Murrow purchased insurance from Textile. The wages paid claimant and other drivers were one of the factors used to determine the premium Textile collected. Textile certified to Byrd that Murrow had procured workmen's compensation insurance.

The right of a franchise carrier to recover from his lessor in accordance with his contractual obligation was determined in *Newsome v. Surratt,* 237 N.C. 297, 74 S.E. 2d 732. The contract then under con-

sideration contained provisions identical with those in the contract between Murrow and Byrd. *Denny, J.*, said: "We have held that when an interstate franchise carrier executes a lease or contract by which its equipment is augmented and used as one of its fleet of trucks under its franchise and with its license plates attached thereto, the holder of the franchise is responsible for the operation of the truck in so far as third parties are concerned. (Citations). We have likewise held that the franchise carrier in such cases is also liable to the driver of such truck for any injury that may arise out of and in the course of his employment within the purview of our Workmen's Compensation Act, and that the driver of such leased vehicle is not bound by any provision in the lease to the contrary. (Citations)

"The liability thus imposed on interstate franchise carriers is to prevent such carriers from evading their responsibility by the employment of irresponsible persons as independent carriers. *Hodges v. Johnson, supra* (52 F Supp 488); *War Emergency Co-op. Ass'n. v. Widenhouse, supra.* However, as pointed out by *Parker, J.*, in the last cited case, the liability of the franchise carrier was secondary, and in the absence of some countervailing equity, the carrier is entitled to recover over against the owner of the leased truck."

We hold the contract between Murrow and Byrd made Murrow and Textile as his insurance carrier primarily liable to claimant.

The final question presented by the assignments is: Did plaintiff suffer an accident arising out of and in the course of his employment, or is he the victim of an occupational disease? We think the finding by the Commission that claimant was injured by an accident is correct. *Cabe v. Parker-Graham-Sexton, Inc.*, 202 N.C. 176, 162 S.E. 223; *Beck v. C. & J. Commercial Driveaway*, 245 N.W. 806 As said in *Henry v. Leather Co.*, 234 N.C. 126, 66 S.E. 2d 693: "An injury by accident, as that term is ordinarily understood, 'is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time.'" The findings negative an occupational disease. They establish an accidental injury as found by the Commission.

Plaintiff's appeal was taken as a precaution, to secure compensation by Byrd and Iowa in the event Murrow and Textile were held not liable.

Judge Preyer was in error in holding that Murrow was the sole employer of claimant. Public policy makes him likewise a servant of the franchise carrier not to be denied the benefits of the Workmen's Compensation Act by contract between lessor and lessee. He

correctly concluded as between lessor and lessee the contract was binding, imposing primary liability on lessor. He properly remanded the cause to the Industrial Commission. The judgment is modified to conform wth this opinion.

Modified and Affirmed.

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IN THE MATTER OF W. L. TYSON S. S. #237-46-2399 CLAIMANT-EMPLOYEE, ET AL.
AND
SWIFT & COMPANY ROCKY MOUNT, N. C.

(Filed 20 January, 1961.)

1. **Master and Servant § 97—**

The Employment Security Law must be construed to promote and not to defeat the legislative policy as declared in the statute, and the courts will not construe the Act in such manner as to discourage parties from entering into contracts designed to lessen the hardships incident to termination of employment. G.S. 96-2.

2. **Master and Servant § 105— Severance and vacation pay must be considered in determining unemployment benefits.**

Discharged employees who are entitled under the contract of employment to severance and vacation pay are not entitled to unemployment compensation until the moneys paid as severance and vacation pay have been exhausted by weeks elapsed at the employees' weekly wage rate, since such severance and vacation pay constitute "wages" within the purview of G.S. 96-8(13)a, and since such employees are disqualified under G.S. 96-14(8), it not being the policy of the law that an employee should receive by reason of unemployment a weekly sum in excess of what he would receive if employed. Retirement pay received by an employee comes within the same category.

APPEAL by Swift & Company from *Hobgood, J.*, March 1960 Civil Term, of EDGECOMBE.

This is an appeal from a judgment affirming an order of the Employment Security Commission awarding unemployment benefits to twenty-two former employees of Swift & Company (hereafter designated as Swift) from the time they filed claims and registered for work, notwithstanding vacation and severance payments made by Swift when the employment terminated.

*Battle, Winslow, Merrell, Scott & Wiley for appellant.*

*W. D. Holoman, R. B. Billings, and D. G. Ball for the Employment Security Commission of North Carolina.*

RODMAN, J. The appeal requires an interpretation of our Employment Security Law (G.S. c. 96) and the application of that interpretation to the facts.

These are the facts: Swift had for many years operated a plant at Rocky Mount. It built a new and larger plant at Wilson. In the fall of 1958 it began to reduce its operation at Rocky Mount. Because of this reduction it was not able to provide all of its regular employees with regular work. During the summer and fall of 1958, some of its employees applied for and were awarded unemployment benefits. They were not, however, permanently separated from employment by Swift until March 1959.

In the spring of 1959 Swift decided to terminate its operation at Rocky Mount. It notified its employees of its decision and, on 25 March 1959, terminated the employment of fourteen claimants, including those whose work periods had previously been irregular. It continued some in employment until the latter part of June 1959 when employment of the remaining eight claimants was terminated.

United Packing House Workers of America, a labor organization, was the labor representative of Swift's employees at Rocky Mount. It and Swift had, prior to 1959, entered into a contract by which Swift was obligated for severance pay to its employees "who are permanently separated from the service either because of a reduction in forces arising out of the closing of a department or unit of the business or because of technological change in production adopted by the Company and when it is not expected that they will be re-employed."

The amount of severance pay to which an employee was entitled upon permanent separation from the company's rolls was computed on length of service and weekly wage. It was not payable:

"1. To employes with less than one (1) year's continuous service;

"2. To employes laid off in gang reductions;

"3. In cases where the employe was discharged for cause;

"4. In cases of voluntary resignation;

"5. In cases of employes retired on pension;

"6. To employes who refuse an offer of employment by the Company in the same sales unit or in another unit of its business, the location of which is reasonably accessible to the location of the place of employment from which the employes are being dropped from the service."

The amounts payable upon termination of employment were payable:

"1. If less than the equivalent of four (4) week's pay — in one lump sum.

"2. Amounts over a total of four (4) weeks' pay — weekly installments of full wages until the total amount is exhausted. The employe may, at his option, elect to receive such amount in a shorter period of time or in one lump sum.

"3. In the event of death, any unpaid balance shall be paid to the widow or dependents."

The contract also provided for annual paid vacations. The length of vacation to which an employee might be entitled was based on length of service. The amount of vacation pay was duration of vacation multiplied by weekly wage. When an employee had qualified for vacation, the amount owing was payable notwithstanding his death prior to payment. An employee could not continue to work and draw vacation pay. Termination of employment did not defeat employee's right to vacation pay.

When employment was terminated, Swift paid claimants their severance and vacation pay as provided in the contract. The severance pay ranged from $249.60, equivalent to three weeks' wages, to $1407.60 equivalent to eighteen weeks' wages. The vacation pay ranged from $78.20, equivalent to one week's wage, to $334.40, equivalent to four weeks' wages.

Claimants who had, prior to the termination of employment, filed claims had received unemployment benefits varying from $96, representing three weeks of unemployment benefits, to $719, representing twenty-four weeks of unemployment benefits.

Upon termination of employment, claimants filed claims with the Commission for "benefits," contending they were presently entitled thereto. Swift denied the claim, asserting they were not entitled to benefits before the expiration of a waiting period ascertained by dividing the sum of vacation and severance pay by the amount earned per week when at work. Hence the sole question for determination is: Can claimants disregard the amounts paid to them under the terms of their contract and immediately begin the collection of unemployment benefits?

The severe economic depression of the early 1930s produced national legislation known as the Social Security Act. It was designed to ease economic strain produced by causes beyond the control of the individual. The loss of income because of involuntary unemployment was one of the hardships to be eased. To lighten this burden, payroll taxes levied by the Federal Government would in large part

be returned to those States which enacted laws to accomplish the declared purpose of the Federal statute. 42 USCA 502.

To secure to employees residing in North Carolina the benefit of the Social Security Act, Governor Ehringhaus called an extra session of the General Assembly for December 1936. That session enacted only two laws: one, merely extending the time within which revenue bonds theretofore authorized could be issued; the other was a comprehensive act designed to secure for North Carolina workmen the benefits of Federal legislation. C. 1, P.L., Extra Session 1936. That Act, as subsequently amended, is now known as the "Employment Security Law." It appears as c. 96 of our General Statutes.

The Legislature, when it acted in 1936, incorporated in the Act the reason for the legislation and the guide for interpretation. It said: "Economic insecurity due to unemployment is a serious menace to the . . . welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action . . . to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. *This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance.*" (Emphasis supplied.) Sec. 2, c. 1, P.L., Extra Session 1936.

The Legislature has, in the twenty-four years which have intervened since the statute was originally enacted, amended it as experience has shown necessary to accomplish its declared purpose, but no change has been made in the declared purpose and rule for interpretation as originally given. G.S. 96-2.

To accomplish the declared purpose, employers are required to contribute to a fund for the protection of their employees who may lose employment. The amount which an employer is required to contribute to this fund is based on his employment record. G.S. 96-9.

An individual who performs no work and to whom no wages are payable for any week is totally unemployed. G.S. 96-8(11). An eligible individual who is unemployed is entitled to benefits from the fund created by the tax imposed on employers' payrolls. G.S. 96-12.

The weekly amount, called weekly benefit, which one may receive from the fund is determined by wages earned during the period of employment. G.S. 96-12(b) (2). The weekly benefit is a fraction of

weekly wage. The weekly benefit paid these claimants when temporarily unemployed was less than 50% of their weekly wage. Such amounts as they may receive because of unemployment resulting from abandonment of operations will be less than 50% of their weekly wage. The period during which an unemployed person may receive benefits in any benefit year is limited to twenty-six weeks. G.S. 96-12(d).

Unemployment resulting in economic hardship may result from either of two causes: (1) temporary reduction of work force or temporary shutdown because of lack of orders, for repairs, or other temporary causes; (2) a permanent termination of the relationship due to abandonment of operations or permanent reduction of working force, voluntary act of the employee, or because of the misconduct of an employee resulting in his discharge. Some of present claimants have been confronted with the hardships resulting from loss of income produced by temporary unemployment, all with the hardship resulting from unemployment caused by complete severance of the relationship of employer and employee.

The parties did not, in their contract, undertake to reduce the hardship resulting from temporary unemployment; but, mindful of the philosophy of the Employment Security Act that the hardship of unemployment could at least be reduced "by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment," Swift and claimants, acting through their bargaining agents, agreed that where a permanent termination of employment should occur, the employer would pay to the employee a sum equal to the weekly wage of the employee when at work multiplied by a number of weeks, ascertained by the years of continuous service.

The contract requires the payment of this sum irrespective of when the employee may find new employment. If he dies before the sum is paid to him, his widow or dependents receive it. A persual of the contract provisions can leave no doubt that the parties intended to accomplish the laudatory purpose declared in the Employment Security Act. The statute and the contract follow different paths to accomplish the desired purpose. The contract provisions are more favorable to the employee. Under the statute the employee draws only a fraction of the amount paid as wages and cannot draw this sum for more than twenty-six weeks. Under the contract he draws a sum equivalent to his weekly wage for a period based on his past services. Swift paid one of the claimants severance pay for 19½

weeks plus three weeks of vacation pay. The amount so paid is substantially more than he could receive as unemployment benefits. Notwithstanding the payments so made, he may, if still unemployed at the expiration of 22½ weeks (the period covered by severance and vacation pay) collect unemployment benefits for the full statutory amount. The statute negatives the idea that the employee should receive, because of unemployment, a weekly sum in excess of the amount which he would receive if employed.

Under the statute, to be eligible for benefits, claimant must register for work with the Commission and be able to work and available for work. G.S. 96-13. No such conditions are imposed by the contract. Notwithstanding sickness, injury, or other cause rendering him unable to work or because other employment has been promptly secured, he is entitled to receive his compensation as provided in the contract.

Courts ought not to defeat legislative policy by construing contracts between employer and employee in such manner as to discourage parties from entering into contracts designed to promote a public policy plainly and specifically enunciated by the Legislature.

One is not entitled to unemployment benefits merely because he meets the legislative definition of "totally unemployed." G.S. 96-8(11). He must also meet the statutory requirements of eligibility, G.S. 96-13, and he must not be disqualified for benefits, G.S. 96-14. This section of the statute enumerates eight conditions which disqualify an unemployed individual from receiving statutory benefits. The first three subdivisions of the section not only disqualify but contain penalty provisions. Subsection 4 disqualifies when unemployment is caused by a labor dispute. None of these provisions are applicable to this case. Subsection 5, in substance a part of the original Act, provides: "For any week with respect to which he is receiving or has received remuneration in the form of remuneration in lieu of notice."

The National Labor Relations Act vests the National Labor Relations Board with broad discretion in dealing with controversies between employer and employee. In *Marshall Field & Co. v. National Labor Rel. Bd.*, 318 U.S. 253, 87 L. ed. 744, the Supreme Court held that benefits "received under the state compensation act were plainly not 'earnings' which under the terms of the Board's order, could be deducted from the back pay awarded." The question there answered is the converse of the question here presented. The decision of our highest Court was reaffirmed in *National Labor Rel Bd. v. Gullett Gin Co.*, 340 U.S. 361, 95 L. ed. 337. The Court there expressly declared that the power of the National Labor Relations Board to act was not restricted by State unemployment compensation laws.

Following these decisions, our Legislature amended the definition of "wages." The original definition was: "All remuneration payable by employers for employment." C. 1, sec. 19(m), Public Laws, Extra Session 1936. In 1953 the definition was changed to read: ". . . all remuneration for services from whatever source." C. 401, S.L. 1953, G.S. 96-8(13). The Legislature did not then deem it necessary to extend the class of acts which would defer employees' right to unemployment benefits.

Not satisfied that the 1953 amendment to the definition sufficed to prevent payment of benefits when an employee was receiving wages, whether by order of the National Labor Relations Board or pursuant to contract provisions with his employer, the Legislature in 1955 again redefined "wages." It now includes "commissions and bonuses and any sums paid to an employee by an employer pursuant to an order of the National Labor Relations Board or *by private agreement,* consent or arbitration for loss of pay by reason of discharge. . ." (Emphasis added.) C. 385, S.L. 1955, G.S. 96-8 (13)a. Not content with redefining "wages," the 1955 Act added a new subsection to the disqualifying provisions. It said an employee should not be entitled to compensation benefits "for any week with respect to which he has received any sum from the employer pursuant to an order of the National Labor Relations Board or *by private agreement,* consent or arbitration *for loss of pay by reason of discharge. When the amount so paid by the employer is a lump sum and covers a period of more than one week, such amount shall be allocated to the weeks in the period of a pro rata basis.* . . G.S. 96-14(8). (Emphasis supplied.)

The fact that the Legislature not only amended the definition of "wages," but added a disqualifying provision is, we think, clear evidence of its intent to prevent the collection of unemployment benefits so long as the employee had vacation or severance pay payable to him. It is a clear declaration that the Legislature did not intend that an employer should be required to provide greater compensation to an unemployed individual than to the same individual when at work.

Under the 1955 definition of "wages," Swift has been required to pay Social Security taxes including unemployment taxes on the sums paid claimants because of its contractual obligations. If the sums so paid are taxable because they are wages, it would seem they should qualify as wages under the definition of unemployment and other provisions of the Act.

Claimants contend the moneys paid pursuant to the contract had no relation to their unemployment but were the payment of a debt

for past services. This contention is without merit. It ignores the express language of the contract. If, as claimants argue, the payments were a debt owing for past services, a voluntary termination of the relationship would not discharge the debt nor would a discharge for cause; but the contract by express language declares claimants are not entitled to the moneys in either of these events. They have no right to collect under the contract unless they meet its express provisions and there is a total and permanent termination of the relationship due to no fault of theirs.

Claimant Daniel McClain was paid for a four weeks' vacation and given a gratuity of $688.80, equal to eight weeks' wages, which payments sufficed to bring him in the class of employees entitled to retirement pay. We think these payments to him fall in the same category as the payments made to the other claimants.

The excellent briefs furnished by the parties have been helpful in reaching a decision. We have given careful consideration to the cases cited in them. We have made an independent research. Decisions by the various courts called upon to consider the question here presented are reviewed in *Globe-Democrat Pub. Co. v. Industrial Commission,* 301 S.W. 2d 846. We concur in the statement there made: "The only definite conclusion that can be reached from an analysis and consideration of the authorities in other jurisdictions is that there is a complete lack of unanimity of opinion on the basic question here presented." The divergent conclusions are in part due to statutory differences.

Our conclusion that claimants are disqualified for benefits until the moneys paid by Swift have been exhausted by weeks elapsed at the employees' weekly wage rate is supported by *Globe-Democrat Pub. Co. v. Industrial Commission, supra* (Mo.); *Schenley Distillers v. Review Board of Ind.* Emp. S.D., 112 N.E. 2d 299 (Ind.); *Santus v. Unemployment Compensation Bd. of Review,* 110 A 2d 874 (Pa.); *General Electric Co. v. Unemployment Comp. Bd. of R.,* 110 A 2d 258 (Pa.); *Wheatland Tube Co. v. Unemployment Comp. Bd. of Rev.,* 142 A 2d 772 (Pa.); *Fazio v. Unemployment Compensation Board of Review,* 63 A 2d 489 (Pa.); *Krupa v. Western Union Tel. Co.,* 103 N.E. 2d 784 (Ohio); *Kalen v. Director of Division of Employment Security,* 136 N.E. 2d 257 (Mass.); *Cerce v. Director of Division of Employment Security,* 128 N.E. 2d 793 (Mass.); *Bradshaw v. California Employment Stab. Com'n.,* 297 P 2d 970 (Cal.).

Contrary conclusions were reached in *Kroger Company v. Blumenthal,* 148 N.E. 734 (Ill.); *Dubois v. Maine Employment Security Commission,* 114 A 2d 359 (Me.); *Western Union Tel. Co. v. Texas*

*Employment Com'n.*, 243 S.W. 2d 217; *Ackerson v. Western Union Tel. Co.*, 48 N.W. 2d 338, 25 A.L.R. 2d 1063 (Minn.); *Meakin v. Huiet*, 112 S.E. 167 (Ga.).

For the reasons we have given we conclude our statute defers claimants' right to unemployment benefits until the lapse of the periods for which payments were made.

Reversed.

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WILLIAM B. JACKSON, JR. v. LOUIS RICHARD BOBBITT AND ROBERT L. SATTERFIELD, ADMR. OF THE ESTATE OF JAMES LAMAR ROBERTS, ADDITIONAL PARTY DEFENDANT.

WILLIAM JUNIOR LONG v. LOUIS RICHARD BOBBITT AND ROBERT L. SATTERFIELD, ADMR. OF THE ESTATE OF JAMES LAMAR ROBERTS, ADDITIONAL PARTY DEFENDANT.

GROVER VERNON JOHNSON v. LOUIS RICHARD BOBBITT AND ROBERT L. SATTERFIELD, ADMR. OF THE ESTATE OF JAMES LAMAR ROBERTS, ADDITIONAL PARTY DEFENDANT.

SAMUEL LEE EVANS v. LOUIS RICHARD BOBBITT AND ROBERT L. SATTERFIELD, ADMR. OF THE ESTATE OF JAMES LAMAR ROBERTS, ADDITIONAL PARTY DEFENDANT.

LAWRENCE THOMAS SWANN v. LOUIS RICHARD BOBBITT AND ROBERT L. SATTERFIELD, ADMR. OF THE ESTATE OF JAMES LAMAR ROBERTS, ADDITIONAL PARTY DEFENDANT.

(Filed 20 January, 1961.)

**1. Courts § 2—**

A challenge to the jurisdiction of the court may be made at any time, and it is the duty of the court to take notice of want of jurisdiction at any stage of the proceeding and dismiss the suit.

**2. Courts § 3—**

The Superior Court is a court of general state-wide jurisdiction. Constitution of North Carolina, Article IV, § 2.

**3. Courts § 2—**

Where a court of general jurisdiction acts in the matter, there is a presumption of jurisdiction and the burden is upon the party asserting want of jurisdiction to show it.

**4. Courts § 3—**

Where the Superior Court denies motion for judgment of nonsuit on the ground of want of jurisdiction without finding any facts, and the record fails to show any requests for findings, it will be presumed that the trial judge duly found that the court had jurisdiction over the subject matter and the parties unless the contrary appears from the record.

JACKSON, LONG, JOHNSON, EVANS, SWANN *v.* BOBBITT.

**5. Same: Master and Servant § 84— Evidence held not to show that action was within exclusive jurisdiction of Industrial Commission.**

In these actions to recover for negligent injury against the personal representative of the driver of the car in which plaintiffs were riding, there was nothing in the pleadings to show that the actions were within the purview of the Workmen's Compensation Act, and the evidence in this respect tended to show only that all of the plaintiffs were employees of intestate's brother, that the employer or someone in his behalf customarily provided them transportation to and from work, that intestate worked for his brother on occasions after school, and that on the occasion in suit intestate, driving a car, picked them up early from work because of rain, and that the accident in question occurred while he was driving them back from work. The evidence failed to show that intestate was paid any regular salary or that the transportation of the employees to or from work was a part of the contract of employment, express or implied, or was other than gratuitous. *Held:* The denial of motions for compulsory nonsuit on the ground that the actions were within the exclusive jurisdiction of the Industrial Commission will not be disturbed, it not appearing from the record that the injuries were by accident arising out of and in the course of plaintiffs' employments, and it being presumed that the trial court found all facts necessary to give it jurisdiction. G.S. 97-10.

APPEAL by defendant Robert L. Satterfield, Administrator of the estate of James Lamar Roberts, deceased, additional party defendant, from *Hall, J.*, June 1960 Civil Term, of ORANGE.

Five separate actions to recover damages for personal injuries resulting from the actionable negligence of defendant Satterfield's intestate James Lamar Roberts, deceased, in the operation of a Dodge automobile registered in the name of the defendant Louis Richard Bobbitt, which actions were consolidated and tried together.

On the afternoon of 15 April 1958 the five plaintiffs were passengers in the Dodge automobile, which was being driven on Highway No. 751 between Durham and Hillsboro by James Lamar Roberts, a boy 16 or 17 years old. There was a drizzling, steady rain. A man in front was driving an automobile about 50 miles an hour. James Lamar Roberts followed this automobile about a hundred yards. He turned to the left to pass at a speed of 60 or 65 miles an hour, his left hind wheel hit a soft shoulder, and he skidded off the road 50 yards, pulled back on the road, lost control of his automobile, ran off the road into a ditch and then into a tree. In the collision with the tree the five plaintiffs were injured, and James Lamar Roberts was killed.

All of the complaints are identical, except as to different allegations of injuries. In each of the five complaints it is averred "that at all times herein complained of, James Lamar Roberts was the agent, servant, and employee of the defendant Louis Richard Bobbitt . . .

acting within the scope of his employment and authority and in furtherance of the business of the defendant (Bobbitt)."

The answers in the five actions are identical. Each answer consists of a general denial of the allegations of the complaint, except it admits the residence of the parties, the death of James Lamar Roberts, and the appointment and qualification of Satterfield as administrator of his estate.

Five sets of issues were submitted to the jury. They are identical, except that different plaintiffs' names appear in the first and third issues. The issues in the Jackson case are as follows:

"1. Was the plaintiff, William B. Jackson, Jr., injured by the negligence of James Lamar Roberts, as alleged in the complaint?

Answer: Yes.

"2. Was James Lamar Roberts at the time the agent or employee of the defendant, Louis Richard Bobbitt, and acting within the scope and course of his employment or agency, as alleged in the complaint?

Answer: No.

"3. What amount, if any is the plaintiff, William B. Jackson, Jr., entitled to recover?

Answer: $12,500.00."

In each one of the five cases the jury answered the first issue Yes, the second issue No, and the third issue in different amounts.

From five separate judgments in accord with the verdict in each case, defendant Robert L. Satterfield, administrator of the estate of James Lamar Roberts, appeals.

*Henry Godwin (N. H. Godwin) for plaintiffs, appellees.*

*Robert L. Satterfield and Smith, Leach, Anderson & Dorsett for defendant, appellant.*

PARKER, J. Defendant Satterfield assigns as errors the denial of his motion for judgment of compulsory nonsuit made at the close of plaintiffs' evidence, and the denial of a similar motion renewed at the close of all the evidence.

Defendant contends that all five plaintiffs and James Lamar Roberts were employees of Bobby Roberts, and all five plaintiffs were injured by accident arising out of and in the course of their employment, and, therefore, their remedy being exclusively under the North Carolina's Workmen's Compensation Act, the trial court was without jurisdiction, and should have compulsorily nonsuited all five actions.

All complaints allege that James Lamar Roberts was an employee,

agent and servant of the defendant Louis Richard Bobbitt. All answers merely deny these allegations. The pleadings in the case contain no allegations that plaintiffs and James Lamar Roberts were employees of Bobby Roberts. There is no plea by defendant that the court lacked jurisdiction. Plaintiffs' brief states, "the first time Workmen's Compensation coverage for these plaintiffs was raised, was at the close of plaintiffs' evidence." However that may be, a challenge to the jurisdiction of the court may be made at any time, *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673, even in the Supreme Court, *MacRae & Co. v. Shew,* 220 N.C. 516, 17 S.E. 2d 664.

If a court finds at any stage of the proceedings that it is without jurisdiction, it is its duty to take proper notice of the defect, and stay, quash or dismiss the suit. *In re Davis,* 248 N.C. 423, 103 S.E. 2d 503; *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136.

The Superior Court is a court of general state-wide jurisdiction. N. C. Constitution, Article IV § 2; *S. v. Pender,* 66 N.C. 313; *Rhyne v. Lipscombe,* 122 N.C. 650, 29 S.E. 57; *Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723.

Plaintiffs are entitled to call to their aid the principle of *omnia rite acta praesumuntur* and the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter. *Williamson v. Spivey,* 224 N.C. 311, 30 S.E. 2d 46, and cases cited.

This Court said in *Dellinger v. Clark,* 234 N.C. 419, 67 S.E. 2d 448: "The court below had the power to consider and inquire into the facts in respect to, and determine, subject to review, the question of its jurisdiction. (Citing authority). And the court having acted in the matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction. (Citing authority). The burden is on the party asserting want of jurisdiction to show such want."

The allegations of all five complaints show that the court had jurisdiction over the parties and the subject matter of all five actions, and there is nothing in the answers to show the contrary. "Unless the contrary appears from the record, it will be presumed, with respect to a court of general jurisdiction, that all the facts necessary to give the court jurisdiction to render the particular judgment existed and were duly found, that the court has determined every matter on which its jurisdiction depends, and that every step necessary to give it jurisdiction has been taken." 21 C.J.S., Courts, p. 150.

What the Court said in *Powers v. Memorial Hospital,* 242 N.C. 290, 87 S.E. 2d 510, is apposite: "Whether the hospital had the required number of employees is a jurisdictional fact to be found by

the court. (Citing authority). But in the absence of a request for such finding, it will be assumed that, in allowing the motion for judgment as of nonsuit on the ground stated, the court found the essential facts."

The record shows that the trial judge denied the motions for judgments of compulsory nonsuit without stating any reason for his ruling. So far as the record shows, no request was made by defendants, or any one of them, that he find the facts as to jurisdiction. It will be presumed that in denying the motions for judgments of compulsory nonsuit the trial judge duly found and determined that the court had jurisdiction over the subject matter of all five cases and of the parties, unless the contrary appears from the record.

In reference to appellant's contention that the court was without jurisdiction, plaintiffs' evidence shows the following: All five plaintiffs live in Orange County, and were on 15 April 1958 employees of Bobby Roberts, who at the time was constructing two houses in the city of Durham. Paul Roberts, a brother of Bobby Roberts, was supervisor for Bobby Roberts. James Lamar Roberts was a 17-year-old brother of Paul and Bobby Roberts. James Lamar Roberts went to school in the morning, and worked for Bobby Roberts in the afternoon. Paul and James Lamar Roberts live in Orange County, and it seems that Bobby Roberts lives in the same county.

On 15 April 1958 plaintiffs Long, Johnson and Jackson rode to Durham to work with Paul Roberts, who was driving a pickup truck. Plaintiff Evans rode to work that day with Bobby Roberts, who was driving another automobile. It does not appear with whom plaintiff Swann rode to work. Swann and Evans were working on the house Bobby Roberts was looking after. The other plaintiffs were working on the house where Paul Roberts was. That afternoon it began raining. James Lamar Roberts came up driving the Dodge automobile registered in the name of defendant Bobbitt, and Bobby Roberts told plaintiffs Evans and Swann to get in the automobile with him and go home. Then James Lamar Roberts drove the Dodge to where Paul Roberts was working, and Paul Roberts told plaintiffs Long, Johnson and Jackson to get in the automobile with him and go home. On the way home the wreck occurred in which plaintiffs were injured and James Lamar Roberts was killed. Plaintiff Swann testified: "James worked there for Bobby in the afternoon and was working there this particular afternoon before you all (sic) left." Plaintiff Evans testified: "James Roberts went to school in the morning and in the afternoon he worked on the job. . . . I had

ridden with James Roberts in this Dodge automobile before. I had ridden in the pickup with Bobby and Paul and in the station wagon."

Plaintiffs Evans, Johnson, Swann and Jackson upon being recalled as witnesses testified on recross-examination in substance that it was part of the understanding and arrangement with Bobby Roberts that he would furnish them transportation to and from their homes in Orange County to Durham, and he did so by himself or by an employee. Plaintiff Long upon being recalled as a witness testified on recross-examination: "I rode down to Durham with Mr. Roberts every day that I went and home with him every day. We didn't have any arrangement that way but there was another boy who would bring me back in the evening. He worked for Mr. Roberts too. He never told me that it was our understanding or arrangement that either Mr. Roberts or one of his employees would see that I got there and bring me back, but that is the way that we usually and customarily did it. I was expecting the first time that I went for one of his employees to come and take me to the job. I didn't have any way to go and I was expecting someone to come by and pick me up. I knew the boy was coming. I had an understanding with the boy that was coming to get me, who was an employee of Mr. Roberts."

Plaintiff Long had been working for Bobby Roberts three days, although he had worked for him before. It was the first time he had ever ridden with James Lamar Roberts. Plaintiff Evans had ridden with James Lamar Roberts before, but he didn't pick him up very often to take him home. It was the first time plaintiff Johnson had ridden with James Lamar Roberts: usually, he and plaintiffs Jackson and Long rode together on a truck. Plaintiff Jackson had ridden with James Lamar Roberts dozens of times.

The defendants called to the stand two witnesses, the defendant Bobbitt and Paul Roberts.

Defendant Bobbitt's testimony is to this effect: The Dodge automobile James Lamar Roberts was driving at the time of the wreck was owned by the mother of the Roberts', and the title to it was in her name. In January 1957 Paul Roberts had the title to this automobile put in Bobbitt's name so he could borrow some money on it for Paul Roberts. Paul Roberts told him he had had some financial difficulties, and was unable to borrow money himself. Bobbitt borrowed money on the automobile, and turned it over to Paul Roberts. Bobbitt testified: "I didn't object to Paul Roberts keeping the car and driving it because it was his car."

Paul Roberts testified in substance: James Lamar Roberts went to school. Sometimes in the evening he would come to Durham. Some-

times he would come by, and if my brother Bobby had anything for him to do, he would do it. He doesn't know whether his brother Bobby paid James Lamar Roberts anything for his work: his brother Bobby gave him spending money. He doesn't know whether James Lamar Roberts worked for a salary or not. James Lamar Roberts was 17 years old. James Lamar Roberts with two plaintiffs came by the house where he was working and he told the plaintiffs working with him to go home with James. At that time defendant Bobbitt had no connection with Bobby Roberts. On 15 April 1958 he drove the Dodge automobile from his home in Hillsboro to the job in Durham carrying some of the help with him.

So far as the defendants' evidence is concerned, there is none tending to show that Bobby Roberts, the employer of plaintiffs, furnished them the means of transportation to and from the place where their work was to be performed as an incident to their contracts of employment, or as a part of their contracts of employment, or that Bobby Roberts paid the plaintiffs anything to cover their expenses of travelling to and from their work as an incident to their contracts of employment, or that on the afternoon of the wreck James Lamar Roberts was an employee of Bobby Roberts and was paid for his work. It would seem that Bobby Roberts was available as a witness, but defendants did not call him as a witness. He could have testified as to whether James Lamar Roberts was an employee of his on the afternoon of the wreck, as to whether or not he paid him any salary when he worked for him, and as to whether or not he had agreed with the plaintiffs to furnish them transportation to and from their work as an incident to their contracts of employment with him, or as a part of their contracts with him, or that he paid them anything to cover their expenses of travelling to and from their work as an incident to their contracts of employment. Defendants have offered no evidence that the transportation of these plaintiffs to and from their work was other than gratuitous or a mere accommodation.

The Court said in *Lassiter v. Telephone Co.*, 215 N.C. 227, 1 S.E. 2d 542, quoting from 1 Honnold on Workmen's Compensation, § 110: " 'The rule has been established in accordance with sound reason that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employee, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of the contract. Pursuant to this rule, the employee is in the course of employment if he has a

right to the transportation, but not if it is gratuitous, or a mere accommodation. A workman injured while riding to or from his work in the conveyance of a third person is not ordinarily entitled to compensation.' "

This is written in Schneider, Workmen's Compensation, Third or Permanent Ed., Vol. 8, § 1746 (a):

> "Courtesy rides given by an employer do not, generally, give rise to liability under compensation statutes. The transporation must be furnished as a real incident of the employment to come within the rule. In other words, there must exist an express or implied obligation on the part of the employer to provide transportation.
>
> "An employee who has completed his day's work and in company with other employees is riding on a conveyance of the employer upon a public street, pursuant to permission, but not to any obligation on the part of the employer by contract, express or implied, to furnish such transportation, is not engaged in performing any services for his employer, the word 'furnish' implying something more than 'permission.'
>
> "Where an employer merely permits or authorizes the use of his facilities by an employee to return home, it is not considered as being in the course of employment, but as a convenience to the employee. An injury happening under such circumstances does not bring the employee within the compensation act."

It is well settled law that a contract is not what either party thinks, but what both agree. *Overall Co. v. Holmes,* 186 N.C. 428, 119 S.E. 817; *Brown v. Williams,* 196 N.C. 247, 145 S.E. 233. "To constitute a valid contract the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms." *Goeckel v. Stokely,* 236 N.C. 604, 73 S.E. 2d 618.

The Court said in *Warner v. Leder,* 234 N.C. 727, 69 S.E. 2d 6: " . . . an 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 . . . and that the provision in G.S. 97-10 which gives the injured employee or his personal representative 'a right to recover damages for such injury, loss of service, or death from any person other than the employer,' means any other person or party who is a stranger to the employment but whose negligence contributed to the injury. And we further hold that such

provision does not authorize the injured employee to maintain an action at common law against those conducting the business of the employer whose negligence caused the injury."

This Court said in *Ward v. Bowles,* 228 N.C. 273, 45 S.E. 2d 354: "While the rights of the employee, as against a third party after claim for compensation is filed, are limited, G.S. 97-10, there is nothing in the Act which denies him the right to waive his claim against his employer and pursue his remedy against the alleged tort-feasor by common law action for negligence."

There is nothing in the record before us to show that the plaintiffs here or any one of them, ever filed a claim for compensation against Bobby Roberts, or that the Industrial Commission issued an award, or that Bobby Roberts ever admitted liability in writing.

G.S. 97-2 of our Workmen's Compensation Act defines the term "employee," so far as relevant here, thus: "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed."

When the wreck in which plaintiffs were injured occurred, they were riding in an automobile registered in the name of the defendant Bobbitt. This automobile had never been owned by their employer Bobby Roberts. There is no evidence Bobby Roberts ever had any control over it. Bobby Roberts told plaintiffs Evans and Swann to get in this automobile and go home. Paul Roberts told plaintiffs Long, Johnson and Jackson at another place and time to get in this automobile and go home.

In our opinion, it does not appear from the record that there existed an express or implied obligation on the part of Bobby Roberts to provide transportation for plaintiffs to and from their work, and it does not appear from the record that James Lamar Roberts at the time of the wreck was an employee of Bobby Roberts within the purview of our Workmen's Compensation Act, or that he was conducting any business for Bobby Roberts at the time, but it does appear from the record before us that the transportation furnished these plaintiffs was gratuitous or a mere accommodation or courtesy rides, and, therefore, plaintiffs were not injured by accident arising out of and in the course of their employment. Injuries to plaintiffs happening under such circumstances do not bring them within our compensation act. Appellant has not successfully carried the burden of showing want of jurisdiction. Such facts appearing from the record, we indulge the presumption that all the facts necessary to give the court

jurisdiction to render the judgments existed and were duly found, and that the court determined every matter on which its jurisdiction depends.

Plaintiffs offered sufficient evidence to show that their injuries were proximately caused by the actionable negligence of James Lamar Roberts. Appellant in his brief has no argument to the contrary.

Appellant's assignments of error to the denial of his motions for judgments of compulsory nonsuit are overruled.

Appellant's only other assignment of error is to the signing of the judgments. The judgments were entered in accord with the verdicts. The judgments of the court below are

Affirmed.

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DOROTHY A. ARVIN, ADMINISTRATRIX OF THE ESTATE OF CHARLES ARVIN, DECEASED, V. C. R. MCCLINTOCK AND THE SOUTHERN RAILWAY COMPANY.

(Filed 20 January, 1961.)

**1. Negligence § 26—**

While nonsuit for contributory negligence is proper only when plaintiff proves himself out of court, considering the evidence in the light most favorable to plaintiff and giving him the benefit of every reasonable intendment thereon and inference therefrom, when plaintiff's own evidence establishes negligence on his part constituting a proximate cause of the injury as the sole reasonable conclusion, nonsuit for contributory negligence is proper.

**2. Railroads § 4—**

A railroad crossing is in itself notice of danger, and a motorist is required not only to stop, look and listen before entering upon a grade crossing, but to stop at a place where his precaution will be effective.

**3. Same—**

Where plaintiff's evidence tends to show that his intestate stopped the truck he was driving momentarily before entering upon a railroad grade crossing within a municipality, and was struck by a train, that the track was straight for a long distance in the direction from which the train approached, and that a person could see down the track when within twelve or fifteen feet of the crossing, *is held* to show contributory negligence as a matter of law on the part of intestate.

**4. Negligence § 10—**

The doctrine of last clear chance is not applicable when plaintiff is guilty of contributory negligence as a matter of law.

BOBBITT, J., concurring in result.

HIGGINS and RODMAN, JJ., join in concurring opinion.

ARVIN *v.* MCCLINTOCK.

APPEAL by plaintiff from *Clark, J.*, at March Civil Term, 1960, of WAKE.

Civil action to recover damages for the alleged wrongful death of Charles Arvin in a collision between a fuel truck operated by plaintiff's intestate, and a train of defendant Railway Company, at a railroad grade crossing in the City of Raleigh, North Carolina, on 1 April, 1958.

The collision occurred where the defendant's railroad tracks intersect Blount and Hoke Streets. The tracks run generally in a northwest-southeast direction and the plaintiff's intestate approached the railroad from the easternmost side of the tracks, and the train was traveling from south to north.

Upon trial in Superior Court Henry Muldrove, an eye witness to the collision, offered by plaintiff, testified in pertinent part substantially as follows: " * * * On April 1, 1958, about 5:30 in the afternoon, I was driving a 1956 Chevrolet car on South Blount Street, going south, coming from home. I was driving the car from Smithfield to Blount, then turned and went out south. I was coming by Sinclair place and I saw an oil truck pull out from Sinclair and I slowed down. I slowed down and pulled on out. The Sinclair truck pulled on out, going on towards Buckeye Company across the railroad. The Buckeye Oil plant is across the railroad, which is in a southerly direction. At that time I did not see any train. I did not hear any train. I did not see any one out at the railroad, any person standing out there. The truck was easing along slowly in front of me. I was behind it and it went on across the railroad, and in a little bit got half-way across, the train blowed and when it blowed, hit, all about the same time. When I first saw the train it was not in my vision very long before it hit the truck * * * At the time I saw the train I have an opinion as to the speed of the train. In my opinion the approximate speed of the train when I first saw it was 40 miles per hour * * * I did not hear any bell on that train. There were no lights at that crossing * * * ."

And on cross-examination witness Muldrove testified: " * * * When the collision occurred between the truck and the train, I was about 90 feet from the track or rail and behind the truck, driving along slowly. At that time I was watching the truck. I had my mind centered on that truck as it went on the rail. I was driving slow behind the truck because I let the truck get out of the way. I was 90 feet behind that truck all the time after it pulled out in the street in front of me. There was no automobile between my car and the truck at that time. I saw no other car at all anywhere at the time

when it pulled out in front of me * * * The oil truck in front of me won't even out of low gear as it approached the rail— not the way it was going, just moving slowly, and when it came up to the rails it stopped a little bit and pulled on off. I saw that truck come up close to the railroad tracks. The truck did come to a stop close to the tracks before it pulled on off. That truck, when it came to that stop before it pulled on off again, was a couple of feet back from the rail and in front of me. I couldn't tell exactly how close it was to the rails but it did stop but went right up on the railroad. I don't think it was as close as 5 feet to the tracks. When it stopped it was back a few feet from the track. It stopped long enough to come to a standstill, then pulled off. It came to a full stop and immediately pulled off * * * ."

Another witness for the plaintiff, L. T. Hoviss, in answer to the following question, "From your observation as of April 1, 1958, how far did you have to get to the crossing before you could see the rails beyond the crossing, looking in a southeasterly direction?", said: "The front of my automobile would need to be within 12 to 15 feet, I'd say, of the railroad."

Mrs. L. T. Hoviss, who was in the car with her husband, testified, "The weather was clear and fair that day."

Another witness for plaintiff, Mr. J. W. Arvin, father of the plaintiff's intestate, testified that his son had driven across the crossing before and was familiar with said crossing. "On this particular day, my son was making a delivery of kerosene to one of my customers. At the time of the collision the truck had on it a mixed load of kerosene, fuel oil and gasoline. I estimated the load itself as weighing about 10,000 pounds and it was not fully loaded then. I had instructed my son to go and pick up some fuel at the bulk plant, but it wasn't a load, just a part of a load. I had instructed him to make delivery of kerosene to two of my customers that afternoon. Before April 1, 1958, my son had driven that truck some but not often. I would say he drove it as much as two or three times a week * * * He had not driven this truck across the crossing in question many times before * * * He had been to the Sinclair bulk plant but I don't recall ever sending him to the plant. He probably went with me. He could have gone but I don't recall how many times or how often, but wasn't but a few times, if he had * * * He did make some trips to the Sinclair bulk plant in that truck with me. On those trips I crossed this crossing. I would cross it going in an easterly direction going from my place of business, and then coming back from the plant I would cross it from the east going west * * * ."

Harry Litchfield, a plaintiff witness, testified on cross-examination: " * * * The track was straight a long distance in a southerly direction. I never noticed a curve in the track, I know there is one there. I do not know that the curve is over 1200 feet south of the crossing. I don't know how many feet it is * * * ."

At the close of all the evidence the defendants moved for judgment as in the case of nonsuit. The lower court allowed the motion on the ground "that the plaintiff's intestate was negligent and that his negligence was one of the proximate causes of his death and that no issue under the doctrine of last clear chance arises upon the evidence * * * ," and entered judgment in accordance therewith. Plaintiff excepts thereto and appeals to Supreme Court, and assigns error.

*Bunn, Hatch, Little & Bunn and Thomas A. Banks for plaintiff, appellant.*

*Smith, Leach, Anderson & Dorsett for defendant appellees.*

WINBORNE, C. J.: The sole question to be decided in case on appeal is whether or not the trial court erred in allowing defendants' motion for nonsuit. Taking the evidence offered upon the trial in the light most favorable to the plaintiff and giving to him the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as is done when considering motion for judgment of nonsuit, the conclusion is that the plaintiff's intestate was negligent, as a matter of law, and that his negligence contributed to his untimely death, *Clontz v. Krimminger, ante,* 252, and that the trial court was correct in sustaining defendants' motion for involuntary nonsuit. "Only when plaintiff proves himself out of court is he to be nonsuited on the evidence of contributory negligence." *Lincoln v. RR,* 207 N.C. 787, 178 S.E. 601. See also *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

In the instant case the evidence of the plaintiff shows that the plaintiff's intestate had full opportunity to observe the train and could have avoided going upon the tracks if he had exercised ordinary care. The plaintiff's evidence shows that an oncoming train could be seen 12 to 15 feet from the tracks as an automobile approaches from the direction in question. Indeed, plaintiff's witness Muldrove testified that he saw the train while 90 feet from the crossing. He testified that he followed the plaintiff's intestate to the crossing and that he saw the train when he was 90 feet from said crossing, and that the de-

ceased stopped the truck close to the tracks, and then drove on to the tracks.

There have been similar railroad crossing cases before the Supreme Court. And in this connection the Court has laid down the following principles of law:

1. In *Coleman v. RR,* 153 N.C. 322, 69 S.E. 251, it is said: "A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the Court. 'In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track, and a failure to do so is contributory negligence which will bar recovery. A multitude of decisions of all the courts enforce this reasonable rule.' There are, of course, exceptions to this, as well as most other rules, but when the traveler can see and won't see he must bear the consequences of his own folly. His negligence under such conditions bars recovery because it is the proximate cause of his injury. He has the last opportunity to avoid injury and fails to take advantage of it."

2. In *Johnson v. RR,* 163 N.C. 431, 79 S.E. 690, it is declared: "On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances— he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so his precaution may be effective."

3. In *Dowdy v. RR & Burns v. RR,* 237 N.C. 519, 75 S.E. 2d 639, "Conceding the existence of negligence on the part of the defendants, which they strenuously deny, this case is controlled by the fact that Dowdy drove his tractor and oil tanker upon the railroad crossing in the face of an oncoming train, which he could have seen in the exercise of ordinary care, if he had looked to the right while he was traveling according to his testimony 25 or 30 feet from the gate to the railroad crossing, or according to actual measurement taken by his witness Rhine 47 feet and 9 inches. If Dowdy had looked to his right while traveling this distance, he could have seen the train and avoided injury. This negligence on Dowdy's part contributed to the injury and damage of all the plaintiffs, and bars recovery, unless

they can bring themselves within the doctrine of last clear chance."

4. In *Godwin v. RR*, 220 N.C. 281, 17 S.E. 2d 137, the Court said: "In approaching a grade crossing both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident. A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing. Yet its failure to do so does not relieve the traveler of the duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery, when such failure is a proximate cause of the injury."

5. In *Irby v. RR*, 246 N.C. 384, 98 S.E. 2d 445, it is said: "In the instant case plaintiff knew that he was approaching a railroad, and he knew he was entering a zone of danger. He was required before entering upon the track to look and listen to ascertain whether a train was approaching."

6. In *Beaman v. RR*, 238 N.C. 418, 78 S.E. 2d 182, it is said: "Here the plaintiff was thoroughly familiar with the crossing and the surrounding area. He knew that the tracks to his left curved in a southerly direction. He saw the trees and bushes along the track almost daily. He knew it was a dangerous crossing. It was a clear day and the windows of his automobile were open. He looked to the right and then to the left and there was nothing that he could see coming from the west. He then looked forward and proceeded to cross the track. When he traveled only from seven to nine feet and his right wheel was across the first rail, he saw a train to his left, from 125 to 175 feet from the crossing. Why did he not see the train almost directly in front of him before it had traveled from 125 to 175 feet beyond all obstructions? Was it for the reason he looked once and then looked no more as his evidence seems to indicate?"

7. In *Gray v. RR*, 243 N.C. 107, 89 S.E. 2d 807, it is declared: "In the light of the settled principles of law long prevailing in this State that where a railroad track crosses a public highway, though a traveler and the railroad have equal rights to cross, the traveler must yield the right of way to the railroad company in the ordinary course of its business."

8. In *Parker v. RR*, 232 N.C. 472, 61 S.E. 2d 370, the Court said: "It does not suffice to say that plaintiff stopped, looked and listened. His looking and listening must be timely, *McCrimmon v. Powell, supra*, (221 N.C. 216) so that his precaution will be effective. *Godwin v. RR, supra*. It was his duty to 'look attentively, up and down the

track', in time to save himself, if opportunity to do so was available to him. *Harrison v. RR, supra* (194 N.C. 656); *Godwin v. RR, supra.* Here the conditions were such that by diligent use of his senses he could have avoided the collision. His failure to do so bars his right to recover. *Godwin v. RR, supra.*"

9. And in *Herndon v. RR,* 234 N.C. 9, 65 S.E. 2d 320, it is declared: "Assuming but not deciding that the evidence offered below made out a *prima facie* case of actionable negligence against the defendants, nevertheless, it is manifest from the evidence adduced that the plaintiff's intestate failed to exercise due care under the surrounding circumstances for his own safety and that such failure contributed to, and was a proximate cause of, his death."

Moreover, having decided that plaintiff's intestate was negligent as a matter of law, the doctrine of last clear chance is not applicable. *Redmon v. RR,* 195 N.C. 764, 143 S.E. 829; *Rives v. RR,* 203 N.C. 227, 165 S.E. 709; *Rimmer v. RR,* 208 N.C. 198, 179 S.E. 753; *Stover v. RR,* 208 N.C. 495, 181 S.E. 336; *Reep v. RR,* 210 N.C. 285, 186 S.E. 318; *Lemings v. RR,* 211 N.C. 499, 191 S.E. 39; *Sherlin v. RR,* 214 N.C. 222, 198 S.E. 640.

For reasons stated the judgment below is

Affirmed.

BOBBITT, J., concurring in result. I agree that the evidence, when considered in the light most favorable to plaintiff, establishes the contributory negligence of plaintiff's intestate. This bars recovery unless there is evidence sufficient to entitle plaintiff to invoke the doctrine of last clear chance. Since I find no evidence sufficient to warrant the submission of an issue as to last clear chance, I concur in the result.

My dissent is directed solely to this statement in the Court's opinion: "Moreover, having decided that plaintiff's intestate was negligent as a matter of law, the doctrine of last clear chance is not applicable." Similar statements appear in opinions in prior cases. However, in my view, such statements do not express accurately the intended meaning. In any event, they do not express accurately the correct legal principle.

I understand the oft-used expression, "guilty of contributory negligence as a matter of law," means simply that the evidence, when considered in the light most favorable to plaintiff, establishes plaintiff's contributory negligence. But the legal significance of plaintiff's contributory negligence, whether it appears as a matter of law from the evidence most favorable to plaintiff or is determined by a jury on conflicting evidence, is the same.

The doctrine of last clear chance presupposes the defendant was negligent and the plaintiff was contributorily negligent. *Barnes v. Horney,* 247 N.C. 495, 101 S.E. 2d 315; *Graham v. Atlantic Coast Line R. Co.,* 240 N.C. 338, 82 S.E. 2d 346; *Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150, and cases cited.

"The doctrine of last clear chance, otherwise known as the doctrine of discovered peril, is accepted law in this State. It is this: The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so." *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 447, 35 S.E. 2d 337, and cases cited; *Wade v. Sausage Co., supra,* and cases cited.

"To sustain the plea (of last clear chance) it must be made to appear that (1) plaintiff by his own negligence placed himself in a dangerous situation; (2) the defendant saw, or by the exercise of reasonable care should have discovered, the perilous position of plaintiff, (3) in time to avoid injuring him; and (4) notwithstanding such notice of imminent peril negligently failed or refused to use every reasonable means at his command to avoid the impending injury, (5) as a result of which plaintiff was in fact injured." *Ingram v. Smoky Mountain Stages, Inc., supra.*

My view is well expressed in this statement: "The doctrine of last clear chance does not arise until it appears that the injured person has been guilty of contributory negligence, and no issue with respect thereto must be submitted to the jury unless there is evidence to support it." *Irby v. R. R.,* 246 N.C. 384, 390, 98 S.E. 2d 349.

Whether the doctrine of last clear chance is applicable does not depend upon whether the evidence, when considered in the light most favorable to plaintiff, establishes the contributory negligence of his intestate. The doctrine of last clear chance is not applicable here because the evidence was insufficient to support a finding that the defendant saw or should have seen the perilous position in which plaintiff's intestate had, by his own negligence, placed himself, in time to avoid injuring him and under such circumstances failed to exercise reasonable care to avoid the impending injury.

HIGGINS and RODMAN, JJ., join in this opinion.

PAUL EDWARD LYDAY v. SOUTHERN RAILWAY COMPANY AND E. C. KERSTEIN

(Filed 20 January, 1961.)

**1. Automobiles § 83—**

The operation on a highway of a tractor-trailer of a combined length of over 55 feet, the trailer being in excess of 8 feet wide, without a special permit, is a misdemeanor. G.S. 20-116, G.S. 20-119. A permit to operate an oversize vehicle on a designated highway between two designated points is not a permit to operate on a different highway to a different destination.

**2. Automobiles § 6—**

The statutory provisions requiring a special permit to operate oversize vehicles on the highway were enacted in the interest of public safety, and the violation of the statutory restrictions is negligence *per se* and actionable when the proximate cause of injury.

**3. Railroads § 4— Evidence held to disclose contributory negligence of motorist as a matter of law in causing crossing accident.**

The evidence tended to show that the tractor-trailer in question was of a size requiring special permit for operation over a highway, that no permit had been obtained, that the driver attempted to drive the vehicle over a grade crossing, where, by reason of the length of the vehicle, the narrow road and curve in the road at the crossing, the vehicle could not traverse and clear the crossing within the time that it took defendant's train, traveling at lawful speed, to reach the crossing from the place it first came into view from around a curve in the track. *Held*: It was contributory negligence as a matter of law to attempt to traverse the crossing with such vehicle without notifying the railroad company and ascertaining when the vehicle could be moved across in safely, or without sending someone down to the curve in the track to ascertain whether or not the crossing could be made in safety.

APPEAL by plaintiff from *Froneberger, J.*, June Term, 1960, of BUNCOMBE.

This is a civil action to recover damages arising out of a collision which occurred about 11:00 a.m. on 10 October 1959 between the plaintiff's mobile home and one of defendant's passenger trains at the railway crossing on Jim's Branch Road in Buncombe County, North Carolina.

The evidence tends to show that the plaintiff was the owner of a Sterling Mobile Home, hereinafter called a trailer. It contained a living room, two bedrooms, a bath, a kitchen and a hall. This trailer was ten feet wide and 45 feet long. The plaintiff and his family prior to 10 October 1959 had been living in it at 200 Governor's View Road in Beverly Hills in Buncombe County.

Sometime prior to 10 October 1959 the plaintiff had requested one

Clair E. Revell, who was engaged in the business of moving houses, to move his trailer to a new location on Jim's Branch Road. Revell was related to the plaintiff by marriage, and the others, Willard Hunter and Reeves L. Maney, who assisted the plaintiff in moving were his co-employees and friends, all assembled for the purpose of assisting the plaintiff in the removal of his trailer to the new location on Saturday, 10 October 1959. There is no allegation in the complaint with respect to any contract existing between the plaintiff and Revell for furnishing his tractor for the towing and moving of the said trailer.

The evidence tends to show there was no agreement with respect to pay for moving this trailer. The plaintiff so testified, and further testified that he had never received a bill for Revell's services and that the question of pay had never been mentioned.

The plaintiff testified that on the morning of 10 October 1959, Revell arrived at the location of his trailer around 7:30 o'clock and requested him to take him and show him the route that they would have to travel and the point to which they would have to take the trailer. (The plaintiff and Revell had been out to the railroad crossing on Jim's Branch Road the day before.) "He asked me to drive him up there so that he could observe the crossing and the route." After Revell inspected Jim's Branch Crossing on Saturday morning, 10 October 1959, they returned to 200 Governor's View Road where Revell's tractor was hooked to the plaintiff's trailer and was then driven by Revell over U. S. Highway 70 to Jim's Branch Road, a distance of five or six miles. The tractor was 14 feet eight inches long, making the total length of the tractor and trailer 59 feet eight inches.

The main line of the Southern Railway that runs from Winston-Salem to Asheville crosses Jim's Branch Road at a point 50 feet south of U. S. Highway 70, between Swannanoa and Biltmore. Jim's Branch Road is between 16 and 18 feet wide; it is paved from the intersection of U. S. Highway 70 and leads into a rural area in Buncombe County. From where this road leaves U. S. Highway 70, according to the plaintiff's evidence, "it goes downhill in a sort of left curve and then it curves right and straightens up to the railroad tracks and then as soon as it gets over the track it goes downhill." The crossing had a highway stop sign and two railway crossing signs. To the east, from which direction the train approached, by reason of the banks and a curve in the track, the approaching train could be seen as one approached the crossing for a distance of 450 feet.

Revell, who was driving the trailer, did not testify in the hearing below. He was engaged in work out of the State. There is evidence

that Revell stopped before driving the tractor and trailer on the railroad track, but there is no evidence as to whether he looked or listened.

The evidence tends to show that it took considerable maneuvering to get the tractor-trailer in position to cross the railroad track due to the curve in the road between U. S. Highway 70 and the railroad crossing.

The plaintiff further testified that Mr. Hunter passed the tractor-trailer in his car just before it reached Jim's Branch Road and proceeded along Jim's Branch Road, crossed the railroad track and parked his car about 50 feet south of the crossing.

Mr. Hunter testified: "When I got out of my car, I didn't hear anything. I then went back toward the Southern Railway crossing on Jim's Branch Road. I never got all the way to the tracks there at the crossing. * * * I was about 8 or ten feet from the railroad track. * * * At that point Mr. Revell was proceeding across the railroad tracks * * *, the front wheels on the tractor were already across the southernmost track. The rear wheels were approximately in the center of the tracks between the two rails. He moved on very slowly * * * three or four miles per hour. When I first saw the train, it had done come around the curve and was in the portion where the curve begins to straighten out. * * * From the point where I first saw the train to the crossing, I would say it would be about 275 to 300 feet. * * * After that I heard a whistle. * * * I did not hear any bells or whistles prior to that time. * * * As soon as I heard that toot, I ran. * * * I didn't get back to my car. I ran about 40 feet * * * I hollered at the driver of the truck * * *. He got out of the truck before the impact. It was just a split second. * * * I have an opinion * * * as to the speed of the train as it went through the trailer. I would say from 50 to 55 miles an hour."

The plaintiff testified that at the time of the collision the tractor and trailer were moving at a speed of from two to four miles per hour; that he did not see the defendant's train until it was within 250 feet of the crossing; that in his opinion the train was traveling at least 50 to 60 miles per hour. The train did not come to a stop until it had traveled between one-quarter and one-half a mile down the track. The plaintiff offered evidence by two witnesses who were hunting about one-half mile from the crossing and who testified they saw the collision but did not hear any whistle or bell prior to the collision.

On cross-examination, Mr. Hunter admitted that he had a conversation with a Mr. Shotwell, a representative of the railroad, soon

after the accident, which conversation was recorded, and at which time the witness said: " * * * I thought he could come on across like he would in an ordinary vehicle, but I saw that it takes quite a bit of maneuvering and easing around to get one of those things across correct, so I got out of the car and walked back up there, walked back to the crossing, and I was observing the right side of the trailer to see that he didn't drop his wheels and hang them on the track. * * * I was guiding him and trying to see that he didn't hang his wheels up on that track."

This witness further testified on cross-examination: "I was on the west side of the trailer. I could see between the truck and the trailer. The view I had was between the coupling of the truck and the trailer. * * * When I heard the whistle, I saw the train and immediately began running and hollering at the same time."

The plaintiff's witness Maney testified: "I saw it (the train) as soon as it could be seen. It was about 400 feet, blowing as it rounded the curve." This witness further testified that the train was being operated at 50 or 60 miles per hour at the time of the collision.

The defendant's evidence tends to show that the engineer started blowing his whistle for the Jim's Branch Crossing some 1,300 or 1,400 feet east of the crossing at the whistle post for said crossing; that he had blown two long blasts, and as he blew the short blast he saw the tractor-trailer on the crossing, turned loose the whistle cord and put the brakes in emergency. The defendant's evidence further tends to show that the train consisted of eleven cars and was being pulled by two diesel units; the length of the train was approximately 800 feet and the air brakes on the train were in good condition; that the train was being operated at between 35 and 40 miles per hour; that the engineer used his emergency brake and all the appliances at his command, and that the train could not be stopped in less than 1,500 feet. It was being operated downgrade. The engineer further testified "that he did everything in his power to stop the train after seeing the mobile home pulled on the track; that after striking the mobile home, the impact knocked all the air pipes off the front end; the air went down on all the cars. * * * The engine's air pipes and braking facilities were so torn up from the impact that it was necessary to radio to Asheville and have a crew sent out with repairmen to repair the brake lines before the train could be brought to Asheville."

One of the defendant's witnesses who lived on the south side of the railroad crossing involved, testified that she heard the train whistle and saw the train strike the tractor-trailer. She further testified: "On that morning I was working at my sink and looked up and

saw a trailer coming across. I saw the trailer on that crossing more than five minutes before it was struck."

Plaintiff testified that he knew he had to get a permit from the North Carolina State Highway Commission before moving the trailer over the highway. Plaintiff's agent, Revell, owner and driver of the tractor, applied to the North Carolina State Highway Commission on 9 October 1959 (the day before the accident) for a permit to move a house trailer. On the same date, the North Carolina State Highway Commission issued to Revell "a special permit for excessive size house trailer with a width in excess of 8 feet and not to exceed ten feet and an over-all combined length of 65 feet." The weight of the house trailer was 12,000 pounds, to be towed by a one-ton truck from Asheville to Black Mountain via Route U.S. 70. The permit so issued recited that it was subject to State Highway Ordinance reading: "It shall be unlawful for any overwidth house trailer operating under a special permit for overwidth to travel on the highways at a speed in excess of 35 miles per hour, and such vehicle shall at all times be operated to the right of the center line, and as near the right-hand side of the traveled portion of the highway as practicable.

"This permit is granted upon condition that movement will be made during daylight and that no movements will be made on Saturdays, Sundays or Holidays. That all necessary precautions will be taken to safeguard the traveling public, and that you will be responsible for any and all damages whatsoever that may be caused during this movement, and that permission of proper authorities of incorporated municipalities will be obtained for movements over streets which are not on the highway system. * * *"

This permit was introduced in evidence by the defendant over the objection of the plaintiff.

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

*Williams, Williams & Morris; James N. Golding for plaintiff appellant.*

*W. T. Joyner, Ward & Bennett for defendant appellee.*

DENNY, J. The plaintiff insists that the permit introduced in evidence was not for the removal of his trailer. Be that as it may, there is no evidence introduced in the trial below tending to show that the plaintiff or his agent, Revell, obtained any permit to move the plain-

tiff's trailer over Jim's Branch Road. Furthermore, there is no contention on the part of the plaintiff that any such permit was ever requested or obtained for such purpose. The permit obtained by Revell on 9 October 1959 only authorized the removal of a house trailer from Asheville to Black Mountain over route U.S. 70.

The pertinent statutes with respect to the size of vehicles permitted to be operated on highways under the control of the North Carolina State Highway Commission without a special permit, are: G.S. 20-116, "(a) The total outside width of any vehicle * * * shall not exceed ninety-six inches, except as otherwise provided in this section; * * * (e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of fifty feet inclusive of front and rear bumpers * * *. Provided, however, that a combination of a house trailer used as a mobile home, together with its towing vehicle, shall not exceed a total length of fifty-five (55) feet exclusive of front and rear bumpers. * * *" G.S. 20-119, "Special permits for vehicles of excessive size or weight. The State Highway and Public Works Commission may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle of a size or weight exceeding a maximum specified in this article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer; and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit. * * *"

"The violation of a statute or ordinance, intended and designed to prevent injury to persons or property, whether done intentionally or otherwise, is negligence *per se* and renders one civilly liable in damages if its violation results in injury to another; for in such cases the statute or ordinance becomes the standard of conduct or the rule of the prudent man." *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *Ham v. Fuel Co.,* 204 N.C. 614, 169 S.E. 180; *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459. See also *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 311.

Certainly, an attempt to move the plaintiff's trailer over and along Jim's Branch Road without a permit was a misdemeanor. Furthermore, the statute requiring a permit before moving plaintiff's trailer over or upon any highway controlled by the North Carolina State Highway Commission was enacted for the protection of the traveling public. But whether such violation constituted contributory negli-

gence depends on whether or not such violation was a proximate cause or one of the proximate causes of the damages suffered by the plaintiff. *McNair v. Richardson, supra; Aldridge v. Hasty, supra.*

All the plaintiff's evidence tends to show that Revell had considerable difficulty in maneuvering the tractor-trailer into a position after leaving U. S. Highway 70, so that the tractor-trailer could be pulled across the railway crossing. The plaintiff testified that Revell stopped at the crossing about ten seconds before entering it. According to the evidence, when Revell first entered the crossing, the rear nine feet and eight inches of the trailer would still have to be on Highway 70; the plaintiff was in his jeep to the rear of the trailer, and Mr. Maney was in an automobile to the rear of plaintiff's jeep.

The evidence further tends to show that the driver of the tractor-trailer entered the crossing at almost the same moment the defendant's train appeared around the curve some 450 feet east of the crossing. Certainly a driver of an ordinary size vehicle would be guilty of contributory negligence if he failed to get out of the way of a train which could or should have been seen at a distance of 450 feet from the crossing. *Herndon v. R.R.*, 234 N.C. 9, 65 S.E. 2d 320. Here, the 45 foot trailer was only half way across the crossing when struck by defendant's train.

In *Godwin v. R.R.*, 220 N.C. 281, 17 S.E. 2d 137, in delivering the opinion of the Court, *Stacy, C. J.*, said: "It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them. * * * The plaintiff thus proves himself out of court. * * * (I)t is recognized that 'a railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the court.' * * * We have said that a traveler has the right to expect timely warning, * * * but the failure to give such warning would not justify the traveler relying upon such failure or in assuming that no train was approaching. It is still his duty to keep a proper lookout. * * * 'A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.'"

In the case of *Moore v. R.R.*, 201 N.C. 26, 158 S.E. 556, our Court

said: "When approaching a public crossing the employees in charge of a train and a traveler upon the highway are charged with the mutual and reciprocal duty of exercising due care to avoid inflicting or receiving injury, due care being such as a prudent person would exercise under the circumstances at the particular time and place. 'Both parties are charged with the mutual duty of keeping a careful lookout for danger and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty.' *Improvement Co. v. Stead,* 95 U.S. 161, 24 Law Ed., 403 * * *."

The court in its opinion in the *Moore* case quoted with approval from the case of *B. & O. Railroad Company v. Goodman,* 275 U.S. 66, 72 Law Ed., 167, where it is said: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train — not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal, and takes no further precautions, he does so at his own risk."

One of the plaintiff's witnesses testified that he saw the defendant's train as soon as it could be seen; that it was blowing as it rounded the curve. All of plaintiff's evidence tends to show that the approaching train could not be seen for a distance of more than 450 feet from Jim's Branch Road Crossing. The defendant's train, if traveling at 50 miles an hour, its minimum speed according to the evidence offered by the plaintiff, would require less than six and one-quarter seconds to travel 450 feet. If the defendant's train was traveling at the minimum speed of only 35 miles an hour, as its evidence tends to show, it would have required only nine seconds for the train to travel the 450 feet from the point where it could be seen to the crossing. Yet the tractor-trailer traveling at the minimum speed fixed by the plaintiff's evidence, would require approximately twenty seconds to move across the crossing from the time it reached the north rail of the railroad track. At the maximum speed fixed by the plaintiff's witnesses at which the tractor-trailer was being operated, it would have required ten seconds of travel time to get the tractor-trailer across the track of defendant's railroad. Moreover, there is no evidence tending to show that the engineer of defendant's train could have stopped

the train before colliding with plaintiff's trailer after the engineer saw the tractor-trailer on the crossing.

The tractor-trailer combination was of such size and length that it could not be legally moved over any highway under the control of the State Highway Commission without a special permit. The equipment was heavy and cumbersome, wholly incapable of rapid acceleration under the circumstances; the crossing was narrow, the road approaching the crossing was crooked and difficult to negotiate due to the combined length of the tractor-trailer. Therefore, under the facts as revealed by this record, we are of the opinion that it was the duty of the plaintiff to notify the railroad before undertaking to move its tractor-trailer across this particular crossing, and to have requested a time when the equipment could be moved across said crossing in safety, or to have sent someone down to the curve in the railroad to ascertain whether or not the crossing could be made in safety. *T. E. Ritter Corporation v. Rose*, 200 Va. 736, 107 S.E. 2d 479; *Schwesinger v. Hebert*, ..... Ore. ....., 348 P 2d 249. Neither the plaintiff nor the driver of the tractor-trailer had the right to assume that no train was approaching or would approach during the unusual time required to move this slow-moving equipment across the track of defendant's railroad.

For the purposes of this appeal, we have assumed, without deciding, that the defendant was negligent in failing to give timely notice of the approach of its train to Jim's Branch Road Crossing. Even so, for the reasons stated, we are constrained to uphold the ruling of the court below.

Judgment of the court below is

Affirmed.

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JANET LEIGH BENTON, MINOR, BY HER NEXT FRIEND, GLENN BENTON, v. R. W. MONTAGUE AND HUNTLEY HOSIERY COMPANY, INC.

(Filed 20 January, 1961.)

**1. Trial § 22b—**

On motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff and plaintiff is entitled to every reasonable inference of fact to be drawn therefrom consistent with the allegations of the complaint.

**2. Trial § 22c—**

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury to resolve and do not justify nonsuit.

**3. Fires § 1—**

While G.S. 14-136 was enacted primarily for the protection of property from fire damage, its language is sufficiently broad to cover injury to the person as well, and the act of setting out fire in a field in a more or less thickly populated community adjacent to residential lots upon which children are known to play, without giving notice to adjoining owners and without taking proper precautions to prevent the spread of the fire, constitutes negligence, and if such negligence is the proximate cause of injury, liability results.

**4. Same: Negligence § 4—**

The rule that a person engaging in an activity, with knowledge that it involves peril to others, is liable for injury resulting from his negligence, either of omission or commission while engaged in the activtiy, applies to the setting out of fire.

**5. Fires § 1— Evidence held sufficient to show negligence in setting out fire causing injury to child.**

The evidence tended to show that the individual defendant set out fire in a field covered with dry grass and vegetation, that the wind was blowing towards residential lots, that defendant knew that children of tender years living in houses on these lots habitually played in their back yards, that defendant failed to notify the owners of the lots that he was setting out fire, and that while defendant was tending fires in two places in the field and was engaged in conversation with a neighbor, plaintiff, a three year old child, screamed and was seen at or near the back line of her back yard, contiguous to the field, that her clothing had caught fire and she was seriously burned, and that immediately after the fire it was found that the fire had burned from the field into the yard some 10 to 15 feet in the short grass, and was still smoldering. *Held:* The evidence is sufficient to make out a *prima facie* case of actionable negligence as to the individual defendant.

**6. Master and Servant § 1—**

Evidence tending to show that the owner of a field granted permission to an individual to use a portion of the field for a small garden, and that pursuant to such permission the individual, without knowledge of the owner, set out fire to the dry grass and vegetation covering the field, *is held* insufficient to show the relationship of master and servant between the owner and the individual in regard to the setting out of fire, the individual being a mere licensee.

**7. Negligence § 33½—**

The owner of land is not liable for injury caused to third persons by the acts of a licensee unless the licensee creates a nuisance which the owner knowingly permits to continue.

**8. Same: Fires § 2— Evidence held insufficient predicate for liability of owner for injury negligently inflicted by licensee.**

Evidence tending to show that the corporate owner of a field granted permission to an individual to use a small portion thereof for a garden, that the individual set out fire to the dry grass and vegetation on the field on three separate days, that there was no mention of fire in

negotiations for use of the land, that on one occasion an official of the company saw a man tending a small fire in the field, but without evidence that this man was the licensee, *is held* insufficient to fix the owner with knowledge of a nuisance, even conceding the setting out of fire had been sufficiently continuous to constitute a nuisance, and therefore nonsuit was proper as to the owner in an action to recover for the injury to a child burned as a result of the setting out of the fire.

APPEAL by plaintiff from *Farthing, J.*, April 4, 1960, Regular Civil Term, of MECKLENBURG.

This is a tort action for recovery of damages for personal injury. Suit was commenced 2 March 1959.

The complaint, in summary, alleges the following facts:

Plaintiff, Janet Leigh Benton, was three years old at the time of her injury. She is represented herein by Next Friend, her father. She resided with her parents. The corporate defendant, Huntley Hosiery Company, Inc., hereinafter referred to as "Company," had two factory buildings near plaintiff's home. The Company owned a vacant plot or field which extended from one of its plants to the back line of the Benton home lot. On 1 April 1958 the field was covered with dead, dry grass and weeds; it had been in this condition through the preceding winter. The Company and R. W. Montague, the individual defendant, agreed that the "vacant field . . . would be cleared by the individual defendant and the individual defendant would be entitled to use a portion of it for garden purposes." Montague lived near the Bentons and on the same street. On 1 April 1958, despite windy conditions, Montague set fire to and burned the grass and vegetation. In the Benton back yard there was playground equipment. Small children were accustomed to play there, and some played in this back yard on the day of the fire. There was short dry grass in the yard. While Montague was burning the grass and weeds plaintiff came into the back yard and was playing. Montague was standing "some distance away" engaged in conversation, "at which time the fire spread into the playground area at the Benton home and the minor plaintiff was burned from her feet to her head . . . ." She was seriously injured. Defendants were negligent, in that: they knew the burning of the grass and weeds was a hazard to plaintiff and other children, and that the wind increased the peril; they did not give advance notice of the burning, did not maintain watch, and did not provide sufficient help to tend and contain the fire; they violated G.S. 14-136; the burning constituted a perilous condition attractive to children; and the Company knew or should have known that Montague was burning the field in a negligent manner and took

no measures to direct or restrain him. Montague was acting as agent for and was on a joint venture with the Company. The negligence of defendants was the proximate cause of plaintiff's injuries.

At the close of plaintiff's evidence both defendants moved for judgment of involuntary nonsuit. The motions were allowed and the court entered judgment nonsuiting and dismissing the action.

*Henderson & Henderson and William A. Shuford for plaintiff, appellant.*

*Helms, Mulliss, McMillan & Johnston and E. Osborne Ayscue, Jr., for defendant Montague, appellee.*

*Carpenter & Webb, John G. Golding, Fairley & Hamrick and Jack T. Hamilton for defendant Hoisery Company, appellee.*

MOORE, J. The sole question for decision here is whether the court erred in sustaining defendants' motions for nonsuit.

On a motion for involuntary nonsuit the evidence must be considered in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference of fact to be drawn therefrom consistent with the allegations of the complaint. *Manufacturing Co. v. Gable,* 246 N.C. 1, 14, 97 S.E. 2d 672. "Discrepancies and contradictions, even in the plaintiff's evidence, are for the jury and not for the court, and do not justify nonsuit." *Keaton v. Blue Bird Taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93.

When we examine the evidence in accordance with these rules we find the following factual situation:

The Benton home lot abuts on the southern line of Peterson Street a distance of 50 feet and extends southwardly a depth of 200 feet. The other lots along Peterson Street have the same dimensions. The Montague lot is on the same side of the street and there are three lots between it and Benton's. There are homes on many of the lots. Montague had lived there seven years, the Bentons five years. The back line of the Company's field is 525 feet in length and runs along the back lines of the above lots, including Benton's and Montague's. Benton's lot is about 175 to 200 feet from one of the Company's factory buildings and about 300 feet from its main office. On 1 April 1960 the field was covered with dead, dry broom sedge, weeds and grass. The Company had had leaves hauled and piled at places in the field for fertilization purposes. There was no fence or other barrier between the field and Benton's yard. There was short, dry grass in the Benton back yard. The Bentons had a "gym. set" in their back yard near the back line to afford a place for children to play. Eight

children, including the Benton children, played there regularly — all of pre-school age, except one. They occasionally played on the piles of leaves in the field. Montague gave the Bentons no notice of his intention to burn off the field on Tuesday, 1 April 1958. Mr. and Mrs. Benton both had jobs. Mrs. Benton on this day left for work about 2:00 P. M., and Mr. Benton left about 3:10 P. M. There was no fire in the field when Mr. Benton left. The children were in charge of a maid, Mary Jackson. Mrs. Sara Wallace came to the house during the afternoon to wash clothes, as she had frequently done. When she came there was a fire in the field. There was a moderate wind blowing toward the Benton house from the direction of the fire. Four or five children were playing in the back yard. Mrs. Wallace began washing and hanging out clothes. Janet (plaintiff) had been taking a nap. She came out of the house to Mrs. Wallace at the clothesline. At this time the maid and the other Benton children were in the house — there were no other children in the back yard. The clothesline is about 75 feet from the field. Mrs. Wallace observed that Janet was wearing one only shoe and told her to go back in the house and put on the other shoe. In about two minutes Janet was heard to scream. At this time the field back of the Benton lot had been burned over. Defendant Montague and a neighbor, Mr. McGrath, were in the field 10 to 30 feet from the Benton line engaged in a conversation and watching two fires. Mr. McGrath had seen children playing in the yard a short time before, and on one occasion Mr. Montague had asked children to get away from the fire. When Janet screamed she was at or near the back line. Her clothing was on fire. She ran through the yard a distance of about 30 feet and began dancing up and down. McGrath ran to her, threw her to the ground, and tore off her clothing. She was severely burned. Montague carried her into the house. An ambulance was called and she was taken to the hospital. After the ambulance left, a rural policeman who had been summoned went into the back yard. He found that fire had burned into the back yard a distance of 10 to 15 feet and was still "smoking and smouldering." Defendant Montague on adverse examination testified in part as follows: "Immediately before she was hurt I was giving my attention to two different locations of grass that had still not burned out. . . . I didn't see any other fire burning. . . . I don't believe there was smoke from the fire I was tending. It was mostly coals of some debris that had been there in the grass. . . . When I first saw that Janet Benton was on fire, she was moving in an angular direction toward her house and she was right on or near the property line between Mr. McGrath's lot, the Benton lot and the

Huntley lot. . . . When I heard her yell and saw her running she was not near any of the fire that I was burning. The fire had previously gone out along that area. She was fairly close to the boundary line between the Huntley property and the Benton lot. At that time I had not observed any fire on Mr. Benton's land. . . . I do not know where Janet Benton caught on fire." An area about 250 feet long and from 60 to 100 feet wide was burned over.

It is provided by statute that "If any person shall intentionally set fire to any grassland, brushland or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor . . . ." G.S. 14-136. This section formerly applied only to woodland. *Achenbach v. Johnston,* 84 N.C. 264. But the act was amended to include grassland and brushland. P.L. 1915, c. 243, s. 8. It has been held, in a case involving fire damage to adjoining property, that failure to give the notice required by this statute is negligence *per se. Lamb v. Sloan,* 94 N.C. 534. There the Court said: ". . . (i)f such notice shall not be given, the statute in that case, gives the party injured specially, a right of action, whereby he may recover such actual damage as he shall sustain from the fire, at all events, and without regard to whether or not the defendant was negligent or careless in setting the fire to his own woods and controlling the same." Such far-reaching application of the statute is perhaps inappropriate in the present situation. It must be conceded that the primary purpose of the statute was to protect *property* from fire damage. But the enactment is broad enough to include setting fire to a grass-covered field such as that involved in this case. And where the field, as here, is in a more or less thickly populated community and is adjacent to inhabited lots upon which children are known to play, a violation of the provisions of the statute would constitute negligence. If such negligence is the proximate cause of injury to a child, liability results.

Furthermore, if one engages in activity involving peril to others to the knowledge of the actor, his negligence while so engaged, whether consisting of acts of commission or omission, which results in damage to another is actionable. The activity of setting out, controlling or confining fire is no exception. *Ford v. Blythe Brothers Co.,* 242 N.C. 347, 87 S.E. 2d 879. *Gibbon v. Lamm,* 183 N.C. 421, 111 S.E. 618; *Stemmler v. R.R.,* 169 N.C. 46, 85 S.E. 21; *Mizell v. Manufacturing*

*Co.*, 158 N.C. 265, 73 S.E. 802; *Garrett v. Freeman*, 50 N.C. 78.

In the Ford case, a three-year old child was burned when she walked into a bed of ashes containing live coals. Defendant, who was doing clearing and grading work on the land, knew the premises were frequented by children of tender years but took no precautions to provide them reasonable protection from the bed of live coals. This case involved a technical trespass on the part of the child. The Court said: "In our opinion, it was within the reasonable prevision of the defendant to have foreseen that some injury might result from burning the brush and other debris in the way and manner it did within the area it knew was frequented by children of tender years. . . . Furthermore, there is no question about the ash bed containing live coals beneath the surface, a condition for which the defendant was responsible and which we think it might reasonably have foreseen was likely to cause an injury to a child of tender years, should it walk or run through it."

In the case at bar the following inferences are permissible: Montague knew or in the exercise of reasonable care should have known that children of tender years regularly played in the Benton yard and occasionally in the field. He set fire to the broom sedge, grass and weeds without notice to the Bentons he was to do so on this day. He fired the field when the wind was blowing from the field toward the yard. When plaintiff caught fire he was engaged in conversation with a neighbor, had insufficient help for control of the fire, and was tending fire in two places in the field. The fire a short time before had burned the field up to the Benton line. Plaintiff went to the edge of her yard and there caught fire. It is a reasonable inference that there were smouldering coals at the edge of the yard, and fanned by the wind they set fire to the grass in the edge of the yard and ignited her clothing. There were such coals elsewhere in the field. When she first screamed she was at the edge of the burned-over field. In the excitement no one observed fire in the yard, but a short time later it was found that the fire had burned into the yard some ten to fifteen feet and was still smoking and smouldering. The evidence discloses no other source from which fire could have caught her clothing.

In our opinion there is sufficient evidence to make out a *prima facie* case of actionable negligence as to defendant Montague. We give no consideration to the question of "attractive nuisance" in this case. It does not arise on this record.

Defendant Company permitted the field to become foul and to continue in this condition a long time. Its factory and main office are

adjacent to the field. Indeed, they are at the edge of the field and within a hundred yards of the Benton lot. Montague was not an employee of the Company; he worked for United Equipment and Service. The Company president agreed that Montague might use a portion of the field for a small garden. There was no mention of burning. The field was clearly visible from Old York Road which runs along the edge of the field. The field could not be seen from the main office. At least four officials of the Company, in line of duty, traveled daily along this road between the two factory buildings. One of them, on one occasion, saw a man tending a small fire in the field, but did not investigate. Montague did some burning in the field on three separate days.

In our opinion the evidence is insufficient to support an inference that the relationship of principal and agent, or employer and employee, existed between the Company and Montague. Montague had no specific authority to set fire to the field, and it seems that he was engaged in clearing a greater portion of the field than it was contemplated he would use. Montague was certainly nothing more than a licensee.

"As a general rule, the owner of land is not liable for injury caused by the acts of a licensee unless such acts constitute a nuisance which the owner knowingly suffers to remain. 38 Cyc. 483. The doctrine is pertinently stated in *Rockport v. Granite Co.*, 51 L.R.A., 779: 'In case of work done by a licensee, the work is done on the licensee's own account, as his own business, and the profit of it is his. It is not a case, therefore, where the thing which caused the accident is a thing contracted for by the owner of the land, and for which he may be liable for that reason.'" *Brooks v. Mills Co.*, 182 N.C. 719, 722, 110 S.E. 96.

*Simmel v. New Jersey Coop. Co.* (N.J. 1958), 143 A. 2d 521, presents a situation somewhat analogous to the instant case. Plaintiff, four years old, wandered onto an unenclosed lot in the City of Hoboken. She stumbled on some junk which was on fire on the premises and was burned. She lived in a large housing project across the street from the lot. The project contained about 700 families and many children. Defendant, owner of the lot, had obtained title twenty-one days before the child was injured, and was engaged in transferring its business to a building adjacent to the lot. The lot had been used for some time as a dump for rubbish by City employees. They had dumped rubbish there every day and there were fires on the premises every day. Children were constantly playing there. No fire had been set by defendant or its employees. Unlike the case at bar, plaintiff

was an infant trespasser. There was a verdict and judgment for plaintiff. On appeal, a new trial was ordered. The basis for new trial was the failure of the trial judge in his charge to limit the question of knowledge of conditions on the part of defendant to *actual* knowledge. The following excerpt from the opinion is of especial interest: "It should be recognized, however, that the landowner or occupier is not an insurer of the infant. He has no duty to periodically inspect the premises in order to ascertain whether third persons, themselves trespassers, might have created dangerous artificial conditions thereon. (Citing authorities) The maintenance here is alleged to consist of toleration or sufferance of, or acquiescence in, the acts of others, but before the defendant can be said to have so endured the others' conduct, he must have actual knowledge of the condition created by third persons unrelated to him." There is exhaustive citation and discussion of authorities.

With reference to negligence of a landowner in controlling the activities of third persons on the land, where there is injury to persons outside the premises and where there is no vicarious liability, it is said in Harper and James — The Law of Torts — Vol. 2, s. 27.19, p. 1526: "It is not enough here, of course, to show that the third person's conduct foreseeably and unreasonably jeopardized plaintiff. Plaintiff must also show that the occupier (a) had knowledge or reason to anticipate that the third person would engage in such conduct upon the occupier's land, and (b) thereafter had a reasonable opportunity to prevent or control such conduct." Further, with respect to the liability of a landlord for injury to persons outside the premises on account of the negligent use of premises by the tenant, it is said. "So far as the tenant's use of leased premises goes, he is not the landlord's agent merely because of the lease, and '(o)rdinarily a landlord is not liable for a nuisance created upon premises he has leased where that nuisance did not exist when they were leased or was not a result reasonably to be anticipated from their use for the purpose and in the manner intended.' Moreover, if the contemplated use of the premises 'may or may not become a nuisance according as the tenant exercises ordinary care, or uses the premises negligently, the tenant alone is liable.' " *Ibid,* s. 27.20, p. 1526-7.

In the instant case, it is a permissible inference that the conduct of Montague was a proximate cause of plaintiff's injury. It is doubtful that this conduct, at the time of the injury, had been sufficiently continuous and of such duration to amount to a nuisance. But if the existence of a nuisance is assumed, the evidence is insufficient to fix

defendant Company with knowledge and to show that defendant Company knowingly suffered it to continue. There were three burnings on separate days by Montague. An officer of defendant Company on one occasion saw an unidentified man tending a small fire. There is no evidence that this fire was one of those set by Montague. It might even have been a later occurence. In short, the record does not tend to disclose a state of facts amounting to a nuisance which the landowner knowingly suffered to remain.

As to defendant Montague, the judgment below is reversed.

As to defendant Company, judgment is affirmed.

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RAYMOND L. MARTIN v. BERYL HELEN MARTIN.

(Filed 20 January, 1961.)

**1. Divorce and Alimony § 1—**

In order for a court to have jurisdiction of an action for divorce, it is required not only that the court have jurisdiction of the parties, but also that it have jurisdiction of the marital status, which is the *res* to be adjudicated, and in order for the court to have jurisdiction of the status, it is necessary that one of the parties be a resident of this State, which requires that such party have his domicile here. G.S. 50-8.

**2. Domicile § 1—**

In order to be a resident of this State, a party must not only reside here but have the intention of making his permanent home here, to which, whenever absent, he intends to return, and from which he has no present intention of moving.

**3. Army and Navy: Domicile § 1: Divorce and Alimony § 1—**

G.S. 50-18 cannot be given the effect of making this State the domicile of military personnel stationed in this State under military orders even though such presence here be for a duration in excess of six months, but the statute does have the effect of enabling a serviceman to establish this as the State of his residence while so stationed here if he actually intends to make this the State of his permanent residence.

**4. Domicile § 1—**

A person's declarations as to his intentions are not conclusive in establishing domicile, even when considered together with testimony as to his conduct and acts, but such testimony and evidence are circumstances from which the jury may find the fact of domicile.

**5. Same: Army and Navy: Divorce and Alimony § 1— Whether serviceman had established residence here held for jury on evidence.**

Testimony of a serviceman that while stationed in this State under

**military orders he formed the intent to make this State his home, that he listed and paid his personal property taxes and paid his income tax here, registered his automobile and obtained an operator's license therefor in this State, and was stationed here for more than a year under military orders, is sufficient to be submitted to the jury on the question of whether he had established a domicile here, but is not conclusive, since the jury may find from such testimony and other testimony by him that he merely intended to establish a legal residence here at some future time, and therefore an instruction that if the jury should find from the greater weight of the evidence that he had been stationed here pursuant to military duty for a period of six months prior to the institution of his action for divorce to answer the issue of residence in the affirmative, must be held for error as insufficient to adjudicate the question of jurisdiction.**

APPEAL by defendant from *Williams, J.,* May 1960 Civil Term, of CUMBERLAND.

This is a civil action. Plaintiff sues for absolute divorce on the ground of two years separation. Defendant answers plaintiff's complaint and specifically denies material allegations thereof and counterclaims for alimony without divorce.

Plaintiff is a native of Missouri. He served in the Army of the United States during World War II. After the war he attended college in Missouri. Later he became an instructor at the University of Detroit. While there he met defendant — in July 1950. Shortly thereafter he re-entered the Army. He is a commissioned officer. While he was stationed at Fort Meade, Maryland, he and defendant were married on 2 December 1950. A child was born to this union on 1 October 1951. The parties separated at Alexandria, Virginia, 1 July 1957. In the meanwhile plaintiff had served at military posts in Maryland, New Jersey, Virginia and overseas. Prior to the separation plaintiff had never resided in North Carolina. In July 1958 plaintiff was assigned to Fort Bragg, North Carolina, and served there continuously until August 1959. He resided on the military reservation. This action was instituted 6 July 1959. About 20 August 1959 plaintiff was assigned to Fort Leavenworth, Kansas, and was stationed there at the time of the trial. Defendant and the child reside in the State of Michigan. Defendant has never at any time resided in North Carolina. Summons and copy of the complaint were personally served on her in Michigan.

Both parties were present at the trial, testified and called witnesses in support of their respective positions.

Appropriate issues were submitted to and answered by the jury. Verdict was favorable to plaintiff.

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

*Butler, High & Baer for plaintiff.*
*Tally, Tally & Taylor and Jesse M. Henley, Jr., for defendant.*

MOORE, J. Plaintiff alleges that he "has been a resident of Cumberland County, State of North Carolina, for more than six months next preceding the bringing of this action . . . and has resided on the Fort Bragg Military Reservation in Cumberland County, North Carolina, for more than six months next preceding the commencement of this action." Answering, defendant avers that "plaintiff does not intend to make North Carolina his permanent home nor his home for an indefinite period of time and he is therefore not a resident of North Carolina."

Jurisdiction in divorce actions is conferred by statute. The requirement that one of the parties to a divorce action shall have resided in the State for a specified period of time next preceding the commencement of the action is jurisdictional. If the element of residence is lacking the court has no jurisdiction to try the action or grant a divorce. *Henderson v. Henderson,* 232 N.C. 1, 9, 59 S.E. 2d 227; *Ellis v. Ellis,* 190 N.C. 418, 421, 130 S.E. 7.

In an action for divorce "The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint . . . ." G.S. 50-8.

This Court has declared that: "In order to constitute residence as a jurisdictional fact to render a divorce decree valid under the laws of this State there must not only be physical presence at some place in the State but also the intention to make such locality a permanent abiding place. There must be both residence and *animus manendi. Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240; *Roanoke Rapids v. Patterson,* 184 N.C. 135, 113 S.E. 603; *S. v. Williams,* 224 N.C. 183 (191), 29 S.E. (2d), 744. To establish a domicile there must be residence, and the intention to make it a home or to live there permanently or indefinitely. *S. v. Williams, supra.*" *Bryant v. Bryant,* 228 N.C. 287, 289, 45 S.E. 2d 572 (1947).

The holding in the Bryant case is in accord with the decisions of the Supreme Court of the United States. In *Williams v. North Carolina,* 325 U.S. 226, 229 (1945), it is said: "Under our system of law, judicial power to grant a divorce — jurisdiction, strictly speaking — is founded on domicil. *Bell v. Bell,* 181 U.S. 175; *Andrews v. Andrews,* 188 U.S 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it.

Domicil implies a nexus between persons and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted."

"In a strict legal sense that place is properly the domicil of a person where he has his true, fixed, permanent home and principal establishment, and to which he has, whenever he is absent, the intention of returning, and from which he has no present intention of moving." 17A Am. Jur., Domicil, S. 2, pp. 194-5.

In 1959 the General Assembly of North Carolina passed an Act which provides that in a divorce action "allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirements" for divorce, "provided that personal service is had upon the defendant or service is accepted by the defendant, within or without the State as by law provided." G.S. 50-18.

Defendant contends that the residence requirement in G.S. 50-18 involves domicile, and that the jurisdictional requisite that there be physical presence plus *animus manendi* has not been changed by this statute. With this contention we agree. Furthermore, we do not understand that plaintiff seriously contends otherwise.

The Legislative Assembly of the Virgin Islands adopted a statute providing that mere presence of plaintiff in the district for a period of six weeks shall be *prima facie* evidence of domicile and where the defendant has been personally served within the district or enters a general appearance the court shall have jurisdiction of the divorce action without further reference to domicile. The United States Court of Appeals, Third Circuit, in passing upon the validity of the statute, said in *Alton v. Alton*, 207 F. 2d 667 (1953):

> "The requirements for effecting a change of domicile by a person having legal capacity are clear and undisputed. There must be physical presence in the place where domicile is claimed and there must be the intent to make that place the home of the person whose domicile is in question." (p. 671.)
>
> "If domicile is really the basis for a divorce jurisdiction . . . then six weeks' physical presence without more is not a reasonable way to prove it." (p. 672.)

"The presumption must, therefore, be regarded as either an unreasonable interference by the legislative branch of the insular government with the exercise of the judicial power by the judicial branch or as an attempt by the legislature to convert the suit for divorce into what is in fact a transitory action masquerading under a fiction of domiciliary jurisdiction. We think that looked at in any of these ways the portion of the statute which provides for such a prima facie conclusion is invalid." (p. 673.)

"We think that adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens." (p. 676.)

"Our conclusion is that the second part of this statute conflicts with the due process clause of the Fifth Amendment and the Organic Act. Domestic relations are a matter of concern to the state where a person is domiciled. An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question." (p. 677.)

*Jennings v. Jennings* (Ala. 1948), 36 So. 2d 236, deals with an Alabama statute which provides in substance that the courts of that State shall have jurisdiction of divorce actions wherein both parties are before the court even though both reside in another State. In declaring the statute invalid the Court declared:

"Jurisdiction, which is the judicial power to grant a divorce, is founded on domicile under our system of law. (Citing authorities.) This is true because domicile in the state gives the court jurisdiction of the marital status or the res which the court must have before it in order to act. (Citing authorities) The domicile of one spouse, however, within the state gives power to that state to dissolve the marriage. (Citing authorities) . . . Jurisdiction of the res is essential because the object of a divorce action is to sever the bonds of matrimony, and unless the marital status is before the court, the court cannot act on that status. . . . Futhermore, it is recognized that unless one of the parties has a residence or domicile within the state, the parties cannot even by consent confer jurisdiction on the courts of that state to grant a divorce. 17 Am. Jur. p. 273.

" '* * * The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law

> of the domicil. * * *' *Andrews v. Andrews, supra* (188 U.S. 14, 23 S. Ct. 244). . . . the legislature of a state cannot confer on the courts of that state a power which is not within the power of the state to confer on the legislature."

However, there is authority to the contrary. Statutes relating to servicemen, similar to N.C.G.S. 50-18, have been held to confer jurisdiction where there is merely a showing of presence in the State for the requisite period. The rationale of decision in these instances is that "It is within the power of the Legislature to establish reasonable bases of jurisdiction other than domicile." *Wallace v. Wallace* (N.M. 1958), 320 P. 2d 1020; *Craig v. Craig* (Kan. 1936), 56 P. 2d 464. We do not agree with the conclusions reached in these decisions. We hold that in order for the courts of this State to exercise jurisdiction affecting the marital status, at least one of the parties to the action must be domiciled in the State. Mere presence is insufficient.

What, then, is the effect of G.S. 50-18? In some cases it has been held that legal residence or domicile in a state cannot be acquired by residence on a military reservation under United States jurisdiction within the borders of the State. 21 A.L.R. 2d, Anno: Divorce — Domicile — Soldiers or Sailors, s. 8, p. 1173. G.S. 50-18 is an expression of policy by the General Assembly that a serviceman stationed on a military reservation in the State is capable of establishing his domicile in North Carolina. The statute removes the barriers which might prevent a serviceman so situated from establishing a legal residence in this State where he actually has the present intention of changing his domicile to this State.

The defendant in the case *sub judice* moved for nonsuit on the ground that plaintiff failed to make a *prima facie* showing that he is a *bona fide* resident of North Carolina. The motion was overruled.

Plaintiff testified in part: "I am in the Army. In July, 1958, I was stationed at Fort Bragg, N. C. I was stationed there from that time up until August of 1959. . . . starting about 1955, I used to come down on special projects at Ft. Bragg while I was stationed in the Pentagon. . . . I have formed the intent to make North Carolina my home. I have always liked North Carolina since the first time I was down here and I have decided this will be my home as soon as I can make a permanent home. This will definitely be where I will settle. . . . I have registered my car here. I have driver's license from here. I have paid my income tax to this area and any other tax, of course, while I am here . . . . I obtained my driver's license in North Carolina in . . . July 1958, right after coming here. I have listed my car for

personal property tax here in North Carolina . . . . Since going to Leavenworth, I have come back here for vacation . . . . I intend to make North Carolina my home as soon as the service contingencies will permit. . . . I plan to get a little place on the beach when I retire and that is certainly what I would like to do. . . . I formed my intent to become a resident of North Carolina back in 1955 when I really became interested in that. I have never changed my original intent; I am now a resident of North Carolina and hope to continue to be."

We think this evidence sufficient to be submitted to the jury on the question of legal residence. "A person's testimony regarding his intention with respect to acquiring or retaining a domicil is not conclusive, although ordinarily it will make a *prima facie* case if not contradicted. The conduct and the various acts of the party are not ordinarily conclusive of the question, but are regarded rather as circumstances from which the jury in its discretion may find the fact. All of the surrounding circumstances and the conduct of the person must be taken into consideration." 17A Am. Jur., Domicil, s. 95, pp. 264-5. When taken in the light most favorable to plaintiff, his evidence tends to show that in 1955 he formed the intent to make North Carolina his home, that beginning in 1958 he actually resided within the State for more than a year, that upon his arrival he registered his automobile in the State, obtained North Carolina operator's license, paid income tax, listed and paid personal property taxes, and that he considers North Carolina his home and intends to make it his home permanently. From these facts a jury might justifiably conclude that he has acquired a domicile in North Carolina.

Defendant excepts to the following portion of the judge's charge: "And I instruct you, if you find by the greater weight of the evidence that the plaintiff has been stationed at Fort Bragg, U. S. Army Post or Reservation pursuant to military duty for a period of six months prior to the bringing of this action, you will answer that first issue YES; unless you so find, you will answer it NO."

It is our opinion that in so instructing the jury the trial judge fell into error. This instruction omits the requirement of intent to adopt North Carolina as legal residence.

Plaintiff contends that the error is harmless in that plaintiff's evidence is uncontradicted and a peremptory instruction would have been permissible. It is true that there was no substantial contradictory testimony on the part of defendant and her witnesses on the issue of residence. But plaintiff's evidence is conflicting. From his testimony the inference is permissible that he established his domicile in North Carolina more than six months prior to the institution of the action

and that he was a *bona fide* resident of this State at the time the action was begun. On the other hand the jury may find from his testimony that defendant intends at some future time to make his home here and has not established a domicile in North Carolina. A mere intention to establish a legal residence at some future time is not sufficient basis for a finding of domicile so as to give the court jurisdiction of a divorce action. 21 A.L.R. 2d, Anno: Divorce — Domicile — Soldier or Sailor, s. 6, pp. 1170-2; and cases there cited.

The court should have instructed the jury upon the issue of residence that the burden is on plaintiff to satisfy the jury: (1) that plaintiff was stationed on the Fort Bragg military reservation for six months next preceding the institution of the action, and (2) that during said period plaintiff had the intention to make North Carolina his permanent home or to live there indefinitely. The error in failing to so charge is prejudicial.

The question of jurisdiction has not been determined.

New trial.

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STATE v. C. S. BARNES, JR.

(Filed 20 January, 1961.)

**1. Assault and Battery § 14—**

Testimony to the effect that defendant intentionally pointed a "gun" at the prosecuting witness is sufficient to be submitted to the jury under a warrant charging that defendant intentionally assaulted the prosecuting witness by pointing a "pistol" at her, a gun being a generic term which includes pistol, and there being nothing in the record to indicate that the weapon which defendant pointed at the prosecuting witness was not a pistol. G.S. 14-34.

**2. Indictment and Warrant § 15—**

A motion to quash is the proper method of testing the sufficiency of a warrant or indictment to charge a criminal offense.

**3. Constitutional Law § 28: Indictment and Warrant § 9—**

Every person accused of crime has a right to be informed of the accusation against him with sufficient definiteness to identify the offense, to protect the accused from being twice put in jeopardy for the same offense, to enable the accused to prepare for trial, and to enable the court to proceed to judgment and pronounce sentence according to the rights of the case.

**4. Indictment and Warrant § 9—**

While it is ordinarily sufficient to charge a statutory offense in the

language of the statute, when the statute characterizes the offense in general terms or does not sufficiently set forth all of the essential elements of the offense, the statutory word must be supplemented by allegations which set forth every essential element of the offense and explicitly identify it.

**5. Obscenity—**

In a prosecution for purposely and knowingly disseminating obscene pictures and photographs, it is not necessary that the pictures or photographs be particularly described, and the obscene material need not be attached to the warrant or indictment, but it is required that they be sufficiently described so that they may be identified, and a warrant which merely characterizes them in general terms as appealing to prurient interest in nudity and sex, is insufficient to charge the offense with sufficient definiteness, and motion to quash should have been allowed. G.S. 14-189.1(a)

**6. Indictment and Warrant § 16—**

The quashal of a warrant for its failure sufficiently to charge the offense will not bar a future prosecution on a valid warrant.

APPEAL by defendant from *Hobgood, J.*, March 1960 Regular Criminal Term, of WAKE.

Two criminal actions consolidated for trial and tried *de novo* on two warrants, on appeals from adverse judgments in the Recorder's Court for Cary, Meredith and House Creek Townships, Wake County.

The first warrant charged defendant on 18 May 1959, at and in the boundaries of Cary, Meredith and House Creek Townships, with unlawfully and wilfully assaulting Margaret Matthews with a deadly weapon, to wit, a pistol, by pointing the pistol at her.

The second warrant reads as follows: "Jerry G. Gilchrist, being duly sworn, complains and says that at and in the said county of Wake, and within the boundaries of the town of Cary; Cary, Meredith and House Creek Townships, on or about the 18th day of May 1959, C. S. Barnes, Jr. did: 1. Unlawfully, purposely and knowingly disseminate obscenity by delivering, providing, and offering, obscene pictures and photographs, having a predominant appeal to the prurient interest by having a shameful and morbid interest in nudity and sex and going substantially beyond the customary limit of candor in presentation of such matters, to Linda Matthews, Dorothy Matthews, and Joanne Matthews, being children under the age of 16 years, in violation of G.S. 14-189.1 (a) (1). 2. Did unlawfully, purposely and knowingly disseminate obscenity by exhibiting obscene pictures and photographs having a predominant appeal to the prurient interest by having a shameful and morbid interest in nudity and sex and going substantially beyond the customary limit of candor in presen-

tation of such matters, to Linda Matthews, Dorothy Matthews and Joanne Matthews, being children under the age of 16 years in violation of G.S. 14-189.1 (a) (3), and 3. Did knowingly and intentionally possess obscene matter, namely photographs and pictures having a predominant appeal to the prurient interest by having a shameful and morbid interest in nudity and sex and going substantially beyond the customary limits of candor in presentation of such matters, with the purpose of disseminating it unlawfully, and did in fact disseminate said obscene matter to Linda Matthews, Dorothy Matthews and Joanne Matthews, being children under the age of 16 years in violation of G.S. 14-189.1 (d) and contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

Defendant before pleading moved to quash the second warrant. The motion was denied, and defendant excepts.

Whereupon, defendant entered pleas of not guilty to the charges in both warrants.

Jury Verdict: Guilty as charged in both cases, with a recommendation for mercy.

Judgment on first warrant: Sixty days in jail to be assigned to work the public roads, roads' sentence suspended upon the payment of a fine of $50.00 and the costs.

Judgment on second warrant: Six months in jail to be assigned to work the public roads, roads' sentence suspended upon the payment of a fine of $200.00 and the costs.

From these judgments, defendant appeals.

*T. W. Bruton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.*

*I. Beverly Lake and Ellis Nassif for defendant, appellant.*

PARKER, J.

FIRST WARRANT — ASSAULT CASE.

Margaret Matthews, mother of the children Linda, Dorothy and Joanne Matthews named in the second warrant, testified as a witness for the State that on 18 May 1959 in the yard of her home the defendant, C. S. Barnes, Jr., pointed a gun at her.

The word gun is a generic term and includes pistol. According to Webster's New International Dictionary, 2d. Ed., the word "gun" is defined, "6. A revolver or pistol. *Orig., Western U. S.*" In common usage the words "pistol" and "gun" are used interchangeably.

*Muse v. Interstate Life & Accident Co.*, 45 Ga. App. 839, 166 S.E. 219; *State v. Christ*, 189 Iowa 474, 177 N.W. 54; *State v. Barrington*, 198 Mo. 23, 95 S.W. 235. There is nothing in the record or in defendant's brief to suggest that the weapon defendant pointed at Margaret Matthews was not a pistol. Her testimony was sufficient to carry the case to the jury on the first warrant, as tending to show a violation of G.S. 14-34 — assault by pointing gun or pistol. There is nothing in the record, or in defendant's assignments of error, or in his brief to justify a discussion or a new trial in the assault case. Defendant's brief discusses only the case charged in the second warrant. In the trial of the assault case, which assault is charged in the first warrant, we find no error.

SECOND WARRANT — OBSCENE PICTURES.

Defendant, in apt time, moved orally to quash the second warrant before pleading to it. *S. v. Perry*, 248 N.C. 334, 103 S.E. 2d 404. The court overruled the motion, and defendant excepted.

Defendant challenges the sufficiency of the second warrant to inform him of the accusation against him. A motion to quash is a proper method of testing the sufficiency of a warrant or an indictment to charge a criminal offense. *S. v. Greer*, 238 N.C. 325, 77 S.E. 2d 917; *S. v. Scott*, 241 N.C. 178, 84 S.E. 2d 654.

The Constitution of North Carolina, Article I, § 11, guarantees that in all criminal prosecutions every person has the right to be informed of the accusation against him.

Similar provisions in the U. S. Constitution (which are not a restriction on the States in this respect, 42 C.J.S., Indictments, p. 957), and in the Constitutions of the various States, which are a substantial redeclaration of the common law, are one of the chief glories of the administration of the criminal law in our courts, for they are in strict accord with our inherited and "traditional notions of fair play and substantial justice."

This Court said in *S. v. Greer, supra:* "The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the

court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case."

"It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or an indictment." *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781.

"An indictment or information for having in possession, exhibiting, or offering for sale an obsence drawing or picture need not particularly describe in what the obscenity consists, and the obscene matter need not be set up; but good pleading requires that if a copy of the pictures is not given, such a description as decency permits should be given, and then the indictment should contain an averment that the pictures are too obscene, lewd or lascivious for further description or recital." 67 C.J.S., Obscenity, § 11, b. Pictures, p. 36.

"The rule requiring that the article or matter shall be so described as to be capable of identification does not require that the indictment shall go into detail in describing a picture, or that it must set out the substance of an obscene article. To do this would be as objectionable as setting out the article or matter itself, the placing of which on the records the indictment seeks to excuse on account of its gross obscenity. All that is required is that the article shall be so described as to render it capable of identification." 33 Am. Jur., Lewdness, Indecency and Obscenity, § 18, In Prosecution for Obscenity, p. 26. To the same effect see Joyce on Indictments, 2nd Ed., Sections 421, 422 and 423.

*Commonwealth v. Sharpless,* 17 Penn. 91, 2 Sergeant & Rawle 91, 7 Am. Decisions 632, was an indictment for exhibiting an obscene picture. There was a motion for arrest of judgment on the ground that the picture is not sufficiently described in the indictment. The indictment described the picture as "a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman." The description was held sufficient, and the motion in arrest of judgment was overruled.

In *Reyes v. State,* 34 Fla. 181, 15 So. 875, defendant was convicted of improperly printing books and pamphlets, in violation of Rev. St., § 2620. The indictment charged that defendant did "print, publish, and distribute certain printed and written paper containing obscene language and an obsence figure or picture, manifestly tending to the corruption of the morals of youth." Defendant moved in arrest of judgment on the ground that the indictment was insufficient, for the reasons, *inter alia,* that it did not apprise him of the true character of the charge so as to enable him to prepare his defense, and was

not sufficient to protect him from a second prosecution for the same offense. The Court in holding that the motion should have been granted, and judgment arrested said: "The indictment wholly fails to set out in *haec verba,* or to give any description whatever of, the alleged 'printed and written paper containing obscene language and an obscene figure or picture,' which it charges the defendant with printing, publishing, and distributing. The authorities are practically unanimous that such an indictment is insufficient."

In *Vannoy v. State,* 94 Fla. 1175, 115 So. 510, the indictment did not set out the "printed paper containing obscene prints, figures, and pictures" by any certain description, or give any excuse for failure to do so. The Court reversed the lower court on authority of *Reyes v. State, supra.*

In *Thomas v. State,* 103 Ind. 419, 2 N.E. 808, the Court said: "It has been many times held, and it seems to be now the general American doctrine, that in a case like this the obscene book or paper need not be set out in the indictment if it be properly described, and the indictment contains the averments that it is so obscene that it would be offensive to the court, and improper to be placed on the records thereof, and that, therefore, the grand jury did not set it forth in the indictment."

*Commonwealth v. Wright,* 139 Mass. 382, 1 N.E. 411, was an indictment for publishing and distributing a printed paper containing obscene, indecent, and impure language. In both counts it is alleged to be a paper so obscene in its character that it cannot with decency be spread upon the records of the court. No general description of it by title or contents is given in the indictment, nor are any other means afforded thereby which would distinguish it from any other paper of its class. Before trial defendant moved to quash the indictment, among other reasons, because it afforded no proper description of the alleged obscene paper. The Court in sustaining the exception and quashing the indictment said: "But, while the indecent publication need not be set forth at length, and it is sufficient in the indictment to allege, as an excuse for not doing so, its scandalous and obscene character, it must be identified by some general description which shall show what the paper is which the defendant is charged with publishing. Unless this is done, it is obvious that the defendant is not informed with such precision as the law requires of the offense charged against him, and may be entirely deceived in regard to the paper to which the obscene character is attributed. Nor would the indictment afford the protection to the defendant to which he is entitled should he be subsequently indicted for the same offense." See *Commonwealth*

*v. Dejardin,* 126 Mass. 46, 30 Am. Reports 652; *Commonwealth v. McCance,* 164 Mass. 162, 41 N.E. 133.

In *State v. Zurhorst,* 75 Ohio St. 232, 79 N.E. 238, 9 Am. & English Ann. Cas. 45, the defendant was indicted for violation of an Ohio statute prohibiting the possession or disposition of obsecene matter. The first count in the indictment charged that defendant "unlawfully did have in his possession two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to wit, a certain printed pamphlet of an indecent and immoral nature, entitled 'Circular Number One — A Biographical Sketch of a Few Short Skate Politicians,' etc." The Court held this to be sufficient. Following the report of the case in 9 Am. & English Ann. Cas. is a valuable note, entitled "Sufficiency of Description of Obscene Matter in Indictment or Information for Publishing, Distributing, or Mailing Same."

In *State v. Miller,* (W. Va. — 1960), 112 S.E. 2d 472, 477, the indictment charging defendant with distributing obscene pictures is set out. The indictment in both counts avers a general description of the obscene pictures.

The following cases support the rule that the warrant or indictment shall, at least, so describe the alleged obscene matter or pictures, as to render them capable of identification. *People v. Hallenbeck,* (N. Y.), 52 How. Prac. 502; *People v. Kaufman,* 14 N.Y. App. Div. 305, 43 N.Y. Supp. 1046; *State v. Brown,* 27 Vt. 619; *State v. Hayward,* 83 Mo. 299.

In *S. v. Robbins,* 253 N.C. 47, 116 S.E. 2d 192, defendant was tried on an indictment charging that he did unlawfully "write and transmit certain letters using vulgar and obscene language without signing his true name thereto in violation of G.S. 14-394." The Court closed its opinion with this language: "The motion to quash should have been allowed. The bill was insufficient to charge a criminal offense. This conclusion will, of course, not prevent the solicitor from sending a bill adequately charging the transmission to a designated person of letters containing language prohibited by the statute *with such particularization of the language* so used as may be proper." Emphasis used here.

A bill of particulars will not supply any matter which the warrant must contain. *S. v. Cox,* 244 N.C. 57, 92 S.E. 2d 413; *S. v. Greer, supra.*

This Court said in *S. v. Cox, supra:* "Moreover, while it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, the rule is inapplicable where the words of the statute do not in themselves inform the accused of the specific offense of which he is accused so as to enable him

to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged."

We held in *S. v. Scott, supra,* that an indictment charging defendant with resisting an officer in the language of G.S. 14-223 is insufficient. The Court said: "The allegations in a bill of indictment must particularize the crime charged and be sufficiently explicit to protect the defendant against a subsequent prosecution for the same offense." In *S. v. Cox, supra,* the warrant charged in the language of G.S. 14-204(7) that defendant did unlawfully "aid and abet in prostitution and assignation." The Court held the warrant was insufficient and overruled on that point *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358.

The second warrant here has no description of, and has no allegation or reference of any kind whatever to the alleged obscene photographs and pictures, so as to render them capable of identification. It affords no means at all which would distinguish the alleged obscene photographs and pictures from any other photographs and pictures of their class. The second warrant could refer to any obscene photographs and pictures. It is not sufficiently explicit, though it uses the relevant words of G.S. 14-189.1, to inform defendant of the accusation against him, and to protect him against a subsequent prosecution for the same offense. The trial court erred in not quashing the second warrant.

Like every other person on trial in the criminal courts, defendant is entitled to the full benefit of the constitutional provisions devised to protect the safety of all. To quote the language of *Taylor, J.,* in *S. v. Owen,* 5 N.C. 452, "We cannot too strongly impress it on our minds that want of the requisite precision and certainty which may, at one time, postpone or ward off the punishment of guilt, may, at another, present itself as the last hope and only asylum of persecuted innocence."

Though the second warrant is fatally defective, it will not serve to bar further prosecution on a valid warrant. *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Greer, supra.*

Assault Case — No error.

Obscenity Case — Reversed.

WILLIAM W. SEAFORD v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 20 January, 1961.)

1. **Insurance § 54—**

Where a policy of automobile liability insurance fails to define the term "automobile", the word must be given its ordinary and commonly accepted meaning, and embraces a tractor-trailer unit designed for use on highways.

2. **Insurance § 3—**

If a contract of insurance is ambiguous and susceptible to two constructions, the courts will adopt that construction which is more favorable to the insured.

3. **Insurance § 54—**

Where a policy of automobile liability insurance covers liability attaching while insured is operating a vehicle not owned by him, with exclusion if the vehicle is used in any other business or occupation of insured, the policy does not cover an accident occurring while insured was operating a tractor-trailer in the employment of another, even though such employment was limited to a single trip and insured had other employment upon which he depended primarily for his livelihood.

4. **Insurance § 62½—**

The filing by insurer of form SR-21 with the Department of Motor Vehicles as required by G.S. 20-279.19 does not estop insurer from thereafter denying coverage under the policy.

APPEAL by plaintiff from *Olive, J.*, in Chambers, 9 July 1960, of July 1960 Term, of DAVIE.

An action for a Declaratory Judgment under G.S. 1-253 *et seq.*

The defendant insurance company issued its Family Automobile Comprehensive and Liability Policy insuring the plaintiff within certain defined limits for bodily injury and property damage. The policy provided that "the company shall defend any suit alleging * * * bodily injury or property damage * * * arising out of the * * * use of the owned automobile or any non-owned automobile."

The policy further provides under the heading "Exclusions" the following: "1. This policy does not apply * * * (f) to a non-owned automobile while used (1) in the automobile business by the insured, or (2) in any other business or occupation of the insured except a private passenger automobile operated or occupied by the Named Insured or by his private chauffeur or domestic servant, or trailer used therewith." And in the section of the policy denominated as "Definitions under Part Two" it is said: "'Non-owned automobile' means an automobile * * * not owned by the Named Insured."

While said policy was in force and effect, the plaintiff, who had been employed as a textile employee prior to the accident in question, was operating a 1952 White tractor-trailer unit owned by one Paul Leo Bennett. And in this connection, the plaintiff admits in his verified reply that he was, at the time of the accident, the employee of Paul L. Bennett " * * * and was engaged in the performance of his duties and was acting in the course of his employment." While thus operating said tractor-trailer unit, the plaintiff was involved in an accident in the State of Maryland on 3 March, 1958.

Thereafter, the defendant insurance company, pursuant to plaintiff's request, filed with the North Carolina Department of Motor Vehicles an SR-21 form on 14 July 1958. This is the usual form showing financial responsibility as required by the laws of North Carolina. It provided in pertinent part " * * * our policy for the named policy holder applies to him as the operator but does not apply to the above owner of the vehicle involved in the accident." As a result, on 21 January 1959, a suit was commenced in the State of Maryland by a third party against the plaintiff alleging bodily injury and property damage.

The suit papers were referred to the defendant insurance company. Thereafter, on 9 February 1959, the plaintiff and the defendant insurance company entered into the following written agreement:

"NON-WAIVER AGREEMENT."

"Whereas, Nationwide Mutual Automobile Insurance Company of Columbus, Ohio, hereinafter called the Company, issued a policy of insurance No. 61-168-461 to William W. Seaford and Margaret Seaford, of Rt. #2, Advance, North Carolina,

"And Whereas, William W. Seaford, of Rt. #2, Advance, North Carolina, hereinafter called the Insured, claims benefits under said policy in connection with an accident which occurred on or about March 3, 1958, but the said Company contends, or may later contend, that the Insured is not entitled to such benefits in view of the fact that Driving a non-owned Tractor-Trailer Unit.

"And Whereas it appears that the interests of both the Insured and the Company may be better served and protected by an investigation of the facts and/or entering of defense on behalf of the Insured:

"Now, Therefore, it is understood and agreed between the Insured and the Company that the Company may by its representatives proceed to investigate the said accident, negotiate the settlement of any claim, or undertake the defense of any suit growing out of the said accident, without prejudice to the rights of the said Company,

and that no action heretofore or hereafter taken by the Company shall be construed as a waiver of the right of the Company if in fact it has such right, to deny liability and withdraw from the case; also, that by the execution of this agreement the insured does not waive any rights under the policy.

"Executed in triplicate this 9 day of February, 1959.

"Nationwide Mutual Automobile Insurance Company— By Donovan L. Godfrey

"William W. Seaford— Insured

"Shirley Josey— Witness— Sandra Schofield— Witness."

Thereafter, the defendant insurance company denied its liability under the policy on the ground " • * • that said policy by its terms expressly excluded coverage to a non-owned automobile which was not a private passenger automobile when said automobile was being used • * * in any • • • occupation of the insured except a private passenger automobile operated or occupied by the named insured." Thereupon, the plaintiff commenced this action to construe the policy of insurance and to obtain a declaration of his rights.

After the verified pleadings were filed, the defendant moved, in writing for a judgment upon the pleadings. When the cause came on for hearing, and being heard, the lower court allowed the motion, and entered judgment that the plaintiff's action be dismissed in its entirety. To the signing of the judgment the plaintiff excepts and appeals to the Supreme Court, and assigns error.

*Peter W. Hairston for plaintiff, appellant.*
*Walser & Brinkley for defendant, appellee.*

WINBORNE, C. J.: Both plaintiff and defendant agree that the questions presented on this appeal are these:

"1. Is a tractor-trailer unit not 'an automobile' within the meaning of the so-called non-owned coverage provisions of the Family Comprehensive Liability Policy?

"2. Was the plaintiff a textile worker who had been employed to operate a tractor-trailer unit for the one trip only, using this equipment 'in any business or occupation' of the plaintiff within the meaning of the policy?

"3. Did the non-waiver agreement entered into by the plaintiff apply under the circumstances herein to the action taken by the defendant company in the filing of a notice of liability coverage

designated as SR-21 with the North Carolina Department of Motor Vehicles?"

The word "automobile" is derived from the Greek word "autos" meaning self, and the Latin word "mobilis" meaning freely movable, changing its own place or able to effect a change of its own place. The word has been defined by the North Carolina Supreme Court in *Jernigan v. Ins. Co.*, 235 N.C. 334, 69 S.E. 2d 847. In that case *Justice Ervin,* writing for the Court said: "Inasmuch as there is nothing in the policy indicating that the parties intended the word automobile to have a different meaning it is to be taken and understood in its ordinary and popular sense. *Bailey v. Ins. Co.*, 222 N.C. 716, 24 S.E. 2d 614; *Stanback v. Ins. Co.*, 220 N.C. 494, 17 S.E. 2d 666 * * * When it is employed in its general sense, the word automobile embraces all kinds of motor vehicles, except motorcycles, designed for use on the highways and streets for the conveyance of either persons or property * * * When used in its particular sense, the term automobile includes such motor vehicles other than motorcycles, as are intended for use on the highways and streets for the carriage of persons only * * * ."

The Court held in the *Jernigan* case, *supra,* that a farm tractor cannot be properly classified as an automobile in either the general or the particular sense since a tractor is " * * * neither designed nor suitable for use on highways and streets for the transportation of either persons or property." Therefore, in the present case a different question is presented, namely, whether a tractor-trailer unit is an "automobile" as used in the insurance policy in question.

There have been numerous cases in other jurisdictions holding that a truck is an "automobile" within the meaning of provisions of an automobile insurance policy. See *Life & Casualty Ins. Co. of Tenn. v. Metcalf,* 42 S.W. 2d 909, 240 Ky. 628; *Kellaher v. Portland,* 57 Ore. 575, 112 P. 1076; *Casualty Co. v. Buckeye Union Cas. Co.* (Ohio Ct. Com. Pleas 1957) 143 N.E. 2d 169; *Life & Cas. Ins. Co. of Tenn. v. Roland,* 45 Ga. App. 467, 165 S.E. 293; *Lonsdale v. Union Ins. Co.,* 167 Neb. 56, 91 N.W. 2d 245.

The absence from the policy in question of express unequivocal language expressly excluding a tractor-trailer unit by appropriate words saving itself from liability to the insured where an accident occurs while riding in an "owned automobile or any non-owned automobile" tends to show that by the use of the word "automobile" the policy did not thereby exclude an "owned" or "any non-owned" tractor-trailer unit. It is apparent that the word "automobile" was

selected and used in the policy in its common, general and popular sense.

In substance, the defendant company contends that whatever may be the meaning of the word "automobile" when contained in a policy which does not contain a definition of that term (here there is no such definition), that such definition *ex vi terminii* excludes a tractor-trailer unit.

It then comes to this: We must forfeit entirely the "use of the owned automobile or any non-owned automobile" provision or conclude that the use of the word "automobile" therein must be given its ordinary and commonly accepted meaning. When so considered the conclusion is that a tractor-trailer unit is an "automobile" within the meaning of the policy herein. Furthermore, it is an established principle of law in this State that when an insurance policy is reasonably susceptible of more than one interpretation, or if the language is ambiguous, the construction more favorable to the assured will be adopted. See *Johnston v. Cas. Co.*, 200 N.C. 763, 158 S.E. 473; *Conyard v. Ins. Co.*, 204 N.C. 506, 168 S.E. 835; *Stanback v. Ins. Co., supra; Bailey v. Ins. Co., supra.*

In the *Johnston* case the Court in opinion by *Adams, J.*, expressed the principle in this manner: "We recognize the established principles that a policy of insurance, if the language is ambiguous or susceptible of more than one interpretation, should be given a construction favorable to the assured * * * ."

And in the *Conyard* case it is said: "The rule of construction is that when an insurance policy is reasonably susceptible of two interpretations, the one more favorable to the assured will be adopted. 'The policy having been prepared by the insurers, it should be construed most strongly against them.' "

For reasons stated, a tractor-trailer unit is an "automobile" within the meaning of the provisions of the Family Comprehensive Liability Policy under consideration.

However, even though the tractor-trailer unit in question does come within the "automobile" provisions of the policy, the plaintiff must still hurdle the clause therein providing that the policy does not apply " * * * (f) to a non-owned automobile while used (1) in the automobile business by the insured, or (2) in any other business or occupation of the insured except a private passenger automobile operated or occupied by the Named Insured or by his private chauffeur or domestic servant, or trailer used therewith." The term "business or occupation" is not restrictive in its meaning nor made so by any provisions of the policy.

The defendant company contends that at the time of the accident the business and occupation of the plaintiff was that of operating a tractor-trailer unit for Paul Leo Bennett, the employer. But the plaintiff counters and contends that since he was employed to operate the tractor-trailer unit for the one trip only that it is not in his "business or occupation" within the meaning of the policy. In *Allstate Ins. Co. v. Hoffman,* 21 Ill. App. 2d 314, 158 N.E. 2d 428, where the Court there had to pass on the identical question here presented, it is said: "It is not uncommon for an insured to have a business in addition to his regular and customary occupation which he may pursue primarily or even wholly for purposes other than pecuniary gain; but such collateral business would nonetheless constitute a business or an occupation while so pursued. Since the policy contains no restrictive provisions as to the business or profession of the insured, it would seem that coverage or non-coverage is to be determined by the terms and provisions of the policy and not by reference to the particular business or occupation of the insured described in the policy." Also to the same effect are *Dickey v. Fire & Life Assur. Corp.,* 328 Pa. 541, 195 A. 875; *Voelker v. Indemnity Co.,* D.C. N.D. Ill., 172 F. Supp. 306, affirmed 260 F. 2d 275 (7th Cir.).

The conclusion is that the insurance company's position is sound and supported by authority, and even though the insured had other employment upon which he depended primarily for his livelihood, the tractor-trailer was being used in "business or occupation" while the plaintiff was on the trip in the employ of Paul Leo Bennett.

Having so concluded, the next question is whether or not the filing of the SR-21 form by the insurance company, as required by G.S. 20-279.19, waives its right to deny coverage under the terms of the policy. In other words, does the filing of an SR-21 form with the Department of Motor Vehicles prevent the defendant insurance company from subsequently raising the defense that the policy in question did not cover the plaintiff in the Maryland accident?

The purpose of the SR-21 form, as required by G.S. 20-279.19, seems to be a means of protecting one's driving privilege by proving insurance in the minimum amount required by this State, and was not intended to be a contract. The required filing of the SR-21 form does not show an intent on the part of the Legislature that once the insurer files the form showing that the policy is in effect, such act affects the contractual rights of the parties, or precludes the insurance company from thereafter seeking to deny its liability under the policy.

The plaintiff contends that the filing of the SR-21 form should have the effect of estopping the insurer from later denying coverage under

the policy, and cites a Wisconsin case, *Behringer v. State Farm Mutual Auto Ins. Co.*, 275 Wisc. 586, 82 N.W. 2d 915, in support of his contention. As a result of the holding in the *Behringer* case, *supra*, the laws of Wisconsin were amended so as to change the holding of that case. Indeed, since the law has been changed in Wisconsin the Supreme Court of that State has allowed the insurance company to raise a defense subsequent to the filing of the SR-21 form. *Kurz v. Collins*, 6 Wisc. 2d 538, 95 N.W. 2d 365.

The better rule seems to be that by the mere filing of an SR-21 form as required by the law of this State, the insurer is not estopped to later deny coverage under the policy. *Hoosier Cas. Co. v. Fox*, 102 F. Supp. 214; *Auto Ins. Co. v. West*, 149 F. Supp. 289.

Therefore, for reasons stated, the lower court should be and it is Affirmed.

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LOUISE K. BOYKIN, ADMINISTRATRIX OF THE ESTATE OF JOHN R. BOYKIN, DECEASED, v. WILLIAM E. BENNETT, JOHN R. TAYLOR AND ARTHUR RAY MATTHEWS.

(Filed 20 January, 1961.)

**1. Automobiles § 35— Complaint held not to disclose contributory negligence of passenger in car whose driver engaged in speed competition.**

A complaint alleging that intestate was a gratuitous passenger in an automobile and was killed in an accident resulting when the driver lost control while engaged in a speed contest with two other vehicles, is not demurrable on the ground that the facts alleged disclose contributory negligence of intestate as a matter of law, since there is nothing in the complaint making it appear affirmatively that intestate knew, or by the exercise of reasonable care should have known, before the race was under way, that the drivers would engage in speed competition, or that he failed to take such measures as a reasonably prudent person would have taken after he learned that a race was contemplated or in progress.

**2. Negligence §§ 11, 20—**

Contributory negligence is an affirmative defense which ordinarily must be set up in the answer, and it is only when the facts alleged in the complaint disclose contributory negligence patently and unquestionably that a demurrer on the ground of contributory negligence may be allowed.

**3. Automobiles §§ 30½, 35: Torts § 4—**

Where two or more persons engage in speed competition upon the highway, each driver is a joint *tort-feasor* in engaging in the joint venture and in encouraging and inciting the others, and each may be held

liable, jointly or severally, by a third person injured as a result of such speed competition, even though the injured party is a gratuitous passenger in one of the cars (in the absence of contributory negligence) and is injured when the driver of the vehicle in which he is riding loses control without having come in contact with any other vehicle.

**4. Automobiles § 30½—**

The operation of a vehicle on the highway in speed competition is a misdemeanor and is negligence *per se*. G.S. 20-141.3(b).

APPEAL by plaintiff from *Parker, J.*, September 1960 Term, of LENOIR.

This is a civil action, instituted 18 July 1960. Plaintiff seeks to recover for the alleged wrongful death of her intestate, John R. Boykin.

The allegations of the complaint are summarized as follows:

About 1:10 A.M. on 29 August 1958 deceased, John R. Boykin, was riding as a "gratuitous passenger" in an automobile owned and being operated by defendant William E. Bennett along N. C. Highway 58. At the same time defendants John R. Taylor and Arthur Ray Matthews were each operating an automobile along N. C. Highway 58 in the same direction and in the same area as defendant Bennett. The three "defendants were engaged in a race with the said motor vehicle operated by them, and competing in speed each with the other as they proceeded southwardly from Smith's Store located on N. C. Highway 58, to the intersection of said Highway with U. S. Highway 70, during which said speed competition between them, they attained speeds of at least 100 miles per hour." Defendants and each of them were negligent in that they were racing motor vehicles on a public highway in speed competition, were exceeding the maximum speed limit and travelling at a rate in excess of 100 miles per hour without having their vehicles under control, and were driving recklessly. As a consequence of such negligence the automobile being operated by defendant Bennett left the highway at a curve, overturned at least five times, and threw plaintiff's intestate "at least 77 feet southwardly from the point along said highway at which said automobile came to rest, and inflicted upon him injuries from which he died instantly." The negligent acts of defendants concurred in bringing about the death of plaintiff's intestate, and the negligence of each defendant was a proximate cause of the death.

The defendants filed separate demurrers.

Defendants Bennett and Taylor each demurred on the ground that the "complaint does not allege facts sufficient to constitute a cause of

action in that it appears from the face of the complaint that plaintiff's intestate was contributorily negligent as a matter of law."

Defendant Matthews demurred on the ground that "it appears from the face of the complaint that the alleged acts of negligence of the defendants are independent acts of negligence and the acts of this demurring defendant did not concur with nor join in the alleged acts of the other defendants."

The court sustained the demurrers and dismissed the action.

Plaintiff appealed and assigned errors.

*Jones, Reed & Griffin for plaintiff.*

*John G. Dawson and Roberts & Stocks for defendant John R. Taylor.*

*White & Aycock for defendant, William E. Bennett.*

*Ward & Tucker for defendant, Arthur Ray Matthews.*

MOORE, J. It does not affirmatively appear from the allegations of the complaint that plaintiff's intestate was contributorily negligent as a matter of law. As to his conduct the sole allegation is that "he was riding as a gratuitous passenger" in the automobile owned and operated by defendant Bennett.

There is no allegation from which it affirmatively appears, or is necessarily implied, that plaintiff's intestate knew, or in the exercise of reasonable care should have known, before the race was underway, that defendants would engage in speed competition. Nor does the complaint show that he failed to take such measures as a reasonably prudent person would have taken after he learned that a race was contemplated or in progress. If he had knowledge of the race at a time when he could have safely quit the vehicle and refused to ride, or otherwise assumed the risk of the venture, or acquiesced in the race, this is a matter for the answer. Such facts are not alleged in the complaint. Contributory negligence is an affirmative defense. *Skinner v. Jernigan*, 250 N.C. 657, 662, 110 S.E. 2d 301; *James v. R. R.*, 233 N.C. 591, 599, 65 S.E. 2d 214. " 'In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial.' G.S. 1-139. Where contributory negligence is the ground of objection, the demurrer will be sustained 'only where on the face of the complaint itself the contributory negligence of the plaintiff is patent and unquestionable.' *Ramsey v. Furniture Co.*, 209 N.C. 165, 169, 183 S.E. 536, and cases cited. Defendants cannot rely upon plaintiff's failure to allege facts sufficient to nega-

tive contributory negligence. The facts alleged must affirmatively show contributory negligence as a matter of law." *Skipper v. Cheatham,* 249 N.C. 706, 711-2, 107 S.E. 2d 625. In the complaint plaintiff is not required to negative negligence on his part.

The court erred in sustaining the demurrers interposed by defendants Bennett and Taylor.

We now consider the question raised by the demurrer of defendant Matthews. Are the acts of those who engage in racing motor vehicles on a public highway independent, or are they joint and concurrent? This question, insofar as it relates to the matters alleged in the complaint, is of first impression in this jurisdiction. No former decision of this Court deals directly with the situation here presented.

It is provided in G.S. 20-141.3(b) that "It shall be unlawful for any person to operate a motor vehicle on a street or highway wilfully in speed competition with another motor vehicle."

"Racing in the the public highways is a plain and serious danger to every other person using the way, and a danger it is often impossible to avoid. When persons are making such unlawful use of the highways and another is injured thereby, the former are liable in damages for the injuries sustained by the latter. And where a person is injured by such racing all engaged in the race are liable although only one, or even none, of the vehicles came in contact with the injured person." Berry: Automobiles, 7th Ed., Vol. 2, s. 2.398, p. 467.

"Since two motorists racing make a plain and serious danger to every other person driving along the highway, and one which is often impossible to avoid, it is of itself an act of such negligence as to make the racing drivers responsible for damage caused by it. . . . Where the negligence of a driver racing with another motorist cannot be attributed to a person riding in the car with him, the mere fact that such person was riding in a car engaged in a race does not defeat his right to recover for injuries resulting therefrom." Blashfield: Cyclopedia of Automobile Law and Practice, Perm. Ed., Vol. 1, s. 761, p. 706.

"If two or more persons, while racing automobiles upon a public highway in concert, injure another traveler or bystander, they are individually liable for the damage or injury so caused, although only one of the vehicles engaged in the race comes in contact with the injured person or the vehicle in which he is riding." *ibid,* s. 767, p. 713.

*Reader v. Ottis* (Minn. 1920), 180 N.W. 117, 16 A.L.R. 463, involves a two-car race on a public highway. Plaintiff was a passenger in one of the cars. While the automobile in which she was riding was attempting to pass the other racing vehicle on a curve it ran off the

pavement and into a ditch. Plaintiff was seriously injured and sued the operators and owners of both automobiles involved in the race. The Court declared: "Our highways are not designed or maintained as places for racing automobiles, and those who use them for such purpose do so at their peril. Nor does the fact that the injured party was riding in one of the racing cars necessarily relieve the respondents from liability. . . . The rule is well settled that, where two or more tort-feasors by concurrent acts of negligence, which, although disconnected, yet, in combination, inflict injury, all are liable. . . . one who is riding in a vehicle or car, the driver of which is not his agent or servant, nor under his control, and who is injured by the negligence of a third person and of such driver, may recover of the third person for the injuries inflicted through such concurring negligence."

In a Georgia case two automobiles were racing at a speed of approximately 70 miles per hour on a street in the City of Atlanta. A truck from which ice cream was being retailed was standing about four feet from the curb. Plaintiff, a small child, was standing near the truck waiting to purchase ice cream. With the ice cream truck standing in the street there was not sufficient street width to permit the racing cars to pass abreast. One passed the truck at 70 miles per hour and the other attempted to follow. The latter struck and injured plaintiff. The owners and operators of both racing cars and the owner of the ice cream truck were sued. The owner and the operator of the racing vehicle which did not strike plaintiff demurred generally and contended: ". . . that the allegations of the petition show that his car had passed the point of impact before the Williams automobile struck the plaintiff and that therefore no cause of action is set forth against him, inasmuch as the mere racing of an automobile is not negligence to the plaintiff where such automobile was beyond the point of impact at the time the second automobile engaged in the race struck the plaintiff." In ruling upon the demurrer the Court said: "With this contention the court cannot agree. 'Racing motor vehicles on a public highway is negligence, and all those who engage in a race do so at their peril, and are liable for an injury sustained by a third person as a result thereof, regardless of which of the racing cars actually inflicted the injury, or of the fact that injured person was a passenger in one of the cars.' 60 C.J.S., Motor Vehicles, s. 297, p. 702." *Landers v. French's Ice Cream Co.*, 106 S.E. 2d 325, 329 (1958).

*Jones v. Northwestern Auto Supply Co.* (Mont. 1933), 18 P. 2d 305, was a suit for recovery of damages for the wrongful death of one Floyd Jones. Mrs. Russell and one Ruddy were racing automobiles

on a public highway. Jones was a passenger in a car not involved in the race. The Russell car struck the vehicle in which Jones was riding. Jones was thrown from the vehicle onto the highway. The Ruddy car ran over him. Jones was killed. In discussing the liability of Russell and Ruddy the Court said: "The complaint, fairly and liberally construed, shows that the cause of action is based upon the concurrent negligence of the two drivers in converting the highway into a race track. As a consequence of the race the body of deceased was thrown from the car in which he was riding. Whether his death was produced by the impact causing him to be hurled from the car, or by reason of being run over by the Ruddy car is immaterial. The defendant would be liable therefor if it, through its agent Ruddy, participated in the race. . . . The allegation that the Ruddy car ran over the deceased is but an allegation relative to the sequence of events resulting from the negligent act of racing, and failure to prove the allegation under the circumstances here would simply amount to a failure of proof with respect to an immaterial detail as to how the injury and death occurred. Or, in other words, if the impact between the Russell car and the car in which Jones was riding caused his death, and if the impact was caused by the racing, it is of no consequence whether or not the Ruddy car ran over the decedent. . . . The negligence charged — the racing — if proved, and that it produced the death, would be sufficient whether the allegation that the Ruddy car ran over defendant was proved or not." (p. 308.)

*Saisa v. Lilja* (CCA 1C 1935), 76 F. 2d 380, involves automobiles racing on a highway. L and K were engaged in the race. K struck and killed a pedestrian. L and K were both sued for the wrongful death. L testified he was not in the vicinity of the accident at the time it occurred, that he had abandoned the race sometime before, and that his car did not in any way cause K to hit deceased. There was some evidence to the contrary. In discussing instructions given the jury by the District Judge the Court said: "The District Judge instructed the jury in substance that if the defendant and Keefe engaged in a race as stated, and Keefe at a time when he did not know that the defendant had withdrawn and supposed that the race was still on, negligently struck the intestate, the defendant would be liable if the jury regarded his connection with the accident as negligence. In our opinion the ruling was right. The race itself was a joint enterprise in which each racer was a participant, although 'because of the statute the damages must be assessed severally, with separate verdicts and judgments.' (Citing authorities.) As against persons legitimately using the highway and entitled to the rights of travelers on it, the defendant

and Keefe were engaged in a joint tort, in the prosecution of which each was responsible for the acts of the other. (Citing cases.) This responsibility lasted as long as either continued to act under the agreement for the race, without knowledge of its abandonment by the other, and within the scope of it." (p. 381.)

In *Carney v. De Wees* (Conn. 1949), 70 A. 2d 142, a passenger in a car engaged in a race with another motor vehicle on a highway was killed. In discussing the liability of the operators of the two vehicles the Court said: "The evidence warranted the jury in finding, as suggested above, facts which established a sequence of improper conduct by the two drivers, that on the part of De Wees serving to incite and encourage the misconduct of Valentino. This afforded a basis of liability within the following principle: 'For harm resulting to a third person from the tortious conduct of another, a person is liable if he * * * (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.' Restatement, 4 Torts, s. 876. 'If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tort-feasor and is responsible for the consequences of the other's act.' Id., comment on clause (b). (Citing authorities)." (pp. 145-6).

Further detailed consideration of cases from other jurisdictions would be superfluous. But the following cases support the principles set out above: *Giemza v. Insurance Co.* (Wis. 1960), 103 N.W. 2d 538; *Deck v. Sherlock* (Neb. 1956), 75 N.W. 2d 99; *Bybee v. Shanks* (Ky. 1952), 253 S.W. 2d 257; *Ironside v. Ironside* (Okla. 1940), 108 P. 2d 157, 134 A.L.R. 621; *Mesmer v. Wagner* (La. 1936), 168 S. 378; *Gay v. Samples* (Mo. 1933), 57 S.W. 2d 768; *Oppenheimer v. Linkous' Adm'x.* (Va. 1932), 165 S.E. 385; *Bleumel v. Kroizy* (Cal. 1931), 298 P. 825; *Electric Co. v. Perkins* (Md. 1927), 136 A. 50; *Thomas v. Rasmussen* (Neb. 1921), 184 N.W. 104; *Rose v. Gypsum City* (Kan. 1919), 179 P. 348; *DeCarvalho v. Brunner* (N.Y. 1918), 119 N.E. 563; *Brown v. Thayer* (Mass. 1912), 99 N.E. 237; *Bogart v. City of New York,* 93 N.E. 937 (1911); *Hanrahan v. Cochran,* 42 N.Y. Supp. 1031 (1896); *Middlestadt v. Morrison* (Wis. 1890), 44 N.W. 1103; *Potter v. Moran* (Mich. 1886), 27 N.W. 854.

The principles enunciated in the foregoing authorities have been universally applied. We find no contrary holdings.

The violation of the racing statute, G.S. 20-141.3(a) and (b), is negligence *per se.* Those who participate are on a joint venture and are encouraging and inciting each other. The primary negligence involved is the race itself. All who wilfully participate in speed com-

petition between motor vehicles on a public highway are jointly and concurrently negligent and, if damage to one not involved in the race proximately results from it, all participants are liable, regardless of which of the racing cars actually inflicts the injury, and regardless of the fact that the injured person was a passenger in one of the racing vehicles. Of course, if the injured passenger had knowledge of the race and acquiesced in it, he cannot recover. A participant who abandons the race, to the knowledge of the other participants, before the accident and injury, may not be held liable.

We find that the complaint sufficiently alleges that defendants wilfully and jointly engaged in a race of motor vehicles in speed competition on a public highway of this State, and as a result of the race plaintiff's intestate came to his death.

The court erred in sustaining the demurrer of defendant Matthews.

The judgment below is

Reversed.

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PAUL EVERETTE CLARK v. H. W. SCHELD AND THE CITY OF LENOIR (ORIGINAL DEFENDANTS), AND JOHN THOMAS SUDDRETH, SR., JOHN THOMAS SUDDRETH, JR., AND JAKE ROBERTS (ADDITIONAL NEW DEFENDANTS).

(Filed 20 January, 1961.)

**1. Municipal Corporations § 5—**

A municipal corporation exercises two classes of powers: One governmental, which are performed for the public good in behalf of the State, and are discretionary, political, or public in nature; and the other commercial or proprietary, which are performed for the private advantage of the compact community. It is not liable in tort in the performance of a governmental function.

**2. Same—**

In the operation of a chemical fogging machine on a street or highway for the purpose of destroying insects, a municipality acts in a governmental capacity in the interest of the public health, and it may not be held liable in tort for injuries resulting therefrom unless it waives its immunity by procuring liability insurance, G.S. 160-191.1, *et seq.*, even though the operation of the machine renders a street or highway hazardous to traffic, since the exception to governmental immunity in failing to keep its streets in a reasonably safe condition relates solely to the maintenance and repair of its streets.

**3. Automobiles § 41f—**

Ordinarily, the mere fact of a collision with a vehicle ahead is some

evidence of negligence as to speed, or in following too closely, or in failing to keep a proper lookout, but each case must be governed by its own facts and circumstances.

**4. Same— Evidence held insufficient to be submitted to jury on question of negligence in hitting preceding vehicle.**

The evidence tended to show that a municipality was operating a chemical fogging machine on a jeep vehicle at nighttime, that in approaching the jeep its lights looked like the lights of any ordinary vehicle, that its flashing red light was not visible because of its own fog, and that the presence of the fog could not be ascertained until a motorist had passed the headlights of the jeep. The evidence further tended to show that plaintiff was following another car at moderate speed, that immediately upon entering the fog he applied his brakes and stopped, and was hit by defendant's car, with considerable force, inflicting serious injuries. The evidence also tended to show that defendant's car, traveling within the speed limit, had been following and overtaking plaintiff's car for about a mile, that plaintiff's car had slowed to about 35 miles per hour just before the collision, and that ten vehicles in the line of traffic had similar rear-end collisions. It was not alleged that defendant was following plaintiff's car more closely than was reasonable and prudent. *Held:* The evidence does not disclose that there was anything that could have given defendant notice of the peril in time for defendant to have avoided the accident, and nonsuit was proper.

**5. Negligence §§ 1, 24a—**

The law does not require omniscience and proof of negligence must rest on a more solid foundation than mere conjecture.

APPEAL by plaintiff from *Huskins, J.*, January-February 1960 Civil Term, of CALDWELL.

This is a civil action instituted 23 October 1958. Plaintiff seeks to recover damages for personal injury and property damage sustained by reason of the alleged actionable negligence of defendants, City of Lenoir and H. W. Scheld. The action involves a collision of automobiles.

The collision occurred about 10:30 P.M., 1 September 1958 (Labor Day), on Highway 321 within the corporate limits of the City of Lenoir. At the point of the accident the highway runs north and south and is downgrade for northbound traffic. It is a two-lane highway with a white line in the center. The posted speed limit is 55 miles per hour. In the vicinity of the accident there were only two houses, both unfinished, and a business establishment — otherwise, it was open territory. The weather was clear and the highway dry. Traffic was heavy.

An employee of the City of Lenoir was operating a jeep southwardly on the highway at a speed of about 10 miles per hour. Mounted

on the rear of the jeep was a machine used for spraying insecticide in vaporized form. On this occasion the machine was in operation and was emitting the vapor or fog from a nozzle located at a point about midway the length of the jeep. On the left front fender behind the headlights was a flashing red light.

Plaintiff was driving his 1949 Ford automobile northwardly, meeting the jeep. He was following a car driven by a lady from West Virginia. Defendant Scheld was following plaintiff. Plaintiff came up behind the lady's car about 1000 feet south of the accident and followed. She was travelling at a moderate rate and reduced speed as she neared the jeep. She and plaintiff were then travelling about 30 to 35 miles per hour. At the time she met the jeep, or immediately before, plaintiff saw her brake lights go on and then all of her lights suddenly disappeared. Plaintiff applied brakes and stopped. The jeep continued on.

In approaching and meeting the jeep it appeared to be an ordinary automobile. The flashing red light was not visible; only the headlights could be seen. As plaintiff passed the headlights of the jeep he was suddenly enveloped by a fog. It was so thick plaintiff could see nothing. The fog could not be seen until plaintiff passed the jeep's headlights and was engulfed by it. The fog covered the entire width of the road. Plaintiff had no time to give notice or warning that he was going to stop. The fog destroyed visibility for 5 to 10 minutes.

Plaintiff did not know whether he struck the lady's car in front of him or not. She had stopped. He testified: "She thought I had hit her. . . . I don't know whether I hit her or not. When I came to rest I was sitting against her bumper . . . ."

Defendant Scheld's car hit the rear of plaintiff's vehicle. Plaintiff first saw the Scheld car behind him about a mile or more before he reached the place of collision. Scheld was then "several hundred yards" behind plaintiff. Scheld was gaining on plaintiff. When plaintiff came into the fog and stopped Scheld was "right behind" him. Just when plaintiff stopped Scheld hit him in the rear. The seats were torn out of plaintiff's car, the hood was jerked loose, "the back seat was bent down and the middle of it up." The whole back was crushed in. The chassis was bent. Plaintiff received personal injuries.

Scheld's car was struck in the rear by an automobile driven by John Suddreth, Jr. Suddreth testified: "The Clark, Scheld's car, and mine, were all jammed up there together. The Scheld car was in the middle. . . . I didn't know at the moment whether I hit the Scheld car before he hit the Clark car or at the same time, or afterwards. I didn't know just what happened until I got out and was talking to Mr. Scheld.

He said he hit the guy in front and he hadn't gotten straightened out until I hit him, until I hit his back end."

The Suddreth car in turn was struck in the rear by an automobile driven by a deputy sheriff. The deputy's car could be operated, so he turned around, pursued and stopped the jeep. It was then he discovered it had a flashing red light. He had not seen it before. None of the other parties involved had seen it at all.

"Ten vehicles had been wrecked. They all had been headed northward. All of them had been in their own lane of traffic. It was a rear end collision in each instance."

At the close of plaintiff's evidence both defendants moved for judgment of involuntary nonsuit. The motion was allowed.

From judgments of nonsuit and dismissal of the action as against the City of Lenoir and Scheld, plaintiff appealed and assigned error.

*W. H. Strickland for plaintiff.*
*Patton & Ervin and L. H. Wall for defendant, City of Lenoir.*
*Patrick, Harper & Dixon for defendant Scheld.*

MOORE, J. The question for decision is whether or not the trial court erred in allowing the motions for nonsuit.

The City of Lenoir is a municipal corporation.

"A municipal corporation is dual in character and exercises two classes of powers — governmental and proprietary. It has a twofold existence — one as a governmental agency, the other as a private corporation.

"Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

"When injury or damage results from the negligent discharge of a ministerial or proprietary function it is subject to suit in tort as a private corporation. 6 McQuillin, Mun. Corps. (2d), sec. 2792.

"While acting 'in behalf of the State' in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. No action in tort may be maintained for resulting injury to person or property. (Citing many authorities)." *Millar v. Wilson,* 222 N.C. 340, 341, 23 S.E. 2d 42. See also *Carter v. Greensboro,* 249 N.C. 328, 333, 106 S.E. 2d 564.

"In the absence of a constitutional or statutory imposition of tort

liability upon governmental units, recovery for personal injury or property damage resulting from insecticide or vermin eradication operations conducted by governmental units has generally been denied." 25 A.L.R. 2d, Anno: Destruction of Pest — Incidental Damage, s. 2, p. 1058. We have found no authorities contrary to the foregoing general rule.

Dr. Dula, a physician and formerly Councilman for the City of Lenoir, testified: "The purpose for the process was to destroy flies, mosquitoes and other insects which might be responsible for the transfer of infection from one individual to another. . . . The purpose of the program was for the health of the citizens of the community."

*Moore v. Plymouth,* 249 N.C. 423, 106 S.E. 2d 695, involves a factual situation somewhat similar to that of the instant case. A collision of motor vehicles resulted from the operation of a machine emitting chemical fog. The machine was mounted on a pickup truck being driven on a highway. The Town of Plymouth had procured liability insurance and had waived governmental immunity to the extent of the amount of the insurance. G.S. 160-191.1 *et seq.* In the opinion delivered by *Parker, J.,* it is said:

"The evidence is clear that the Ford pickup-truck and the fogging machine were being operated at the time by the Town of Plymouth to destroy mosquitoes. It is a well known fact that the breeding and presence of anopheles mosquitoes constitute a menace to the health and comfort of persons exposed to them. See *Godfrey v. Power Co.,* 190 N.C. 24, 128 S.E. 485; *Pruitt v. Bethell,* 174 N.C. 454, 93 S.E. 945. The Legislature has given powers to municipalities to promote and to secure the lives and health of their residents by empowering them in G.S. 160-200(6) '. . . to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof.'

"Unquestionably the Town of Plymouth had a legal right to destroy mosquitoes detrimental to the health and comfort of its residents, but if in doing so in the instant case it injured plaintiff by actionable negligence in the operation of its truck and fogging machine, it cannot completely avoid liability to him by reason of the provisions of G.S., Ch. 160, Art. 15A." (p. 431.)

Inferentially, then, this Court has held that governmental immunity applies under circumstances such as presented in the instant case unless waived by the municipality under the provisions of Art. 15A, Ch. 160, General Statutes of North Carolina (G.S. 160-191.1 *et seq*).

We think, in the enactment of the legislation above referred to permitting the procurement of insurance and waiver of governmental immunity, the General Assembly recognized the immunity of municipalities from tort liability in the operation of motor vehicles in performance of governmental functions, and intended by the enactment to provide a limited exception to the general doctrine. This limited exception does not apply in this case. There is no proof that the City of Lenoir had waived immunity.

But plaintiff contends that the City is liable in this instance for the reason that the negligent conduct of its employee created a condition that obstructed and rendered dangerous a public highway within the City and that this condition proximately caused damage to plaintiff. The construction and maintenance of streets by a municipality is a governmental function. But, as an exception to the doctrine of governmental immunity, it has been uniformly held in this jurisdiction that municipalities may be held liable in tort for failure to maintain their streets in a reasonably safe condition and they are now required by statute (G.S. 160-54) to do so. *Glenn v. Raleigh*, 246 N.C. 469, 98 S.E. 2d 913.

But G.S. 160-54 relates to the maintenance and repair of the streets themselves. Parenthetically, it would appear that the duty to maintain and repair the highway in question rested upon the State Highway Commission. G.S. 136-41.1; G.S. 160-54.

The fact that chemical fog temporarily covered the highway as the jeep passed and rendered the passage of meeting vehicles perilous is only an incidental result of the performance of the governmental activity of insect extermination and does not impose liability in this case. *Stephenson v. Raleigh*, 232 N.C. 42, 59 S.E. 2d 195.

The court properly sustained the City of Lenoir's motion for nonsuit.

Plaintiff alleges that defendant Scheld was negligent in that he operated his automobile at a greater speed than was reasonable and prudent under the circumstances, failed to maintain a proper lookout, neglected to keep his vehicle under reasonable control, and drove recklessly.

Ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout. *Clontz v. Krimminger*, 253 N.C. 252, 116 S.E. 2d 804; *Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184. However, "The relative duties automobile drivers owe one another when they are travelling along a highway in the same direction, are governed ordinarily by the cir-

cumstances in each particular case." *Beaman v. Duncan*, 228 N.C. 600, 604, 46 S.E. 2d 707.

"The driver of a car is not required to anticipate that vehicles will be stopped or parked on the highway at night without lights or the warning signals required by statute, but this does not relieve him of the duty to keep a proper lookout and not exceed a speed at which he can stop within the radius of his lights, taking into consideration the darkness and atmospheric conditions, and the duty to anticipate the presence of others and hazards of the road, such as disabled vehicles." Strong: N. C. Index, Vol. 1, Automobiles, s. 10, pp. 241-2; *Weavil v. Trading Post*, 245 N.C. 106, 95 S.E. 2d 533; *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676; *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845; *Wilson v. Motor Lines*, 230 N.C. 551, 54 S.E. 2d 53.

There is no allegation that defendant Scheld followed plaintiff's car more closely than was reasonable and prudent. And the evidence does not support the allegation of reckless driving.

There is no evidence from which it may be inferred that Scheld was exceeding the maximum speed limit of 55 miles per hour. The inquiry as to speed is whether it was greater than was reasonable and prudent under the circumstances. Scheld was in a line of traffic. He did not overtake and pass or attempt to pass any other vehicle in the line. For a mile or more he had been narrowing the distance between his and plaintiff's automobiles. The weather was clear and the road was dry. Plaintiff had been travelling at a moderate rate and his speed just prior to the collision was 30 to 35 miles per hour. There was nothing visible to Scheld which indicated any unusual danger. He could see the headlights of the jeep approaching from the opposite direction, but it appeared to be an ordinary motor vehicle. According to plaintiff's testimony the red flashing light was not visible and the chemical fog could not be seen until the headlights of the jeep had been passed. Plaintiff testified that he had no time to give notice or warning that he was going to stop. Plaintiff applied brakes, but there is no evidence as to whether they took effect before or after he entered the fog. There is no evidence as to whether he had brake lights, or, if he did, whether they were in working order. The distance between Scheld's and plaintiff's vehicles just before the accident does not appear; plaintiff stated that when he stopped Scheld was "right behind" him. This expression is so indefinite as to be speculative, and recovery is not sought on the theory that Scheld was following too closely. It does not appear how quickly plaintiff stopped after entering the fog or whether there was sufficient

reaction time or space within which to stop after Scheld discovered the foggy condition. Ten vehicles in this line of traffic, including Scheld's car, suffered similar rear end collisions. It is true there was extensive damage to plaintiff's car, but Scheld's car was struck in the rear by Suddreth. Taken as a whole the evidence does not indicate that Scheld might, in the exercise of ordinary care, have avoided the collision with plaintiff's automobile. If Scheld saw all that could have been seen, the evidence does not disclose anything which would have warned him of peril until he reached the area of fog behind the jeep's headlights. The law does not require omniscience and proof of negligence must rest on a more solid foundation than mere conjecture. *Cheek v. Brokerage Co.*, 209 N.C. 569, 183 S.E. 729.

In *Moore v. Plymouth, supra,* involving chemical fog on a highway, the defendant Daniel saw the cloud of fog at a distance of 250 yards and as he drew nearer he saw the red flashing light. He had ample warning of danger. But in the instant case there is positive testimony from plaintiff that neither the fog nor the red light was visible until the headlights of the jeep had passed.

This case is easily distinguishable from those in which motorists travelled for some distance through smoke or fog before collision and were aware of, or under duty to anticipate, danger. *Clontz v. Krimminger, supra; Royal v. McClure,* 244 N.C. 186, 92 S.E. 2d 762; *Dawson v. Transportation Co.*, 230 N.C. 36, 51 S.E. 2d 921; *Bus Co. v. Products Co.*, 229 N.C. 352, 49 S.E. 2d 623; *Riggs v. Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254; *Sibbitt v. Transit Co.*, 220 N.C. 702, 18 S.E. 2d 203.

A consideration of the evidence within the framework of the complaint leads us to the conclusion that plaintiff failed to make out a *prima facie* case of actionable negligence as against defendant Scheld.

The judgments appealed from are

Affirmed.

W. MASTON BALDWIN v. AMAZON COTTON MILLS AND THE TRAVELERS INSURANCE COMPANY.

(Filed 20 January, 1961.)

**1. Master and Servant §§ 74, 82—**

The Industrial Commission has jurisdiction to review an award for change of condition *ex mero motu* or upon application at any time within one year after the last payment of compensation under the prior award, and when application is aptly made, the fact that the Industrial Commission does not actually hear the claim for change of condition until the elapse of more than one year after the last payment of compensation is immaterial. G.S. 97-47.

**2. Master and Servant § 67—**

There is no maximum amount of an award when there is permanent disability due to injury to the spinal cord. G.S. 97-29, G.S. 97-41.

**3. Master and Servant § 91—**

Where the trial commissioner finds for claimant in every respect and enters an award, and the full commission affirms the findings and conclusions of law of the hearing commissioner, the award is in effect a ruling on defendant's motion to dismiss for want of jurisdiction.

**4. Master and Servant § 93—**

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

APPEAL by defendants from *Olive, J.*, in Chambers 24 June 1960, DAVIDSON COUNTY Superior Court.

Proceeding under the Workmen's Compensation Act.

Plaintiff was injured on 24 January 1952 while employed by Amazon Cotton Mills, and as set out in the record of case on appeal the following proceedings were had in this matter:

1. On 13 February 1952, the Industrial Commission approved an agreement providing for payment of compensation to the plaintiff for temporary total disability at the rate of $30.00 per week beginning 31 January 1952, and continuing for the necessary weeks.

2. On 26 August 1952, a hearing was held before Deputy Commissioner W. Scott Buck, who filed an opinion dated 22 September 1952, directing that an award be issued in favor of the plaintiff; and pursuant to the opinion an award was issued by the Industrial Commission in favor of plaintiff on 24 September 1952.

Deputy Commissioner Buck found as a fact, among other things, at the 26 August 1952 hearing "that plaintiff has not reached the end of his healing period, nor has he achieved his maximum improvement; and that the rating(s) of his permanent injuries were premature * * *," and concluded as a matter of law that the plaintiff

was disabled and ordered that "the defendants shall pay to the plaintiff compensation at the rate of $30.00 per week based on his average weekly wage, for temporary total disability beginning 23 July 1952, and extending through 26 August 1952, and continuing during disability: Provided, however, that the total period of compensation shall not exceed 400 weeks, nor the total sum of $8,000.00."

3. On 25 February 1954, the Industrial Commission approved a supplemental agreement for payment of compensation for temporary total and temporary partial disability to the plaintiff.

4. On 3 December 1956, a further hearing was held before Commissioner N. F. Ransdell. An opinion was filed by him on 3 January 1957, directing that an order be issued ordering the defendants to comply with the award of Deputy Commissioner Buck, dated 22 September 1952, and issued by the Industrial Commission on 24 September 1952.

In Commissioner Ransdell's opinion the defendants were ordered "to continue to comply with the award of Deputy Commisisoner W. Scott Buck entered in this case as regards the payment of compensation to plaintiff." Pursuant to Commissioner Ransdell's opinion the Industrial Commission issued an award on 8 January 1957.

5. On 25 June 1957, Commissioner Frank H. Gibbs held a further hearing, and on 9 July 1957, filed an order for the Industrial Commission directing the defendants to continue to comply with the award filed by Commissioner Ransdell on 3 January 1957. Commissioner Gibbs held, among other things, that since plaintiff was still disabled and still receiving compensation payments for temporary total disability, defendants were ordered to continue to comply with said order of Commissioner Ransdell.

6. The Industrial Commission received several letters from the plaintiff requesting that the case be re-opened. One letter, dated 18 November 1957, and received by the Industrial Commission on 25 November 1957, requested that the case be reopened for consideration because he had been advised that he had a spinal cord involvement. Another letter dated 29 August 1958, was received by the Industrial Commission on 3 September 1958.

7. On 16 September 1958, the Industrial Commission acknowledged plaintiff's letters, the last two of which are noted above, and advised him that there would be a further hearing in regard to the change of condition.

8. On 21 January 1959, the case was re-set for hearing before Commissioner Robert F. Thomas. No evidence was taken at this hearing, but the Commissioner filed an order on 23 January 1959,

which directed that the case not be placed on the hearing docket except upon plaintiff's request to be made within 90 days of the filing of the order.

9. On 17 April 1959, the Industrial Commission received a letter from the plaintiff's attorney requesting that the case be re-set for a hearing.

10. On 23 April 1959, the Industrial Commission received a letter from defendants' attorney requesting "that the letter be treated as a motion to dismiss plaintiff's claim for the reason that he had not brought himself within the provisions of North Carolina General Statutes 97-47 and the maximum compensation had been paid to him under the statutes governing his claim at the time of his injury."

11. On 25 June 1959, a further hearing was had before Deputy Commissioner Thomas. On 29 June 1959, the defendants again moved to dismiss on the grounds "that the North Carolina Industrial Commission does not have jurisdiction over this claim nor the parties hereto, as no change of condition, under North Carolina General Statutes 97-47, has been established; that the previous awards of the North Carolina Industrial Commission have been fully complied with; that the last payment of compensation, to the limit of the liability imposed by the Act, having been paid during September 1957; that thereafter more than one year passed before the North Carolina Industrial Commission on 25 June 1959, reviewed this matter over the objections and motions to dismiss interposed by these defendants; that at such hearing, after motion to dismiss was again made, none of the evidence established a change of condition; it being established that the claimant was paid for total disability to the time of the exhaustion of his rights under this Act; and that claimant is still totally disabled * * * ."

12. On 21 September 1959 an opinion and award was filed by Deputy Commissioner Robert F. Thomas. Findings of Fact and Conclusions of Law were incorporated in the opinion, and the award directed, among other things, "that the defendants pay compensation to the plaintiff at the rate of $30.00 per week beginning 12 September 1957, and continuing during his lifetime without regard to the 400 weeks limitation or the $8,000 maximum compensation, together with medical and hospital bills in the amounts approved by the Industrial Commission * * * ."

13. On 25 September 1959, the defendants gave notice of appeal from the opinion and award filed by Deputy Commisioner Thomas on 21 September 1959 to the Full Commission. On 9 November 1959,

the Industrial Commission received an executed form No. 44, Application for Review, as required by Industrial Commission rules.

14. On 17 December 1959, the cause came on for hearing before the Full Commission, and an opinion and award was filed on 30 December 1959. The Full Commission "overruled each and every one of the defendants' exceptions and adopted as its own the findings of fact and conclusions of law of Deputy Commissioner Thomas, together with the award based thereon, and ordered that the result reached by him be in all respects affirmed."

15. From the ruling of the Full Commission the defendants appealed to the Superior Court, setting out exceptions and assignments of error to the findings of fact, conclusions of law and award of the Industrial Commission, and renewed their motion to dismiss the action.

The cause coming on to be heard, and being heard, the Superior Court overruled the exceptions and assignments of error filed by the defendants and affirmed the findings of fact and the conclusions of law contained in the award of the Industrial Commission "filed on the 30th day of December 1959, awarding compensation to the plaintiff."

16. From the foregoing ruling in the Superior Court the defendants except and appeal to the Supreme Court, and assign error.

*W. H. Steed, Teague, Johnson & Patterson for plaintiff, appellee.*
*Sapp & Sapp for defendant appellants.*

WINBORNE, C. J.: The pivotal question on appeal is whether or not the Industrial Commission had jurisdiction of this case when "the plaintiff received the full benefit of an award to the limit of the North Carolina Workmen's Compensation Act, Chapter 97 of the General Statutes of North Carolina, Article 1 * * *" for the injury initially claimed. Put another way, is the finding of fact at the original hearing conclusive, or does the Industrial Commission retain jurisdiction over the parties and subject matter of the dispute for further adjustment for change of condition?

Defendants contend that all of the terms of the initial award have been complied with and, therefore, the North Carolina Industrial Commission does not have jurisdiction. On the other hand, the plaintiff contends that the plaintiff had a change of condition and that the law, specifically G.S. 97-47, gives the Industrial Commission the authority to re-open a case upon a proper application for a change of condition.

G.S. 97-47 provides: "Upon its own motion or upon the application

of any party in interest on the ground of a change of condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article * * * ." By this section the Industrial Commission is given authority to review an award and increase the compensation theretofore awarded when there has been a change of condition of the claimant, and where the evidence supports a finding of change in claimant's condition, the finding of the Industrial Commission is conclusive. *Knight v. Body Co.*, 214 N.C. 7, 197 S.E. 563; *Murray v. Knitting Co.*, 214 N.C. 437, 199 S.E. 609; *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438.

In the *Dail* case, *supra*, the Court said: "The Commission is concerned with conditions existing prior to and at the time of the hearing. If such conditions change in the future, to the detriment of the claimant, this section affords the claimant a remedy and fixes the time within which to seek it."

The conclusion is that the Industrial Commission, by virtue of G.S. 97-47, had authority to re-open the case upon application for change of condition, notwithstanding the fact that defendants had paid the maximum under the award of Deputy Commissioner W. Scott Buck, dated 22 September 1952. Indeed, there is no maximum where there is permanent disability due to injury to the spinal cord. G.S. 97-29; G.S. 97-41.

G.S. 97-47 further provides that a review must be had within twelve months from the last payment of compensation. And in this connection this Court has held that the last payment of compensation within the meaning of this section is the date the last check was delivered to and accepted by the employee. *Paris v. Carolina Builders Corp.*, 244 N.C. 35, 92 S.E. 2d 405; *Harris v. Asheville Contracting Co.*, 240 N.C. 715, 83 S.E. 2d 802.

The defendants contend that since the review in this case was actually made by the Industrial Commission more than twelve months after the last payment of compensation, the Industrial Commission is precluded from making the review. We cannot agree with this contention. The record of case on appeal shows that the defendants made the last payment of compensation on 11 September 1957, and that the plaintiff requested a hearing on 18 November 1957. The fact that the Industrial Commission did not actually hear the claim until after the twelve months period had elapsed does not bar the plaintiff from having his case heard by the Commission. The plaintiff requested a hearing in apt time and the fact the Industrial Com-

mission did not actually conduct the hearing within the time specified by the statute does not revoke the jurisdiction of the Industrial Commission in the matter.

Indeed, the defendants cite cases in their brief in which there is language to the effect that an application for review within the twelve months following final payment of compensation is sufficient to invoke the jurisdiction of the Commission. *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E. 2d 109; *Dail v. Kellex Corp., supra; Harris v. Asheville Contracting Co., supra; Paris v. Carolina Builders Corp., supra.*

The plaintiff should not have his rights prejudiced by the fact that circumstances prevented the Industrial Commission from actually conducting the hearing within the twelve months next after the last payment of compensation.

The defendants also assign as error the fact that their motion to dismiss was not ruled upon by the Hearing Commissioner, Full Commission, or the Superior Court. It is to be noted that the Trial Commissioner by his opinion and award filed 21 September 1959, in effect ruled on the motion to dismiss in that he found for the plaintiff in every respect. Thereafter the Full Commission affirmed in every respect the findings of fact and conclusions of law rendered by the Hearing Commissioner, and the Superior Court affirmed the findings of fact and conclusions of law of the Full Commission.

It is an elementary rule of law in North Carolina in Workmen's Compensation cases that the facts found by the Industrial Commission are conclusive on appeal, both in the Superior Court and in the Supreme Court when supported by competent evidence. G.S. 97-86. *McGinnis v. Finishing Plant, ante,* 493. Upon a careful reading of the record of case on appeal the conclusion is that the evidence supports the findings of fact; that the findings of fact support the conclusions of law; and that the conclusions of law support the award.

Therefore, for reasons stated the judgment of the Superior Court from which appeal is taken is

Affirmed.

HARVEY W. MATTINGLY v. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 20 January, 1961.)

**1. Trial § 22a—**

On motion to nonsuit, the evidence is to be viewed in the light most favorable to the plaintiff, giving to him the benefit of every reasonable inference to be drawn therefrom, and assuming to be true all the facts in evidence tending to support his cause of action.

**2. Negligence § 24a—**

In order to establish actionable negligence, plaintiff must show a failure to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty was the proximate cause of injury, which is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.

**3. Automobiles § 7—**

It is the duty of a motorist to exercise ordinary care for his own safety, which includes the duty to keep his vehicle under control and to keep a reasonably careful lookout in the direction of travel, and he is held to the duty of seeing what he ought to have seen.

**4. Railroads § 4—**

Evidence tending to show that plaintiff, in attempting to traverse a grade crossing, "misjudged the turn", ran off the asphalt surface, so that his wheels became lodged in the soft gravel around the tracks, without evidence of defect in the crossing itself, discloses contributory negligence barring recovery as a matter of law for damage to the vehicle resulting when it was hit by a train some twenty minutes after becoming stuck.

**5. Same— Evidence held insufficient to invoke the doctrine of last clear chance.**

Evidence tending to show that plaintiff's car was stuck in the soft gravel adjacent to a railroad crossing, that the car's lights were shining away from the track, that a person ran toward the approaching train swinging a flashlight in an arc in front of his body, but that the light could be seen only when the beam was directed toward the viewer, *is held* insufficient to invoke the doctrine of last clear chance in an action to recover damages resulting to the car when struck by the train, since the situation is governed by how it appeared to the engineer, and the evidence does not disclose that he knew, or by the exercise of due care should have known, that plaintiff's automobile was stranded in a position of peril in time to have avoided the collision.

**6. Negligence § 10—**

The doctrine of last clear chance does not apply unless it is shown that plaintiff was in a helpless condition, that defendant saw, or in

the exercise of due care could have seen him and appreciated the danger in time to have avoided the injury, and that the failure to exercise such care to avoid the injury was one of the proximate causes thereof.

APPEAL by defendants from *Campbell, J.*, at April 25, 1960, Regular Civil Schedule B Term, of MECKLENBURG.

Civil action to recover damages to an automobile sustained in a collision with a train of the defendants at a crossing in the unincorporated town of Newell, North Carolina, some time after midnight on 22 November 1958.

The crossing consisted of a north-bound track and a south-bound track set down in asphalt so that the rails are flush with the road level. Coming from west to east, the cross-over road rises about 3 feet in a distance of approximately 20 feet in the approach from the west, and declines about 5 feet within a distance of approximately 15 feet in the approach from the east. The crossing is level for about 25 feet between the place on the west where the road rises and crosses over to the place on the east where it does the same thing. The unnamed road crossing the tracks was approximately 15 feet wide at the crossing, and comes to a dead end about two blocks from the extension of the Chinch Road. On the west side of the tracks and of the Concord Road there is one residence directly opposite the crossing, and then a filling station approximately fifty yards north. South of the crossing on the west side there is nothing but the tracks. There is nothing between the tracks and the old Concord Road except Western Union cable lines and telephone lines.

The plaintiff proceeded across the westernmost tracks in an easterly direction, and upon crossing the easternmost tracks he "misjudged the turn" and his car became lodged in the soft gravel off the asphalt. The front of the plaintiff's automobile came to rest in a southeasterly direction or away from the tracks; the head lights were on and likewise shining away from the tracks. The right rear wheel of plaintiff's car was approximately 6 feet off the asphalt and within two to two and one-half feet of the easternmost rail, and within six or eight inches of the closest crosstie. The left rear was approximately 3 feet off the asphalt. A short time, twenty or thirty minutes, thereafter the defendants' train collided with the rear quarter of the plaintiff's automobile.

The evidence offered upon the trial in Superior Court by the plaintiff, as set out in the record on this appeal, tends to show this narrative of events and circumstances at and about the time of, and in connection with the collision hereinabove referred to:

"I live at 237 Antony Circle, Charlotte, N. C. * * * On November 21, 1958, I had occasion to drive my auto out in the Newell section. Prior to being out there * * * my wife and I had been over to our neighbor's house * * * next door * * * We stayed there somewhere between 10:30 and 11 o'clock. During that time I had something of an alcoholic nature to drink * * * a couple of highballs * * * After I left * * * I stayed at my home * * * 15 to 20 minutes. I then, went to town to the Hoot Mon to get a sandwich and a cup of coffee, which I did * * *. It took me about ten minutes to drive from my home to the Hoot Mon. As to what time I left the Hoot Mon Restaurant * * * it must have been, in my opinion * * * it was between 11:30 and 12 o'clock. At that time I rode downtown of Charlotte on North Tryon Street to no particular place, just riding * * * As to where else I went, I had no particular place in mind to go and I did not go to any other place than out North Tryon Street, and I saw the sign 'Pecan Grove', and I turned off there. As to why * * * no particular reason * * * turned left, that is when I became lost. I had never been in that vicinity or in the city of Newell, and the first thing I knew I ended up over in that particular area * * * I was trying to get back to U. S. 29 where I was familiar. I recall turning in to this cross-over leading up to the Chinch Road * * * I must have been going north because I made a right turn * * * at the old Concord Road and the road leading over the tracks * * * As to what I did when I turned right off the old Concord Road and onto this cross-over * * * The approach to it is an incline of three to four feet to the level of the crossing, and then just a short distance between the easternmost track there is a downgrade whereby your car comes off the track. Your beam of your lights is not on the road below you * * * After I focused myself, I could easily see that it was no particular road, just a dirt road leading to a dead-end and residences and streets on each side. As I went over the first tracks there * * * the westernmost track, my headlights were directly slightly above the grade of the crossing. As to how fast I was traveling * * * it could not have been more than ten or fifteen miles per hour at the most. Nobody was with me at this time. The condition of the weather was clear. As I proceeded on in an easterly direction I misjudged the turn to the right and as a result of it my car ended up * * * the right rear wheels became lodged in the soft gravel where I had no traction to either go forward or backward * * * I tried to get it out under our own power by going forward and backward * * * I would say at least five minutes. At that time no train was approaching in either direction. I then got out of the car and approached the house occupied by an

elderly couple who were in bed. Then I went back across the tracks and that is where I became aware that Mr. Crowell was going to help me • • • he went and got the fire truck and came back over and I went around the front of my car and he had in the meantime driven the truck up * * • and we were working with the winch there. The first time I heard any signal or knew that the train was approaching was at the time Mr. Crowell said there was a train coming which I could hear also in the distance • • • I did not see it at that time. I looked south. Then we were concerned primarily with getting away. We knew that we could not get the car off the track • • * we were concerned with our personal safety more than we were with the car at that time. He hooked up the truck and drove it out of the way and he ran up the track waving a flashlight * • • He advised me to get back * * • My own personal opinion as to the speed of the train when I first saw it coming down the track is it was going 70 or in excess thereof, miles per hour * • * at the time it struck my auto, apparently was going 50 * * • My opinion is in excess of 50 miles an hour * * * The flashlight was burning when Mr. Crowell was flashing it out there and moving it back and forth. My lights remained on from the time I went across the crossing until the collision."

And the plaintiff recalls saying, on adverse examination, in answer to question whether he had an opinion satisfactory to himself as to what speed the train was moving at the time he first saw it, his answer was "No, I have no idea how fast it was going."

And plaintiff testified: "I made no attempt to go down the track and wave my arms without any light"; that in his opinion about 20 to 30 minutes elapsed from the time his car got "in the ditch off the crossing" and the time that the train first came into sight.

Also on adverse examination plaintiff was asked this question: "Did you have any difficulty there because the crossing was rough, is that what caused you to go off the shoulder, is that what you say?" "And my answer was 'No', I can't attribute the cause of my going off on the shoulder to that." "That was my answer. It is correct."

And Fleet P. Crowell, plaintiff's witness, testified in pertinent part as follows: " * * * I have refreshed my recollection concerning the weather conditions on that night and it was clear. The tracks and the road were dry. I have an opinion as to the speed of the train when I first saw the train as I looked south along the railroad tracks. I would estimate the speed at approximately 70 miles an hour • * * I estimate the speed when the train struck the auto, at the time it struck the auto, I estimate that it was traveling approximately fifty

miles an hour at that time * * * ." And this witness testified that there was nothing wrong with the crossing.

At the close of plaintiff's evidence the defendants moved for judgment as of nonsuit and upon the denial of the motion the defendants rested and renewed the motion. The court denied the second motion and submitted the case to the jury. From judgment on the verdict in favor of the plaintiff, the defendants except and appeal to the Supreme Court, and assign error.

*Sedberry, Sanders & Walker for plaintiff, appellee.*

*W. T. Joyner and Robinson, Jones & Hewson for defendants, appellants.*

WINBORNE, C. J.: Defendants stress for error the overruling of their motion for judgment as of nonsuit at the close of the plaintiff's evidence. In such case the evidence is to be viewed in the light most favorable to the plaintiff, giving to him the benefit of every reasonable inference to be drawn therefrom, and assuming to be true all the facts in evidence tending to support his cause of action. *Ervin v. Mills Co.*, 233 N.C. 415; 64 S.E. 2d 431; *Clontz v. Krimminger, ante* 252.

In order to establish a case of actionable negligence in a suit like the present, the plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury— a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Ramsbottom v. RR*, 138 N.C. 38, 50 S.E. 448.

It is also a general rule of law in North Carolina "that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout * * * ." *Smith v. Rawlins, ante* 67; *Clontz v. Krimminger, ante* 252.

It would seem, therefore, that when the evidence of the plaintiff is tested by the rules laid down by this Court that the defendants' motion for nonsuit should have been granted. The plaintiff's own

evidence shows that the railroad cross-over was smooth and straight, and not in disrepair. Indeed, plaintiff failed to introduce any evidence tending to show negligence on the part of the defendant railroads in maintaining the crossing. The clue as to the cause of plaintiff's running off the road is stated by him. He testified that he was unfamiliar with the crossing and "misjudged the turn to the right" and as a result his car ended up "lodged in the soft gravel" off the asphalt crossing.

When the evidence, as narrated above, is considered it compels the conclusion that the plaintiff failed to keep a proper lookout and contributed to his own injury. "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 333.

However, it is the plaintiff's contention, that notwithstanding any contributory negligence on his part, the fact that his car was stalled near the railroad tracks was apparent, or in the exercise of due care should have been apparent, to the engineer of the defendants' train in time to have stopped the train and avoided the collision— in other words, that the defendants had the last clear chance to avoid injury to plaintiff's car.

We cannot agree with this contention. The plaintiff's car was not on the tracks, but off the tracks with its headlights shining away from the tracks. Furthermore, plaintiff's witness Crowell testified substantially as follows concerning the flashlight warning signal: " * * * When I was waving this flashlight, I waved it from one side to the other across my body, more or less in the same plane with the ground. When I waved that flashlight that way, the beam of the light was only visible to someone standing in front of it at any distance, only once in every arc. It was not visible when it was over at one side or the other * * * it could be seen as a clear light like a single light bulb * * * We tested it in that manner and you can't see the beam except when it comes in directly with you. You can't see the arc on each side * * * ."

Appearances are governed by the situation as it appears to the engineer, not to the plaintiff. As is said in *Redmon v. RR*, 195 N.C. 764, 143 S.E. 829: "The doctrine does not apply to trespassers and licensees upon the tracks of a railroad, who, at the time, are in apparent possession of their strength and faculties, the engineer of the train producing the injury, having no information to the contrary. Under such circumstances the engineer is not required to stop his train or even slacken its speed, for the reason that he may assume

until the very last moment of impact that the pedestrian will use his faculties for his own protection and leave the track in time to avoid injury."

Furthermore, this Court has held that a speed of sixty miles per hour on the part of a train traveling through a rural section, nothing else appearing, is not unlawful or negligent. See *Jeffries v. Powell* and *Branch v. Powell*, 221 N.C. 415, 20 S.E. 2d 561. In the present case the plaintiff has introduced no evidence tending to show that the speed of the train would come within the exception.

In short, there is no evidence in the record that the engineer knew, or by the exercise of due care could have known, that plaintiff's automobile was stranded in a position of peril. As is held in *Mercer v. Powell*, 218 N.C. 642, 12 S.E. 2d 227, the burden is upon the party invoking the doctrine of last clear chance to prove beyond speculation or conjecture every material fact necessary to support issues of (1) helpless condition of plaintiff, (2) that the defendant saw or in the exercise of due care could have seen him and stopped in time to avoid the injury, and (3) that this failure to keep a proper lookout was one of the proximate causes of the injury.

In the instant case plaintiff placed his car in a dangerous position, but there is no evidence that the defendants saw it or should have seen or discovered it in time to avoid the collision. *Temple v. Hawkins*, 220 N.C. 26, 16 S.E. 2d 400; *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337.

For reasons stated the judgment from which defendants appeal is Reversed.

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LUCILLE REDDING MOODY v. JOE ALFRED MOODY.

(Filed 20 January, 1961.)

**1. Divorce and Alimony § 1—**

Divorce is purely statutory in this State. Constitution of North Carolina, Article II, § 10.

**2. Divorce and Alimony § 13—**

A separation due to a brain injury suffered by the husband, which rendered him irrational to the extent he could not form an intention to remain separate and apart from his wife, is not ground for divorce under G.S. 50-6, and when this situation appears from the facts alleged in the complaint, demurrer is properly sustained, it not appearing from

the complaint that the husband had been mentally competent for a period of two years at any time during the separation.

**3. Same—**

The fact that prior to separation arising by reason of brain injury suffered by the husband, both husband and wife had expressed an intent to separate from each other and terminate the marital relationship, is insufficient to support divorce on the ground of two years separation, since it is required that the separation be voluntary in its inception to come within the purview of the statute.

APPEAL by plaintiff from *Crissman, J.*, April 1960 Term, of RANDOLPH.

This is an action for divorce *a vinculo matrimonii.*

The complaint alleges in substance:

Plaintiff and defendant are and, for more than 6 months prior to the institution of this action, have been *bona fide* residents of North Carolina. They were married 26 July 1938. "On July 5, 1954, the defendant suffered a brain injury from which he has not yet fully recovered. Plaintiff and defendant have lived continuously separate and apart since July 5, 1954, and at no time since said date have they resumed their marital relationship. Such separation, on the part of this plaintiff, was with the intent to terminate their marital relation and to live continuously separate and apart. During the entire period of separation . . . defendant has lived with his father's family. The defendant has never been confined to an institution for the care and treatment of the mentally disordered. The separation of these parties was not caused by the incurable insanity of the defendant . . . . (d)efendant is not incurably insane but is merely incompetent to manage his own affairs because of the aforesaid injury. . . . (o)n occasions since their separation there have been periods during which the defendant was rational to the extent that he could form the intention to remain separate and apart from the plaintiff." On 24 July 1958 plaintiff conveyed to defendant all her right, title and interest in the real property owned by plaintiff and defendant, for the purpose of assisting in his support. "Immediately prior to the . . . separation plaintiff had intended to separate from the defendant and terminate their marital relation and the defendant had expressed to the plaintiff his intention to separate from . . . plaintiff and terminate their marriage." In a lunacy proceeding before the Clerk of Superior Court of Randolph County on 29 November 1955 defendant was declared incompetent "from want of understanding to manage his own affairs by reason of mental and physical weakness and on account of disease or injury," and a general guardian was appointed for him.

Defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action for absolute divorce.

The court entered judgment sustaining the demurrer and dismissing the action.

Plaintiff appealed and assigned errors.

*Moser and Moser for plaintiff.*
*Coltrane and Gavin for defendant.*

MOORE, J. The question for decision is whether or not the complaint states a cause of action for absolute divorce.

According to the fundamental law of this State "The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any individual case." Constitution of North Carolina, Art. II, s. 10.

By reason of the constitutional provision, "divorce is purely statutory, and is under no obligation to the ecclesiastical or common law." *Byers v. Byers,* 222 N.C. 298, 303, 22 S.E. 2d 902. "The statute gives and the statute takes away." *Long v. Long,* 206 N.C. 706, 708, 175 S.E. 85 See also *Schlagel v. Schlagel, post,* 787; *Ellis v. Ellis,* 190 N.C. 418, 130 S.E. 7.

We have two statutes authorizing the granting of absolute divorce on the ground of two years separation. G.S. 50-5(4) and G.S. 50-6. For history and review of legislation permitting divorces because of separation, see *Byers v. Byers, supra;* 21 N.C. Law Review 347; 27 N. C. Law Review 453.

The instant action was instituted pursuant to G.S. 50-6. This statute provides for absolute divorce on application of either party, if husband and wife have lived separate and apart for two years and if plaintiff or defendant have resided in the State for six months.

The broad provisions of this statute have been construed in a number of cases. In *Byers v. Byers* (1942), *supra,* it is said: "It is still true that the bare fact of living separate and apart for the period of two years, standing alone, will not constitute a cause of action for divorce. There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period; it must appear that the separation is with that definite purpose on the part of at least one of the parties. The exigencies of life and the necessity of making a livelihood may sometimes require that

the husband shall absent himself from the wife for long periods — a situation which was not contemplated by the law as a cause for divorce in fixing the period of separation." p. 304. See also *Mallard v. Mallard,* 234 N.C. 654, 68 S.E. 2d 247; *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154.

*Lawson v. Bennett,* 240 N.C. 52, 81 S.E. 2d 162, involves an action for absolute divorce on the ground of two years separation. It was prosecuted pursuant to G.S. 50-6. Defendant wife denied the alleged separation and asserted that she was induced to execute a deed of separation at a time when she did not have sufficient mental capacity to know the nature and consequences of her acts. The opinion delivered by *Winborne, J.,* now *C. J.,* declares: "The foremost question here is this: Where a spouse, the wife in the instant case, has suffered impairment of mind to such an extent that she does not have sufficient mental capacity to understand what she is engaged in doing, and the nature and consequences of her act, may the other spouse, the husband here, maintain an action against her for divorce on the ground of two years' separation, that is, under the provisions of G.S. 50-6? The trial judge held that he did not have such right, and, upon careful consideration of the question, this Court affirms. In this connection, the General Assembly has seen fit to legislate specifically and specially in respect to the granting of absolute divorce in all cases where a husband and wife have lived separate and apart by reason of the incurable insanity of one of them, upon the petition of the same (sane) spouse. G.S. 50-5, subsection 6, as amended. Therefore, in keeping with well established principle the remedy provided is exclusive. . . . Hence, the jury having answered the fourth issue in the negative, and the provisions of G.S. 50-5 (6) not having been invoked, the trial court properly held that plaintiff cannot maintain an action upon the grounds alleged in the complaint." pp. 57-8. See also *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492; *Williams v. Williams,* 224 N.C. 91, 29 S.E. 2d 39; *Lee v. Lee,* 182 N.C. 61, 108 S.E. 352. "Insanity is not generally recognized in any of the States of the United States as a ground for divorce unless made so by statute." *Mabry v. Mabry,* 243 N.C. 126, 129, 90 S.E. 2d 221.

At the very least, the holding in the *Lawson* case is in accord with the great weight of authority in the United States. In Nelson: Divorce and Annulment, 2d Ed., Vol. 1, it is said:

"Insanity contracted after a marriage obviously does not have any effect on the validity of the marriage contract, and, in the absence of a statute specifically providing that it shall be so, is not a ground for divorce. As a matter of fact, there is a distinct sentiment against

the granting of divorces on the ground of insanity, based, no doubt, upon the view that divorces should be granted because of fault and not misfortune. In many jurisdictions, however, divorce on the ground of insanity has been specifically provided for by statute, and the right of a legislature to include insanity as a ground for divorce has been sustained. . . . It is generally provided, however, that the condition must be incurable." s. 8.04, pp. 334-5-6.

". . . (W)here a separation is attributable to insanity, an action for divorce on the ground of separation will not be granted." s. 8.04, pp. 337-8.

Insanity as the cause of separation in divorce actions is the subject of inquiry and discussion in 19 A.L.R. 2d, Anno: Divorce — Insanity as precluding, pp. 144-185. There it is said:

"The view supported by most cases is that such a statute (providing for divorce based on separation) contemplates that the separating parties must have been separated for the full required period while they were in a normal state of mind, and that a separation, though commencing prior to occurence of the insanity, does not satisfy the requirements of the statute if it has not continued for the required period prior to such occurrence, since after such occurrence the insane spouse's separation is not by his or her voluntary action, and the statute presupposes voluntary separation for the full period. (Parentheses ours)." s. 8, p. 160.

"Mental derangement to an extent rendering the subject incapable of distinguishing between right and wrong, and not a condition of mind of lesser gravity, will constitute a defense to an action for divorce on the ground of adultery. Mere moral bluntness, mental weakness, or licentious disposition, nervousness, or hysteria do not satisfy the requirements of this test." s. 14, p. 174.

Separation occasioned by insanity is cause for divorce in North Carolina only in cases of incurable insanity. And in these cases the requirements of G.S. 50-5 (6) must be met. In all other instances of separation arising by reason of mental incompetency, such separation is not a ground for divorce. But to bar an action for divorce based on two years separation, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act. *Lawson v. Bennett, supra.*

The complaint alleges that the parties were separated on 5 July 1954 in consequence of a brain injury suffered by defendant husband "from which he has not recovered." With respect to the extent

of mental impairment it is alleged that defendant is not incurably insane, is merely incompetent to manage his own affairs and was judicially declared to be so on 29 November 1955, a general guardian was then appointed for him, and since the separation there have been occasions during which defendant was rational to the extent that he could form the intention to remain separate and apart from plaintiff.

From these allegations the conclusion is inescapable that the separation arose by reason of the brain injury suffered by defendant, and that he was not then rational to the extent he could form the intention to remain separate and apart from plaintiff. Furthermore, it does not appear from the complaint that defendant has since been mentally competent for a period of time sufficient to bring the case within the provisions of G.S. 50-6.

The fact that plaintiff, prior to the brain injury and separation formed, and expressed to defendant, the intent to separate from him and terminate the marital relationship, and that defendant had formed and expressed a like intent, will not avail to sustain this action. It is clear from the complaint that the separation took place because of the brain injury and not by reason of mutual consent. It is alleged: "On July 5, 1954, the defendant suffered a brain injury from which he has not yet fully recovered. Plaintiff and defendant have lived continuously separate and apart since July 5, 1954 . . . . During the entire period of separation . . . defendant has lived with his father's family." At the time of the separation defendant was mentally incompetent and could not have assented thereto. For divorce based on separation by mutual consent, plaintiff must not only show that she and defendant lived apart for the statutory period, but also that the separation was voluntary in its inception. *Young v. Young, supra; Williams v. Williams, supra.*

The plaintiff was not bound to anticipate all grounds of defense to her action and plead them in her complaint. *Taylor v. Taylor, supra,* at page 82. But we must consider the complaint as drawn.

The judgment below is

Affirmed.

GLADYS HARRELL v. WALTER R. HARRELL, JR.

(Filed 20 January, 1961.)

1. **Appeal and Error § 3—**

An appeal lies as a matter of right and not as a matter of grace in those cases in which an appeal is authorized. G.S. 1-271, G.S. 1-277, G.S. 1-279, G.S. 1-280.

2. **Same: Appeal and Error § 12—**

An appeal does not lie from an interlocutory order unless it deprives the party aggrieved of a substantial right which will be lost if not reviewed before final judgment, G.S. 1-277, but even so, the Superior Court may not stay proceedings and seek to preclude an appeal from a nonappealable interlocutory order, since such appeal will be dismissed in due course in the Supreme Court.

3. **Appeal and Error § 3: Reference § 3—**

Ordinarily an appeal will not lie from an order of compulsory reference made pursuant to statute where there is no complete plea in bar to the entire case, but an appeal will lie from an order of compulsory reference when such interlocutory order is not in accordance with the course and practice of the courts, affects a substantial right, and would incur costs which the aggrieved party would be without remedy to recover.

4. **Same: Divorce and Alimony § 18—**

Upon the hearing to determine the amount to be awarded the wife as subsistence and counsel fees *pendente lite*, G.S. 50-16, the statute does not contemplate an accounting between the husband and wife even though the amount of his income is controverted, and an order of compulsory reference involving examination of books and business records located in various parts of the United States, with requirement of an undertaking for the payment of the expenses of the reference, does not come within the purview of G.S. 1-189(2) and is appealable as involving a substantial right and unrecoverable expense.

5. **Divorce and Alimony § 18—**

The purpose of the statutory provision for subsistence and counsel fees *pendente lite* is to put the wife on substantially even terms with the husband in the litigation pending trial, and it is not contemplated that the proceedings be delayed by a slow and costly reference even though the amount of the husband's income is controverted, since the court has plenary power to require the disclosure of any information within the knowledge of or available to the parties bearing upon the amount which should be allowed, which amount may be modified or vacated at any time on motion.

APPEAL by defendant from *Johnston, J.*, at Chambers 29 July 1960, in FORSYTH.

Plaintiff commenced this action 13 April 1960 for alimony without divorce, property settlement, custody of child and attorney's fees.

Defendant filed answer and by denying material allegations of the complaint raised issues of fact requiring trial by jury. Plaintiff filed a reply.

Pursuant to notice duly given, plaintiff moved before Johnston, J., for subsistence for herself and child *pendente lite* and counsel fees. Hearings were held 22 and 29 July 1960.

The court heard and considered on behalf of plaintiff: complaint and reply (received as affidavits) and the affidavits of plaintiff, Mrs. Sudie J. Cropps, T. W. Heath and Mrs. Lucy K. Glass. On behalf of defendant the court heard and considered: answer (used as affidavit), affidavit of defendant and testimony of Dan Drummond.

On the question of support and maintenance plaintiff's evidence tends to show: Defendant has been providing $258.00 per month for support of plaintiff and their child. This is inadequate. Plaintiff and defendant own a residence in Winston-Salem as tenants by the entirety. Defendant during the year ending June 1959 had a net reported income of $12,870.73. He also had other income. He is owner of the capital stock of W. R. Harrell Produce, Inc., a Florida corporation engaged in transporting produce.

Defendant offered operating statement and balance sheet of W. R. Harrell Produce, Inc., prepared by Dan Drummond, accountant. The statement and balance sheet showed for the year 1 June 1959 to 31 May 1960, among other things: total receipts, $24,837.81 and total expenses, $22,812.50. Expenses included officer's salary, $3,900.00 (salary of defendant) and depreciation, $2,320.80. The net profit was $2,025.01. The balance sheet showed assets as of 31 May 1960 of $20,473.66, including $588.71 cash, $16,000.00 equipment and $8,743.35 accounts receivable. This item of $8,743.35 purported to be a sum due by defendant to the corporation — it arose by reason of withdrawal of $10,000.00 from corporation funds for purchase of equipment. Corporate liabilities and net worth consisted of reserve for depreciation, $6,750.00, surplus, $3,723.66, capital stock $10,000.00. Drummond testified that he was an accountant of 27 years experience. He qualified as an expert accountant. He had kept the records of the corporation from the inception of defendant's business. He made the statement and balance sheet from trip sheets and cancelled checks.

On 5 August 1960 the court signed an order in material part as follows:

". . . (T)he Court finding as a fact that in order to determine the amount, if any, which should be ordered paid by the defendant to the plaintiff as temporary support for herself and for the child of this marriage, it is necessary that the Court determine the approxi-

mate income of the defendant; and it further appearing to the Court, and the Court finding as a fact that the amount of income of the defendant is not agreed upon by the parties, and that the amount of such income is not readily apparent to the Court and that there is a substantial difference in the amount of defendant's income as contended by the parties;

"And it further appearing to the Court, and the Court finding as a fact that the defendant is engaged in the business of hauling produce by tractor-trailer from the State of Florida to many different locations and States other than Florida, and that the only evidence before the Court at this time which will enable the Court to determine the income of the defendant is Affidavits submitted by the parties and the oral testimony of Mr. Dan L. Drummond, the bookkeeper of the defendant, whose testimony is based on information provided him by the defendant or at the defendant's directions;

"And it further appearing to the Court, and the Court finding as a fact that the taking of an account to determine the income of the defendant is necessary for the information of the Court in order to enter a proper Order upon the plaintiff's Motion for temporary support for herself and her minor child, and that an examination should be made of the defendant's books and other business records as well as of information located in various parts of the United States;

"IT IS NOW, ON THE COURT'S OWN MOTION, ORDERED that this matter be referred to Robert H. Sapp, Attorney, for the purpose of obtaining information for the Court as to the income of the defendant, and that Robert H. Sapp obtain evidence from plaintiff and defendant and from all known sources of information as to the income of the defendant, and that he report his findings as to the income of the defendant to this Court in the manner provided by law not later than the 7th day of October, 1960.

"IT IS ALSO ORDERED that the defendant pay into the office of the Clerk of Superior Court the sum of Two Hundred ($200.00) Dollars as an undertaking for the payment of whatever expenses may be incurred or taxed against the defendant as costs in this cause."

On 13 August 1960 defendant excepted to the order and moved that it be set aside and vacated. The motion was overruled and defendant excepted. At the same time defendant gave notice of appeal. The court declined to sign the appeal entry and refused to fix appeal bond. Defendant excepted.

Defendant petitioned the Supreme Court for *certiorari* and *supersedeas*. The writs were issued.

Defendant assigns errors.

*Robert B. Wilson, Jr., for plaintiff.*
*W. Scott Buck for defendant.*

MOORE, J. A Superior Court Judge can neither allow nor refuse an appeal. "Appeals lie from the Superior Court to the Supreme Court as a matter of right rather than as a matter of grace. Under the Code of Civil Procedure, the aggrieved party is authorized to *take an appeal* in the cases prescribed by law. G.S. 1-271, 1-277, 1-279, 1-280. In such cases, he appeals as a matter of right on compliance with the statutes and rules of court as to the time and manner of taking and perfecting the appeal." But where an interlocutory order is not subject to appeal, the Superior Court need not stay proceedings pending dismissal of the appeal in Supreme Court. *Veazey v. Durham,* 231 N.C. 357, 365, 57 S.E. 2d 377.

"Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute 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 (and cases cited)." *Raleigh v. Edwards,* 234 N.C. 528, 529, 530, 67 S.E. 2d 669.

Ordinarily an appeal will not lie from an order of compulsory reference made pursuant to statute and where there is no complete plea in bar to the entire case. McIntosh: N. C. Practice and Procedure, 2d Ed., Vol. 2, s. 1782(3) (b); *Leach v. Quinn,* 223 N.C. 27, 25 S.E. 2d 170; *Bank v. McCormick,* 192 N.C. 42, 133 S.E. 183.

It is our opinion, however, that the order of compulsory reference in the instant case is appealable. Compulsory reference is not a proper procedure under the circumstances here presented. The order affects a substantial right of defendant. It requires that defendant deposit immediately with the Clerk $200.00 for payment of whatever expenses may be incurred. It is common knowledge that references are expensive. It is reasonable to assume that the expense of a reference, involving the transactions of a business having its principal office in the State of Florida and transporting produce over a large part of the United States, would greatly exceed $200.00. To require defendant to defer testing the validity of the order until the reference has been completed and the costs have been incurred and imposed would sub-

stantially affect his rights and leave him without remedy for recovery of the expenses necessarily involved.

The circumstances under which compulsory references may be ordered are fixed by statute. G.S. 1-189. The court found facts as a basis for the order of reference and stated that "it is necessary that the Court determine the approximate income of the defendant," that defendant's income is not agreed upon by the parties and the amount is not readily apparent to the Court, "that the taking of an account to determine the income of defendant is necessary for the information of the Court in order to enter a proper order upon the plaintiff's Motion for temporary support . . . and that an examination should be made of the defendant's books and other business records as well as of information located in various parts of the United States."

It is apparent that the court undertook to proceed under subsection 2 of G.S. 1-189 which authorizes a compulsory reference "Where the taking of an account is neccesary for the information of the court, before judgment, or for carrying a judgment or order into effect."

"Our statutes relating to trials by referees serve a useful purpose, and must be liberally construed." *Jones v. Beaman,* 117 N.C. 259, 261, 23 S.E. 248; *Bank v. Evans,* 191 N.C. 535, 539, 132 S.E. 563. A reference under G.S. 1-189(2) is in the nature of an interlocutory reference for the information of the court. Such reference involves incidental questions of fact, upon a determination of which the court may proceed, and these may be referred without involving the whole case. McIntosh: N. C. Practice and Procedure, 2d Ed., Vol. 1, s. 1393 (1), p. 770. But as indicated by the statute the taking of an account must be necessary. It also seems clear that the accounting taken should have some direct relation to the ultimate disposition of the case.

Pending the trial and final determination of the issues in an action for alimony without divorce, the wife may apply to the court for reasonable subsistence and attorney's fees to be secured from the husband's estate or earnings, according to his condition and circumstances; any allowance ordered may be modified or vacated at any time, on the application of either party. G.S. 50-16. The purpose of the allowance for attorney's fees is to put the wife on substantially even terms with the husband in the litigation. *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443. The amount of the allowance for subsistence *pendente lite* is for the trial judge. He has full power to act without the intervention of a jury and his discretion in this respect is not reviewable, except in case of manifest abuse of discretion. *Mercer v. Mercer, supra; Fogartie v. Fogartie,* 236 N.C.

188, 72 S.E. 2d 226. The granting of an allowance and the amount thereof does not necessarily depend upon the earnings of the husband. One who has no income, but is able-bodied and capable of earning, may be ordered to pay subsistence. *Muse v. Muse,* 84 N.C. 35.

The provision for temporary subsistence pending the trial on the merits does not involve an accounting between husband and wife. It is not designed to determine property rights or to finally ascertain what alimony the wife may be entitled to in the event she prevails on the merits. Its purpose is to give her reasonable subsistence pending trial and without delay. The matter may be heard on affidavits. It is not contemplated that the proceeding will be delayed by a slow and costly reference involving the examination of records in many different locations and in other States. From an examination of the evidence and information before the court below, it does not appear that a reference was necessary. The facts to be found by such reference would have no lasting value and would not be binding upon the court at a final hearing. The fortunes of business change. The temporary order of alimony may be modified or vacated at any time on motion. *Quare:* Would it be proper to order a reference upon each hearing for modification for change of condition?

We do not exclude the possibility that a case might arise in which a mandatory reference might be proper in a proceeding for alimony *pendente lite.* But such procedure is contrary to the course and practice of our courts.

Plaintiff cites *Cram v. Cram,* 116 N.C. 288, 21 S.E. 197, in support of the order made. This was an action for alimony without divorce. The Court said: "(W)here facts are found or admitted which entitle a wife to a statutory allowance for support, it becomes the duty of the judge, as in the case of fixing the amount of alimony, to hear evidence himself or to order a reference to ascertain such facts, as to the income of the husband, the value of his estate, etc., as will enable him to determine what is 'a reasonable subsistence, according to his (the husband's) condition and circumstances' as the statute declares 'it should be lawful for such judge' to do." pp. 295-6. In this case there had been a final hearing on the merits and it had been determined that the wife was entitled to alimony. The cause had been retained for determination of the amount of alimony. Pending this determination defendant had appealed. We express no opinion as to whether the *dicta* in that case should be adopted as a rule of law in this jurisdiction. Suffice to say that the *Cram* case did not involve alimony *pendente lite.*

The court has jurisdiction of the parties and has plenary power and authority to require the disclosure of any information within their knowledge or available to them bearing upon a temporary allowance. It is not necessary that the parties agree as to what the husband's income is. The findings of the court will not be disturbed if based on competent evidence. *Mercer v. Mercer, supra.*

The order is vacated and the cause is remanded for further proceedings in accordance with law.

Reversed and remanded.

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RICHARD STANLEY LANE v. EASTERN CAROLINA DRIVERS ASSOCIATION.

(Filed 20 January, 1961.)

**1. Appeal and Error § 1—**

In granting a new trial for error in the charge, the evidence being sufficient to warrant the overruling of defendant's motion to nonsuit, the Supreme Court will refrain from discussing the evidence except as necessary to show the ground on which the new trial is awarded.

**2. Games and Exhibitions § 2—**

The operator of an automobile race track is not an insurer of the safety of his invitees, but is charged with the duty of exercising for the safety of his patrons reasonable care commensurate with the known and reasonably foreseeable danger under the circumstances.

**3. Same: Negligence § 28—**

Where a patron injured at an automobile race track seeks to recover on the dual grounds of negligence of the proprietor in permitting an improper and specially constructed vehicle to participate in the race and the negligence of the proprietor in failing to provide barriers reasonably sufficient to protect the patron, an instruction which submits only one of the theories of liability to the jury is incomplete.

**4. Negligence § 7—**

In order for negligence to be actionable, it must be so related to the injury that, but for such negligence, the injury would not have occurred.

**5. Games and Exhibitions § 2: Negligence § 28— Charge held for error in failing to instruct jury on element of proximate cause.**

This action was instituted by a patron of an automobile race track who was injured when struck by a racing vehicle, which veered from its direction of travel at an angle of 45 degrees and sped toward the spectator area, where cars were parked, at a speed of 120 miles per hour. There was conflict in the evidence as to what protective barriers, if any,

were customary or in general use on similar tracks, and the evidence disclosed that the barrier provided by the proprietor afforded virtually no protection. *Held:* It was for the jury to determine whether a barrier reasonably necessary to protect plaintiff from known or foreseeable dangers would have protected plaintiff from injury under the circumstances disclosed by the evidence, and a charge which refers to proximate cause only in stating the abstract principals of law applicable and which fails to mention proximate cause in the later application of the law to the evidence in the case, and in the last portion instructs the jury that if defendant had failed to provide proper barriers under the circumstances to answer the issue of negligence in the affirmative, must be held for prejudicial error.

APPEAL by defendant from *Burgwyn, Emergency Judge,* May Term, 1960, of PASQUOTANK.

Plaintiff's action is to recover damages for personal injuries he sustained on Sunday, February 22, 1959, while observing drag races or acceleration contests conducted by defendant, when a "dragster," operated by Earl Layden, left the racing strip and crashed, at a speed of approximately 120 miles per hour, into the spectator area.

The basic factual situation was as follows:

The races were conducted on a strip of concrete built (1941-1944) as a flight strip for airplanes. It was originally known as Maple Flight Strip, later as Maple Drag Strip. In 1955, and thereafter, defendant, in possession under lease of the land on which this strip is located, conducted such races or contests thereon, usually on the second and fourth Sunday of each month. Participants were charged an entry fee. Spectators (patrons) were charged an admission fee.

The concrete strip, running straight north-south, had an overall width of 162 feet. It consisted of fourteen parallel sections. The outer section on each side was nine feet wide. Each of the twelve inner sections was twelve feet wide. The overall length of this straight concrete strip was approximately three-quarters of a mile. However, a race, from start to finish, covered only the distance of 1320 feet, a quarter of a mile. The racers started from a standstill at the south end of the strip and traveled north towards and beyond the finish line.

The spectator area was on the west side of the concrete strip, to the left of the racers. There were no grandstands or bleachers. Spectators watched the races while standing or from parked cars.

Square posts, four inches in diameter, were set along and near the west edge of the concrete strip. These posts, three or four feet high, were ten to twelve feet apart. Two strands of wire, one about three

feet above the other, were fastened to the posts. This fence was the only barrier separating the spectator area from the concrete strip.

Only two cars participated in a race. They used the second and fourth sections (lanes) from the east edge of the concrete strip. The portion of the concrete strip west of the fourth section (lane), having a width in excess of one hundred feet, was used only for the return, at slow speed and in a lane marked by wooden blocks, of cars which had finished a race and were returning to their original positions.

Plaintiff, after paying the admission fee, drove into defendant's premises. He was accompanied by his wife and by Mr. and Mrs. Meads. A sign directed spectators to turn north. Parked cars of spectators were headed east, at right angles to the concrete strip, near the fence. Plaintiff, proceeding north behind these parked cars, turned right into the first open space and parked his car in the manner in which the cars of other spectators were parked. The space where plaintiff parked was north of the finish line. Cars of other spectators were parked north of the space where plaintiff parked.

Plaintiff had watched drag races at defendant's track on one prior occasion. On February 22, 1959, prior to his injury, plaintiff had watched several drag races, including three or four in which the Layden car had participated.

When the Layden car left the track and crashed into the spectator area, the race then in progress was between Layden and the (unidentified) driver of a "purple" car. Plaintiff was standing by the fence. His attention was directed towards the "purple" car, which was ahead as the two cars approached the finish line. The "purple" car was traveling in the second section (lane) from the east. The Layden car was traveling in the fourth section (lane) from the east. Approximately one hundred feet before it reached the finish line, Layden's car veered to its left, at an angle of approximately forty-five degrees, from its original straight course and headed directly towards and into the spectator area. In the resulting crash, Layden, the driver, was killed, Meads received fatal injuries, and plaintiff, his wife and Mrs. Meads were injured.

Plaintiff alleged his injuries were proximately caused by the negligence of defendant. He alleged defendant was negligent in these respects: (1) It failed to erect and maintain sufficient barriers or other protective devices to protect its patrons. (2) It failed to prepare or maintain a reasonably safe race track. (3) It invited its patrons to take a position near the race track without warning them they were in a position of danger. (4) It failed to provide a reasonably safe area or zone from which patrons might view the races. (5) It allowed

improperly constructed and unsafe automobiles to participate in the races. (6) It allowed the Layden car to race when it knew, or should have known, that it was built "with flimsy motor mounts, built with a steering mechanism of a type too slow to safely operate such a 'Spook' type car, and built with a bell housing shield on said vehicle not in accordance with the National Hot Rod Association's rules and regulations for safety."

Answering, defendant denied all plaintiff's allegations as to negligence. As further defenses, defendant pleaded: (1) The contributory negligence, including assumption of risk, on the part of plaintiff. (2) The negligence of Layden, constituted "either the sole proximate cause or, coupled with the contributory negligence of the plaintiff, constituted the proximate cause of the injuries to the plaintiff," and so insulated any negligence on the part of defendant. (3) Unavoidable accident.

The court submitted, and the jury answered, two issues: "1. Was the plaintiff injured by the negligence of the defendant, as alleged in the Complaint? ANSWER: Yes. 2. What amount, if any, is plaintiff entitled to recover of the defendant? ANSWER: $40,000."

Judgment for plaintiff, in accordance with the verdict, was entered. Defendant excepted and appealed; and upon appeal defendant sets forth 36 assignments of error based on 134 exceptions.

*Willard J. Moody, Killian Barwick and John H. Hall for plaintiff, appellee.*

*LeRoy, Goodwin & Wells for defendant, appellant.*

BOBBITT, J. Defendant's motion for judgment of nonsuit was properly overruled. Hence, we refrain from discussing the evidence presently before us except to the extent necessary to show the ground on which a new trial is awarded. *McGinnis v. Robinson*, 252 N.C. 574, 114 S.E. 2d 365; *Caudle v. R. R.*, 242 N.C. 466, 88 S.E. 2d 138.

Plaintiff, a patron, occupied the status of invitee. Defendant was not an insurer of plaintiff's safety. "The general rule is that the owner or operator of an automobile race track is charged with the duty of exercising reasonable care, under the circumstances present, for the safety of patrons, that is a care commensurate with the known or reasonably foreseeable danger." *Williams v. Strickland*, 251 N.C. 767, 112 S.E. 2d 533; 37 A.L.R. 2d 393.

"If the need is obvious or experience shows that an automobile race of the character and in the place proposed requires, in order to afford reasonable protection to spectators, the erection of fences or

similar barriers between the track and the places assigned to them, it becomes a part of the duty in exercising reasonable care for their safety to provide fences or barriers, the adequacy of which is dependent on the circumstances present, principally the custom of the business." 37 A.L.R. 2d 394; *Williams v. Strickland, supra.*

The Layden car was a specially constructed rear engine dragster. There was evidence from which diverse conclusions and inferences might be drawn as to whether the Layden car was so constructed that defendant, by the exercise of due care, could and should have reasonably foreseen that the driver would or might lose control thereof when operating at high speed, and as to whether defendant, upon proper inspection thereof, should have excluded the Layden car from participating in the fatal race. Under the court's instruction, as indicated below, the negligence of defendant was made to depend upon whether it failed to exercise due care to provide barriers reasonably sufficient to protect its patrons.

There was no evidence that any prior incident similar to that here considered had occurred on defendant's track. There was evidence that Layden had participated in such races on defendant's track since 1955.

Conflicting evidence was offered as to what protective barriers, if any, were customary or in use on similar drag race tracks. There was no evidence that facilities such as grandstands or bleachers were provided at any drag race track. From the evidence most favorable to plaintiff, diverse conclusions and inferences may be drawn as to whether any protective barrier referred to as in use on any similar track would have protected plaintiff from a car headed towards the spectator area at a speed of 120 miles per hour.

It appears plainly, from the evidence offered by both plaintiff and defendant, that the sole purpose of the fence was to keep spectators off the concrete strip, not to provide protection for spectators. If a racing car or wheel or other part thereof invaded the spectator area, the protection afforded by this fence was incidental and negligible.

As to negligence, the question was whether defendant breached its said legal duty. Here the inquiry was to determine whether defendant provided for its patrons such fence or other barrier as was reasonably necessary to protect them from known or foreseeable dangers. Since virtually no protection was provided, the second inquiry was of major importance, namely, whether, assuming defendant had provided for the protection of its patrons such fence or other barrier *as was reasonably necessary to protect them from known or foreseeable dangers,* would *such fences or barriers* have protected plaintiff from

a racing car headed into the spectator area at a speed of 120 miles per hour? If not, defendant's negligence in the respect indicated was not a proximate cause of plaintiff's injuries. The alleged negligence, to be actionable, must be so related to the injury that, but for such negligence, injury would not have occurred.

The importance of the element of proximate cause in this respect must be kept in mind in considering the assignment of error directed by defendant to this excerpt from the judge's charge:

> "Now, gentlemen, if you are satisfied from the testimony and by the greater weight of the testimony that the defendant has been negligent, in failing to provide adequate, proper and reasonably safe premises for the spectators at their race and failed to exercise reasonable care for their safety, provide proper barriers for their protection, the adequacy of which was dependent upon the circumstances present, then and in that event, gentlemen, you would find the plaintiff to have carried the burden of proof of this case and answer that issue YES. If you are not so satisfied, you would answer it NO."

The foregoing is the court's final instruction to the jury relevant to the negligence issue. It will be observed that the element of proximate cause was inadvertently but entirely omitted.

Plaintiff cites the consolidated cases of *Sparks v. Holland* and *Pardue v. Holland*, 209 N.C. 705, 184 S.E. 552, and similar cases, as authority for the well established rule that the court's charge must be construed contextually as a whole and not disjointedly. In the cited case, the challenged instruction was as follows: "Now, gentlemen of the jury, if you find from the evidence and by its greater weight in this case that the plaintiff in each of these cases *was injured by* the negligence of the defendant, in each case you would answer the first issue 'Yes,' that is, in the *'Sparks* case' and also in the *'Pardue* case,' you would answer the issue 'Yes.'" (Our italics.) However, immediately preceding this statement, the court fully instructed the jury as to the significance of proximate cause as an element of actionable negligence. A similar factual situation was the basis of decision in *Gentry v. Utilities Co.*, 185 N.C. 285, 117 S.E. 9.

Here, consideration of the charge as a whole discloses that the court, before reviewing at length the respective contentions of the parties, defined actionable negligence in general terms. In doing so, the court rightly included in the definition of proximate cause the element that it must be a cause without which the result would not have occured. No attempt was made to apply this element of proxi-

mate cause to the factual situation in the manner indicated above. Under these circmstances, when the court, in the final instruction relating to the negligence issue, omitted entirely the element of proximate cause, we apprehend the jurors received the impression that, since *no* protective fence or barrier was provided, whether plaintiff would have been injured if defendant had provided a fence or barrier *reasonably necessary to protect plaintiff from known or foreseeable dangers* was of no importance in reaching their verdict.

Under the circumstances stated, the erroneous omission from the court's said final instruction of the element of proximate cause must be held sufficiently prejudicial to necessitate a new trial.

Mindful of the fact that the evidence at the next trial may be different in material respects, we refrain from discussing, on the basis of evidence presently before us, questions presented by defendant's other assignments of error.

New trial.

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DANIEL D. SPEAS, INEZ M. COPE, NOLLIE G. COPE, PLAINTIFFS v. WILLIAM T. FORD, DEFENDANT; ROADWAY EXPRESS, INC. AND D. J. REALTY COMPANY, ADDITIONAL DEFENDANTS.

(Filed 20 January, 1961.)

**1. Notice § 1—**

No notice is required of a motion made at the term at which the cause is calendared for trial unless specifically required by statute.

**2. Limitation of Actions § 7—**

An action for fraud is barred after the lapse of three years from the date the fraud is discovered. G.S. 1-52(9).

**3. Limitation of Actions § 1—**

After a statute of limitations has begun to run, it ordinarily continues to run until stopped by appropriate judicial process. G.S. 1-15.

**4. Limitation of Actions § 17—**

When the applicable statute of limitations is pleaded, the burden rests on the party asserting the cause of action to prove that his claim is not barred.

**5. Limitation of Actions § 18—**

The court may sustain a plea of the statute of limitations when it appears upon the face of the pleading that the claim is barred.

**6. Limitation of Actions § 7—**

Where defendant in his answer alleges that he refused to comply with his contract on the contractual date because of his discovery of fraudulent misrepresentations inducing his execution of the contract, and files a cross action against plaintiff and his co-defendants for such fraud more than three years after the contractual date, judgment dismissing the cross action on motion upon the plea of the three year statute of limitations is without error. G.S. 1-59(9).

APPEAL by defendant Ford from *Phillips, J.*, June 6, 1960 Civil Term, of FORSYTH.

This action was begun by Daniel D. Speas and Inez M. Cope against William T. Ford by the issuance of summons 4 March 1955, served 5 March 1955.

Plaintiffs allege: They contracted, on 24 January 1955, to sell and defendant Ford agreed to purchase "the assets, properties, leasehold interest, equipment, inventory, and other items as specified in said written Contract which were at or about the filling station and service station property known as Winston Truck Service"; the price to be paid for the equipment, lease, etc. was $8189 plus the inventory price of the merchandise on hand at 12:01 a.m., 1 March 1955, plus a weekly salary of $125 to each plaintiff for a period of three weeks; in February 1955 plaintiff handed to defendant "the assignment of the lease of the premises, with lessors' written consent to the assignment of same to the defendant" and had in all other particulars complied with the contract and were able and willing to perform at the time fixed for the consummation, to wit, 1 March 1955; prior to 1 March 1955 defendant notified plaintiffs he would not comply with the contract; plaintiffs had suffered damages by defendant's failure to perform his part of the contract.

By motions and requests for extensions of time to plead defendant was not required to answer until 17 October 1958. On that date he filed his answer. He admitted executing the contract and notice to plaintiffs prior to 1 March 1955 "that he did not intend to go through with the contract or to comply with the same. . ." To defeat plaintiffs' cause of action he asserted he was induced to execute the contract by the fraudulent representations of plaintiffs, Nollie G. Cope, Roadway Express, Inc. (hereafter called Roadway), and D. J. Realty Company (hereafter called Realty Co.). To support his charge of fraud he alleged the lease referred to in the contract contained a provision by which Realty Co. as lessor or defendant as lessee might cancel upon "thirty days' written notice to the other party in the event Roadway Express, Inc. should substantially discontinue its

leased equipment operations, and if it should come to have a majority of its truck operations as company-owned truck operations rather than leased operations"; the right to occupy the leased land was the prime inducement to the contract; for that reason he made inquiry prior to the execution of the contract with respect to possible cancellation because of a change in Roadway's method of operation; he was assured by plaintiffs, Nollie G. Cope, Roadway, and Realty Co. that no change in the manner of operation was contemplated within twelve to eighteen months; acting on these representations, which were knowingly false, he executed the contract; on 27 January 1955, three days after the contract was signed, he was notified by Roadway of a change to be made in its method of operation which would permit cancellation of the lease; having learned of the fraud attempted to be perpetrated on him, he refused to perform his part of the contract; the least was in fact terminated pursuant to notice given on or about 15 March 1955.

He followed his plea of fraud to defeat plaintiffs' right to recover by a counterclaim or crossaction against plaintiffs, Nollie G. Cope, Roadway, and Realty Co., alleging he had been damaged in the sum of $15,000, profits he would have made had there been no change in Roadway's manner of operation. He further alleged lessor's assent to the assignment of the lease was part of the conspiracy formed by plaintiffs, Nollie G. Cope, Roadway, and Realty Co. to defraud him. He alleged: "That immediately upon being informed of the purported consent to the assignment of the lease by D. J. Realty, *this defendant advised plaintiffs of his election to terminate said written instrument of January 24 1955, knowing that D. J. Realty Company would immediately terminate its lease of the premises occupied by Winston Truck Service.*" (Emphasis added.)

He prayed that Nollie G. Cope, Roadway, and Realty Co. be made parties and required to answer his asserted counterclaim. His motion was allowed. Process issued for Roadway and Realty Co. 30 December 1958 and was served 2 January 1959, issued for Nollie G. Cope 18 February 1959, and was served 19 February 1959.

Each of the parties thus brought into the controversy denied the alleged fraud. Each pleaded the three-year statute of limitations.

Judge Phillips allowed the motions of Nollie G. Cope, Roadway, and Realty Co. for judgment sustaining their pleas of the statute of limitations and entered judgment accordingly. Defendant appealed.

*Eugene H. Phillips and Blackwell, Blackwell & Canady for Daniel D. Speas and Inez M. Cope.*

*Hastings, Booe and Mitchell for D. J. Realty Company.*

*Deal, Hutchins and Minor for Roadway Express, Inc.*

*Craige, Brawley, Lucas & Hendrix for William T. Ford.*

RODMAN, J. Preliminarily we are confronted with the contention that Judge Phillips had no right to act on the motion, because defendant had no prior notice. The contention is without merit. The motion was made at the term at which the cause was calendared for trial. Before the jury was empaneled, the parties suggested to the court: "that a Pre-Trial Conference was necessary in order for the Court to pass on various motions and points of law raised by the pleadings." The law applicable, and the reason therefor, is succinctly stated by *Ervin, J.*, in *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709. He said: "The law manifests its practicality in determining 'when notice of a motion is necessary.' When a civil action or special proceeding is regularly docketed for hearing at a term of court, notice of a motion need not be given to an adversary party, unless actual notice is required in the particular cause by some statute. This rule is bottomed on the proposition that all parties to a civil action or special proceeding are bound to take notice of all motions made and proceedings had in the action or special proceeding in open court during the term."

The statute of limitations in an action for fraud begins to run from its discovery and is barred in three years from that date. G.S. 1-52(9).

When the statute starts to run, it continues until stopped by appropriate judicial process, G.S. 1-15; *Swartzberg v. Insurance Co.,* 252 N.C. 150, 113 S.E. 2d 270; *Nowell v. Hamilton,* 249 N.C. 523, 107 S.E. 2d 112; *Stamey v. Membership Corp.,* 249 N.C. 90, 105 S.E. 2d 282; *Aydlett v. Major & Loomis Co.,* 211 N.C. 548, 191 S.E. 31; *Washington v. Bonner,* 203 N.C. 250, 165 S.E. 683; or for statutory causes not here material.

When the statute is pleaded, the burden rests on the party asserting a cause of action to remove the bar. *Swartzberg v. Insurance Co., supra; Solon Lodge v. Ionic Lodge,* 247 N.C. 310, 101 S.E. 2d 8.

The reasons which justify a judgment sustaining a demurrer for failure to state a cause of action likewise support a judgment sustaining the plea of the statute of limitations and dismissing the action when it appears on the face of plaintiff's pleadings that plaintiff's right to recover is barred by the lapse of time properly pleaded.

*Nowell v. Hamilton, supra; Mobley v. Broome,* 248 N.C. 54, 102 S.E. 2d 407; *Latham v. Latham,* 184 N.C. 55, 113 S.E. 623; *Stubbs v. Motz,* 113 N.C. 458; McIntosh, N. C. P. & P., 2nd ed., sec. 373.

The date for defendant Ford to pay his money and consummate his contract with plaintiffs was 1 March 1955. Prior to that time he notified plaintiff he would not comply with the contract. He specifically justified his refusal because of his knowledge "that D. J. Realty Company would immediately terminate its lease of the premises occupied by Winston Truck Service." This specific assertion of knowledge acquired on or prior to 1 March 1955 fixes that date as the latest date for the statute to start to run. More than three years elapsed between the date he alleges he discovered the fraud and 17 October 1958, when defendant first claimed damages for fraud, and more than three years prior to the issuance or service of process requiring appellees to answer.

Since the plea is established by the facts stated by defendant Ford, it follows that the judgment is

Affirmed.

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HOWARD F. SEALEY v. ALBANY INSURANCE COMPANY; CHRISTINE BRIDGMAN BULLOCK, ADMINISTRATRIX OF THE ESTATE OF RALPH BULLOCK; EMMA RHODES, ADMINISTRATRIX OF THE ESTATE OF GUTHRIE JOHNSON RHODES; HUBERT PAGE; ELBERT HAYES.

(Filed 20 January, 1961.)

1. **Principal and Agent § 4—**

**While the fact of agency may not be proved by testimony of declarations of the alleged agent, the agent himself may testify as a sworn witness at the trial as to the fact of agency.**

2. **Same: Insurance § 2—**

**Where the authority of a person to cancel a policy as agent for the insurer is in issue, and insured's attorneys admit the authenticity of the contract of agency after copy had been furnished them as contemplated by G.S. 8-91, and the court excludes the testimony of the agent as to the fact of agency and also the contract of agency, although the agent had testified to its authenticity, a new trial must be awarded, since even if it were proper to exclude the oral testimony of the agent on the ground that his authority was in writing, the exclusion of the properly identified and authenticated contract of agency was prejudicial.**

APPEAL by the defendant Albany Insurance Company from *Hall, J.,* September 1960 Civil Term, ROBESON Superior Court.

Civil action instituted by the plaintiff under the provisions of the Declaratory Judgment Act (Ch. 1, Article 26, General Statutes of North Carolina) for the purpose of having the court determine the rights and liabilities of the parties under a policy of insurance issued by appellant insuring the plaintiff against liability for bodily injury by reason of ownership and operation of a 1957 Mercury automobile No. 57ME30743M.

The plaintiff alleged that the appellant, "through its duly authorized representative, C. G. Mauney, issued and delivered" the policy to the plaintiff, covering the period of 12 months beginning June 12, 1959, and that on August 29, 1959, the plaintiff, while driving the insured vehicle, had an accident which resulted in the death of Guthrie Johnson Rhodes and Ralph Bullock, whose personal representatives instituted against the plaintiff civil actions for damages under the wrongful death statute. The plaintiff notified the insurer of these actions against him and requested insurer to defend them. This the insurer refused to do. The plaintiff asked the court to determine the liability of the insurer under the policy.

The defendant Albany Insurance Company filed answer, alleging that the plaintiff failed and refused to pay the premium on the policy which was due at the time it was issued and that after notice the policy was duly and effectively canceled on July 11, 1959, for failure to pay the premium, and at the time of the accident the policy was not in force. The appellant asked the court to enter judgment that the insurer was neither under contract nor obligated to defend the wrongful death actions, nor to pay any damages awarded in them.

The plaintiff offered in evidence the insurance policy, the appointments and pleadings of the personal representatives of Rhodes and Bullock in which the plaintiffs demanded damages for the wrongful deaths. The insurance policy contained the following provision:

> "CANCELATION: . . . This policy may be canceled by the company by mailing to the insured named in Item 1 of the declarations at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of the surrender or the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the company shall be equivalent to mailing."

After plaintiff rested, the appellant offered as a witness C. G. Mauney, alleged by the plaintiff to be the insurer's duly authorized

representative who issued and delivered the policy. Mr. Mauney offered to testify that the plaintiff did not pay the premium due on the policy and that he, Mauney, had authority on that ground to cancel the policy; that he gave the plaintiff notice of the cancellation by "certified" mail. He further offered to testify that he requested and received the "certified mail receipt." Mr. Mauney offered to testify that he was agent for the Albany Insurance Company; that his contract of agency was in writing. "I can identify this contract . . . It is an Agency Agreement between Albany Insurance Company and myself. . . . I was present at the execution of this document."

The plaintiff objected. The court sustained the objection. Whereupon, appellant offered a notice, pursuant to G.S. 8-91, served on plaintiff's counsel "to make written admissions that the following documents, which are attached hereto, are genuine: (1) . . . (2) Contract of agency between Albany Insurance Company and Mauney Insurance Agency." Plaintiff's counsel replied: "'Request to Admit Genuineness,' dated September 8, 1960, received and with reference to same we admit, as counsel for plaintiff, that the papers executed were executed by the persons purporting to sign the same."

The agreement between Albany Insurance Company and Mauney Insurance Agency gave the agent authority "to issue and deliver policies . . . to collect and receipt for premiums thereon . . . to cancel such policies in the discretion of the Agent where cancellation is legally possible."

Mr. Mauney's evidence and the documents were excluded on the plaintiff's motion. The appellant duly excepted. The court submitted to the jury one issue: "Did the defendant Albany Insurance Company cancel the policy referred to in the complaint prior to August 29, 1959?" The court gave the jury peremptory instructions to answer the issue, No, and after the issue was so answered, judgment was entered that the codefendants "are entitled to the protection afforded them by the terms of the policy by reason of the accident which occurred on August 29, 1959."

The defendant Albany Insurance Company excepted and appealed.

*Sanford, Phillips, McCoy & Weaver, for defendant Albany Insurance Co., appellant.*

*Hackett & Weinstein, for plaintiff, appellee.*

*Britt, Campbell & Britt, for defendant Christine Bridgman Bullock, Admx., appellee.*

*L. J. Britt & Son, for defendant Emma Rhodes, Admx., appellee.*

*McLean & Stacy, for defendants Hubert Page and Elbert Hayes, appellees.*

HIGGINS, J. The plaintiff introduced the insurance policy which he alleged was issued and delivered to him for the appellant by "its authorized representative, C. G. Mauney." The policy provided for cancellation. Mr. Mauney offered to testify that no premium was ever paid and that for that reason he had authority to and did cancel the policy in the manner provided. When the court refused to admit the testimony, Mauney identified his contract with the appellant and offered to testify that he had been acting under it for three years; that he knew the signature of the officer who signed it. The court still refused to admit the contract which showed Mauney's authority to cancel. The evidence was sufficient to identify and authenticate the contract. It should have been admitted in evidence. If the court excluded the agent's oral testimony on the ground his authority was in writing, then the exclusion of the writing was certainly prejudicial.

We apprehend that in this instance counsel and the court gave undue heed to the well recognized principle of law that agency and its extent may not be proved by the declarations and statements of the agent. The proposition is correct in a proper case. This is not such a case. "We know of no rule of evidence that does not allow an agent to go on the witness stand and testify that he is an agent. It is not a declaration, but the sworn evidence of a witness." *Machine Co. v. Seago,* 128 N.C. 158, 38 S.E. 805. "This is not a case of proving an agency by the declaration of the alleged agent, but by the testimony of an agent, under oath." *Hill v. Bean,* 150 N.C. 436, 64 S.E. 212. "It is a rule of universal application in this jurisdiction that agency cannot be proved by the mere declaration of the agent. . . . Of course, the agent may testify under oath as to the agency." *State v. Lassiter,* 191 N.C. 210, 131 S.E. 577. "Proof of agency as well as its nature and extent may be made by the direct testimony, but not by the extra-judicial declarations, of the alleged agent." *Jones v. Light Co.,* 206 N.C. 862, 175 S.E. 167. "While proof of agency, as well as its nature and extent may be made by the direct testimony, but not by alleged agent, . . . nevertheless it is well established that, as against the principal, evidence of declarations or statements of an alleged agent made out of court is not admissible either to prove the fact of agency or its nature and extent." *Commercial Solvents v. Johnson,* 235 N.C. 237, 69 S.E. 2d 716.

In this case the appellant offered and the court excluded oral testimony of the witness Mauney as to his authority to cancel the insurance policy here involved. Likewise, the court excluded the documentary evidence of the agent's authority after its identity and au-

thenticity were established not only by the testimony, but by the stipulation of counsel after a copy had been furnished them as contemplated by G.S. 8-91. For the court's error in excluding pertinent testimony on the issue of cancellation, there must be a

New trial.

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D. B. HOYLE v. J. A. BAGBY D/B/A J. A. BAGBY CONSTRUCTION COMPANY.

(Filed 20 January, 1961.)

**1. Appeal and Error § 7—**

A motion in the Supreme Court for leave to amend, as well as the proposed amendment, must be reduced to writing and filed in the Supreme Court, and a motion not in conformity with the rule will not be considered. Rule of Practice in the Supreme Court No. 36.

**2. Fraud § 8—**

Allegations to the effect that defendant induced plaintiff to do certain work under contract upon misrepresentation that defendant would pay the contract price when defendant was paid for the entire job by the owner, together with allegations of fact establishing that defendant was not paid anything by the owner subsequent to the promise until the day plaintiff had completed his contract, is insufficient to allege a cause of action for fraud in the absence of allegations that at the time the representation was made defendant had a then existing intent not to comply with his promise.

**3. Fraud § 3—**

A promise of performance in the future cannot constitute the basis for an action for fraud unless the promisor intended not to comply with the promise at the time the promise was made, and such misrepresentation of the fact of present intent was made with the purpose of inducing plaintiff to act to his detriment.

**4. Fraud § 8—**

The complaint in an action for fraud must set up with sufficient particularity the facts from which legal fraud arises or, when actual fraud is relied on, must specifically allege fraudulent intent and particularize the acts complained of as being fraudulent.

**5. Bankruptcy § 7—**

Exceptions to the discharge of debts under the bankruptcy law must be confined to those plainly expressed, and the exclusion of claims based on fraud is limited to claims for "money or property" thus obtained, and it has been held that such exclusion does not extend to claims for services obtained by fraud.

HOYLE *v.* BAGBY.

APPEAL by defendant from *Mallard, J.*, April 1960 Term, DURHAM Superior Court.

Civil action in which plaintiff seeks to recover for work done on a road construction project which the defendant was under contract to complete for Duke University. Duke University had agreed to pay the defendant $34,500 for the completed job. The defendant employed the plaintiff to furnish men and machines to help complete the project which was under way and partially completed when the plaintiff entered upon the work.

Plaintiff alleged he began work for defendant on December 17, 1957, and worked with tractor and bulldozer four or five days for which he was due $478. His next work began March 7, 1958, and continued until May 23, 1958. For work done and machines furnished he was due an additional $7,051, or $7,529 altogether. The plaintiff alleged "the date of payment for the services rendered was understood to be the day upon which the defendant received payment from Duke University."

The plaintiff further alleged that on December 20, 1957, the defendant collected $17,039.29, and on January 31, 1958, $3,654. "That between March 7, 1958, and May 23, 1958, this plaintiff inquired of the defendant about payment for services rendered and was assured that when he, the defendant, was paid for the job that the plaintiff would certainly get his money . . . and informed this plaintiff that he, the defendant, could not get his money until the job was inspected"; that the defendant "purposely misinformed the plaintiff about any monies that the defendant had already received on the job for the purpose of deceiving this plaintiff and to prevent the plaintiff from taking a lien on the job for services rendered, and to induce the plaintiff to continue work."

The plaintiff further alleged that the last day plaintiff worked, May 23, 1958, the defendant received from Duke University the sum of $10,380.20 and that $3,400 then remained unpaid. Claims have been filed with Duke University against the amount retained for approximately $12,000.

The defendant filed an answer, admitted the plaintiff performed the work with men and machines for which he had not been paid. The defendant denied any failure to keep any promises. By way of further answer and defense, the defendant set up as a plea in abatement, an order of discharge in bankruptcy entered on November 13, 1958, on a voluntary petition filed on September 11, 1958.

The court, by agreement, heard the defendant's plea in abatement and held: "That the complaint of the plaintiff states a cause of action

based upon fraud for obtaining money or moneys worth upon false representation that were known by the defendant to be false when he made them and that they were relied upon by the plaintiff to his detriment and as such is not a debt or claim as is discharged by the 'Discharge or Bankrupt.' "

From the order overruling the defendant's plea in abatement, he appealed.

*Williams and Zimmerman, for defendant, appellant.*
*Lester W. Owen, for plaintiff, appellee.*

HIGGINS, J. Counsel for plaintiff, during the argument here, moved for leave to amend the complaint in order to amplify his allegations of fraud. However, neither the motion, nor the proposed amendment, was reduced to writing and filed in this Court as required by Rule 36, Rules of Practice in the Supreme Court, 221 N.C. 566. The motion and amendment are not in compliance with the rules and the Court cannot consider them.

The plaintiff alleged the defendant purposely misinformed him concerning the time he had been paid by Duke University and about the payments he had already received, "for the purpose of deceiving this plaintiff and to prevent the plaintiff from taking a lien on the job for services rendered, and to induce the plaintiff to continue work." We might be able to sustain plaintiff's allegation — more properly his conclusion — that the defendant had perpetrated a fraud on him but for the detailed allegations of the facts upon which he relies to sustain the charge of fraud. Here are the details alleged: Duke University contracted to pay the defendant $34,500 to complete a road contract. After the work was under way the defendant contracted to pay the plaintiff a stipulated price per hour to furnish men and machines to help the defendant complete the contract. Plaintiff worked four or five days beginning December 17, 1957, for which he was due $478. On December 20, the defendant drew $17,039.20 for work already done prior to the time plaintiff began. On January 31, 1958, the defendant received an additional $3,654. The plaintiff did not go back on the job until March 7, 1958, and he continued to work until May 23, 1958. On that date he was due $7,529. The plaintiff further alleged "that between the dates March 7, 1958, and May 23, 1958, this plaintiff inquired of the defendant about the payment for services rendered and was assured that when he, the defendant, was paid for the job that the plaintiff would certainly get his money." The plaintiff then alleges that on May 23, 1958, the defendant was

paid $10,380.20 and that a balance of $3,400 was still due by Duke University.

It is noted that the defendant had agreed to pay the plaintiff when the defendant collected from Duke; and that the basis of defendant's fraud is that the very day on which the plaintiff completed his work the defendant received more than $10,000 in payment from Duke and did not comply with his promise to pay the plaintiff when he collected. The plaintiff's own allegations show that between the date of the conversations on which the plaintiff relies (between March 7 and May 23) and the date he completed his work, the defendant did not receive one cent from Duke University.

The defendant's promise to pay when he collected was not breached until after the plaintiff had completed the work. The promise at the time made was for future fulfillment. It may have been made in good faith. The promise to pay was not based on any false statement of an existing fact. The complaint falls short of alleging fraud. "It is the general rule that an unfulfilled promise cannot be made the basis for an action for fraud." *Davis v. Davis,* 236 N. C. 208, 72 S.E. 2d 414; *Friend v. Talcott,* 228 U.S. 27, 28 L.R.A. (N.S.) 363; *Development Co. v. Bearden,* 227 N.C. 124, 41 S.E. 2d 85. In the *Bearden* case, this Court said: "Whatever may be the facts beyond the complaint, the pleading will be of no avail unless it sets up with sufficient particularity facts from which legal fraud arises or, where proof of actual fraud is necessary to relief, specifically alleges the fraud — that is, the fraudulent intent — and particularizes the acts complained of as fraudulent so that the court may judge whether they are at least *prima facie* of that character."

The plaintiff may be able to allege facts from which a court and jury may reasonably infer the defendant's intent not to pay for the work existed at the time he made the commitment to do so; but to be fraudulent the intent not to pay must have existed in the defendant's mind at the time he made the promise which induced the plaintiff to do the work. The promise to pay must have been made (1) with the present intent not to carry it out and (2) with the purpose to induce the plaintiff to do work for which the defendant did not intend to pay. *Davis v. Davis, supra; Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364.

In overruling the defendant's plea in abatement, the superior court held: "The complaint of the plaintiff states a cause of action based upon fraud for obtaining money or moneys worth . . . and as such is not a debt or claim as is discharged by a 'Discharge of Bankrupt.' " We call attention to the wording of the exception in the Bankruptcy

Act: "A discharge in bankruptcy shall release a bankrupt from all his provable debts . . . except . . . (2) liabilities for obtaining money or property by false pretenses or false representations." The exclusion extends to money or property — not to money or money's worth.

"In view of the well-known purposes of the Bankrupt Law exceptions to the operation of a discharge thereunder should be confined to those plainly expressed; and while much might be said in favor of extending these to liabilities incurred for services obtained by fraud, the language of the Act does not go so far." *Gleason v. Thaw,* 236 U.S. 558; *Fidelity & Deposit Co. v. Arenz,* 290 U.S. 66.

The trial court's conclusion the complaint states a cause of action for fraud is not sustained. The order overruling the plea in abatement is reversed. However, the plaintiff, if so advised, may offer in the superior court the amendment to the complaint which he requested here. The plea in abatement will stand for hearing in the superior court if the plaintiff amends.

Reversed.

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WESLEY C. GUNTER v. WILLIAM R. WINDERS, GUARDIAN AD LITEM FOR BILLY RAY ALLEN, ORAN J. COTTLE, HORACE JUNIOR EFRID, AND MILLER MOTOR EXPRESS, INC.

(Filed 20 January, 1961.)

**1. Judgments § 28—**

The doctrine of *res judicata* must be strictly construed, and in determining whether an issue is precluded by a former adjudication, the prior judgment must be interpreted with reference to the pleadings, the evidence, the judge's charge and the issues submitted and answered by the jury, and the plea may not be allowed when it deprives a party of his right to a day in court guaranteed by the Constitution.

**2. Judgments § 38—**

Where, in an action to recover for the wrongful death of a passenger in an automobile, the complaint alleges separate acts of negligence of the defendants and that intestate's death resulted from the negligence of defendants as set forth, with the legal conclusion that defendants were jointly and severally liable; and the issues and verdict establish the negligence of each defendant separately as a proximate cause of intestate's death; *held,* the record fails to establish the joint and concurrent negligence of the defendants and is insufficient to sustain the plea of *res judicata* as a matter of law in a subsequent action between the defendants.

**3. Judgments § 28—**

**A judgment in favor of a passenger in one of the vehicles against the defendants respectively responsible for the operation of the vehicles involved in the collision will not operate as an adjudication of the rights of defendants *inter se* unless they had an opportunity to cross-plead so that their rights *inter se* were brought into issue and embraced in the adjudication, since a right may not be precluded without an opportunity to be heard.**

APPEAL by plaintiff from *Mallard, J.*, April 11, 1960 Term, DURHAM Superior Court.

Civil action by Wesley C. Gunter v. Billy Ray Allen, Oran J. Cottle, Horace Junior Efrid and Miller Motor Express, Inc., to recover for personal injury and property damage growing out of a collision involving three motor vehicles — (1) a 1950 Ford owned and operated by the plaintiff, (2) a pickup truck owned by the defendant Cottle and operated by the defendant Allen, and (3) a tractor-trailer truck owned by the defendant Miller Motor Express, Inc., and driven by the defendant Efrid. Allen, a minor, is represented by his guardian *ad litem,* Winders.

The plaintiff alleged in substance that on November 3, 1958, he was driving his 1950 model Ford west on Highway 70 in Durham County. The line of vehicles in his front slowed down and as he reduced speed to conform to the traffic the pickup truck owned by Oran J. Cottle and operated by Billy Ray Allen "smashed into the left rear portion of this plaintiff's automobile . . . causing it to plunge across the center line of said highway and into the southern traffic lane in front of oncoming (east-bound) traffic; that after this occurred a tractor-trailer being driven by defendant Horace Junior Efrid and owned by defendant Miller Motor Express, Inc., . . . ran into the right side of plaintiff's automobile; that as a proximate result of this collision this plaintiff suffered . . . damage and injury."

Plaintiff further alleged in substance that Allen and Cottle were negligent (1) in operating the pickup at an excessive rate of speed, (2) in overtaking and attempting to pass plaintiff's vehicle without ascertaining the movement could be made in safety, (3) in failing to keep a proper lookout, (4) in failing to keep their vehicle under proper control.

The plaintiff alleged the defendant Efrid and Miller Motor Express were negligent (1) in failing to keep a proper lookout, (2) in operating the tractor-trailer at an excessive and dangerous rate of speed, (3) in failing to decrease speed and avoid the collision.

The plaintiff alleged the joint and concurrent negligence of all defendants was the sole proximate cause of his injury and damage.

The defendants answered, denying negligence, and each pleaded contributory negligence on the part of the plaintiff. The defendants Billy Ray Allen and Oran J. Cottle set up as a plea in bar a final judgment of the Superior Court of Alamance County in an action entitled Dalrymple, Administrator, against the plaintiff Gunter and the defendants Allen and Cottle, in which it was adjudged the death of Viola D. Jones, a passenger in plaintiff Gunter's vehicle, was proximately caused by the negligence of the defendants. Attached to the plea in bar was the judgment roll in the *Dalrymple* case.

The plaintiff was allowed to amend his complaint to allege defendants had the last clear chance to avoid the injury and negligently failed to avail themselves of that opportunity. At the call of the case Judge Mallard heard the plea in bar on the record, sustained it as to all issues of negligence and contributory negligence, but overruled it as to the issue of last clear chance, reserving that issue for determination by the jury. The plaintiff excepted and appealed.

*Daniel K. Edwards, for plaintiff, appellant.*

*Bryant, Lipton, Strayhorn & Bryant, By: Victor S. Bryant, Jr., for William R. Winders, Guardian Ad Litem for Billy Ray Allen, Minor, and Oran J. Cottle, defendants, appellees.*

HIGGINS, J. The plaintiff assigns as error the order of the court sustaining Allen and Cottle's plea in bar upon the ground the issues of negligence and contributory negligence presently involved had been determined by the judgment of the Superior Court of Alamance County in a civil action by *Dalrymple, Administrator v. Gunter, Allen and Cottle.* At the outset this Court is confronted with the procedural question whether upon the pleadings, including the judgment roll in the Alamance action, enough appears to warrant the Court in passing upon the plea in bar *(res judicata)* or should decision be reserved until evidence is heard?

In the action now before us Gunter alleged: "11. That the joint and concurring negligence of all the defendants was the sole proximate cause of the collision herein described and of the resulting injuries and damages to this plaintiff." In the *Dalrymple* case the plaintiff's intestate, (Miss Jones) a passenger in Gunter's Ford, was killed. Her administrator alleged Allen and Cottle were negligent in that they (1) failed to keep a proper lookout, (2) failed to keep their vehicle under proper control, (3) failed to observe the speed law,

and by reason thereof they negligently ran into the Gunter vehicle from the rear; and that after the impact Gunter negligently drove his vehicle from the north traffic lane across the center line into the southern traffic lane where it collided with the tractor-trailer unit owned by Miller Express, Inc., and driven by Efrid.

In the *Dalrymple* case separate negligent acts were alleged against Allen and Cottle in striking the Gunter vehicle from the rear. Separate negligent acts taking place thereafter were alleged against Gunter in negligently driving his Ford across the center line of the highway and into the traffic lane of the Miller tractor-trailer. Dalrymple alleged: "That the wreck, injury and death herein complained of directly and proximately resulted from the negligence of the defendants *as herein set forth;* and that the defendants are jointly and severally liable and responsible to the plaintiff for the resulting damages." It may be noted that the joint and several liability for damages is alleged as a conclusion. The bases for the conclusion are the separate and successive negligent acts set forth—that is, the negligence of Allen and Cottle in striking the rear of Gunter's Ford and thereafter the negligence of Gunter in carelessly operating his vehicle from its proper north lane of traffic into the south lane in front of the Miller tractor-trailer. Issues were submitted as follows: "(1) Was the death of Viola D. Jones caused by the negligence of Billy Ray Allen and Oran J. Cottle, as alleged in the complaint? Answer, Yes. (2) Was the death of Viola D. Jones caused by the negligence of Wesley Calvin Gunter, as alleged in the complaint? Answer, Yes." Thus, on the face of the record the allegations and the issues in *Dalrymple* do not establish joint and concurrent acts of negligence of Gunter on the one hand, and Allen and Cottle on the other. Does the record disclose the presence of all conditions necessary to establish a valid plea of *res judicata?* "Certainty with respect to the thing determined is one of the fundamentals of every trial; and when the result of that trial is pleaded as *res judicata* in a subsequent proceeding, it cannot be left to uncertain inference. This is sometimes expressed in the rule that the doctrine of *res judicata* must be strictly applied. *Horn v. Indianapolis Nat. Bank,* 125 Ind. 381, 25 N.E. 558, 30 Am. Jur., 909. The right of a party to litigate his claim will not be defeated by a roving abstraction which does not meet the exigent standard of notice and hearing — his day in court — guaranteed to him by the Constitution. He is entitled to this either at the one time or the other." *Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240.

"It is well settled that a verdict must be interpreted with reference to the pleadings, the evidence, and the judge's charge. *Jernigan v.*

*Jernigan,* 226 N.C. 204, 37 S.E. 2d 493. And in determining whether a judgment constitutes *res judicata* the judgment must be interpreted with reference to the pleadings, the evidence, the judge's charge and the issues submitted to and answered by the jury. *Clinard v. Kernersville,* 217 N.C. 686, 9 S.E. 2d 381." *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125.

The allegations and findings in *Dalrymple* do not, on their face, establish (as the cause of the accident) the joint and concurrent negligent acts of Gunter (present plaintiff) and Allen and Cottle (present defendants). The record, therefore, is insufficient to sustain the plea of *res judicata.*

Although we note the procedural defect, we have come to the conclusion that the judgment in this case should be reversed on the more fundamental ground that a judgment against two or more defendants in a tort action should not be held conclusive *inter se,* unless their rights and liabilities were put in issue by their pleadings. The great weight of authority sustains this view. The substance of the general rule, as gathered by the decisions and the text writers, is this: A judgment does not conclude parties to the action who are not adversaries and who do not have opportunity to litigate their differences *inter se.* "It is generally declared that a judgment operates as *res judicata* only with respect to parties who were adversaries in the proceedings wherein the judgment was entered . . . The theory of the many decisions supporting the general rule is that the judgment merely adjudicates the rights of the plaintiff as against each defendant, and leaves unadjudicated the rights of the defendants among themselves." 30 A, Am. Jur., "Judgments," § 411; *Clark's Admrx. v. Rucker* (Ky.) 258 S.W. 2d 9. "A judgment ordinarily settles nothing as to the relative rights and liabilities of the coplaintiffs or codefendants *inter sese,* unless their hostile or conflicting claims were actually brought in issue, litigated, and determined." 50 C.J.S., "Judgments," § 819. Both Am. Jur. and C.J.S. cite cases from many jurisdictions. *Bunge v. Yager,* 236 Minn. 245, 52 N.W. 2d 446; *Wiles v. Young,* 167 Tenn. 224, 68 S.W. 2d 114; *Byrum v. Ames & Webb, Inc.,* 196 Va. 597, 85 S.E. 2d 364. Issues and admissibility of evidence are determined by the pleadings. Unless defendants have opportunity to cross-plead, evidence relating exclusively to their differences is inadmissible — result, an insufficient opportunity to be heard.

This decision is in partial conflict with *Lumberton Coach Co. v. Stone,* 235 N.C. 619, 70 S.E. 2d 673, and subsequent decisions based

on its authority. To the extent of the conflict, the former decisions are now overruled. The judgment of the Superior Court of Durham County is

Reversed.

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MARY KATHERINE SCHLAGEL v. ARTHUR FORT SCHLAGEL, JR.

(Filed 20 January, 1961.)

**1. Divorce and Alimony § 1—**

Jurisdiction of actions for divorce, including actions for alimony without divorce, is purely statutory.

**2. Divorce and Alimony § 16—**

The effect of a decree for alimony without divorce is to authorize separation of the husband and wife and to suspend the effect of the marriage as to cohabitation, without dissolving the marriage bonds, G.S. 50-16, which is the identical effect of a decree of divorce from bed and board, G.S. 50-7, and therefore alimony without divorce comes within the purview of a divorce action and G.S. 50-10 applies to actions for alimony without divorce.

**3. Same: Judgments § 14—**

The clerk of the Superior Court is without jurisdiction to enter a judgment by default in an action for alimony without divorce, since G.S. 50-10 provides that in such action the allegations of the complaint are deemed denied whether actually denied by pleading or not, and requires that the material facts must be found by a jury.

APPEAL by plaintiff from *Bickett, J.*, at October 17, 1960 Civil Term, of DURHAM.

Civil action for alimony without divorce under G.S. 50-16.

Plaintiff instituted this action in the Durham County Superior Court on 5 February 1960, to secure alimony without divorce, custody of a minor child, and alimony and counsel fees *pendente lite* as provided for by G.S. 50-16 on the ground that " * * * the defendant willfully abandoned the plaintiff and their daughter without just provocation and has since * * * refused to support the plaintiff and their daughter according to his means and condition in life * * * ."

Defendant was personally served with summons on the same day the suit was commenced.

On 11 February 1960, upon plaintiff's motion, an order was issued by Judge of Superior Court awarding plaintiff designated sums each

month for the support of the plaintiff and their minor child and counsel fees *pendente lite.* On 27 August 1960, no answer having been made by the defendant, the plaintiff moved the Clerk of the Durham County Superior Court to enter a judgment by default and inquiry in her favor. The Clerk allowed the motion and calendared the judgment by default and inquiry on the issues docket for hearing at the following Civil Term of the Superior Court of that county.

When the cause came on for hearing in the Superior Court the presiding judge, *ex mero motu,* refused to submit issues to the jury and ruled that an action under G.S. 50-16 is not a proper action for judgment by default and inquiry and that the judgment by default and inquiry rendered is null and void.

To judgment in accordance therewith the plaintiff excepts and appeals to the Supreme Court and assigns error.

*J. W. Lasley for plaintiff, appellant.*
*No counsel contra.*

WINBORNE, C. J.: The sole question presented on this appeal is whether or not a suit for alimony without divorce under G.S. 50-16 is one in which a clerk of the Superior Court can enter a judgment by default and inquiry as provided by G.S. 1-209, *et seq.* The answer is "No".

A brief history of the alimony without divorce law in this State shows that prior to 1872 there were no statutes allowing alimony without divorce, but in proper cases equity would allow alimony. Anonymous 2 N.C. 347; *Spiller v. Spiller,* 2 N.C. 482. In 1872 the first statute was passed authorizing alimony without divorce, but none was allowed *pendente lite* in such suits. Laws 1872, C. 193. In 1919 alimony *pendente lite* was authorized in suits for alimony without divorce. Laws 1919, C. 24. In 1953 the statute was amended to allow the custody of children to be determined in a proceeding instituted under G.S. 50-16. Sess. Laws 1953, C. 925. In 1955 the statute was again amended to require the complaint to set out the same information regarding minor children as is required in divorce actions, and to allow the court to enter orders respecting the support and maintenance of such children in the same manner as such orders are entered in divorce actions, and to allow actions for alimony without divorce to be brought as a counterclaim or cross-action in a suit for divorce, and to allow a suit for divorce to be brought as a counterclaim or cross-action to a suit for alimony without divorce. Sess. Laws 1955, CC 814, 1189.

G.S. 50-16 provides for alimony without divorce if the husband separates himself from the wife and fails to provide her and the children of the union with the necessary subsistence. *Brooks v. Brooks,* 226 N. C. 280, 37 S.E. 2d 909; *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923; *Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420; *Batts v. Batts,* 248 N.C. 243, 102 S.E. 2d 862. And in this connection, the material facts at issue in this action for alimony without divorce are the questions of the existence of the marriage relationship and whether the husband abandoned the wife and failed to provide her with the necessary subsistence according to his means and condition in life. *Skittletharpe v. Skittletharpe,* 130 N.C. 72, 40 S.E. 851; *Hooper v. Hooper,* 164 N.C. 1, 80 S.E. 64; *Trull v. Trull,* 229 N.C. 196, 49 S.E. 2d 225.

In addition the plaintiff in a suit under G.S. 50-16 must meet the requirements of the statute for divorce from bed and board as provided by G.S. 50-7. *Pollard v. Pollard,* 221 N.C. 46, 19 S.E. 2d 1; *Brooks v. Brooks, supra; Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214; *Ollis v. Ollis, supra.*

"Jurisdiction over the subject matter of divorce is given only by statute. *Ellis v. Ellis,* 190 N.C. 418, 130 S.E. 7. This applies to an action for alimony without divorce * * * ." *Hodges v. Hodges,* 226 N.C. 570, 39 S.E. 2d 596. G.S. 50-10 provides: "The material facts in every complaint asking for divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury * * * ." The legal effect of this statute is that the allegations required to be set forth in the plaintiff's complaint are indispensable elements of her cause of action and the facts so alleged must be established by the verdict of a jury. *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296. As is said in *Carpenter v. Carpenter,* 244 N.C. 286, 93 S.E. 2d 617, "The statute, G.S. 50-10, denies, and requires findings of fact by a jury * * * as 'to the material facts in every complaint.' " In this connection, this Court in *McQueen v. McQueen,* 82 N.C. 471, a suit for divorce *a mensa et thoro,* said: "The law will not sanction and authorize by its sentence the separation of husband and wife except for legal cause and on the special terms prescribed in the statute, and settled by the adjudication of this Court, as to the pleadings and procedure for that purpose. Hence it is that all the facts relied on as constituting the cause are required to be set forth in a petition and verified by the oath of the petitioner, and as to the manner of their allegation and the procedure thereon they are to be charged, as

far as possible, specifically and definitely, and be proved to the satisfaction of a jury and found by them to be true • • • ." See also *Saunderson v. Saunderson,* 195 N.C. 169, 141 S.E. 572.

As is shown in the cases cited above, G.S. 50-10 applies to a divorce from bed and board under G.S. 50-7. A divorce from bed and board is nothing more than a judicial separation; that is, an authorized separation of the husband and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond. See Nelson, Divorce and Annulment, Vol. 1, p. 17 (2nd Ed.). This is precisely the effect of an action under G.S. 50-16, except that it is only available to the wife.

Furthermore, Black's Law Dictionary (4th Ed.) defines "divorce" as "the legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effect so far as concerns the cohabitation of the parties."

Indeed, in *Rector v. Rector,* 186 N.C. 618, 120 S.E. 195, *Clark, C. J.,* said, "* • * Suits for alimony without divorce are within the analogy of divorce laws • • • ."

Therefore, the conclusion is that the judgment by default and inquiry was entered directly contrary to the statute, G.S. 50-10. The material facts have not been found by a jury in the instant case, and hence the Clerk was without power or authority to enter said judgment. To hold otherwise would be to sanction and authorize the separation of husband and wife not given by statute. Causes affecting the marital relation are statutory in North Carolina. *Ellis v. Ellis, supra; Hodges v. Hodges, supra.* Put another way, jurisdiction over the subject matter of divorce and actions affecting the marriage relationship is given only by statute, and in the grant, judgments in favor of the plaintiff affecting the marriage are prohibited, except upon a finding of the material facts by a jury.

"The legislation is based upon the gravest reasons of public policy, and, as stated in the authorities cited, is designed not only to prevent collusion where the same exists, but to remove the opportunity for it • • • ." *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933.

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

ERNEST ISLEY AND WIFE JARONIA ISLEY v. PERRY BROWN.

(Filed 20 January, 1961.)

**1. Reformation of Instruments § 2—**

In order to reform a deed absolute on its face into a mortgage or security for a debt, plaintiff must show by clear, cogent and convincing proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage and must establish this conclusion by evidence *dehors* the deed.

**2. Fraud § 5—**

A party who signs an instrument without reading it may not thereafter assert his ignorance of its contents, due to his own heedlessness, as fraud on the part of the other contracting party unless he is prevented from reading the instrument by some trick, artifice or misrepresentation.

**3. Reformation of Instruments § 10—**

In an action to reform an absolute deed into a mortgage, plaintiff's evidence to the effect that he signed the instrument without reading it, that defendant had agreed to take over the existing mortgage on the property and permit plaintiff to repay the money in monthly installments, without any evidence that defendant misrepresented the contents of the instrument or did anything to prevent plaintiff from reading it, and without allegation or evidence that the clause of redemption was omitted by mistake, is insufficient to be submitted to the jury.

APPEAL from *Preyer, J.*, at April 4, 1960 Civil Term, of GUILFORD.

Civil action by plaintiff to convert a deed, absolute on its face, into a security for debt.

The plaintiffs are husband and wife, and prior to 1953 owned a house and lot in Greensboro, North Carolina, known as 312 Huffman Street. In March of 1953 the Home Federal Building & Loan Association was in the process of foreclosing a deed of trust upon said property,— the indebtedness secured thereby being in default. The male plaintiff contacted the defendant about the approaching sale, and the plaintiff testified that the defendant agreed to take over the mortgage and allow him to repay the money in monthly installments. On the other hand defendant contends that plaintiff Isley offered to sell him the property, and that he agreed to buy it and that he paid the plaintiff $100.00 for his equity of redemption.

The plaintiff testified that he and his wife signed the deed, but that he did not read it and that he did not know it was a deed. The plaintiff further testified that he and the defendant were complete strangers before the incident complained of herein.

After the signing of the deed, plaintiffs lived in the house at 312

Huffman Street a few months and paid rent to defendant's rental agent. Thereafter they were served with notice to vacate for repairs and never were able to get back into the house.

At the close of plaintiffs' evidence defendant moved for judgment as of nonsuit and aptly renewed the motion at the close of all the evidence. The case was submitted to the jury on these issues, which the jury answered as shown:

"1. Did the defendant obtain the deed to the property at 312 Huffman Street by reason of the ignorance or mistake of the plaintiffs, the fraud of the defendant, or undue advantage of the plaintiffs taken by the defendant? Answer: Yes.

"2. Did the plaintiffs intend that the property at 312 Huffman Street was to serve as security for a loan advanced them by the defendant rather than that it was to belong to the defendant outright? Answer: Yes.

"3. Are the plaintiffs entitled to have the property at 312 Huffman Street deeded back to them? Answer: Yes.

"4. What amount, if any, are the plaintiffs entitled to receive from the defendant in addition to return of their property? Answer: $1,500.00."

As to the fourth issue the lower court, in its judgment, held that the plaintiffs were entitled only to $641.17.

To the judgment entered in accordance therewith both parties object and except and appeal to the Supreme Court, and assign error.

*Hoyle, Boone, Dees & Johnson for defendant.*

*Smith, Moore, Smith, Schell & Hunter, David McK. Clark for plaintiff.*

WINBORNE, C. J.: The pivotal question on this appeal is whether or not the court below erred in refusing to grant defendant's motion of nonsuit. It is conceded that the deed from the plaintiffs to the defendant is an absolute deed on its face. Furthermore, it is well settled in North Carolina that in order to correct a deed, absolute on its face, into a mortgage or security for a debt, it must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage. This must be established by proof of declarations and proof of facts and circumstances, *dehors* the deed, inconsistent with the idea of an absolute purchase. And the quantum of proof in such cases must be clear, cogent, and convincing. See *Perkins v. Perkins,* 249 N.C. 152, 105 S.E. 2d 663, where numerous cases are cited.

As is said in *Williamson v. Rabon,* 177 N.C. 302, 98 S.E. 830: "There is no rule in our system of jurisprudence that has a greater tendency to maintain the stability of titles and the security of investments than that which upholds the integrity of a solemn written deed * * *."

Applying the facts of the present case to the law as stated above, the conclusion is that the court should have granted defendant's motion for nonsuit. There is nowhere alleged in the pleadings that the clause of redemption was omitted by mistake, nor do we find any proof was offered to that effect. If there was mistake, it was unilateral and not mutual and was caused by the plaintiffs' failure to read the deed. Furthermore, the record reveals no evidence that defendant Brown told the plaintiffs anything about the contents of the deed, or did anything to prevent him from reading it. Indeed plaintiff testified as follows: "When Perry Brown came down to my house, it wasn't at night; it was late in the evening. When he came in the house, he had the paper in his hand. When he came in, I was holding the baby in my arms. He told me to sign first. I put the baby down; I gave it to my wife. He handed me the paper folded down. It wasn't straight out that I can see, and it was folded something just like that. I didn't know what kind of paper it was. I didn't make any attempt to read it. He just said sign it, and the husband comes first. I told my wife to sign the paper first, and he said, 'No, the husband comes first.' I signed it first and then my wife signed it. I might have been signing to be electrocuted, and I didn't know; but I was signing * * *."

In this connection these are pertinent decisions of this Court: *Harris v. Bingham,* 246 N.C. 77, 97 S.E. 2d 453, where *Parker, J.,* quoting from *Harrison v. RR,* 229 N.C. 92, 47 S.E. 2d 698, said: "The duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in absence of any mistake, fraud, or oppression, is a circumstance against which no relief may be had, either at law or in equity."

In *Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364, it is said: "In this State it is held that one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was wilfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what it therein contained."

Furthermore, it is said in *Newbern v. Newbern,* 178 N.C. 3, 100 S.E. 77, " 'The mere fact that a grantor who can read and write

signs a deed does not necessarily conclude him from showing, as between himself and the grantee, that he was induced to sign by fraud on the part of the grantee, or that he was deceived and thrown off his guard by the grantee's false statements and assurances, designedly made at the time and relied on by him.'

"There are many other cases to the same effect, but in all of them there is a clear statement that there must be evidence either of 'fraud in the factum', that is, an inducement to sign by 'trick or device', such as placing the instrument along with several others * * * or evidence of positive misrepresentation designedly made and reasonably relied upon.

"In all other cases the negligence of the party signing the deed to read the same when he had an opportunity to do so will bar the assertion of his equity, *'vigilantibus non dormientibus aequitas subvenit.' Dellinger v. Gillespie*, 118 N.C. 737 * * * . In this case, as in that, it may be said: 'It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it.'" See also *Furst v. Merritt*, 190 N.C. 397, 130 S.E. 40.

And it has been appropriately said in *Upton v. Tribilcock*, 91 U.S. 45: "It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."

And in *Poston v. Bowen*, 228 N.C. 202, 44 S.E. 2d 881, a case where the action was to have a deed declared a mortgage, and after the execution of the absolute deed the grantor became a tenant and paid rent, the Court affirmed the nonsuit holding that there was no showing of mistake, undue advantage, fraud, or contrary intention.

Therefore, the conclusion is that the plaintiffs were guilty of heedlessness in signing the absolute deed to convey their interest in the property. They cannot avoid their own conduct in executing the instrument, and then call that heedlessness someone else's fraud. Having so concluded, other errors brought forward on appeal need not be considered.

For reasons stated motion for judgment as of nonsuit should have been granted. Hence the judgment rendered is

Reversed.

STATE v. CLYDE DIAMOND PASCHAL.

(Filed 20 January, 1961.)

**1. Automobiles § 71: Criminal Law § 55—**

Testimony to the effect that defendant, after having been taken into custody for driving a vehicle on a street while intoxicated, answered in the negative a question by the arresting officer as to whether he would like to take a blood test, *held* incompetent and its admission prejudicial, since defendant's negative answer did not amount to a refusal to submit to a blood test but, it not being shown that a blood test, if requested by defendant, would have been otherwise than at defendant's expense, amounted to no more than a statement by defendant that he did not choose to go to the expense of having a blood test made.

PARKER, J., dissents.

APPEAL by defendant from *Gambill, J.*, July 11, 1960, Criminal Term, of GUILFORD Superior Court, Greensboro Division.

Criminal prosecution on warrant charging that defendant, on April 11, 1959, "did unlawfully and willfully drive a vehicle upon the highway while under the influence of intoxicating liquors at the 1800 block of Merritt Drive, Greensboro, North Carolina," a violation of GS 20-138.

Upon trial *de novo* in superior court, on appeal by defendant from conviction and judgment in the Municipal-County Court of Greensboro, the jury found the defendant "Guilty as Charged," and judgment was pronounced as appears in the record. Defendant excepted and appealed.

*Attorney General Bruton and Assistant Attorney General Moody for the State.*

*E. L. Alston, Jr., for defendant, appellant.*

BOBBITT, J. Defendant does not challenge the sufficiency of the evidence to support the verdict, but assigns as prejudicial error the admission, over his objection, of the following testimony of a State's witness, the arresting officer, on direct examination, *viz.*: "I asked Mr. Paschal on the way to the Police Station if he knew about the blood test. And he stated that he did, and I asked him if he would like to take a blood test. He stated, 'no,' that he had taken one before and didn't want one." The solicitor then asked: "Did he take a blood test?" the witness answered: "No, sir, he did not."

Defendant did not testify, either on direct or cross-examination, as to what conversation, if any, he had with the arresting officer with reference to taking a blood test.

The State's evidence, which consisted solely of the testimony of the arresting officer, tended to show: The officer stopped defendant on account of the manner (described in detail) in which defendant was operating his car. Defendant, when he walked out in front of the patrol car, "weaved and wobbled." His speech was "slurred" and the odor of alcohol was upon his breath. In defendant's car, there was a six-pack carton of Budweiser Beer, containing four full bottles and one empty bottle, and also a partially filled bottle (containing thirteen ounces) of vodka. In the officer's opinion, defendant was highly intoxicated at the time of his arrest.

Defendant denied he was under the influence of intoxicating liquor when arrested. He told the arresting officer and testified at trial that the only alcoholic beverage he had drunk was "two beers." A witness for defendant testified that he, not the defendant, had taken the drink from defendant's pint bottle of vodka at a service station some two hours or more prior to defendant's arrest.

Uncontradicted evidence was to the effect that defendant was operating a motor vehicle upon a public street. The crucial question was whether defendant was doing so while under the influence of intoxicating liquor.

Assuming the blood specimen is obtained at or near the pertinent time and identified and traced until chemical analysis thereof is made, this Court has held: In a prosecution under GS 20-138, testimony of *a qualified expert* (1) as to the making and results of a chemical analysis of such blood specimen to determine the alcoholic content thereof, and (2) as to the effects of certain percentages of alcohol in the blood stream, is competent. *S. v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *S. v. Henderson,* 245 N.C. 165, 95 S.E. 2d 594; *S. v. Willard,* 241 N.C. 259, 84 S.E. 2d 899; *S. v. Collins,* 247 N.C. 244, 100 S.E. 2d 489. In each of these cases, the blood specimen was obtained for chemical analysis with the defendant's consent.

In *Osborne v. Ice Co.,* 249 N.C. 387, 106 S.E. 2d 573, a proceeding under the Workmen's Compensation Act, the employee was the driver of one of the cars involved in a collision and died on the way to the hospital. Shortly thereafter, the Coroner procured three ounces of blood from the employee's veins and chemical analysis thereof was made. The testimony of a qualified expert as to the making and results of such analysis and as to the effects of the disclosed percentage of alcohol in the employee's blood stream was held competent and sufficient to support the Industrial Commission's finding that the employee was intoxicated when the collision occurred.

In *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277, the defendant in a prosecution for murder pleaded insanity at the time of the homicide due to the continued use of liquor, morphine and other opiates. While in jail, specimens of his blood and urine were taken for chemical analyses to determine the presence or absence of alcohol or morphine in his system. On appeal, defendant's contention that testimony as to the results of such analyses violated his constitutional right against compulsory self-incrimination, North Carolina Constitution, Article I, Section 11, was disposed of on the ground "the record fails to disclose any compulsion on the part of the officers in obtaining specimens of the defendant's blood and urine."

No test of defendant's blood was made. Hence, the competency of expert testimony as to the results of a chemical analysis of a blood specimen obtained without consent, by force or otherwise, is not presented. In this connection, see *Rochin v. California,* 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205, 25 A.L.R. 2d 1396; *Breithaupt v. Abram,* 352 U.S. 432, 1 L. Ed. 2d 448, 77 S. Ct. 408; Annotation, "Requiring submission to physical examination or test as violation of constitutional rights," 25 A.L.R. 2d 1407.

The established rule in this jurisdiction is that "(t)he scope of the privilege against self-incrimination, in history and in principle, includes only the process of testifying by word of mouth or in writing, *i.e.,* the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on the accused's body or about his person." *S. v. Rogers,* 233 N.C. 390, 399, 64 S.E. 2d 572, where *Ervin, J.,* reviews prior decisions of this Court. See also *S. v. Grayson,* 239 N.C. 453, 458, 80 S.E. 2d 387, opinion by *Parker, J.,* and cases cited.

Where this rule applies, it is held that the admission of evidence of a defendant's *refusal to submit* to a chemical test designed to measure the alcoholic content of his blood does not violate his constitutional right against self-incrimination. *State v. Bock* (Idaho 1958), 328 P. 2d 1065; *S. v. Smith* (S.C. 1956), 94 S.E. 2d 886; *Gardner v. Commonwealth* (Va. 1954), 81 S.E. 2d 614. In these cases, and others cited therein, testimony as to the defendant's *refusal to submit* to such test was held admissible.

In *State v. Bock, supra, Taylor, J.,* after referring to the cases where such evidence was held admissible, discusses the basis of decision in each of three cases where such evidence was held inadmissible, to wit, *People v. Stratton* (N.Y. 1955), 143 N.Y.S. 2d 362; *State v. Severson* (N.D. 1956), 75 N.W. 2d 316; *Duckworth v. State* (Okl. Cr. 1957), 309 P. 2d 1103. To this discussion, these additional matters are noted

with reference to *People v. Stratton, supra:* (1) The order (of the Supreme Court, Appellate Division) was affirmed by the Court of Appeals in a memorandum decision reported in 133 N.E. 2d 516. (2) As in *State v. Severson, supra,* a New York statute gave the defendant an absolute right to refuse the test.

Whether a defendant's *refusal to submit* to such blood test is competent as a circumstance for consideration by the jury along with all other evidence in passing upon defendant's guilt or innocence, need not be decided on this appeal.

No North Carolina statute relates to (1) the taking of such blood test, (2) the competency of evidence based on the results thereof, or (3) *the payment of the expense of a chemical analysis or of an expert* to testify as to the effects of the percentage of alcohol, if any, disclosed by such analysis. Here, defendant did not *refuse to submit* to a blood test. He simply answered, "No," when asked if he wanted one. Presumably, such blood test, if requested by defendant, would have been made at his expense. Indeed, the arresting officer testified on cross-examination: "I don't recall (defendant) asking me about the cost of a blood test or telling him the cost of it."

Since nothing appears to indicate that the blood test referred to by the officer, if requested, would be made otherwise than at defendant's expense, the only significance of his statement is that he did not choose to go to the expense of having such blood test made. Defendant's unwillingness to incur this expense was without probative significance in relation to his guilt or innocence. Even so, it seems apparent that the testimony as to the officer's inquiry and defendant's response was susceptible of use and probably was used to the defendant's prejudice.

Under the circumstances here presented, the admission of the challenged testimony was prejudicial error for which a new trial must be awarded.

New trial.

PARKER, J., dissents.

STATE v. JAMES PENNY COLEMAN, JR.

(Filed 20 January, 1961.)

1. **Criminal Law § 159—**

An exception not set out in the brief and in support of which no reason or argument is stated or authority cited is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. **Forgery § 2—**

An indictment for forgery which follows the language of the statute but fails to aver the words alleged to have been forged by defendant, is insufficient.

3. **Indictment and Warrant § 9—**

Where a statute defines an offense in general terms, an indictment for the offense which merely follows the language of the statute is insufficient, but the words of the statute must be supplemented by language setting forth every essential element of the offense so plainly, intelligently and explicitly as to leave no doubt as to the offense intended to be charged.

4. **Criminal Law § 26—**

Prosecution under a void indictment will not support a plea of former jeopardy.

5. **Forgery § 2—**

Evidence that defendant signed the name of another in endorsing a check payable to such other person, and negotiated it, that such other person had not authorized anyone to sign his name on the check, and that such person was not owed the amount of the check, *is held* sufficient to overrule nonsuit in a prosecution for violation of G.S. 14-119 and G.S. 14-120.

BOBBITT, HIGGINS and MOORE, JJ., dissent.

APPEAL by defendant from *Carr, J.*, at April 1960 Regular Criminal Term, of ROBESON.

Criminal prosecution upon a bill of indictment #16447, found as a true bill at March 1960 Term of Robeson County Superior Court, containing two counts charging defendant James Penny Coleman, Jr., with a forged endorsement on a certain check and with thereafter uttering the check in violation of North Carolina General Statutes 14-119 and 14-120, respectively.

Plea: Not guilty to both counts in the bill of indictment.

Upon trial in Superior Court pertinent evidence offered by the State as set forth in brief of the Attorney General appears to correctly reflect the matters in controversy on this appeal as shown by the record.

1. A bill of indictment #16032 was submitted to the Grand Jury of Robeson County at the May 1959 Term of Superior Court and returned "A True Bill". It contained two counts against the defendant; one, that he "did wittingly and falsely make, forge and counterfeit, and did wittingly assent to the falsely making, forging and counterfeiting a certain check and forged endorsement," and the other, that he "did utter and publish as true a certain false, forged and counterfeited check."

2. At the January-February 1960 Term of the Superior Court of Robeson County the defendant was placed on trial on Indictment #16032. And after the jury was impaneled and the bill of indictment read, the presiding judge entered an order holding that the bill of indictment #16032 charged the defendant with the forgery of the check itself and with uttering same. The Solicitor for the District, however, indicated to the court that it was the forged endorsement which the State was undertaking to prove the defendant guilty of, and not the check itself. The court, on its own motion, quashed the bill of indictment as to each of the alleged offenses and allowed the Solicitor "to send another bill of indictment, charging in more accurate language the offense of the forgery of said endorsement, and the uttering of said forged endorsement." This the Solicitor did, and a true bill #16447 was returned, and it is on this bill that defendant was tried and convicted and sentenced from which this appeal is taken.

Verdict: Guilty on both counts in the bill of indictment.

Judgment: The two counts in the bill of indictment were ordered consolidated for judgment. And the judgment of the court is that defendant be confined in the State's prison for a term of not less than two years nor more than three years.

Defendant excepts thereto and appeals to Supreme Court, and assigns error.

*Attorney General Bruton, Assistant Attorney General H. Horton Rountree for the State.*

*Britt, Campbell & Britt, Nance, Barrington & Collier for defendant, appellant.*

WINBORNE, C. J.: The record shows that defendant entered plea in abatement to the denial of which defendant excepted. This constitutes assignment of error Number 1. But apparently this has been abandoned. Since this exception is not set out in appellant's brief, or in support of which no reason or argument is stated or authority

cited, it is taken as abandoned by him. Rule 28 of the Rules of Practice in Supreme Court, 221 N.C., at page 563.

Upon denial of plea in abatement defendant through counsel interposed a plea of former jeopardy and former acquittal, and in support thereof introduced the same two bills of indictment, the first being No. 16032, as above set forth, and the second No. 16447, upon which defendant was put on trial. Defendant likewise introduced the order entered in case No. 16032 in which the facts relating to procedural matters at the former trial are set forth in detail. The plea of former jeopardy was denied and defendant excepts. This constitutes defendant's Exception No. 2.

In the light of the factual situation reflected in the record the bill of indictment No. 16032 was insufficient to charge the offenses. According to the wording of the bill of indictment No. 16032 it is obvious that the State was charging only the two counts of forging the check, and utttering the same. The language used does not allege what the forged endorsement was. Hence to point up the insufficiency thereof, bill of indictment No. 16447 "spells out" the forged endorsement in accurate language.

And as contended by the Attorney General, even though the offense of forgery is charged in statutory language, as argued by defendant, the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. See *S. v. Lytle,* 64 N.C. 255; *S. v. Helms,* 247 N.C. 740, 102 S.E. 2d 241; *S. v. Banks,* 247 N.C. 745, 102 S.E. 2d 245.

Now as to Assignments of Error Numbers 4 and 6 predicated upon exceptions of like numbers to the denial of defendant's motion for judgment as of nonsuit: When taken in the light most favorable to the State the evidence appears to be sufficient to support the charge contained in the bill of indictment No. 16447. The offenses charged are violations of G.S. 14-119 and G.S. 14-120. Moreover, the evidence before the Court shows that the defendant stipulated that he signed the name of John A. McLauchlin on the back of check #525 and identified as Exhibit A. John McLauchlin testified that he had not authorized anyone to sign his name to this check. He testified that the school did not owe him the money represented by that check, and that he had been paid for all the work he had performed. And the check itself shows that it was drawn for salary of four weeks — 200 hours work, and shows a total salary of $310.00 less deductions for

withholding tax of $12.00, and retirement of $16.28. Hence there is no error in the denial of motions for judgment as of nonsuit.

Matters to which other exceptions relate have been given due consideration, and in them prejudicial error is not made to appear.

Authorities relied upon by defendant are distinguishable in factual situation.

No error.

BOBBITT, HIGGINS & MOORE, JJ., dissent.

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STATE v. HOWARD FRANKLIN SEALY.

(Filed 20 January, 1961.)

**1. Automobiles § 17—**

Failure to stop in obedience to duly erected signs before entering an intersection with a dominant highway is not negligence or contributory negligence *per se*, but is a circumstance to be considered with the other facts and circumstances in evidence on the question. G.S. 20-158.

**2. Automobiles § 56: Negligence § 31—**

Culpable negligence in the law of crimes imports more than actionable negligence in the law of torts, and while an intentional, willful or wanton violation of a safety statute or ordinance, which proximately results in death or injury, is culpable negligence, the unintentional violation of such ordinance is not culpable negligence unless accompanied by a reckless or heedless indifference to the safety of others, under circumstances from which injury or death to others is reasonably foreseeable.

**3. Automobiles § 56—**

An instruction to the effect that if the jury found from the evidence beyond a reasonable doubt that defendant violated the statutory requirement that he bring his vehicle to a stop before entering upon an intersection with a dominant highway, and that such failure was the proximate cause of the deaths of named persons, defendant would be guilty of manslaughter, must be held for prejudicial error, even though in another part of the charge the court correctly instructs the jury upon this aspect of the law.

APPEAL by defendant from *Burgwyn, Emergency Judge,* February Special Criminal Term, 1960, of ROBESON.

This is a criminal action tried upon two bills of indictment charging the defendant with manslaughter in the death of one Ralph Bullock

and in the death of one Guthrie Johnson Rhodes. The cases were consolidated for trial.

Bullock and Rhodes were killed in an automobile collision on 29 August 1959 about 9:45 p.m. The automobile in which they were riding was being operated in a westerly direction on a dominant highway known as the Bethesda Church Road, in Robeson County, when they were struck by an automobile being operated by the defendant in a southerly direction along Wiregrass Road, a servient highway, at the intersection of the two roads. Stop signs had been erected at the intersection of the servient highway directing traffic to stop before entering the Bethesda Church Road.

The defendant offered evidence tending to show that he stopped before entering the interesection and that he did not see the lights of the approaching car.

The jury returned a verdict of guilty of involuntary manslaughter as to both bills and the defendant was sentenced to from three to five years in each case, the sentences to run concurrently.

The defendant appeals, assigning error.

*Attorney General Bruton, Asst. Attorney General Hooper for the State.*

*Hackett & Weinstein for defendant.*

DENNY, J. The defendant assigns as error those portions of the court's charge to the jury hereinafter set out. The court, after having read to the jury G.S. 20-158 (the statute which requires the driver of a motor vehicle to stop before entering or crossing certain through highways), and G.S. 20-140 (the statute defining reckless driving), charged: "If you find from the evidence in this case, * * * beyond a reasonable doubt that the defendant intentionally violated one or more of the statutes read to you, designed and intended to protect human life, and * * * that such intentional violation thereof was the proximate cause of the death of the deceased, then it would be your duty to return a verdict of guilty of involuntary manslaughter.

" * * * (I)f you are satisfied from the testimony beyond a reasonable doubt that the driver of this car, the defendant in this case, Mr. Howard Franklin Sealy, was operating his motor vehicle in violation of the statute, in respect to stopping at the stop sign, * * * and that such action on his part was the proximate cause of the death of these two men, you would find him guilty of involuntary manslaughter."

The above instructions are conflicting and the State concedes error in the latter. According to the provisions of G.S. 20-158, a violation

thereof is not negligence *per se* in any action at law for injury to person or property, but the failure to stop at a stop sign before entering an intersection with a dominant highway may be considered with other facts in the case in determining whether or not under all the facts and circumstances involved, such driver was guilty of negligence or contributory negligence. *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223.

"Culpable negligence in the law of crimes necessarily implies something more than actionable negligence in the law of torts." *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Becker,* 241 N.C. 321, 85 S.E. 2d 327; *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580.

"An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb which proximately results in injury or death, is culpable negligence." *S. v. Cope, supra.* But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. *S. v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491; *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143.

Other assignments of error need not be considered or discussed since they may not arise on another hearing.

The defendant is entitled to a new trial and it is so ordered.

New trial.

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STATE v. ROBERT WILLIAMS.

(Filed 20 January, 1961.)

**1. Constitutional Law § 20—**

The Fifth Amendment to the Federal Constitution contains no restrictions on the powers of the State but operates solely on the Federal Government, and therefore a State prosecution of a Negro for trespass in refusing to leave a drug store lunch counter after being requested to do so cannot violate any rights guaranteed by this section of the Federal Constitution.

STATE *v.* WILLIAMS.

**2. Same: Trespass § 9—**

The operator of a private drug store on private property has the right to discriminate on the basis of race as to persons whom he will serve at the soda fountain of the store, and evidence that a Negro sat at the counter and demanded service and refused to leave after request is sufficient to be submitted to the jury in a prosecution for trespass.

An APPEAL by defendant from *Armstrong, J.*, 10 May 1960 Regular Criminal Term, of UNION.

Criminal action tried *de novo* on appeal from the Recorder's Court of Union County on a warrant charging that defendant on 11 March 1960 in Union County "unlawfully and willfully, did enter and trespass upon the land and premises of Jones Drug Company, Inc., after having been forbidden to enter said premises and not having a license to enter said premises and did unlawfully refuse to leave upon request contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Plea: Not Guilty. Verdict: Guilty of trespass as charged in the warrant.

From judgment imposed in accord with the verdict, defendant appeals.

*T. W. Bruton, Attorney General, and Ralph Moody, Assistant Attorney General, for the State.*

*T. H. Wyche and W. B. Nivens for defendant, appellant.*

PARKER, J. Defendant testified in his own behalf. He has in substance two assignments of error. One, the denial by the court of his motion for judgment of compulsory nonsuit made at the close of all the evidence. He contends the motion should have been granted for two reasons: First, the insufficiency of the evidence, and second, on constitutional grounds. Two, this part of the charge: "Now, the court instructs you that the right of an operator of a private business, such as a drugstore and operating a lunch counter, to select the people it will serve or not serve is a right that our law recognizes."

The evidence for the State tends to show the following facts: On 11 March 1960, Jones Drug Company, Inc., was a privately owned retail drugstore situate in the town of Monroe. In it is a soda fountain with eleven stools, where sandwiches, coffee and soft drinks are sold. On the afternoon of 11 March 1960 defendant, a Negro, came into this store with ten or eleven teen-age Negro boys, and they sat down on the stools at the counter at the soda fountain. Whereupon, W. R. May, secretary, treasurer, part owner of the drugstore, and one of its managers, went to defendant, and asked him to leave, telling him

they would not serve him at the fountain. He told him to leave several times. Defendant refused to leave. May told defendant he was going to get a trespass warrant, if he did not leave. Defendant said he couldn't get one. Then May went to the police station to get a warrant leaving defendant sitting on a stool at the soda fountain. The warrant in the case was sworn out by May.

After May left to procure a warrant, Dolan Jones, president of the drug company and co-manager, went over and told defendant, "that the store belonged to us, and it wasn't our custom of serving colored people at the fountain sitting at the stools and that we had the privilege of serving who we wanted to or who we didn't want to, and to save trouble it would be good for him to get up and get on out." Defendant continued to sit there. About ten or fifteen minutes after Jones told defendant to get out, defendant got up and went out, then he came back in and sat down again. After a while he went out again.

Defendant presents for decision in his written motion for judgment of compulsory nonsuit on constitutional grounds the same constitutional questions that were presented and decided in the cases of *S. v. Avent et al.*, decided this day, ante 253, 118 S.E. 2d 47, with the addition that he contends that his rights guaranteed by the equal protection and due process classes of the Fifth Amendment to the Federal Constitution were violated, as well as by the similar provisions of the Fourteenth Amendment.

In his brief he states these questions are presented for decision: One. Did the court err in refusing to grant his motion for judgment of involuntary nonsuit when defendant, a Negro, went into the store of Jones Drug Company, Inc., and took a seat at an eating counter which was customarily open to members of the White race? Two. Did the judicial process here constitute State action as prohibited by the Fourteenth Amendment to the Federal Constitution? Three. Did the court err in its charge as set forth in his sole assignment of error thereto?

Defendant in his brief has not favored us with any mention or discussion as to the alleged violation of his rights under the Fifth Amendment to the Federal Constitution. The Fifth Amendment, "unlike the Fourteenth, has no equal protection clause." *Currin v. Wallace,* 306 U.S. 1, 14, 83 L. Ed. 441, 450. "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government. . . . Due process and equal protection of the laws are guaranteed by the Fourteenth Amendment, and this amendment operates to restrict the powers of the State, . . . ." *Brown v. New Jersey,* 175 U.S. 172, 44

L. Ed. 119. Defendant has not shown that any of his rights were violated as guaranteed by the Fifth Amendment to the Federal Constitution, and we so hold.

The evidence was amply sufficient to carry the case to the jury. The constitutional questions presented for decision in this case, and the question presented by the assignment of error to the charge were decided in the cases of *S. v. Avent et al., supra.*

Upon the authority of those cases we find no error in the trial of the instant case. All defendant's assignments of error are overruled.

No error.

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ALBERT DIXON, ADMINISTRATOR OF JAMES B. DIXON, DECEASED v. WILLIAM F. BRILEY, ADMINISTRATOR OF OTHA LEE DIXON, DECEASED, AND SOUTHERN RAILWAY COMPANY, A CORPORATION.

(Filed 20 January, 1961.)

**1. Automobiles § 55—**

Allegations that the car involved in the collision was a family purpose car owned by the father and intended for the convenience and pleasure of members of his family, and that one of the sons of the owner was driving, with the knowledge and consent of the owner, at the time of the collision, is sufficient, liberally construed, to allege agency under the family purpose doctrine, notwithstanding the absence of allegation that the son was living with the owner as a member of his household.

**2. Actions § 5: Death § 9—**

An automobile occupied by two brothers, one of whom was driving, was involved in a crossing accident and this action was instituted to recover for the death of one of them. *Held:* The defendant is entitled to set up agency of the driver under the family purpose doctrine for the purpose of imputing the driver's negligence to the owner as a bar to that portion of the recovery which would inure to the benefit of the owner if it were established that intestate was the passenger.

**3. Appeal and Error § 46: Pleadings § 24—**

A motion to be allowed to amend is ordinarily addressed to the discretion of the trial court, and when the trial court refuses as a matter of law to grant a motion for a proper amendment, the cause will be remanded in order that the motion may be determined as a discretionary matter.

APPEAL by defendant Southern Railway Company from *Hall, J.*, May Civil Term, 1960, of ALAMANCE.

This is an action to recover for the alleged wrongful death of plain-

tiff's intestate arising out of a collision which occurred on 17 December 1959, about 11 o'clock p.m., at a railroad crossing in Alamance County, between an automobile in which plaintiff was riding and a freight train of the defendant Southern Railway Company.

After filing answer denying any negligence on its part, defendant Southern Railway Company moved the court for leave to file an amendment to its answer setting up negligence as imputed to beneficiary (father of plaintiff's intestate) as a bar to recovery.

The proposed amendment purports to show the relationship of the parties, to wit, that the automobile involved in the collision was a family purpose car, owned by the plaintiff Albert Dixon and maintained for the convenience and pleasure of the members of his family including his two sons, James B. Dixon and Otha Lee Dixon, and was being operated at the time of the collision either by Otha Lee Dixon or plaintiff's intestate, James B. Dixon, with his knowledge and consent.

The amendment further alleges the negligence of the operator of said automobile as imputed to Albert Dixon as a bar to any recovery in this action. It is also alleged in the proposed amendment that if such imputed negligence is not a bar to all recovery, such negligence as may be imputed to Albert Dixon, the plaintiff, is a bar *pro tanto* to that portion of any recovery which would be distributed or distributable to Albert Dixon as father of plaintiff's intestate.

Upon the hearing of the motion to amend, the trial court held as a matter of law that the matters alleged in the proposed amendment did not constitute a defense to recovery by the plaintiff and thereupon denied the motion of Southern Railway Company to amend.

The Southern Railway appeals, assigning error.

*William T. Joyner; Long, Ridge, Harris & Walker, attorneys for defendant Southern Railway Company.*

*No counsel contra.*

PER CURIAM. We assume the court below was of the opinion that the allegations set out in the proposed amendment were insufficient to constitute a good and sufficient plea that the car involved in the collision was a family purpose car and was being so used at the time of the accident with the knowledge and consent of the plaintiff, the owner therof.

It is true the allegations are not explicit as to whether or not the sons of the plaintiff, James B. Dixon and Otha Lee Dixon, were actually living with the plaintiff as members of his household at the time

of the accident. Even so, we think the inference to that effect is sufficiently clear to permit proof with respect thereto.

Therefore, in our opinion, when the allegations in the proposed amendment are liberally construed, as required by G.S. 1-151, they are sufficient, if proven, to establish agency within the purview of the family purpose doctrine. *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603.

Ordinarily, a defendant has the right to plead as a defense to an action for wrongful death, facts, which if proven, will constitute a bar to plaintiff's right to recover. *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807; *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203; *Pearson v. Stores Corp.,* 219 N.C. 717, 14 S.E. 2d 811; *Davis v. R.R.,* 136 N.C. 115, 48 S.E. 591.

This Court, in the case of *Woody v. Pickelsimer,* 248 N.C. 599, 104 S.E. 2d 273, said: "Ordinarily, motion to amend a pleading * * * is addressed to the sound discretion of the trial court, and his ruling thereon, made in the exercise of such discretion, is not reviewable on appeal; but it is error for the trial court to rule thereon as a matter of law without the exercise of discretion. See *Tickle v. Hobgood,* 212 N.C. 762, 194 S.E. 461, and cases cited."

In view of the conclusion we have reached with respect to the allegations contained in the proposed amendment, in our opinion, the defendant is entitled to have its motion reconsidered and passed upon as a discretionary matter. *Tickle v. Hobgood, supra.*

Error.

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STATE OF NORTH CAROLINA v. DANIEL WEBSTER BULLARD.

(Filed 20 January, 1961.)

**1. Criminal Law § 96—**

One defendant may not object to the action of the solicitor in taking a *nolle prosequi* in open court against other defendants charged with like offenses, and thereafter examining such other defendants as witnesses.

**2. Assault and Battery § 15—**

In a prosecution for assault with a deadly weapon with intent to kill, it is error for the court to instruct the jury that if they found beyond a reasonable doubt that defendant committed the assault under circumstances tending to show that he did it with intent to kill, defendant should be found guilty.

STATE *v.* BULLARD.

APPEAL by defendant from *Carr, J.*, June 1960 Regular Criminal Term, of ROBESON.

Criminal prosecution on an indictment charging the defendant with assaulting Floyd Oxendine with a deadly weapon, to wit, a pistol, with intent to kill, thereby inflicting on him serious injury not resulting in death, contrary to G.S. 14-32.

Plea: Not Guilty.

Verdict: Guilty of assault with a deadly weapon with intent to kill, inflicting serious bodily injuries not resulting in death.

From a judgment of imprisonment, defendant appeals.

*T. W. Bruton, Attorney General, and Ralph Moody, Assistant Attorney General, for the State.*

*Britt, Campbell & Britt for defendant, appellant.*

PER CURIAM: The State's evidence was amply sufficient to carry the case to the jury on the felony charge in the indictment. Defendant in his brief abandons his assignments of error to the court's denial of his motions for a directed verdict of not guilty on the felony charge in the indictment.

There was an indictment charging one Martha Covington with an assault with a deadly weapon, to wit, a pistol, on Daniel Webster Bullard, the defendant here. There was a separate indictment charging Floyd Oxendine with an assault with a deadly weapon, to wit, a pistol, on Daniel Webster Bullard, the defendant here. The solicitor for the State called Martha Covington to the stand, in open court took a *nolle prosequi* in the case against her, and examined her as a witness against the defendant. To the taking of the *nolle prosequi* defendant excepted, and assigns this as error. The solicitor did exactly the same thing in the case against Floyd Oxendine. To the taking of the *nolle prosequi* in Floyd Oxendine's case defendant excepts, and assigns this as error. Martha Covington and Floyd Oxendine acquiesced in the action of the solicitor. These assignments of error are overruled on authority of *S. v. Ammons*, 204 N.C. 753, 169 S.E. 631.

The court charged the jury as follows:

> "If the State has satisfied you from this evidence beyond a reasonable doubt that the defendant did make an assault upon the prosecuting witness, Oxendine, with a deadly weapon, and has satisfied you beyond a reasonable doubt that he did it with intent to kill, (that is to say, has satisfied you beyond a reasonable doubt that he did it under circumstances tending to show

he did it with intent to kill) and defendant has failed to satisfy you from the evidence that he was so drunk he didn't have mind enough to form intent to kill, and the State has further satisfied you beyond a reasonable doubt that such assault resulted in serious injury to Oxendine, within the meaning of that term as it has been defined to you by the court, it would be your duty to return a verdict of guilty of assault with a deadly weapon with intent to kill, as charged in the bill."

Defendant assigns as error the part of the charge in parentheses.

The exception is well taken. The murderous intent was a matter for the State to prove, *S. v. Gibson,* 196 N.C. 393, 145 S.E. 772, and to prove beyond a reasonable doubt, *S. v. Revels,* 227 N.C. 34, 40 S.E. 2d 474. The court committed prejudicial error, when it charged in effect that the State had carried this burden if it had satisfied the jury "beyond a reasonable doubt that he (the defendant) did it under circumstances tending to show he did it with intent to kill."

New trial.

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STATE v. OTIS HUNT.

(Filed 20 January, 1961.)

**Intoxicating Liquor § 13c—**

Evidence tending to show that a quantity of liquor was found in defendant's house, but also that defendant had not been home for two days prior to the search, and that defendant's brother-in-law was found on the porch of the house intoxicated at the time of the search, is insufficient to show that defendant had either actual or constructive possession of the liquor, and nonsuit should have been granted.

APPEAL by defendant from *Hall, J.,* August 1960 Regular Criminal Term, ROBESON Superior Court.

This criminal prosecution originated in the recorder's court upon a warrant charging that on July 17, 1960, the defendant "did unlawfully and wilfully have in his possession a certain quantity of non-taxpaid liquor, to-wit, less than one (1) quart." A second count charged the unlawful possession for the purpose of sale. From a conviction and judgment in the recorder's court, the defendant appealed to the superior court where he was tried, convicted by the jury, and sentenced to six months on the roads.

He appealed to this Court, assigning as error the denial of his motions for a directed verdict of not guilty for insufficiency of the proof.

*T. W. Bruton, Attorney General, Harry W. McGalliard, Asst. Attorney General, for the State.*
*Britt, Campbell & Britt, for defendant, appellant.*

PER CURIAM: Two police officers, under the authority of a search warrant, searched the defendant's home on July 17, 1960. Before going to the house they picked the defendant up at a filling station located on the main highway about 100 yards from the house. He accompanied the officers and after some difficulty gained entrance to the house by unhooking a screen door on the back porch. The officers found a small quantity, described as less than a quart, of whisky in a fruit jar on a shelf in the kitchen. Seven or eight glasses were on the table and on the floor. Two or three chairs were turned over. One officer testified: "There was a high odor of nontaxpaid whiskey in the kitchen." Eight or nine half-gallon fruit jars were upside down on the porch. They contained no odor of alcohol, nontaxpaid or otherwise.

When the officers picked up the defendant at the filling station he told them, according to their evidence, admitted without objection, that he had not been at home for two days. There was evidence that he and his wife had some difficulties before he left home. At the time of the search the brother of defendant's wife was on the front porch, "passed out drunk." The defendant testified he knew nothing about the liquor and had nothing to do with it. His wife and her brother testified they bought the liquor after the defendant left home; that he had not returned and that he knew nothing of, and had nothing to do with, the liquor.

The defendant's evidence is not in conflict with any evidence presented by the State. Evidence is lacking to show that the defendant and the liquor were in the house together until he entered with the officers. Neither actual nor constructive possession is shown. The court should have granted the motion to dismiss. The verdict and judgment are set aside. The defendant will be released and his bond discharged.

Reversed.

STATE v. MACK LOCKLEAR.

(Filed 20 January, 1961.)

APPEAL by defendant from *Burgwyn, Emergency Judge,* February Special Term, 1960, of ROBESON.

In a criminal prosecution on an indictment charging that defendant, on January 10, 1960, with force and arms, "feloniously, willfully and of his malice aforethought, did kill and murder Gurvis Locklear," the jury returned a verdict of "Guilty of Murder in the first degree with a recommendation of mercy." Thereupon, the court pronounced judgment, imposing a sentence of life imprisonment, from which defendant appealed.

*Attorney General Bruton and Assistant Attorney General McGalliard for the State.*

*Britt, Campbell & Britt for defendant, appellant.*

PER CURIAM. The only assignments of error, directed to the denial of defendant's motions under G.S. 15-173 for judgment as in case of nonsuit, are without merit. Plenary evidence of defendant's guilt supports the verdict. Indeed, defendant did not, either by brief or in oral argument, contend otherwise. Rather, he asserts his intention to move for a new trial on the basis of evidence discovered subsequent to the trial term and that the appeal was perfected in order to preserve defendant's right to make such motion at the "next succeeding term (of superior court) following affirmance of the judgment on appeal." *S. v. Edwards,* 205 N.C. 661, 172 S.E. 399; *S. v. Casey,* 201 N.C. 620, 161 S.E 81.

While defendant does not assign error in respect thereof, attention is called to the fact that the jury's "recommendation of mercy" is not in accord with G.S. 14-17. However, since the court, by imposing a sentence of life imprisonment, treated the verdict as if the jury had recommended that "the punishment be imprisonment for life in the State's prison," the irregularity in the verdict has not prejudiced defendant and the court's judgment will not be disturbed on account thereof.

No error.

# APPENDIX.

## AMENDMENTS TO RULES OF PRACTICE IN THE SUPREME COURT.

The following amendments to the Rules of Practice in the Supreme Court, affecting Rule 5, paragraphs 1, 2, 3; Rule 6, Rule 7, Rule 17, Rule 28 and Rule 29, and requiring appellant to docket his appeal four weeks before the call of his district, his brief three weeks, and appellee to file his brief two weeks, before the call of the district, were adopted by the Supreme Court 20 January 1961.

"5. Appeals—When Heard.

"The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term twenty-eight days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee file a proper certificate prior to the docketing of the transcript.

"The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed twenty-eight days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued unless by consent it is submitted upon printed argument under Rule 10.

"Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: Provided, however, that an appeal in a civil case from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, and Thirtieth districts which is tried between the first Monday of January and the first Monday in February, or between the first Monday of August and the fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument. All criminal cases from the foregoing districts which are tried between the first Monday in January and the first Monday in February, and between the first Monday in August and the fourth Monday in August must be docketed within sixty days from the last day of the term at which the respective cases were tried."

*Notes:* The changes in the first two paragraphs merely change the time for docketing the record from twenty-one to twenty-eight days. The changes in the third paragraph add to the list of excepted districts the Seventh and Twenty-sixth and change the times from the first day of January and the first day of August to the first Monday of those months. The first day may be right in the midst of a term and hence some cases tried during that term would have to come up and some would not. The third change is to fix the time within which criminal cases must be appealed at sixty days rather than forty-five days, as at present.

"6. Appeals—Criminal Actions.

"Appeals in criminal cases, docketed twenty-eight days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Sixteenth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket."

"7. Call of Judicial Districts.

"Appeals from the several districts will be called for hearing in the following order:

"From the First, Second, Twenty-ninth and Thirtieth Districts, the first week of the term.

"From the Third and Twenty-eighth Districts, the second week of the term.

"From the Fourth, Fifth, Sixth and Twenty-seventh Districts, the fourth week of the term.

"From the Seventh and Twenty-sixth Districts, the fifth week of the term.

"From the Eighth, Twenty-fourth and Twenty-fifth Districts, the seventh week of the term.

"From the Ninth, Twenty-first, Twenty-second and Twenty-third Districts, the eighth week of the term.

"From the Tenth and Twentieth Districts, the tenth week of the term.

"From the Eleventh and Nineteenth Districts, the eleventh week of the term.

"From the Twelfth, Thirteenth and Eighteenth Districts, the thirteenth week of the term.

"From the Fourteenth and Seventeenth Districts, the fourteenth week of the term.

"From the Fifteenth and Sixteenth Districts, the sixteenth week of the term.

"In making up the calendar for the two districts allotted to the same week, the appeals will be docketed in the order in which they are received by the clerk, but only those from the district first named will be called on Tuesday of the week to which the district is allotted, unless otherwise directed by the Court, and those from the district last named will not be called before Wednesday of said week, unless otherwise directed by the Court, but appeals from the district last named must nevertheless be docketed not later than twenty-eight days preceding the call for the week."

"17. Appeal Dismissed for Failure to Docket in Time.

"If the appellant in a civil action, or the defendant in a criminal prosecution, shall fail to bring up and file a transcript of the record twenty-eight days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed the appellee may file with the clerk of the Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause; Provided, that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

"(1) Appeal Docketed by Appellee When Frivolous and Taken for

Purposes of Delay. The transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

"(Note—Motion made under this rule is not effectual if filed after appeal has been docketed, although appeal was docketed after time required by Rule 5.)

"28. Appellant's Brief.

"The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, (it shall be sufficient to refer to pages of printed transcript containing the evidence). Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

"Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or typewritten copies to be mimeographed of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the third Tuesday preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief."

"29. Appellee's Brief.

"The appellee shall file printed or typewritten copies for mimeographing with the clerk of this Court by noon of the second Tuesday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished

by the clerk, on application, to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief."

These amendments shall be effective from and after 1 July 1961 and will be published in the next advance sheet and all other advance sheets prior to the Fall Term, 1961.

## APPENDIX.

### AMENDMENT TO THE RULES OF ETHICS OF THE NORTH CAROLINA STATE BAR.

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar, April 15, 1960.

Amend Article X, appearing 221 N.C. 606, by adding a new canon following Article X and following Canon "H" appearing 250 N.C. 734, as follows:

> "I. It shall be deemed unethical and improper for any member of The North Carolina State Bar to give or include as a reference, in his biographical sketch which he causes to be inserted in a legal directory, the name of any judicial or public officer, agency or institution in North Carolina."

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted by The North Carolina State Bar in that the said Council did by resolution at a regular quarterly meeting adopt said amendment to said Rules and Regulations.

Given over my hand and the seal of The North Carolina State Bar, this the 30th day of June, 1960.

/s/ Edward L. Cannon

Edward L. Cannon, Secretary
The North Carolina State Bar

The Court is of the opinion that its approval is not required as a condition precedent to the promulgation of canons of ethics by the Council of The North Carolina State Bar. Let the foregoing amendment to the canons of ethics of The North Carolina State Bar, together with the certificate of Edward L. Cannon, Secretary, be published in the forthcoming volume of the Reports.

This the 1st day of November, 1960.

/s/ Moore, J.

For the Court.

## APPENDIX.

### AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

The following amendments to the Rules and Regulations of The North Carolina State Bar were duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar, October 27, 1960.

Amend Article VI, Section 5 (c), appearing 221 N.C. 586, by striking the present Section 5 (c) and inserting in lieu thereof the following:

"c. Committee on Grievances of not less than three Councilors elected by the Council.

1. It shall be the duty of the Committee on Grievances to investigate and study all complaints which may be made against members of the State Bar. The Committee may include in its investigation all matters which may come to its attention with reference to the member complained of. It shall make a report to the Council at each quarterly meeting of the action taken by it upon all matters which have come to its attention and, if the action recommended be other than dismissal of the complaint, it shall state the facts and circumstances which have come to its attention in connection with the complaint. If the recommendation of the Committee on Grievances is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the Committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

2. The Secretary shall require all complaints to be in the form of affidavits upon forms prepared for such purpose. Where the complaint on its face requires it, the Secretary shall obtain certified copies of court records, or verified copies of any other exhibit or exhibits, which shall accompany and be attached to the complaint.

3. All verified complaints lodged with the Secretary shall be immediately forwarded to the Chairman of the Grievance Committee for initial screening.

4. If the Chairman of the Grievance Committee is of the opinion that the complaint should be entertained, he shall forthwith proceed to issue letter of notice to the accused attorney,

setting forth the substance of the charges made against him in sufficient detail to enable such accused attorney to file an intelligent answer thereto, and notifying the accused attorney to file his preliminary answer to the charges within 15 days of the receipt of such letter of notice, and further advising such accused attorney that he may attach to his answer such exhibits as he may desire, which letter of notice shall be forwarded to such accused attorney by certified or registered mail. The answer need not be verified, but all exhibits attached thereto must be certified.

5. Any action taken by the Chairman of the Grievance Committee shall be reviewed by the full committee.

6. After answer has been filed by the accused attorney, or the time for filing such answer has expired, the Grievance Committee shall consider the charges filed and make recommendation to the full Council.

7. Where any complaint has been entertained by the Grievance Committee, the Secretary shall keep a docket on such case, listing thereon the action taken, the date thereof, and the progress of the case from the time of its original institution until its final conclusion."

Amend Article IX, Section 1, appearing 221 N.C. 588, by changing the period to a comma and adding the following words:

"unless the accused attorney shall waive such hearing."

Amend Article IX, Section 2, appearing 221 N.C. 588, by adding a new sub-section (a) to read as follows:

"(a) Immediately following the adjournment of a quarterly meeting of the Council at which a hearing by a trial committee upon the matters reported to the Committee on Grievances was ordered, the Secretary of the Council shall advise the accused attorney, by certified or registered mail, that the Council has directed a hearing upon the charges preferred against him, and shall advise said attorney that he may, pursuant to the provisions of Chapter 84-28 of the General Statutes of North Carolina, elect to be heard before a trial committee appointed for that purpose by the Council, or a trial committee designated by the Supreme Court of North Carolina, and further notifying said attorney to make his election within 10 days from the receipt of such notice by mailing, on or before the expiration of such 10

day period, notice of his election, which said election shall be sent by certified or registered mail to the Secretary of The North Carolina State Bar, and further notifying said attorney that upon his failure so to do, he will be deemed to have waived his right to such election, and will be heard by a trial committee appointed by the Council."

Amend Article IX, Section 2, by relettering sub-section (a) to sub-section (b) and amending same to read as follows:

"(b) As expeditiously as possible, but not more than 30 days following the adjournment of such quarterly meeting of the Council at which a hearing of the accused attorney was ordered, a verified written statement shall be formulated by the Council, or under its direction, showing in separate paragraphs the nature and substance of all charges preferred against such accused attorney, or lodged and included in the report of the Committee on Grievances. Such statement of charges shall also be accompanied by a notice, notifying him that charges have been filed and setting the time and place for the filing of answer by such attorney thereto. In the absence of acceptance of service of such notice and statement of charges, then service of such notice and statement shall be made by the Sheriff of the county in which said respondent resides, by delivering to him two copies of said notice and statement. The Secretary of the Council shall pay to such Sheriff for such service, from the funds of The North Carolina State Bar, such fees as may be allowed in his county for the service of summons in civil actions."

Amend Article IX, Section 2 by repealing sub-section (b-1), adopted January 15, 1960, and appearing in 251 N.C. 859.

Amend Article IX, Section 2 by relettering present sub-section (b) to sub-section (c) and amending same to read as follows:

"(c) At the quarterly meeting of the Council at which a hearing of the accused attorney is ordered, the Council shall name and designate a trial committee of not less than three Councilors. If the accused attorney does not elect to be heard before a trial committee designated by the Supreme Court of North Carolina, as provided by statute and these regulations, the trial committee named and designated by the Council shall be the trial committee for the hearing of the charges preferred against such accused attorney, and shall sit at the hearing and preside over all proceedings had thereat. The names of the Councilors designated

by the Council for such purpose shall not be made public or disclosed to the accused attorney until the time within which such accused attorney may elect to be tried by a trial committee designated by the Supreme Court shall have expired.

If such accused attorney exercises his right to be tried by a trial committee designated by the Supreme Court, such election shall automatically discharge as trial committee the Councilors theretofore designated as such by the Council, and thereafter the accused attorney shall be notified by the Secretary of the Council the personnel of such trial committee appointed by the Supreme Court.

The trial committee hearing the charges against the accused attorney, whether it be the committee appointed by the Supreme Court or by the Council, shall proceed under the Rules and Regulations adopted by the Council and the statutory provisions governing such hearings."

Amend Article IX, Section 2 by relettering present sub-section (c) to sub-section (d) and amending same to read as follows:

"(d) The respondent, within thirty (30) days immediately following service of notice and statement of charges upon him, as hereinbefore provided, may file a verified answer to the charges set out in said statement, the original of which and two copies thereof shall within said period, be filed in the office of the Secretary of The North Carolina State Bar. Every material allegation of the verified statement not controverted by an answer or to which no answer is made is, for the purpose of the action, taken as true and the trial committee may consider the facts therein contained as conceded and no other proof of the same shall be necessary. The trial committee appointed by the Council, or by the Supreme Court, as the case may be, following the filing of answer by the accused attorney, if an answer be filed, and if no answer be filed then following the expiration of the time for filing answer, shall proceed to hear the charges preferred against the accused attorney as promptly as possible in order that the ends of justice may be served, and the rights of the accused attorney and of the public generally may be fully protected and preserved. The Chairman of the trial committee shall set a time and place for said hearing, and thereafter, and not less than ten (10) days prior to the date thereof, the Secretary of The North Carolina State Bar shall cause notice of the time and place

of such hearing to be given said accused attorney by certified or registered mail."

Amend Article IX, Section 2, by relettering present sub-section (d) to sub-section (e).

Amend Article IX, Section 2, by relettering present sub-section (e) to sub-section (f).

Amend Article IX, Section 2, by relettering present sub-section (f) to sub-section (g).

Amend Article IX, Section 2, by relettering present sub-section (g) to sub-section (h).

Amend Article IX, Section 2, by relettering present sub-section (h) to sub-section (i).

Amend Article IX, Section 2, by relettering present sub-section (i) to sub-section (j).

Amend Article IX, Section 2, by relettering present sub-section (j) to sub-section (k) and amending same to read as follows:

"(k) When the said Committee shall formulate its report, a copy thereof shall be sent, by certified or registered mail, to the respondent, and said respondent shall file his exceptions thereto with the Secretary of The North Carolina State Bar within ten (10) days from receipt of the copy of said report."

Amend Article IX, Section 2, by adding a new sub-section (1) to read as follows:

"(1) The President of The North Carolina State Bar is empowered to extend the time provided herein for the filing of complaint, the filing of answer thereto, the time for filing exceptions by the accused attorney, or his counsel, to the report of the trial committee, or to the action of the Council upon such report, as, in his discretion, he may deem necessary, in order that the ends of justice may be met, having due regard to the rights of the respondent to have a full and ample opportunity to present his defense, but also having due regard to the speedy conclusion of such hearing."

Amend Article IX, Section 2, by relettering present sub-section (k) to sub-section (m).

Amend Article IX, Section 2, by relettering present sub-section (l) to sub-section (n).

Amend Article IX, Section 2, by relettering present sub-section (m) to sub-section (o).

Amend Article IX, Section 2, by relettering present sub-section (n) to sub-section (p).

Amend Article IX, Section 2, by relettering present sub-section (o) to sub-section (q).

Amend Article IX, Section 2, by relettering present sub-section (p) to sub-section (r).

Amend Article IX, Section 2, by relettering present sub-section (q) to sub-section (s).

Amend Article IX, Section 2, by adding a new sub-section (t) to read as follows:

> "(t) The Grievance Committee is charged with the duty of following the progress of all disciplinary matters coming before it and the progress of all hearings ordered by the Council, and shall make report to the Council at its regular quarterly meetings of the status of all hearings theretofore ordered by it, to the final conclusion thereof."

Amend Article IX, Section 2, by relettering present sub-section (r) to sub-section (u).

Amend Article IX, Section 2, by relettering present sub-section (s) to sub-section (v).

Amend Article IX, Section 2, by relettering present sub-section (t) to sub-section (w).

Amend Article IX, Section 2, by relettering present sub-section (u) to sub-section (x).

Amend Article IX, Section 2, by relettering present sub-section (v) to sub-section (y).

Amend Article IX, Section 2, by relettering present sub-section (w) to subsection (z).

Amend Article IX, Section 3, appearing 221 N.C. 592, by adding in line two, after the word "council" and before the word "to" the following: "or the Supreme Court."

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

NORTH CAROLINA—WAKE COUNTY

I, Edward L. Canon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar were duly adopted by the North Carolina State Bar in that the said Council did by resolution at a regular quarterly meeting adopt said Amendments to said Rules and Regulations.

Given over my hand and the seal of The North Carolina State Bar, this the 30th day of December, 1960.

/s/ Edward L. Cannon

Edward L. Cannon, Secretary
The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar as adopted by The Council of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto — Chapter 84, General Statutes.

This the 20th day of January, 1961.

/s/ Moore, J.

For the Court.

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 20th day of January, 1961.

/s/ Moore, J.

For the Court.

## APPENDIX.

### AMENDMENTS TO THE RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS.

The following amendments to the Rules and Regulations of the Board of Law Examiners and of The North Carolina State Bar have been duly adopted by the Board of Law Examiners and recommended to the Council of The North Carolina State Bar, and the Council of the North Carolina State Bar at a regular quarterly meeting did unanimously adopt the same and the recommendation of the Board of Law Examiners regarding said Rule as follows:

1. Amend Rule 9, section (b), of the Rules governing admission to the practice of law in the State of North Carolina, appearing 243 N.C. 788, by adding a comma, and inserting after the word "affidavit" and before the word "or" the following:

> "unless the filing thereof shall have been theretofore required by the Board;"

2. Amend Rule 16 of the Rules governing admission to the practice of law in the State of North Carolina, appearing 243 N.C. 792, by striking the words "deposit with" in the first sentence of the second paragraph, and inserting in lieu thereof the words "pay to."

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of The Board of Law Examiners and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar, this the 24th day of January, 1961.

/s/ Edward L. Cannon

Edward L. Cannon,Secretary
The North Carolina State Bar

After examining the foregoing amendments to the Rules of the Board of Law Examiners as adopted by The Council of The North Carolina State Bar, it is my opinion that the same complies with a

permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto — Chapter 84, General Statutes.

This the 3rd day of February, 1961.

/s/ Moore, J.
For the Court.

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules of The Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This 3rd day of February, 1961.

/s/ Moore, J.
For the Court.

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# ANALYTICAL INDEX

## ACTIONS

**§ 5. Where Plaintiff's Own Wrongful Act Constitutes Element of Cause of Action.**

An automobile occupied by two brothers, one of whom was driving, was involved in a crossing accident and this action was instituted to recover for the death of one of them. *Held:* The defendant is entitled to set up agency of the driver under the family purpose doctrine for the purpose of imputing the driver's negligence to the owner as a bar to that portion of the recovery which would inure to the benefit of the owner if it were established that intestate was the passenger. *Dixon v. Briley*, 807.

## ANIMALS

**§ 3. Liability for Permitting Domestic Animals to Roam at Large.**

It is the legal duty of a person having charge of an animal to exercise ordinary care and the foresight of a reasonably prudent person in keeping the animal in restraint. *Herndon v. Allen*, 271.

Evidence held insufficient to show negligence in failing to keep mule confined. *Ibid.*

## ANONYMOUS COMMUNICATIONS CONTAINING THREATS OR OBSCENITY

In order to sustain a conviction under G.S. 14-394 there must be a transmission by defendant of an anonymous communication which contains at least one of the categories of language prohibited by the statute, and there can be no transmission without an intended recipient and a delivery of the prohibited writing or a communication of its contents to the intended recipient. *S. v. Robbins*, 47.

A bill of indictment under G.S. 14-394, which fails to name the person to whom defendant transmitted the writing and the kind or character of the language contained therein, is fatally defective, and motion to quash should be allowed. *Ibid.*

## APPEAL AND ERROR

**§ 1. Nature and Grounds of Appellate Jurisdiction in General.**

An appeal lies as a mattter of right and not as a matter of grace in those cases in which an appeal is authorized. *Harrell v. Harrell*, 758.

The Supreme Court will not consider matters not raised and adjudicated in the court below. *Andrews v. Andrews*, 139.

The Supreme Court has jurisdiction to pass upon questions of law or legal inference only upon appeal from an adjudication thereon by the lower court, and if the lower court has no jurisdiction, the Supreme Court acquires none by appeal. *Carbide Corp. v. Davis*, 324.

In granting a new trial for error in the charge, the evidence being sufficient to warrant the overruling of defendant's motion to nonsuit, the Supreme Court will refrain from discussing the evidence except as necessary to show the ground on which the new trial is awarded. *Lane v. Drivers Association*, 764.

APPEAL AND ERROR—*Continued.*

An appeal will follow the theory of trial in the lower court. *Rowland v. Rowland*, 328.

**§ 3. Judgments Appealable.**

An order overruling for failure of the complaint to state a cause of action is not immediately appealable and may be reviewed prior to trial only by writ of *certiorari*. *Guinn v. Kincaid*, 228.

An appeal will lie from an order of compulsory reference when the order is not in accord with the course and practice of the court and affects a substantial right. *Harrell v. Harrell*, 758.

**§ 7. Demurrers and Motions in Supreme Court.**

A motion in the Supreme Court for leave to amend, as well as the proposed amendment, must be reduced to writing and filed in the Supreme Court, and a motion not in conformity with the rule will not be considered. *Hoyle v. Bagby*, 778.

**§ 12. Jurisdiction and Powers of Lower Court after Appeal.**

While the lower court may disregard an attempted appeal in those cases in which an appeal is not authorized, it should not attempt to stay the proceedings and preclude the appeal, since the appeal will be dismissed in due course in the Supreme Court. *Harrell v. Harrell*, 758.

**§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.**

An assignment of error must be based upon an exception duly noted. *Biggs v. Biggs*, 10.

**§ 20. Parties Entitled to Object and Take Exception.**

Any error relating to an issue answered in favor of appellant cannot be prejudicial to him. *Casswell v. Greene*, 266.

**§ 21. Exception to Judgment or to Signing of Judgment.**

An exception to the signing of the judgment presents the questions whether the facts found support the judgment and whether error of law appears upon the face of the record. *Rubber Co. v. Crawford*, 100; *Rowland v. Rowland*, 328.

**§ 21a. Exceptions and Assignments of Error to Rulings on Motions to Nonsuit.**

The correctness of the court's ruling on motion to nonsuit is not presented by an exception to the refusal of the motion at the conclusion of all the evidence when the record fails to show a supporting exception, or, indeed, that the motion to nonsuit was renewed after the introduction of evidence by defendant, since the failure to renew the motion after the close of all the evidence waives the motion made at the close of plaintiff's evidence. *Biggs v. Biggs*, 10.

**§ 28. Necessity for Case on Appeal.**

Where there is no proper statement of case on appeal, the appeal will be dismissed in the absence of error appearing on the face of the record. *Wiggins v. Tripp*, 171.

APPEAL AND ERROR—*Continued.*

**§ 29. Making Out and Service of Case on Appeal.**

The appellant has the duty to have statement of cases on appeal redrafted and submitted to the judge for signature even though the appellee's exceptions are allowed as a matter of law because of the failure of appellant to request the trial judge to fix a time and place for setting the case on appeal. *Wiggins v. Tripp*, 171.

**§ 31. Settlement of Case on Appeal.**

Even when appellee's exceptions to the appellant's statement of case on appeal are deemed allowed, or the counter-case served by appellee constitutes the case on appeal, by reason of appellant failure to make apt request that the trial judge fix a time and place for setting the case on appeal, the duty remains on appellant to have the statement of case on appeal, as thus modified, redrafted and submitted to the judge for his signature, and when he fails to do so there is no case on appeal. *Wiggins v. Tripp*, 171.

Order of the Supreme Court granting time in which to serve statement of case on appeal and time in which to serve exceptions or counter-case, and providing that if the case should not be settled by agreement it should be settled by the judge within a given time, does not relieve appellant of the duty to comply with the provisions of G.S. 1-282 and G.S. 1-283, including the duty to request the judge to settle the case. *Ibid*

**§ 39. Presumption and Burden of Showing Error.**

The burden is upon appellant not only to show error, but also to show that the alleged error was material and prejudicial. *Fleming v. Drye*, 545.

**§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.**

While ordinarily the exclusion of evidence can not be ascertained to be harmful when the record fails to show that the witness would have testified had he been permitted to answer, where the record discloses that the court refused to permit the witnesses to testify even in the absence of the jury and affirmatively shows that the testimony of the witness was on a material point and that the appellee went to great lengths to preclude the testimony, the exclusion of the testimony may not be held harmless. *Capps v. Lynch*, 18.

In a hearing by the court, it will be presumed that the court disregarded incompetent evidence in the absence of anything tending to show to the contrary. *Mercer v. Mercer*, 164; *S. v. Brown*, 195.

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have testified had he been permitted to answer. *Westmoreland v. R. R.*, 197.

**§ 42. Harmless and Prejudicial Error in Instructions.**

Where before the jury has retired the court corrects a *lapsus linguae* in the charge and gives a correct instruction in the point, the error is ordinarily cured. *Barnes v. House*, 444.

Reference in the charge to liability insurance will not be held for error on plaintiff's appeal, since any prejudice to defendant is cured by the verdict, and any prejudice to plaintiff from the instruction that insurance premiums are determined on the basis of losses suffered by the insurance companies which all must bear, *is held* not sufficiently prejudicial to plaintiff as to

require a new trial, since the effect of one accident on any juror's future insurance premium would be too insignificant to overcome the court's positive instruction that the existence or non-existence tf liability insurance should not be considered in reaching a verdict. *Hoover v. Gregory*, 452.

**§ 45. Error Cured by Verdict.**

Where erroneous instructions are directed to an issue not reached or answered by the jury and to an issue answered in favor of appellant, the error cannot be held prejudicial to appellant. *Fleming v. Drye*, 545.

**§ 46. Review of Discretionary Matters.**

Where the record discloses that the court refused to determine a discretionary matter in the exercise of its discretion, but determined the question as a matter of law, the ruling is reviewable, and the objecting party is entitled to have the proposition reconsidered and passed upon as a discretionary matter. *Capps v. Lynch*, 18; *Dixon v. Briley*, 807.

**§ 49. Review of Findings or Judgments on Findings.**

In a trial by the court under agreement of the parties, the judgment, in the absence of findings of fact in the record or request for findings, must be affirmed if it is based on any legal ground supported by the evidence. *Paper Co. v. McAllister*, 529.

The findings of fact of the trial court, upon review of municipal annexation ordinances, that the statutory procedure had been substantially and sufficiently complied with, are conclusive and binding on appeal when supported by competent evidence. *In re Annexation Ordinances*, 637.

**§ 54. New Trial and Partial New Trial.**

The Supreme Court has the discretionary power to grant a retrial of the whole case even though the errors relate to a single issue. *Capps v. Lynch*, 18.

**§ 55. Remand.**

Where a ruling of the court is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light. *Capps p. Lynch*, 18.

**§ 60. Law of the Case and Subsequent Proceedings.**

A decision of the Supreme Court must be interpreted in the light of the facts of the case in which the language is used, and where, on a former appeal, the meaning of a particular term of the contract was not involved and no evidence adduced in the prior trial in regard thereto, the former opinion cannot be held to have adjudicated this question. *Robbins v. Trading Post*, 474.

**§ 61. Stare Decisis.**

The doctrine of *stare decisis* requires in the interest of sound public policy that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after ample consideration, should not be disturbed except for most cogent reasons. *Potter v. Water Co.*, 112.

The doctrine of *stare decisis* does not extend to *obiter dicta*, and language in an opinion which is not necessary to decision of the question therein involved should not influence a subsequent decision unless it logically assists therein, and will not be applied when contrary to well settled rules of law. *Muncie v. Ins. Co.*, 74.

## ARMY AND NAVY

Serviceman in this State on military orders is not a resident unless while here he forms present intent to make his domicile in this State. *Martin v. Martin*, 704.

## ARREST AND BAIL

**§ 3. Right of Officers to Arrest Without Warrant.**

An officer of the law has authority to apprehend and arrest an escaped convict. *S. v. Davis*, 86.

An officer may arrest a person who commits a misdemeanor in his presence, including the offense of criminal trespass. *S. v. Avent*, 580.

**§ 7. Right of Person Arrested to Communicate with Friends and Counsel.**

The fact that a notation that defendant was not to be allowed to see or call anyone is copied on the arrest sheet from a memorandum on an envelope made by the arresting officer, does not establish a violation of defendant's right under the Due Process Clause when the undisputed evidence is to the effect that no officer had the right to enter any such order, that it was not enforced, and that the sole request of defendant to communicate with any person was granted, since in such instance the notation is nothing more than an unauthorized and unenforced entry made by the arresting officer. *S. v. Davis*, 86.

## ASSAULT AND BATTERY

**§ 14. Sufficiency of Evidence and Nonsuit.**

Testimony to the effect that defendant intentionally pointed a "gun" at the prosecuting witness is sufficient to be submitted to the jury under a warrant charging that defendant intentionally assaulted the prosecuting witness by pointing a "pistol" at her, a gun being a generic term which includes pistol, and there being nothing in the record to indicate that the weapon which defendant pointed at the prosecuting witness was not a pistol. *S. v. Barnes*, 711.

**§ 15. Instructions.**

In a prosecution for assault with a deadly weapon with intent to kill, it is error for the court to instruct the jury that if they found beyond a reasonable doubt that defendant committed the assault under circumstances tending to shom that he did it with intent to kill, defendant should be found guilty. *S. v. Bullard*, 809.

## ATTORNEY AND CLIENT

**§ 5. Representation of Client and Liabilities to Client.**

The same attorney may not represent parties having conflicting interests, and judgment obtained in such action will be set aside on motion of a minor party thereto. *Smith v. Price*, 285.

## AUTOMOBILES

**§ 4. Title and Certificate of Title.**

A certificate of title failing to show an outstanding lien is no protection

to a purchaser against the lien of a chattel mortgage properly registered in the county in which the mortgagor resides. *Finance Co. v. Pittman*, 550.

**§ 5. Warranties in Sale of Motor Vehicles.**

Evidence tending to show that excessive heat arose from the floor board of the front seat and that fumes were emitted upon the operation of the automobile purchased from defendants, and that on a certain day after the car had been driven a few miles it caught fire while not in operation and unattended, *is held* insufficient to be submitted to the jury in an action against the sellers for breach of implied warranty, there being no evidence from which the cause of the fire might be reasonably inferred. *Casualty Co. v. Gray*, 60.

Recovery may not be had for destruction of car by fire resulting from defective fuel pump and maladjustment of carburetor when buyer continues to drive the car with knowledge of the defects. *Ins. Co. v. Chevrolet Co.*, 243.

**§ 6. Safety Statutes and Ordinances in General.**

A violation of G.S. 20-140 is negligence *per se*. *Carswell v. Lackey*, 387.

The statutory provisions requiring a special permit to operate oversize vehicles on the highway were enacted in the interest of public safety, and the violation of the statutory restrictions is negligence *per se* and actionable when the proximate cause of injury. *Lyday v. R. R.*, 687.

**§ 7. Attention to Road, Look-out and Due Care in General.**

It is the duty of a motorist to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances, and in the exercise of such care it is incumbent upon him to keep his vehicle under control and to keep a reasonably careful lookout so as to avoid collision with persons or vehicles upon the highway. *Smith v. Rawlins*, 67.

It is the duty of a motorist to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances, which requires him not merely to look, but to keep a lookout in his direction of travel, and he is held to the duty of seeing what he ought to have seen. *Clontz v. Krimminger*, 252.

It is the duty of a motorist to exercise ordinary care for his own safety, which includes the duty to keep his vehicle under control and to keep a reasonably careful lookout in the direction of travel, and he is held to the duty of seeing what he ought to have seen. *Mattingly v. R. R.*, 746.

**§ 8. Turning and Turning Signals.**

G.S. 20-154(a) and G.S. 20-155(b) prescribe the respective rights and duties of two motorists approaching an intersection from opposite directions when one of them intends to turn left at the intersection, and G.S. 20-155(a) has no application. *Fleming v. Drye*, 545.

**§ 12. Backing.**

A motorist who backs into a highway without taking reasonable precautions to warn and protect others using the highway and without seeing that such movement can be made in reasonable safety is negligent, and it is immaterial whether such movement is intentional or is due to the failure of the motorist to maintain his brakes in good working condition. *Bundy v. Belue*, 31.

AUTOMOBILES—*Continued.*

**§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.**

The violation of the provisions of G. S. 20-152(a) prohibiting the driver of a motor vehicle from following another vehicle more closely than is reasonable and prudent with regard to the safety of others, the traffic and the condition of the highway, is negligence *per se*, and is actionable if injury proximately results therefrom. *Smith v. Rawlins*, 67.

**§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.**

Failure of a motorist to stay on his right side of the highway and yield one-half the highway to an approaching vehicle is negligence *per se*. *Carswell v. Lackey*, 387.

**§ 17. Right of Way at Intersections.**

G.S. 20-154(a) and G.S. 20-155(b) prescribe the respective rights and duties of two motorists approaching an intersection from opposite directions along the same highway when one of them intends to turn left at the intersection, and G.S. 20-155(a) has no application. *Fleming v. Drye*, 545.

Failure to stop in obedience to duly erected signs before entering an intersection with a dominant highway is not negligence or contributory negligence *per se*, but is a circumstance to be considered with the other facts and circumstances in evidence on the question. *S. v. Sealy*, 802.

**§ 19. Sudden Emergencies.**

A person confronted with a sudden emergency is not held to the wisest choice of conduct, but only to that degree of care which a reasonably prudent man would exercise under like circumstances. *Bundy v. Belue*, 31.

**§ 21. Brakes and Defects in Vehicles.**

The failure of a motorist to equip his vehicle with adequate brakes and to maintain the brakes in good working condition, G.S. 20-124(a), or the failure of a motorist to set the brakes when required by statute, G.S. 20-124(b) and G.S. 20-163, is negligence. *Bundy v. Belue*, 31.

**§ 25. Speed in General.**

The general maximum speed limit of automobiles in North Carolina is 55 miles per hour, G.S. 20-141(b) (4), the limit of 60 miles per hour for certain vehicles on certain highways when authorized by the State Highway Commission being in the nature of an exception. G.S. 20-141 (b) (5). *S. v. Gurley*, 55.

**§ 30½. Engaging in Race or Speed Competition.**

The operation of a vehicle on the highway in speed competition is a misdemeanor and is negligence *per se* G.S. 20-141.3(b). *Boykin v. Bennett*, 729.

All drivers engaged in speed competition are joint tort feasors in causing injury even though the vehicles do not come into contact. *Ibid.*

**§ 35. Pleadings in Auto Accident Cases.**

Complaint held not to disclose contributory negligence of passenger in car whose driver engaged in speed competition. *Boykin v. Bennett*, 725.

AUTOMOBILES—*Continued.*

**§ 36. Presumptions and Burden of Proof.**

There is no presumption of negligence upon proof that a vehicle ran off the road. *Fuller v. Fuller*, 288.

**§ 38. Opinion Evidence as to Speed and Other Facts at Scene.**

Evidence of physical facts at the scene held insufficient predicate for expert testimony as to which of occupants was the driver. *Shaw v. Sylvester*, 176.

**§ 39. Physical Facts at Scene.**

Proof that a vehicle ran off the road at a place where the highway was straight at a time when the road was dry and no other traffic near is insufficient to support an inference of negligence on the part of the driver. *Fuller v. Fuller*, 288.

**§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.**

Evidence tending only to show that the driver of a truck veered gradually to the left and ran off the hard surface at a point where the highway was straight and that the truck continued on until it struck a tree some 150 feet after it had left the highway, resulting in the death of the driver and injury to the two passengers, with further evidence that the day was clear and the road dry and that there was no other traffic at this point, is insufficient to show that the injury to the passengers was the result of the negligence of the driver, since negligence will not be presumed from the mere happening of an accident, but, in the absence of evidence on the question, freedom from negligence will be presumed. *Fuller v. Fuller*, 288.

Plaintiff passenger's allegations were to the effect that his injuries resulted from a collision occurring when one defendant turned left to enter an intersecting street and collided with the car in which plaintiff was riding, and which was driven by the other defendant, as this defendant was attempting to pass at the intersection. Plaintiff's evidence tended to show that the car in which he was riding stopped suddenly and that the collision occurred when the other car, which had started to turn left and had stopped, rolled backward down a steep grade and struck the car in which plaintiff was riding. *Held:* Nonsuit for variance was proper. *Vickers v. Russell*, 394.

**§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Highway.**

Evidence held insufficient to show negligence in veering to left in emergency caused by another vehicle backing into the highway. *Bundy v. Belue*, 31.

**§ 41d. Sufficiency of Evidence of Negligence in Following or Passing Vehicles Traveling in Same Direction.**

Evidence that defendant struck the rear of plaintiffs vehicle when plaintiff stopped in a line of cars due to the exigencies of traffic held sufficient to take to the jury the issue of defendant's negligence in following more closely than was reasonable or precedent or in failing to keep a proper look-out. *Smith v. Rawlins*, 67.

In plaintiff's action to recover for a collision resulting when the vehicle driven by defendant ran into the rear of plaintiff's car, an admission by defendant of his violation of G.S. 20-152(a) requires the submission of the issue of negligence to the jury. *McGinnis v. Smith*, 70.

AUTOMOBILES—*Continued.*

**§ 41f. Sufficiency of Evidence of Negligence in Hitting Preceding Vehicle.**

Ordinarily, the mere fact of a collision with a vehicle ahead is some evidence of negligence as to speed, or in following too closely, or in failing to keep a proper lookout, but each case must be governed by its own facts and circumstances. *Clark v. Scheld*, 732.

Evidence held insufficient on question of negligence in hitting preceding vehicle which had stopped suddenly upon entering fog created by chemical fogging machine used to exterminate mosquitoes. *Ibid.*

**§ 41k. Sufficiency of Evidence of Negligence in Backing.**

Evidence that vehicle with defective brakes was stopped on shoulder so that it rolled back into the highway held to take issue of negligence to jury. *Bundy v. Belue*, 31.

**§ 41m. Sufficiency of Evidence of Negligence in Hitting Children.**

Evidence of negligence in traveling at excessive speed under the circumstances so that driver was unable to stop in time to avoid hitting children on sled who had slid down driveway and across the highway, held for jury. *Carter v. Shelton*, 558.

**§ 41p. Sufficiency of Evidence of Identity of Driver of Vehicle.**

Evidence of physical facts at the scene permitting the inference that the vehicle in question, traveling at great speed, catapulted through the air, once for 37 feet and again for 55 feet, before it came to rest in a creek, that the body of one of the two occupants was found on the shoulder of the road and the body of the other occupant was found in the creek beyond the wrecked vehicle, with evidence that the vehicle was owned by one of the occupants, *is held* insufficient to be submitted to the jury on the question of which of the two occupants was the driver of the vehicle at the time of the accident. *Shaw v. Sylvester*, 176.

**§ 42a. Nonsuit on Ground of Contributory Negligence in General.**

The failure of plaintiff to avoid colliding with defendant's vehicle which was only partly over the center of the highway in plaintiff's lane of traffic, by driving onto the shoulders of the road, which were some 13 or 14 feet wide at the scene, cannot justify nonsuit on the ground of contributory negligence when plaintiff's evidence further tends to show that the shoulders of the road were dangerous because the highway had been resurfaced and the shoulders had not been built up to it, and that there was a ditch and creek running parallel with the road, since plaintiff's evidence does not disclose contributory negligence in this regard so clearly that no other conclusion can be reasonably drawn therefrom. *Carswell v. Lackey*, 387.

**§ 42c. Nonsuit for Contributory Negligence in Stopping or Parking.**

Evidence that plaintiff stopped in a line of cars because of the exigencies of traffic and was struck from the rear by defendant's vehicle held not to disclose contributory negligence as a matter of law. *Smith v. Rawlirs*, 67; *McGinnis v. Smith*, 70.

**§ 42d. Contributory Negligence in Hitting Stopped or Parked Vehicle.**

Evidence tending to show that plaintiff was following defendant's vehicle

upon a highway on a foggy morning while it was still dark, that plaintiff at all times could see the tail lights of the defendant's vehicle, that defendant stopped his vehicle without signal, and that plaintiff was within fifteen feet thereof before he realized the vehicle had stopped, and had insufficient time to either apply his brakes or to turn aside in order to avoid a collision, *is held* to disclose contributory negligence on the part of plaintiff as a matter of law, barring recovery even conceding there was sufficient evidence of negligence on the part of defendant. *Clontz v. Krimminger*, 252.

Nonsuit on the ground that plaintiff's own evidence disclosed that defendant's vehicle, although partly to the left of the center of the highway, was stationary, and that plaintiff's vehicle, approaching from the opposite direction, collided with it after leaving skid marks for some 261 feet, does not justify nonsuit when other portions of plaintiff's evidence are in conflict therewith and do not show that defendant even came to a complete stop prior to the collision. *Carswell v. Lackey*, 387.

**§ 42g. Contributory Negligence in Failing to Yield Right of Way at Intersection.**

Evidence tending to show that plaintiff, traveling along the servient highway, stopped before entering intersection, saw no traffic approaching, and was over half way across the intersection when struck by defendant's truck traveling at excessive speed, *is held* insufficient to establish contributory negligence on the part of plaintiff as a matter of law, since whether plaintiff had reasonable ground for belief that he could cross in safety, and whether he could have seen and apprehended in time to have avoided the collision that defendant's vehicle was not going to stop, are questions for the jury upon the evidence. *Leonard v. Garner*, 278.

**§ 42l. Contributory Negligence of Children Hit by Car.**

Evidence held not to disclose contributory negligence as a matter of law on part of twelve year old child in slidding down driveway and across highway on sled. *Carter v. Shelton*, 558.

**§ 46. Instructions in Auto Accident Cases.**

Where, in support of defendant's plea of contributory negligence, there is evidence tending to show that plaintiff was traveling at excessive speed along the dominant highway in approaching the intersection at which he collided with defendant's vehicle, which was traveling on the servient highway, it is error for the court to fail to instruct the jury as to the effect of such excessive speed in charging upon the issue of contributory negligence. *Hunt v. Crawford*, 381.

Where plaintiff offers no evidence as to the speed of defendant's vehicle and does not allege that defendant failed to keep a proper lookout, it is error for the court to charge the jury on either of these aspects of the law. *Carswell v. Lackey*, 387.

When neither the allegations of the complaint nor plaintiff's evidence adduced facts which would constitute reckless driving on the part of defendant, the court correctly refrains from charging the jury thereon, notwithstanding that the complaint states the conclusion that defendant was guilty of reckless driving. *Fleming v. Drye*, 545.

Where the complaint does not allege that defendant failed to give the statutory signal before making a left turn at an intersection and there is

AUTOMOBILES—*Continued.*

no contradiction in the evidence that defendant did in fact give the statutory signal, the court is not required to instruct the jury in regard thereto. *Ibid.*

**§ 48. Parties Liable.**

Where a passenger in a car is killed in a collision, the passenger's administrator may sue either one or both of the drivers, and each driver is severally liable if his negligence was a proximate cause of the injury and death, and as to plaintiff his liability is not enlarged or diminished by the fact that the negligence of the other driver may or may not have been a contributing cause of the accident. *Hall v. Carroll*, 220.

**§ 52. Liability of Owner for Driver's Negligence in General.**

The holder of a chattel mortgage on an automobile, nothing else appearing, cannot be held liable for the negligent operation of the vehicle by the mortgagor or the mortgagor's agent, since the mortgagor of the vehicle is deemed the owner. *Trust Co. v. King*, 571.

**§ 54f. Sufficiency of Evidence and Nonsuit on Issue of Respondeat Superior.**

The rule of evidence created by G.S. 20-71.1 that proof of ownership of a vehicle makes out a *prima facie* case of agency applies whenever a factual determination as to alleged agency is to be made, and therefore that statute is applicable in determination by the court of the crucial question of agency on the hearing of a nonresident's motion to dismiss on the ground that service of process under the provisions of G.S. 1-105 was ineffectual, and the proof of ownership is sufficient to support, but not compel, a finding in plaintiff's favor as to the validity of the service. *Howard v. Sasso*, 185.

**§ 55. Family Purpose Doctrine.**

Allegations that the car involved in the collision was a family purpose car owned by the father and intended for the convenience and pleasure of members of his family, and that one of the sons of the owner was driving, with the knowledge and consent of the owner, at the time of the collision, is sufficient, liberally construed, to allege agency under the family purpose doctrine, notwithstanding the absence of allegation that the son was living with the owner as a member of his household. *Dixon v. Briley*, 807.

**§ 56. Culpable Negligence.**

A wilful or intentional violation of a safety statute or the unintentional or inadvertent violation of such statute when accompanied by a heedless indifference to the safety of others or a thoughtless disregard of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, constitutes culpable negligence, but an unintentional or inadvertent violation of a safety statute, standing alone, is not culpable negligence. *S. v. Gurley*, 55.

An instruction to the effect that if the jury found from the evidence beyond a reasonable doubt that defendant violated the statutory requirement that he bring his vehicle to a stop before entering upon an intersection with a dominant highway, and that such failure was the proximate cause of the deaths of named persons, defendant would be guilty of manslaughter, must be held for prejudicial error, even though in another part of the charge the court correctly instructs the jury upon this aspect of the law. *S. v. Sealy*, 802.

AUTOMOBILES—*Continued.*

**§ 60 Instructions in Assault and Homicide Prosecutions.**

An instruction in a prosecution for manslaughter to the effect that if defendant operated his automobile at a speed in excess of 55 miles per hour and such speed was a proximate cause or one of the proximate causes of the death of deceased, it would be the duty of the jury to return a verdict of guilty as charged, must be held for prejudicial error as being susceptible to the construction that the unintentional or inadvertent violation of the statutory speed limit, standing alone, constitutes culpable negligence. *S. v. Gurley*, 55.

**§ 71. Competency of Evidence in Prosecutions for Drunken Driving.**

Testimony to the effect that defendant, after having been taken into custody for driving a vehicle on a street while intoxicated, answered in the negative a question by the arresting officer as to whether he would like to take a blood test, *held* incompetent and its admission prejudicial, since defendant's negative answer did not amount to a refusal to submit to a blood test but, it not being shown that the expense of a blood test, if requested by defendant, would have been otherwise than at defendant's expense, amounted to no more than a statement by defendant that he did not choose to go to the expense of having a blood test made. *S. v. Paschal*, 795.

**§ 83. Operation of Oversized Vehicles on Highway without Permit.**

The operation on a highway of a tractor-trailer of a combined length of over 55 feet, the trailer being in excess of 8 feet wide, without a special permit, is a misdemeanor. G.S. 20-116, G.S. 20-119. A permit to operate an oversize vehicle on a designated highway between two designated points is not a permit to operate on a different highway to a different destination. *Lyday v. R. R.*, 687.

AVIATION

**§ 3. Injuries to Person in Flight.**

Evidence tending to show that the pilot of a plane, notwithstanding written warning that the auxiliary tank was to be used in level flight only, was using the auxiliary tank while reducing altitude and going into a bank preparatory to landing, that he failed to observe that the auxiliary tank indicator was standing on empty, that when the power failed he became excited and used the available seconds in attempting to switch tanks instead of giving attention to making a "dead stick" landing, etc. *is held* sufficient to be submitted to the jury on the question of his negligence. *Jackson v. Stancil*, 291.

While a carrier is not liable for error of judgment of the pilot which does not constitute positive negligence in exercising such judgment, the carrier is liable if the pilot, by his negligent conduct, creates a situation requiring the formation of a judgment and then errs in the exercise thereof. *Ibid.*

The State Court has jurisdiction of an action between residents to recover for negligent injury and death in an airplane crash occuring in another state while the plane was on a trip under contract made in this State. G.S. 63-16, G.S. 63-24. *Ibid.*

The liability of an owner or pilot of an aircraft for injury or death of a passenger must be based on negligence which is the proximate cause of the

AVIATION—*Continued*

injury or death, determined by the rules applicable to negligence in general, and such carrier is not an insurer of the safety of his passengers. *Ibid.*

The doctrine of *res ipsa loquitur* does not apply to an airplane crash, it being common knowledge that airplanes sometimes fall without fault of the pilot. *Ibid.*

A contract carrier is under duty to his passengers to exercise due care under the circumstances, and it is error for the court to charge that he is under duty to exercise the highest degree of care consistant with the practical operation of his business. *Ibid.*

BANKRUPTCY

**§ 7. Debts Discharged.**

Exceptions to the discharge of debts under the bankruptcy law must be confined to those plainly expressed, and the exclusion of claims based on fraud is limited to claims for "money or property" thus obtained, and it has been held that such exclusion does not extend to claims for services obtained by fraud. *Hoyle v. Bagby*, 778.

BASTARDS

**§ 11. Right to Custody.**

The mother of an illegitimate child, if a suitable person, is ordinarily entitled to the care and custody of the child, even though there be others who are more suitable. *In re Kimel*, 508.

BETTERMENTS

**§ 1. Nature and Requisition of Claim for Betterments.**

A claim for betterments is available only to one who makes permanent improvements while in possession of lands under color of title believed to be good, and therefore a widow may not assert a claim to betterments in a proceeding by the heirs for partition. *Batts v. Gaylord*, 181.

BILLS AND NOTES

**§ 6. Endorsement, Negotiation, Transfer and Ownership.**

Where a check is made payable to the drawer's own order and delivered to the drawer's creditor without endorsement, the right to collect passes to the lawful holder by mere delivery, and he has the right to demand endorsement. G.S. 25-55. *S. v. Cruse*, 456.

**§ 19. Nature and Elements of Insuring Worthless Checks.**

A person authorized to sign his name under the printed name of his employer on the employer's checks, and who does so under direction merely as a clerical task to authenticate the checks, cannot be found guilty of violating G.S. 14-107 upon the non-payment of the checks for insufficient funds. *S. v. Cruse*, 456.

Persons directing their employee to issue checks on the firm's account, knowing at the time that the firm did not have sufficient funds or credits with the drawee bank to pay the checks on presentation are guilty of knowingly putting worthless commercial paper in circulation. *Ibid.*

BILLS AND NOTES—*Continued.*

**§ 20. Prosecutions for Issuing Worthless Checks.**

Evidence that defendants instigated the drawing of checks on their firm's account and the delivery of the checks to creditors of the firm in payment of the firm's indebtedness, together with testimony of officers of the drawee bank that the firm did not have sufficient funds or credits therein to provide payment of the checks on presentation, and that defendants knew they could not draw on paper accepted by the bank merely for collection until the items had been collected, is sufficient to support a finding by the jury that the checks were drawn and delivered at the instigation of defendants with knowledge that the maker was without funds or credits sufficient to provide payment. *S. v. Cruse*, 456.

The fact that a firm's checks are payable to its own order and delivered without endorsement to its creditor for collection does not affect the liability of those instigating the issuance of the checks under G.S. 14-107, when at the time such persons have knowledge that the firm had insufficient funds or credits with the drawee bank with which to pay same. *Ibid.*

In a prosecution for issuing worthless commercial paper with knowledge that there were insufficient funds on deposit or to the credit of the drawer with which to pay same, the issuance of other worthless checks by the drawer during the same period is competent for the purpose of showing *scienter*. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

**§ 4. Sufficiency of Evidence and Nonsuit.**

Evidence of defendant's guilt of breaking and entering held sufficient to overrule nonsuit. *S. v. Peters*, 331.

CANCELLATION AND RESCISSION OF INSTRUMENTS

**§ 2. Cancellation and Rescission for Fraud or Mistake Induced by Fraud.**

On the issue of fraud in procuring the execution of a deed for nominal consideration, the fact that the grantee later sold the land at a price comparably less than his purchaser paid for other property in the neighborhood, is no evidence of fraud, and therefore evidence of the prices paid for the other land by the transferee is properly excluded. *Barnes v. House*, 444.

Where the parties to a deed understand that the conveyance was made for the purpose of having the grantee transfer to a designated person, misrepresentations as to the identity of the grantee cannot constitute an element of fraud when such grantee conveys to the designated third person and thus effectuates the understanding of the parties. *Ibid.*

Grantors may not assert misrepresentations as to the amount of the land embraced in the conveyance when the grantors are of legal age and were not prevented from reading the instrument by any trick, fraud, artifice, mistake or oppression. *Ibid.*

**§ 6. Limitations.**

Where it appears that more than three years prior to the institution of an action to rescind a deed for fraud for misrepresentations as to the quantity of land embraced in the conveyance, the grantors were served with summons in another action expressly setting out the fact that they had conveyed the entire tract of land, the action for rescission is barred by the three year statute of limitations. *Barnes v. House*, 444.

## CARRIERS

**§ 1. Definitions, State and Federal Regulation and Control.**

A common carrier of passengers is one which holds itself out to the public as willing to carry at a fixed rate all persons applying for transportation within the limits of its facilities; a private or contract carrier is one which contracts separately with each individual desiring transportation. *Jackson v. Stancil*, 291.

Whether a carrier is acting as a common carrier or contract carrier is a question of fact, but where the facts are not controverted, whether the evidence is sufficient to show that the carrier is a common carrier is a question of law for the court. *Ibid.*

The evidence in this case is held to show that defendant carrier did not hold himself out to the public, but contracted separately with all persons requesting air transportation, and therefore the evidence disclosed that defendant was a private or contract carrier, notwithstanding that he had an established place of business, operated his air service regularly as a business, and had a fixed schedule of charges. *Ibid.*

**§ 5. Rates.**

Mileage alone is not a sufficient basis for the determination of instrastate rates by the Utilities Commission, but the Commission must consider all factors involved in rate making, including competition from interstate carriers, the different modes of transportation, the topography and volume of business as affecting costs, etc. *Utilities Com. v. Motor Carriers*, 432.

**§ 18. Liability for Injury to Passengers.**

A private or contract carrier of passengers for hire owes them the duty to exercise ordinary care for their safe transportation; a common carrier owes them the duty of exercising the highest degree of care consistent with the practical operation of its business. *Jackson v. Stancil*, 291.

In an action against a pilot and his employer to recover for injury to one passenger and death of another from the negligence of the pilot, upon evidence disclosing that defendant flying service was a contract and not a common carrier, it is prejudicial error for the court to apply the standard of care required of a common rather than a contract carrier, and to charge the jury that the standard of care required of the carrier is the highest degree of care consistent with the practical operation and conduct of the business. *Ibid.*

## CHATTEL MORTGAGES AND CONDITIONAL SALES

**§ 1. Form, Requisites and Construction of Instruments in General.**

Trust receipts under which the trustor agrees that title to the subject chattels should remain in the *cestui* and that trustor should not sell or dispose of the chattels without paying the *cestui* the amount shown in the release price column, etc., constitute conditional sales contracts, which are treated under our law as chattel mortgages. *Rubber Co. v. Crawford*, 100.

**§ 8. Necessity for Registration and Right of Parties under Unregistered Instruments.**

An unregistered chattel mortgage or conditional sales contract is valid as between the parties. *Rubber Co. v. Crawford*, 100.

Judgment creditors may not levy upon chattels repossessed by mortgagee

CHATTEL MORTGAGES AND CONDITIONAL SALES—*Continued.*

prior to issuance of execution notwithstanding that mortgage was not registered. *Ibid.*

**§ 10. Lien of Instruments Registered in this State.**

Where chattel mortgage on an automobile is duly registered in the county in which the mortgagor resides, G.S. 47-23, a purchaser from the mortgagor does not acquire title free of the lien, notwithstanding his reliance upon the fact that the certificate of title of the Department of Motor Vehicles failed to show any outstanding liens. G.S. 20-57(d). *Finance Co. v. Pittman*, 550.

CLAIM AND DELIVERY

**§ 2. Proceedings in Claim and Delivery.**

In claim and delivery, defendant's answer denying plaintiff's right to immediate possession and defendant's wrongful detention of the goods raises these issues for the determination of the jury, and the submission of issues determining only whether plaintiff wrongfully took possession of the goods is insufficient, since even if it be established that plaintiff did not wrongfully take possession of the goods it would not follow that defendant had wrongfully detained them or that plaintiff has the right of permanent possession as against defendant so as to support judgment that paintiff is entitled to keep possession of the goods. *Rubber Co. v. Distributors*, 459.

Where plaintiff's right to repossess the chattels is dependent upon defendant's breach of consignment contract, the burden is on plaintiff to prove such breach. *Ibid.*

Defendant asserting special damages resulting from seizure of goods under claim and delivery has burden of proving quantum of damages. *Ibid.*

Where defendant in claim and delivery proceedings sets up the defense of payment, the burden of proof upon such defense is upon him, and when there is no evidence of valid payment the court may properly give peremptory instructions in plaintiff's favor upon the appropriate issues. *Finance Co. v. Pittman*, 550.

**§ 5. Judgment for Defendant and Liabilities on Plaintiff's Undertaking.**

Where the seizure by plaintiff is under *bona fide* claim of right, defendant may not recover punitive damages. *Rubber Co. v. Distributors*, 459.

CONSIGNMENT CONTRACTS

**§ 1. Construction and Operation.**

Where a consignment agreement between a manufacturer and a distributor provides that the agreement is terminable upon three days notice by either party, a subsequent agreement that the distributor should make monthly payments, so as to purchase the inventory within three years, modifies the original agreement as to the three days notice, and precludes the manufacturer from terminating the contract within three years except for breach of the contract by the distributor in failing to make payment for current withdrawals or failure to pay the monthly installments on the purchase price as specified in the contract. *Rubber Co. v. Distributors*, 459.

CONSTITUTIONAL LAW

**§ 1. Supremacy of Federal Constitution.**

The State courts are governed by the decisions of the Supreme Court of

CONSTITUTIONAL LAW—*Continued.*

the United States in interpreting defendant's rights under the Fourteenth Amendment to the Federal Constitution. *S. v. Davis*, 86.

**§ 4. Persons Entitled to Raise Constitutional Questions, Waiver and Estoppel.**

A party entering into a contract with knowledge of statutory provisions regulating the subject matter may not after liability attaches complain that the statutory provisions deprive him of property without due process of law. *Swain v. Ins. Co.*, 120.

The court will pass on constitutional questions only when they are squarely presented and necessary to the disposition of a matter then pending and at issue. *Carbide Corp. v. Davis*, 324.

**§ 6. Legislative Powers in General.**

Questions of public policy in regard to rates of carriers and public utilities fall within the province of the General Assembly. *Utilities Com. v. Motor Carriers*, 432.

**§ 7. Delegation of Power by General Assembly.**

Statute delegating authority to State Board of Education to license persons soliciting students for private schools held unconstitutional in failing to prescribe standards to guide the administrative agency. *S. v. Williams*, 337.

The General Assembly has delegated to the Utilities Commission a part of its power to determine questions of policy in regard to rates of public utilities and carriers. *Utilities Com. v. Motor Carriers*, 432.

**§ 8. Control over and Delegation of Power to Municipal Corporations.**

The constitutional restriction against delegation of power by the General Assembly to make law does not apply to municipalities or counties, and the General Assembly has the power, unhampered by constitutional restrictions, to provide statutory procedure for the annexation of territory by municipalities. *In re Annexation Ordinances*, 637.

**§ 10. Judicial Powers.**

The courts must declare the rights of the parties in accordance with the law established and settled by prior decisions, the question of whether public policy requires a change in the law being in the exclusive province of the legislative body. *Finance Co. v. Pittman*, 550.

**§ 12. Police Power — Regulation of Trades and Professions.**

The term "liberty" as used in the Fourteenth Amendment to the Constitution of the United States embraces not only freedom from unlawful restraint, but protects, among other liberties, the right to engage in the common occupations of life subject only to those controls which appear compellingly necessary in the interest of the public health, safety or morals. *S. v. Williams*, 337.

**§ 17. Removal and Civil Rights in General.**

Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our constitutional guaranties. Constitution, Art. I, sec. 17. *Muncie v. Ins. Co.*, 74.

The term "liberty" as used in the Fourteenth Amendment to the Con-

stitution of the United States embraces not only freedom from unlawful restraint, but protects, among other liberties, the right to engage in the common occupations of life subject only to those controls which appear compellingly necessary in the interest of the public health, safety or morals. *S. v. Williams*, 337.

**§ 18. Right of Free Press, Speech and Assemblage.**

The right of free speech and assemblage are not absolute rights but are circumscribed as to time and place, and such rights do not obtain when the circumstances are such that their exercise involves a trespass. *S. v. Advent*, 580.

**§ 20. Equal Protection, Application and Enforcement of Laws.**

Regulations governing the operation of private schools must apply equally to those within and those outside the State. *S. v. Williams*, 337.

The Fourteenth Amendment to the Federal Constitution prohibits only action on the part of the several states in regard to its subject matter and does not apply to private conduct of individuals however discriminatory or wrongful. *S. v. Avent*, 580.

G.S. 14-134 and G.S. 14-126 may not be held unconstitutional on the ground that they constitute State action, enforcing discrimination on the basis of race, since the statutes merely provide procedure for protection against trespassers in behalf of those in the peaceful possession of private property without regard to race, and the application of the statute in a particular instance for the protection of the clear legal right of racial discrimination appertaining to the ownership and possession of private property is not State action enforcing segregation. *Ibid.*

The enforcement of the right of the owner or possessor of private property to discriminate on the basis of race as to those he will permit to enter or remain on the premises violates no rights guaranteed by Article I, Section 17, of the Constitution. *Ibid. S. v. Williams*, 804.

A satute is a public law notwithstanding that it is not applicable to all parts of the State, it being sufficient to constitute it a public law if it applies equally to all persons within the territorial limits described in the Act. *In re Annexation Ordinances*, 637.

**§ 21. Right to Security in Person and Property.**

The right of property is a fundamental and inalienable right embracing all legal incidents appertaining, including the right to forbid trespass by others and the right to eject trespassers so long as the owner or his agent uses no more force than is reasonably necessary. *S. v. Avent*, 580; *S. v. Williams*, 804.

**§ 23. Rights and Interest Protected by Due Process Clause.**

An insurer who voluntarily issues its automobile liability policy with full knowledge of statutory provisions that failure of insured to give notice of a claim or an action against insured should not defeat the injured person's rights as against insurer, may not challenge the constitutionality of the statutory provisions on the ground that the liability of insured to the injured person, for which insurer is liable under the policy, was established in an action of which it had no notice and in which it was given no opportunity to be heard. Constitution of North Carolina, Art. I, sec. 17; Fifth Amendment to the Federal Constitution. *Swain v. Ins. Co.*, 120.

Whether a foreign corporation is doing business in North Carolina so as to subject it to the jurisdiction of the State's Courts is essentially a question of due process of law under the 14th Amendment to the Federal Constitution, which must be decided in accord with the decisions of the U. S. Supreme Court. *Duma v. R. R.*, 501.

**§ 24. What Constitutes Due Process.**

The constitutional right to trial by jury applies only to cases in which the prerogative existed at common law or was secured by statute at the time the Constitution was adopted. *In re Annexation Ordinances*, 637.

Jury trial is not required for annexation of territory by municipality, and the fact that residents of the territory annexed are brought into the city and their property subjected to city taxes wihout their consent does not deprive them of any constitutional rights. *Ibid.*

**§ 26. Full Faith and Credit to Foreign Judgments.**

A decree of divorce rendered in another state having jurisdiction of the parties is *res judicata* as to all matters in issue and determined therein. *Sears v. Sears*, 415.

**§ 27. Burdens on Interstate Commerce.**

Whether statute authorizing the State Board of Education to license solicitors of students for out of state private schools is unconstitutional as burden on interstate commerce, quaere? *S. v. Williams*, 337.

**§ 28. Necessity and Sufficiency of Indictment.**

Every person accused of crime has a right to be informed of the accusation against him with sufficient definiteness to identify the offense, to protect the accused from being twice put in jeopardy for the same offense, to enable the accused to prepare for trial, and to enable the court to proceed to judgment and pronounce sentence according to the rights of the case. *S. v. Barnes*, 711.

**§ 30. Due Process in Criminal Prosecutions.**

The State Court, in the discharge of its duty to protect defendant's rights, is governed by the State decisions in interpreting the State Constitution and law, but is governed by the decisions of the Supreme Court of the United States in interpreting defendant's rights under the Fourteenth Amendment to the Federal Constitution. *S. v. Davis*, 86.

The admission in evidence of voluntary confessions made by defendant while he was being questioned by officers of the law after his apprehension and arrest as an escaped convict, even though 16 days elapsed between his apprehension and the filing of a murder charge against him and his arraignment thereon, does not violate the Due Process Clause of the Federal Constitution, since under the federal decisions the rule denying the admission in evidence of confessions obtained before prompt arraignment is a rule of evidence adopted for the federal courts and is not a constitutional limitation on the states. *Ibid.*

Record held not to show that defendant was deprived of his constitutional right to communicate with friends and counsel after his arrest. *Ibid.*

Conviction of a person for violating an unconstitutional statute must be set aside as a violation of the "law of the land" clause of the State Constitution. *S. v. Williams*, 337.

CONSTITUTIONAL LAW—*Continued.*

Prosecution of Negro for trespass in refusing to leave lunch counter after request held not to violate constitutional rights. *S. v. Avent*, 580.

CONTRACTS

**§ 1. Nature and Essentials of Contracts in General.**

Parties have the right to contract as they deem fit unless contrary to public policy. *Muncie v. Ins. Co.*, 74. But statutory provisions in force at the time become a part of the contract to the same extent as though written into it. *Swain v. Ins. Co.*, 120.

**§ 3. Definitions and Certainty of Agreement.**

A contract between a water company and a municipality under which the company contracts to furnish water for fire protection will not be held too uncertain to support and action for damages resulting to a private property owner for failure of the contract to specify the quantity and pressure of the water to be furnished, since the agreement contemplates that the supply and pressure of water should be reasonably sufficient to accomplish its purpose. *Potter v. Water Co.*, 112.

**§ 5. Form and Requisition of Agreements and Parol Provisions.**

A written contract which does not come within the purview of the statute of frauds may be modified by subsequent parol agreement. *Rubber Co. v. Distributors*, 459.

Subsequent parol negotiations which do not reach the stage of an agreement of the parties cannot modify the original contract, and are properly disregarded in ascertaining what is the agreement of the parties, but may be considered only insofar as they bear upon the issue of damages. *Ibid.*

**§ 7. Contracts in Restraint of Trade.**

Contracts restraining employment are not favored and will be upheld only when founded on valuable consideration, are reasonably necessary to protect the interest of the covenantee, do not impose unreasonable hardship upon the covenantor, and do not unduly prejudice the public interest. *Paper Co. v. McAllister*, 529.

Evidence held sufficient to support findings that covenant in contract of employment not to engage in like business for termination of employment for any reason was void because not supported by consideration, because it embraced too much territory and too many activities, and also because the covenant was not contained in new contract of employment. *Ibid.*

A covenant that an employee would not engage in like business within a designated territory for a specified time after the termination of the employment must be construed as it is written, and the courts may not render the contract valid in part by splitting up the territory designated, since this would make a new contract for the parties. *Ibid.*

**§ 12. Construction and Operation of Contracts in General.**

Valid contractual provisions must be enforced as written and the court in interpreting a contract may not ignore any of its provisions. *Muncie v. Ins. Co.*, 74.

A contract is to be construed as a whole and each clause and word must be considered with reference to the other provisions of the agreement and

be given effect if possible by any reasonable construction. *Robbins v. Trading Post*, 474.

Where the language of a contract is free from ambiguity and its meaning clear, its construction is a matter of law for the court, and parol evidence will not be heard to contradict, add to, or vary its terms, since it will be presumed that the parties inserted all provisions by which they intended to be bound. *Robbins v. Trading Post*, 474.

Where a construction contract provides that the contractor should "complete in a satisfactory manner and as a first class turn-key job the entire construction of said dwelling * * * To use the same kind of material used" in a specified house, the phrase "first class turn-key job" refers to labor and the completion of the dwelling for occupancy and cannot be construed to refer to the quality of materials, since the materials to be used are expressly stipulated and controlled by the provision that they should be the same kind used in the other dwelling referred to. *Ibid.*

A contract will be construed to effect the intent of the parties unless such intent is contrary to law. *Power Co. v. Membership Corp.*, 596.

The interpretation placed upon a contract by the parties themselves will ordinarily be followed by the courts. *Ibid.*

An agreement will be construed as a whole and detached portions will be reconciled with the dominant intent as gathered from the entire instrument if possible, or if this cannot be done, will be rejected as repugnant to such intent. *Stanley v. Cox*, 620.

An agreement must receive a reasonable interpretation in accordance with the intention of the parties at the time the agreement is executed, which intent is to be gathered from the language employed by them, taking into consideration the character of the contract and its objects and purposes. *Ibid.*

Where a contract is susceptible to two constructions, one fair and reasonable and the other inequitable or under which it would operate as a snare, the courts will adopt that construction which makes the agreement rational and such as a prudent man would naturally execute. *Ibid.*

**§ 15. Right of Stranger to the Contract to Sue for Injuries Resulting from Negligence Breach of Contract.**

The owner of private property may sue a water company for damages resulting from the breach by the water company of its contract with the city to furnish water for fire protection. *Potter v. Water Co.*, 112.

Where a contract between a municipality and water company provides that the water company should not be liable for any failure or neglect to supply service by reason of strike or accident beyond its control, the burden is upon the water company to prove that its failure to provide service as contemplated by the contract was due to either of these grounds. *Ibid.*

**§ 25. Pleadings.**

Where, in an action on a contract, the complaint annexes the written agreement thereto, the written agreement fixes the rights and duties of the parties, and an allegation in the complaint as to the rights of the parties thereunder is a mere conclusion of law not admitted by demurrer. *Talman v. Dixon*, 193.

**§ 26. Comptency and Relevancy of Evidence.**

Where a construction contract stipulates the materials to be used in plain and unambiguous language, the kind and quality of the materials is controlled

CONTRACTS—*Continued.*

by the written agreement, and testimony of witnesses as to the meaning of its provisions as to the kind and quality of the materials to be used, and testimony of plaintiff as to subsequent declarations of defendant as to the meaning of this specification, is incompetent as tending to vary the written instrument. *Robbins v. Trading Post*, 474.

Where a construction contract stipulates that the materials to be used should be the same kind as those used by the contractor in another dwelling, and it appears that the contractor had constructed two other dwellings fitting the description, parol evidence is competent to identify the dwelling referred to. *Ibid.*

**§ 29. Measure of Damages for Breach of Contract.**

The measure of damages for the wrongful termination of a distributor contract by the manufacturer is ordinarily the loss of prospective net profits of which the distributor was deprived by such wrongful termination insofar as they can be ascertained and measured with reasonable certainty, and where the contract specifically stipulates that the distributor should bear the promotional expenses, such expenses are not recoverable. *Rubber Co. v. Distributors*, 459.

CORPORATIONS

**§ 4½. Books, Records and Financial Statements.**

Where a corporation has kept its book for a number of years according to an accepted method of accounting, which system is sufficient in computing its capital and surplus for franchise tax purposes and its income for income tax on a cash receipt basis, the Business Corporation Act, G.S. 55-37, does not make mandatory the abandonment of such system or the adoption of a new system of accounting by the corporation. *Watson v. Farms, Inc.*, 238.

G.S. 37-2 does not necessarily require a corporation to assign some value to each article of property owned by it, and where a corporation's statement to its stockholders discloses the quantity and kind of seed held by it, without assigning any particular monetary value to such seed, a stockholder is not entitled to *mandamus* to compel the corporation to assign a value to such seed in preparing its financial reports. *Ibid.*

**§ 7. Authority of Vice-President to Bind Corporation.**

A vice-president of a corporation ordinarily has authority to execute a contract for the purchase of goods used by the corporation in the regular course of its business, and the allegations and evidence in this case are held sufficient to make out a case of agency of the vice-president of defendant broadcasting company to purchase broadcasting equipment for the corporation. *Moore v. W O O W, Inc.*, 1.

COURTS

**§ 2. Jurisdiction of Courts in General.**

A challenge to the jurisdiction of the court may be made at any time, and it is the duty of the court to take notice of want of jurisdiction at any stage of the proceeding and dismiss the suit. *Jackson v. Bobbitt*, 670.

Where a court of general jurisdiction acts in the matter, there is a presumption of jurisdiction and the burden is upon the party asserting want of jurisdiction to show it. *Ibid.*

COURTS—*Continued.*

**§ 3. Original Jurisdiction of Superior Courts in General.**

The Superior Court is a court of general state-wide jurisdiction. Constitution of North Carolina, Article IV, § 2. *Jackson v. Bobbitt*, 670.

Where the Superior Court denies motion for judgment of nonsuit on the ground of want of jurisdiction without finding any facts, and the record fails to show any requests for findings, it will be presumed that the trial judge duly found that the court had jurisdiction over the subject matter and the parties unless the contrary appears from the record. *Ibid.*

Evidence held not to show that action was within exclusive jurisdiction of Industrial Commission. *Ibid.*

**§ 6. Appeals to Superior Court from Clerk.**

Where order confirming the award of appraisers is entered by the clerk on petitioner's motion and only the respondent appeals, the court in its discretion may permit the respondent to withdraw the appeal, and petitioner may not thereafter contend that respondent's appeal entitled both parties to a trial *de novo* before a jury in the Superior Court. *Ramsey v. R. R.*, 230.

**§ 7. Appeals and Transfers of Causes from Inferior Courts to Superior Court.**

The General County Court of Buncombe County has authority to dismiss an appeal from it to the Superior Court for failure on the part of appellant to perfect his appeal. *Rowland v. Beauchamp*, 231.

CRIMINAL LAW

**§ 9. Aiders and Abettors.**

Where two or more persons aid and abet each other in the commission of a crime, all being present, each is a principal and equally guilty regardless of any conspiracy or previous confederation or design. *S. v. Peeden*, 562.

**§ 16. Jurisdiction — Degree of Crime.**

G.S. 7-393 giving county courts exclusive original jurisdiction of misdemeanors has been modified by G. S. 7-64 so as to give the Superior Court concurrent jurisdiction of misdemeanors except in those counties excluded from the provisions of G.S. 7-64, and therefore where a county court coming within G.S. 7-64 binds a defendant over on a misdemeanor charge, defendant's motion in the Superior Court to remand to the county court is correctly denied. *S. v. Robbins*, 47.

Where a statute (Ch. 509, Session Laws of 1945) provides that upon demand for a jury trial by either the defendant or the State the cause should be transferred to the Superior Court, such statute modifies G.S. 7-240 so that upon transfer of a cause to the Superior Court upon demand of the State for a jury trial, the Superior Court acquires concurrent original jurisdiction even though the offense be a petty misdemeanor and even though the county is exempt from the provisions of G.S. 7-64. *S. v. Davis*, 224.

**§ 26. Plea of Former Jeopardy.**

Prosecution under a void indictment will not support a plea of former jeopardy. *S. v. Coleman*, 799.

**§ 34. Evidence of Defendant's Guilt of Other Offenses.**

In a prosecution for issuing worthless commercial paper with knowledge

that there were insufficient funds on deposit or to the credit of the drawer with which to pay same, the issuance of other worthless checks by the drawer during the same period is competent for the purpose of showing *scienter*. *S. v. Cruse*, 456.

**§ 46. Flight as Evidence of Guilt.**

Flight by defendant after the crime had been committed is competent to be considered in connection with other circumstances upon the question of guilt. *S. v. Downey*, 348.

**§ 55. Blood Tests.**

Statement of defendant that he did not wish to take a blood test is incompetent when record fails to show that it amounted to anything more than statement by defendant that he did not choose to go to the expense of having a blood test made. *S. v. Paschal*, 795.

**§ 60. Evidence in Regard to Footprints.**

In order for shoeprints found at the scene of the crime to have any probative force in connecting defendant with the commission of the crime, it must be shown that the shoeprints were made at the time of the crime and that the shoeprints correspond to shoes worn by the accused at that time, and evidence that shoeprints of a peculiar kind were found at the scene, without any evidence comparing such shoeprints with the shoes of defendant, has no tendency to identify defendant as the perpetrator of the offense. *S. v. Bass*, 318.

**§ 62. Evidence as to Sanity of Defendant.**

The testimony of witnesses, admitted to be experts, as to the mental capacity of defendant, based upon their examination of defendant pursuant to law to determine whether or not defendant was mentally competent to stand trial, is competent as substantive evidence. *S. v. Case*, 130.

**§ 71. Confessions.**

Confessions of a defendant are competent in evidence when, and only when, they are in fact voluntarily made. *S. v. Davis*, 86.

Evidence upon the *voir dire* to the effect that the officers advised defendant that he need not answer questions and need not make any statements, that if he did they might be used against him, that defendant was not threatened or mistreated in any way, that his sole request to communicate with any person was granted, *is held* substantial and competent evidence sufficient to support the court's finding that the confessions made by defendant were voluntary. *Ibid.*

The voluntariness of a confession is to be determined in a preliminary inquiry before the trial judge upon evidence adduced, and the determination of the trial court is conclusive on appeal if supported by competent evidence. *Ibid.*

Confession held competent under Federal Rules. *Ibid.*

**§ 72. Admissions and Declarations.**

The statement of one defendant in the presence of the other tending to implicate such other defendant in the commission of the crime is competent as an implied admission by such other defendant when the circumstances

are such as to call for a reply and such other defendant remains silent. *S. v. Case*, 130.

**§ 77. Privileged Communications.**

Testimony of an expert who examined defendant as provided by law to determine whether or not he was mentally competent to stand trial is not privileged, and the defendant may not assert that the physician-patient relationship existed in regard thereto. *S. v. Case*, 130.

**§ 84. Credibility of Witnesses, Corroboration and Impeachment.**

Slight variances in corroborating testimony do not render such testimony inadmissible, it being for the determination of the jury whether or not the testimony of one witness does in fact corroborate that of another. *S. v. Case*, 130.

**§ 85. Rule That Party May Not Impeach Own Witness.**

Where the State introduces in evidence testimony of a statement by defendant, the statement is presented as worthy of belief, and warrants nonsuit if the statement is not contradicted and is wholly exculpatory, but the State, by introducing such statement, is not precluded from showing that the facts were otherwise. *S. v. Downey*, 348.

**§ 87. Consolidation of Prosecution for Trial.**

The court has authority to order prosecutions of several defendants for offenses growing out of the same transaction to be consolidated for trial. *S. v. Cruse*, 456.

**§ 90. Admission of Evidence Competent for Restricted Purpose.**

Where evidence is competent against one defendant but incompetent against another, such other defendant may not complain of its general admission when he fails to object or request that the admission of the evidence be limited. *S. v. Case*, 130.

**§ 94. Expression of Opinion on Evidence by Court in Course of the Trial.**

Where the record discloses that defense counsel made repeated interruptions during the testimony of a State's witness, the trial court may properly command counsel to sit down and permit the witness to complete his answer without interruption, and the court's further comment that "this is not a Roman circus" does not amount to an expression of opinion by the court as to the facts in the case. *S. v. Davis*, 86.

The interrogation of witnesses by the court in this case *held* to exceed mere clarification of their testimony and to constitute an expression of opinion by the court on the facts in evidence, necessitating a new trial. *S. v. Peters*, 331.

**§ 96. Custody of and Incidents Affecting Jury.**

One defendant may not object to the action of the solicitor in taking a *nolle prosequi* in open court against other defendants charged with like offenses, and thereafter examining such other defendants as witnesses. *S. v. Bullard*, 809.

**§ 99. Consideration of Evidence on Motion to Nonsuit.**

Defendant's exculpating testimony can not justify nonsuit, since the credi-

bility of defendant's witnesses is for the determination of the jury. *S. v. Turner*, 37.

Exculpatory declaration introduced by the State does not warrant nonsuit when contradicted by other evidence. *S. v. Downey*, 348.

Upon motion to nonsuit, the evidence is to be considered in the light most favorable to the State. *S. v. Downey*, 348; *S. v. Avent*, 580.

On motion to nonsuit, only the evidence favorable to the State will be considered, and defendants' evidence will not be taken into consideration except insofar as it is not in conflict with the State's evidence and tends to explain or make clear the evidence for the State. *S. v. Avent*, 580.

**§ 100. Necessity for Motion to Nonsuit and Renewal.**

Where defendants introduce evidence, they waive their motions for nonsuit made at the close of the State's evidence, and must rely solely on their similar motions made at the close of all the evidence. G.S. 15-173. *S. v. Avent*, 580.

**§ 101. Sufficiency of Evidence to Overrule Nonsuit.**

There must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. *S. v. Bass*, 318.

The introduction by the State of testimony of declarations by defendant which tend to establish a defense does not warrant nonsuit when there is other evidence tending to contradict such declarations. *S. v. Revis*, 50.

In order to convict a defendant of a criminal offense, the State must prove first that the offense charged had been committed, that is proof of the *corpus delicti*, and second that the offense was committed by the defendant. *S. v. Bass*, 318.

The extra-judicial confession of guilt by a defendant charged with a crime is insufficient to support a conviction without evidence *aliunde* the confession tending to establish the fact that the crime charged had been committed. *Ibid.*

When the State relies upon circumstantial evidence, the incriminating facts must be of such nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis. *Ibid.*

**§ 107. Statements of Law and Application of Evidence Thereto.**

Where defendants are not charged with conspiracy, an instruction to the effect that if the State had satisfied the jury beyond a reasonable doubt that the defendants, or either of them, committed the offense, it would be the duty of the jury to return a verdict of guilty against the defendants, must be held for prejudicial error. *S. v. Miller*, 334.

**§ 111. Charge on Character Evidence and Credibility of Witnesses.**

A defendant is an interested witness as a matter of law in testifying in his own behalf, and the court may properly instruct the jury to scrutinize his testimony in the light of his interest, but that if after such scrutiny the jury finds he was telling the truth, to give his testimony the same weight as that of any other credible witness. *S. v. Turner*, 37.

Where defendant's brother-in-law, living in defendant's house, testifies that the nontaxpaid liquor found in the house belonged to him, an instruction to the effect that the brother-in-law, in testifying for defendant, was an interested witness as a matter of law, is erroneous, since it must be presumed that the interest of the witness against self-incrimination was at

CRIMINAL LAW—*Continued.*

least as strong as the bias which would incline him to testify in behalf of a brother-in-law. ***Ibid.***

Where the court defines corroborating testimony and instructs the jury that certain testimony was admitted solely for the purpose of corroboration, the failure of the court to add that the jury should consider it only if the jury finds that the testimony does in fact corroborate the testimony of the prior witness, will not be held for prejudicial error, there being no expression of opinion by the court as to whether the testimony of the witness did or did not corroborate the previous testimony. *S. v. Case*, 130.

**§ 112. Charge on Contentions.**

Where the testimony of defendant on cross-examination and on further cross-examination is elicted by the State solely for the purpose of impeaching defendant, and the defendant does not base any contention upon the testimony thus elicited by the State, a charge of the court to the effect that the defendant offered the testimony thus elicted and made certain contentions thereon, which statements of contentions also contained erroneous recitation of defendant's testimony upon the cross-examinations, must be held for prejudicial error, notwithstanding the failure of defendant to bring the matter to the court's attention before the submission of the case to the jury. *S. v. Revis*, 50.

The charge of the court that the State contended that certain evidence tended to show and "does show" certain facts will not be held prejudicial when, construing the charge contextually, it is apparent that the court was merely giving the contentions of the State that the evidence tended to show and did show certain facts without expressing an opinion on the part of the court as to what the evidence showed. *S. v. Case*, 130.

**§ 118. Sufficiency and Effect of Verdict in General.**

Where the warrant charges unlawful transportation and possession of nontaxpaid whiskey for the purpose of sale, a verdict of guilty of transporting nontaxpaid whiskey supports judgment and sentence, since the verdict spells out an offense contained in the warrant, it being permissible to treat the words "for the purpose of sale" as surplusage. *S. v. Miller*, 335.

**§ 121. Motions in Arrest of Judgment.**

A motion in arrest of judgment may be allowed only for defects which appear upon the face of the record proper, and defects which appear only by aid of evidence cannot be the subject of a motion in arrest of judgment. *S. v. Williams*, 337.

**§ 125. Motions for New Trial for Newly Discovered Evidence.**

A motion for a new trial for newly discovered evidence may not be made in a criminal case in the Supreme Court, but may be made only in the trial court, at the trial term, or, in case of appeal, at the next succeeding term of the Superior Court after affirmance of the judgment by the Supreme Court. *S. v. Nance*, 424.

**§ 126. Setting Aside Verdict as Being Contrary to Weight of Evidence.**

A motion to set aside the verdict as contrary to the weight of the evidence is addressed to the sound discretion of the trial court, and the refusal of the motion is not subject to review on appeal. *S. v. Downey*, 348.

CRIMINAL LAW—*Continued.*

**§ 131. Severity of Sentence.**

A sentence within the limitations prescribed by statute cannot be held cruel or unusual in the constitutional sense. *S. v. Downey*, 348.

**§ 136. Revocation of Suspension of Judgment or Sentence.**

Ordinarily, whether a defendant has violated the conditions of suspension of sentence is for the determination of the court upon the evidence, and its findings are not reviewable if supported by competent evidence unless there is a manifest abuse of discretion. *S. v. Guffey*, 43.

A judge may not activate a suspended judgment upon his findings of defendant's guilt of a subsequent criminal charge if defendant is acquitted of such charge by a jury or competent tribunal, since such acquittal precludes a judge from finding to the contrary. *Ibid.*

Order activating suspended sentence cannot stand when the conviction upon which it was based is reversed on appeal. *Ibid.*

Where the court suspends execution of sentence on condition that defendant pay a fine and be of good behavior during the ensuing five years, the payment of the fine does not preclude the court from thereafter ordering the sentence put into effect upon the court's finding that defendant had breached the terms of suspension by violating the criminal law. *S. v. Brown*, 195.

In a hearing to determine whether defendant had violated the terms of a suspended sentence, the introduction in evidence of the minutes of a Recorder's Court to show that defendant had pleaded guilty to a criminal charge in that court, will not be held prejudicial, since rules of evidence are not so strictly enforced in a hearing by the judge as in a trial by jury. *Ibid.*

Since a suspended sentence may not be activated upon a plea of *nolo contendere* to a subsequent offense, where the record is insufficient to show whether a charge of a subsequent offense was disposed of under a plea of *nolo contendere* or a verdict of guilty after trial, the cause must be remanded. *S. v. Rogers*, 569.

**§ 140. Motions in Supreme Court.**

A motion for a new trial for newly discovered evidence may not be made in the Supreme Court. *S. v. Nance*, 424.

**§ 154. Necessity for, Form and Requisites of Exceptions and Assignments of Error in General.**

An assignment of error which is not supported by an exception in the record, but only by an exception appearing in the assignment of error, will be disregarded. *S. v. Avent*, 580.

**§ 155. Objections, Exceptions and Assignments of Error to Admission or Exclusion of Evidence.**

An assignment of error to the admission of evidence cannot be sustained when the defendant has failed to make any objection when the evidence was admitted. *S. v. Case*, 130.

**§ 156. Exceptions and Assignments of Error to the Charge.**

Ordinarily, misstatements in the charge as to the evidence or the contentions must be brought to the trial court's attention with request for cor-

CRIMINAL LAW—*Continued.*

rection before the case is submitted to the jury. *S. v. Revis*, 50; *S. v. Case*, 130.

However, an instruction that defendant relied on testimony elicited by the State on cross-examination and made certain contentions thereon, etc., so tends to confuse the jury as to defendant's contentions that it must be held for error notwithstanding defendant's failure to call the matter to the court's attention. *S. v. Revis*, 50.

An assignment of error to the whole charge, without any statement as to what part appellants contend is erroneous, is a broadside exception and will not be considered. *S. v. Avent*, 580.

**§ 159. The Brief.**

An exception not discussed in the brief will be taken as abandoned. *S. v. Avent*, 580; *S. v. Coleman*, 799.

**§ 160. Presumptions and Burden of Showing Error.**

The burden is upon appellant to show error amounting to a denial of some substantial right in order to entitle him to a new trial. *S. v. Downey*, 348.

**§ 161. Harmless and Prejudicial Error in Instructions.**

An erroneous instruction as to the applicable law must be held prejudicial notwithstanding that in other portions of the charge the law is correctly stated, since the jury may have acted upon the incorrect instruction. *S. v. Gurley*, 55. An exception to the charge cannot be sustained if it is free from legal error when construed contextually. *S. v. Peeden*, 562.

**§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.**

The admission of testimony cannot be held prejudicial when defendant thereafter makes admissions of the same import. *S. v. Case*, 130.

Defendant may not complain of the admission of testimony brought out by defendant himself in the cross-examination of the State's witnesses. *Ibid.*

Where the record fails to show what the witness would have testified had he been permitted to answer questions asked by defndant's counsel on cross examination, the exclusion of the testimony cannot be held prejudicial. *S. v. Peeden*, 562.

DAMAGES

**§ 10. Punitive Damages.**

Where the consignor seizes and retains the goods in claim and delivery under *bona fide* claim of right based upon breach of the contract of consignment by the consignee, the consignee may not recover punitive damages even though the consignor's seizure be wrongful, since punitive damages may be awarded only for a wrong done willfully or under circumstances of rudeness, oppression, or reckless and wanton disregard of the rights of claimant. *Rubber Co. v. Distributors*, 459.

DEATH

**§ 6. Expectancy of Life and Damages.**

Where a party entitled to a distributive share of the recovery is charge-

DEATH—*Continued.*

able with negligence constituting a proximate cause of the death, the recovery may be diminished by the amount of such person's share. ***Dixon v. Briley***, 807.

DEEDS

**§ 19. Restrictive Covenants.**

Where the owner of a subdivision containing some 117 lots sells the lots therein with reference to a plat containing no notation that the lots were to be subject to restrictions, the fact that his deeds to 20 of the lots contained restrictions limiting the use of the propery to residential purposes does not impose such restriction on the other lots sold by deeds containing no such restriction. *Spruill v. White*, 71.

DIVORCE AND ALIMONY

**§ 1. Jurisdiction.**

In order for a court to have jurisdiction of an action for divorce, it is required not only that the court have jurisdiction of the parties, but also that it have jurisdiction of the material status, which is the *res* to be adjudicated, and in order for the court to have jurisdiction of the status, it is necessary that one of the parties be a resident of this State, which requires that such party have his domicile here. G.S. 50-8. ***Martin v. Martin***, 704.

Serviceman in this State on military orders is not domiciled here so as to be entitled to maintain action for divorce unless while in this State he forms a present intent to make his domicile here, and question of such intent is for jury to decide upon the evidence. *Ibid.*

Divorce is purely statutory in this State. Constitution of North Carolina, Article II, § 10. *Moody v. Moody*, 752; *Schlagel v. Schlagel*, 787.

**§ 3. Condonation.**

Where, in the husband's action for divorce on the ground of adultery, the wife pleads condonation and testifies to intercourse with him after he forgave the alleged adultery and that she was pregnant as a result of such intercourse, it is competent for the husband to deny the intercourse and to testify to nonaccess at the time in question, since the question of paternity is not in issue, and, by virtue of G.S. 50-11 his testimony could not have the effect of rendering illegitimate any child conceived during coverture. *Biggs v. Biggs*, 10.

**§ 4. Recrimination.**

The doctrine of recrimination obtains in this State, and a defendant in an action for divorce may set up as a defense in bar that plaintiff himself is guilty of misconduct constituting ground for divorce. *Sears v. Sears*, 415.

A divorce *a mensa* on the ground of abandonment legalizes the separation, and in the husband's action for divorce on the ground of separation instituted more than two years thereafter, his prior abandonment cannot be pleaded as recrimination. *Ibid.*

**§ 13. Divorce on the Ground of Separation.**

A decree awarding a divorce *a mensa et thoro* with permanent subsistence

to the wife based upon the misconduct of the husband does not preclude the husband from maintaining an action for divorce on the ground of two years separation, G.S. 50-6, when such action is instituted more than two years subsequent to the rendition of the decree of divorce, since the effect of the decree is to legalize the separation even though the separation was initially due to the fault of the husband, and therefore the husband's initial misconduct cannot be made the basis of a plea of recrimination. *Sears v. Sears*, 415.

A decree of absolute divorce on the ground of two years separation obtained by the husband does not affect the wife's right to continued subsistence in accordance with a prior decree obtained by her. *Ibid.*

A separation due to a brain injury suffered by the husband, which rendered him irrational to the extent he could not form an intention to remain separate and apart from his wife, is not ground for divorce under G.S. 50-6, and when this situation appears from the facts alleged in the complaint, demurrer is properly sustained, it not appearing from the complaint that the husband had been mentally competent for a period of two years at any time during the separation. *Moody v. Moody*, 752.

The fact that prior to separation arising by reason of brain injury suffered by the husband, both husband and wife had expressed an intent to separate from each other and terminate the marital relationship, is insufficient to support divorce on the ground of two years separation, since it is required that the separation be voluntary in its inception to come within the purview of the statute. *Ibid.*

**§ 16. Alimony without Divorce.**

The affidavits required by G.S. 50-8 in action for divorce are not required in actions for alimony without divorce under G.S. 50-16, and in actions under the latter statute verification may be made as in ordinary civil actions. *Rowland v. Rowland*, 329.

The complaint in this action, liberally construed, *is held* to state facts sufficient to constitute a cause of action under G.S. 50-16. *Ibid.*

A decree of divorce *a mensa et thoro*, awarding permanent support, obtained by the wife in another state, is a bar to a cross action for alimony without divorce set up by her in the husband's action instituted here for divorce on the ground of two years separation, since even though the judgment for subsistence is not final, it is subject to modification only by the court rendering the decree, and is therefore *res judicata* the matter. *Sears v. Sears*, 415.

The effect of a decree for alimony without divorce is to authorize separation of the husband and wife and to suspend the effect of the marriage as to cohabitation, without dissolving the marriage bonds, G.S. 50-16, which is the identical effect of a decree of divorce from bed and board, G.S. 50-7, and therefore alimony without divorce comes within the purview of a divorce action and G.S. 50-10 applies to actions for alimony without divorce. *Schlagel v. Schlagel*, 787.

The clerk of the Superior Court is without jurisdiction to enter a judgment by default in an action for alimony without divorce, since G.S. 50-10 provides that in such action the allegations of the complaint are deemed denied whether actually denied by pleading or not, and requires that material facts must be found by a jury. *Ibid.*

DIVORCE AND ALIMONY—CONTINUED.

**§ 18. Alimony and Subsistance Pendente Lite.**

Court may order subsistance *pendente lite* in wife's action for alimony without divorce, and findings and evidence held to support award in this case. *Mercer v. Mercer*, 164.

The fact that the wife has a separate estate does not preclude the court from allowing her subsistance *pendente lite*. *Ibid; Rowland v. Rowland*, 328.

The court may consider transfers of property by the husband to determine whether it would order the husband to secure so much of his estate to insure payment, but the court may not enjoin the husband from transferring his property. *Mercer v. Mercer*, 164.

The amount of subsistence *pendente lite* allowed by the court in its discretion is not reviewable on appeal in the absence of abuse of discretion. *Ibid; Rowland v. Rowland*, 328.

Upon the hearing to determine the amount to be awarded the wife of subsistence and counsel fees *pendente lite*, G.S. 50-16, the statute does not contemplate an accounting between the husband and wife even though the amount of his income is controverted, and an order of compulsory reference involving examination of books and business records located in various parts of the United States, with requirement of an undertaking for the payment of the expenses of the reference, does not come within the purview of G.S. 1-189(2) and is appealable as involving a substantial right and unrecoverable expense. *Harrell v. Harrell*, 758.

The purpose of the statutory provision for subsistence and counsel fees *pendente lite* is to put the wife on substantially even terms with the husband in the litigation pending trial, and it is not contemplated that the proceedings be delayed by a slow and costly reference even though the amount of the husband's income is controverted, since the court has plenary power to require the disclosure of any information within the knowledge or available to parties bearing upon the amount which should be allowed, which amount may be modified or vacated at any time on motion. *Ibid.*

**§ 20. Decree of Divorce as Affecting Right to Alimony.**

Provisions in a deed of separation for the payment of a designated sum monthly to the wife and for division of their property do not constitute "alimony" or a contract for alimony, and the executed provisions of such deed of separation, in the absence of a stipulation to the contrary therein contained, are not affected by a mere reconciliation of the parties or their subsequent divorce. *Stanley v. Cox*, 620.

**§ 21. Enforcing Payment of Alimony.**

Where, upon the jury's verdict upon appropriate issues, the court enters judgment decreeing divorce and providing that by consent of the husband it was decreed that he should make the payments specified in the deed of separation theretofore executed by the parties, and referred to in the judgment, and that such payments should constitute a lien upon the real property of the husband, the consent provisions constitute an equitable lien upon the husband's realty. *Stanley v. Cox*, 620.

DOMICILE

**§ 1. Definitions and Distinctions.**

In order to be a resident of this State, a party must not only reside here

DOMICILE—*Continued.*

but have the intention of making his permanent home here, to which, whenever absent, he intends to return, and from which he has no present intention of moving. *Martin v. Martin*, 704.

G.S. 50-18 cannot be given the effect of making this State the domicile of military personnel stationed in this State under military orders even though such presence here be for a duration in excess of six months, but the statute does have the effect of enabling a service man to establish this as the State of his residence while so stationed here if he actually intends to make this the State of his permanent residence. *Ibid.*

A person's declarations as to his intentions are not conclusive in establishing domicile, even when considered together with testimony as to his conduct and acts, but such testimony and evidence are circumstances from which the jury may find the fact of domicile. *Ibid.*

EJECTMENT

**§ 6. Nature and Essentials of Ejectment to Try Title.**

A complaint alleging that plaintiff is the owner of a described tract of land, that defendant claims the land, which claim constitutes a cloud on plaintiff's title, and that plaintiff is entitled to have such cloud removed and to a writ putting him in possession, states a cause of action in ejectment. *Walker v. Story*, 59.

**§ 7. Presumptions and Burden of Proof.**

In an action in ejectment, the burden is upon plaintiff to prove title good against the whole world or good against the defendant by estoppel. *Walker v. Story*, 59.

**§ 10. Sufficiency of Evidence and Nonsuit.**

In an action in ejectment instituted prior to the effective date of the 1959 amendment to G.S. 1-42, plaintiff's evidence of chain of title for little more than thirty years prior to the institution of the action, is insufficient to overrule nonsuit. Since the 1959 amendment by its terms does not apply to pending litigation, the effect of this amendment is not presented or decided. *Walker v. Story*, 59.

ELECTION OF REMEDIES

**§ 1. When Election is Required.**

Where the execution of a contract is procured by fraud, the party defrauded may either rescind the contract for the fraud or affirm the contract and sue for damages resulting from the fraud. *Brooks v. Construction Co.*, 214.

ELECTIONS

**§ 2. Qualifications of Electors and Registration.**

The failure of a registrar to administer the oath prescribed by law to an elector before registering him, and the registration of voters by persons other than the registrar, does not deprive the elector of his right to vote or rendor his vote void after it has been cast. *Overton v. Comrs. of Hendersonville*, 306.

ELECTIONS—*Continued.*

**§ 3. Boards of Election; Canvassing Returns.**

County board of elections has power to recount ballots upon suggestion of errors in tabulation prior to its canvass. *Strickland v. Hill*, 198.

A rule of the State Board of Elections in conflict with statute is void to the extent of such conflict. *Ibid.*

**§ 4. Ballots and Conduction of Elections.**

The determination of the qualification of a voter is addressed to the election officials, and a watcher has the right only to challenge a voter and, in the event the voter is permitted to vote, to have such voter write his name on the ballot for identification if there is a later inquiry as to the validity of the election, but a watcher is not entitled to conduct an examination of each of the voters he challenges, and when a watcher seeks to take charge of the inquiry the election officials may request him to cease impeding the progress of the election and to leave the polling place. *Overton v. Comrs. of Hendersonville*, 306.

It is a violation of G.S. 163-172 for a judge of elections to mark the ballots for voters without any request for assistance by the voters, or, in the event of a request for assistance, to fail to return the marked ballot to the voter in order that the voter may see how it was marked before putting it in the ballot box. *Ibid.*

The ignorance, neglect or misconduct of an election official, in the absence of actual fraud participated in by the voter, cannot deprive such voter, if he is otherwise entitled to vote, of his right to cast his ballot, or render his vote invalid. *Ibid.*

**§ 7. Contested Elections — Procedure.**

Where challenged voters have been required to sign their names on the ballots pursuant to G.S. 163-168, and an order is issued impounding all papers, books, ballots and reports relative to the election, movants, having been given the right to inspect the impounded documents, should check the poll books against the registration books to ascertain whether any unqualified persons were allowed to vote if they seek to obtain evidence upon which to challenege the election. *Overton v. Comrs. of Hendersonville*, 306.

**§ 10. Contested Elections — Sufficiency of Evidence.**

In an action to restrain municipal officials from proceeding pursuant to an election approving the sale of wine and beer within the city, evidence tending to show only irregularities on the part of election officials not vitiating the ballots cast, together with evidence tending to show the casting of ballots by unqualified voters in a number insufficient to affect the result of the election, is insufficient to vitiate the election, and nonsuit is correctly entered. *Overton v. Comrs. of Hendersonville*, 306.

**§ 14. Primary Elections.**

G.S. 163-86, by its express terms, applies to primaries as well as to general elections, *Strickland v. Hill*, 198.

G.S. 163-143, to the extent of conflict therewith, was repealed or superseded by the provisions of the 1933 Act codified as G.S. 163-86. *Ibid.*

ELECTRICITY

**§ 2. Service to Customers.**

Even though municipal corporations have authority to grant franchises to power companies, Utilities Commission retails authority over such companies, and where contract between power company and electric membership corporation authorizes such corporation to serve its members who reside in an incorporated town, and such contract is approved by Utilities Commission, such corporation is not precluded by law from serving such members even though they live in an incorporated town or who come within the corporate limits by annexation. *Power Co. v. Membership Corp.*, 596.

Where a power company has a franchise with a municipality to provide street lights and sell electricity to citizens of the municipality, upon the annexation of territory by the municipality the power company has the legal right and duty to serve the customers within the territory annexed except to the extent it is precluded from doing so by valid contract with another public utility in the area. *Membership Corp. v. Light Co.*, 610

Although, under Federal and State legislation relating to rural electrification, an electric membership corporation is created to operate only in rural areas and to serve members who are residents of such areas, when an area served by a membership corporation becomes an urban area by reason of annexation by a municipality, the electric membership corporation may continue to serve from its distribution lines constructed prior to the annexation persons who were theretofore members and decide to continue their membership and to receive service from such corporation, but persons in the annexed area who were not members prior to the annexation are not eligible for membership, since eligibility for membership is to be determined as of the date application for membership is made. *Ibid.*

EMINENT DOMAIN

**§ 9. Report of Appraisers and Appeal.**

Where order confirming the award of appraisers is entered by the clerk on petitioner's motion and only the respondent appeals, the court in its discretion may permit the respondent to withdraw the appeal, and petitioner may not thereafter contend that respondent's appeal entitled both parties to a trial *de novo* before a jury in the Superior Court. *Ramsey v. R.R.*, 230.

**§ 14. Persons Entitled to Compensation Paid.**

Where judgement in condemnation proceedings of a part of a mortgaged tract of land provides by consent that the compensation should be applied to the mortgage indebtedness, the parties are bound by the judgement. *Adams v. Taylor*, 411.

ESTOPPEL

**§ 6. Necessity for Pleading Estoppel.**

Even though an estoppel must be pleaded, where the facts constituting the basis of the estoppel are set out in the pleading there is a sufficient pleading of the estoppel, notwithstanding the term "estoppel" is not used. *Faircloth v. Ins. Co.*, 522.

EVIDENCE

**§ 5. Burden of Proof.**

The parties have a substantial right in the correct placing of the burden of

proof, which ordinarily rests on that party asserting the affirmative of the issue. *Rubber Co. v. Distributors*, 459.

**§ 11. Transactions or Communications with Decedent or Lunatic.**

In an action to establish a claim either in contract or in tort against the estate of a deceased person, the surviving party, or one in privity with him, is precluded by G.S. 8-51 from testifying in his own behalf with respect to personal transactions and communications between him and the deceased. *Carswell v. Greene*, 266.

G.S. 8-51 does not preclude a party from testifying as to substantive facts about which he has independent knowledge not acquired in a communication or transaction with a deceased person, and therefore an occupant in one car may testify as to what he saw with respect to the operation of another vehicle in an action against the estate of the driver of such other vehicle. *Ibid.*

Where, in an action against the estate of a deceased person to recover for negligent injury, the defendant introduces testimony of the acts of both drivers before and at the time of the collision, the defendant may not complain of testimony by plantiff as to plantiff's version of the transaction. *Ibid.*

**§ 12. Communications between Husband and Wife.**

While an act of intercourse between husband and wife is a confidential communication between them within the purview of G.S. 8-56, the statute does not preclude the husband from voluntarily denying the intercourse with the wife, asserted by her as condonation in his action for divorce on the ground of adultery, his testimony being otherwise competent, since the statute does not preclude the voluntary disclosure of confidential communications but provides merely that neither spouse may be compelled to divulge such communications. *Biggs v. Biggs*, 10.

**§ 14. Communications between Physician and Patient.**

The statutory provision making communications between physician and patient privileged, which privilege extends not only to information orally communicated by the patient but to knowledge obtained by the physician or surgeon by his own observation or examination, is a qualified and not an absolute privilege, and the judge of the Superior Court has the discretionary authority to compel disclosure of such communications if, in his opinion, such disclosure is necessary to a proper administration of justice and he so finds and enters such finding on the record. *Capps v. Lynch*, 18.

The qualified privilege attaching to communications between physician and patient is for the benefit of the patient's alone, and the patient may waive such privilege not only by express contract but also by implication, and whether there has been waiver by implication must be determined largely upon the facts and circumstances of each particular case. *Ibid.*

While a patient does not waive his right to assert that a communication between himself and his physician is privileged by merely testifying as to his own physical condition or his injuries when he does not go into detail and does not refer to communications made to him by his physician, where the patient does voluntarily go into detail regarding the nature of his injuries and testifies in regard to the nature and results of the operation performed by the surgeon, he waives the privilege, and the physician is competent and compellable to testify in regard thereto, since the patient will not be allowed

EVIDENCE—*Continued.*

to close the mouth of the only witness in a position to contradict him and fully explain the facts. *Ibid.*

**§ 48. Expert Testimony in Regard to Physics.**

Evidence of physical facts at the scene held insufficient predicate for expert testimony as to which of occupants was the driver. *Shaw v. Sylvester*, 176.

**§ 51. Examination of Experts.**

A hypothetical question to an expert should be predicated upon a finding by the jury of the existence of the facts assumed in the question, and no facts should be included in the question which have not been shown in evidence or which are not justifiably inferable from the facts in evidence. *Jackson v. Stancil*, 291.

EXECUTION

**§ 7. Claims of Third Persons.**

Judgment creditors may not levy upon chattels repossessed by mortgagee prior to issuance of execution, notwithstanding that mortgage is not registered. *Rubber Co. v. Crawford*, 100.

Where an intervenor seeking to restrain execution on certain chattels fails to introduce evidence of his title or right to possession of such chattels, motion of the judgment creditors to dismiss his claim to such chattels is properly allowed. *Ibid.*

EXECUTORS AND ADMINISTRATORS

**§ 16. Validity and Attack of Sale to Make Assets.**

While the authority of the court to order a sale of lands of a decedent to make assets is limited to the property owned by decedent, and the court may not order proprety owned by his heirs to be sold, the purchaser at the sale is entitled to a writ of assistance against the heirs as to all property purchased at the sale which is liable for the debts of the deceased. *Robertson v. Robertson*, 376.

Deed pursuant to a sale to make assets is subject to the same rules in ascertaining the boundaries of the land conveyed as though the instrument were a voluntary conveyance by the heirs, and what are the boundaries is to be determined as a matter of law by the court in conformity with the description set out in the deed to the purchaser, while the location of such boundaries on the ground is a question of fact for the jury. *Ibid.*

In ascertaining the boundaries in accordance with the description set out in the deed to the purchaser at a sale of lands of decedent to make assets, it is proper for the court to consider the situation of the parties and all pertinent descriptive matter in order to ascertin the intent of the parties. *Ibid.*

Where the petition for sale of realty to make assets describes the land by metes and bounds, excepting therefrom certain land theretofore sold by the decedent, with further averment to the effect that the land included in the description comprised a house, lot and outbuildings owned by decedent, and the heirs file answer admitting that the decedent was the owner of the real property described in the petition, the heirs are estopped by their admissions, supplemented by the order of sale and deed to the purchaser containing a description in conformity with that set out in the petition, and none of them

EXECUTORS AND ADMINISTRATORS—*Continued.*

may assert that the house and lot had theretofore been conveyed to one of them. *Ibid.*

FINES

**§ 1. Duties and Liabilities of Persons Setting Out Fire.**

While G.S. 14-136 was enacted primarily for the protection of property from fire damage, its language is sufficiently broad to cover injury to the person as well, and the act of setting out fire in a field in a more or less thickly populated community adjacent to residential lots upon which children are known to play, without giving notice to adjoining owners and without taking proper precautions to prevent the spread of the fire, constitutes negligence, and if such negligence is the proximate cause of injury, liability results. *Benton v. Montague*, 695.

Aside from the statute, the general rule that a person handling a dangerous instrumentality must exercise care commensurate with the danger, applies to the setting out of fire. *Ibid.*

Evidence held sufficient to raise issue of negligence of licensee in setting out fire to a field adjacent to residences, resulting in burning of child, but insufficient to establish liability of owner for licensee's negligence. *Ibid.*

FORGERY

**§ 2. Prosecution and Punishment.**

An indictment for forgery which follows the language of the statute but fails to aver the words alleged to have been forged by defendant, is insufficient. *S. v. Coleman*, 799.

Evidence that defendant signed the name of another in endorsing a check payable to such other person, and negotiated it, that such other person had not authorized anyone to sign his name on the check, and that such person was not owed the amount of the check, *is held* sufficient to overrule nonsuit in a prosecution for violation of G.S. 14-119 and G.S. 14-120. *Ibid.*

FRAUD

**§ 3. Misrepresentation.**

Where material facts are accessible to the vendor only, and he knows them not to be reasonably discoverable by a dilligent purchaser, the vendor is bound to disclose such facts, and in such instance *suppressio veri* has the same legal effect as *suggestio falsi*. *Brooks v. Construction Co.*, 214.

A promise of performance in the future cannot constitute the basis for an action for fraud unless the promisor intended not to comply with the promise at the time the promise was made, and such misrepresentation of the fact of present intent was made with the purpose of inducing plaintiff to act to his detriment. *Hoyle v. Bagby*, 778.

**§ 5. Reliance on Misrepresentation and Deception.**

A party who signs an instrument without reading it may not thereafter assert his ignorance of its contents, due to his own heedlesness, as fraud on the part of the other contracting party unless he is prevented from reading the instrument by some trick, artifice or misrepresentation. *Isley v. Brown*, 791.

**§ 8. Pleadings.**

Allegations to the effect that defendant induced plaintiff to do certain work

under contract upon misrepresentation that defendant would pay the contract price when defendant was paid for the entire job by the owner, together with allegations of fact establishing that defendant was not paid anything by the owner subsequent to the promise until the day plaintiff had completed his contract, is insufficient to allege a cause of action for fraud in the adsence of allegations that at the time the representation was made defendant had a then existing intent not to comply with his promise. *Hoyle v. Bagby*, 778.

The complaint in an action for fraud must set up with sufficient particularity the facts from which legal fraud arises or, when actual fraud is relied on, must specifically allege fraudulent intent and particularize the acts complained of as being frauduent. *Ibid.*

FRAUDS, STATUTE OF

**§ 1. Nature and Operation in General.**

A contract consigning goods to be stored in the consignee's warehouse, with provision for payment as the goods are withdrawn, is not required to be in writing. G.S. 22-1. *Rubber Co. v. Distributors*, 459

FRAUDULENT CONVEYANCES

**§ 1. Nature and Scope of Remedy — Sales in Bulk.**

G.S. 39-23 does ont apply to the seller's repossession of chattels under conditional sales contracts, even though the chattels constitute the bulk of the purchaser's stock of merchandise, since the debts secured by the instruments are not pre-existent but contemporaneous with the conditional sales. *Rubber Co. v. Crawford*, 100.

GAMES AND EXHIBITIONS

**§ 2. Liability of Proprietor to Patrons.**

The operator of an automobile race track is not an insurer of the safety of his invitees, but is charged with the duty of exercising for the safety of his patrons reasonable care commensurate with the known and reasonably foreseeable danger under the circumstances. *Lane v. Driver's Asso.*, 764.

Where it is doubtful upon the evidence whether customary barriers would have prevented injury from car traveling out of control at 120 miles per hour, charge of court which fails to present this question, in instructions on proximate cause, must be held prejudicial. *Ibid.*

HABEAS CORPUS

**§ 3. To Determine Right to Custody of Infants.**

In *habeas corpus* proceedings to determine the right to the custody of a minor child, the burden is upon petitioner to show that, in the event she is awarded custody of the child, resources for the support and maintenance of the child are or will be available, and in the absence of evidence and findings on this aspect, decree awarding the custody of the child to petitioner is erroneous. *In re Kimel*, 508.

**§ 4. Review.**

In *habeas corpus* proceedings to determine the right to the custody of a minor child, the findings of fact of the trial court are conclusive when supported by competent evidence. *In re Kimel*, 508.

## HOMICIDE

**§ 1. Definition and Distinctions.**

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation; manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Downey*, 348.

**§ 18. Presumptions and Burden of Proof.**

Evidence tending to show that defendant intentionaly shot the deceased, inflicting fatal injury, raises the presumptions that the killing was unlawful and done with malice, constituting murder in the second degree, nothing else appearing, and the burden is then upon the defendant to satisfy the jury of matters in mitigation or justification. *S. v. Revis*, 50; *S. v. Downey*, 348.

Where the indictment charges murder committed in the perpetration of the specific felony of rape, the State must make out its case in conformity with the indictment and must prove that the defendant killed deceased in the perpetration of or attempt to perpetrate that particular felony in order to support a conviction of murder in the first degree. *S. v. Davis*, 86.

**§ 20. Sufficiency of Evidence and Nonsuit.**

Testimony of declarations of defendant, introduced by the State for the purpose of showing an intentional killing, also tended to show that defendant shot deceased in self-defense while defendant was within his own home. Defendant's testimony at the trial, as well as evidence for the State, tended to show that defendant shot the deceased while defendant was on the porch of his house and the deceased was in the yard. *Held*: Nonsuit was correctly denied, since the declarations introduced by the State tending to establish self-defense were contradicted as to the place and circumstances of the killing by the other evidence. *S. v. Revis*, 50.

In this prosecution for murder committed in the perpetration of the felony of rape, the confession of defendant together with evidence of other numerous facts tending to establish the *corpus delecti* and the presence of defendant at the scene of the crime at the time it was perpetrated, *is held* sufficient to be submitted to the jury, and defendant's motion to dismiss was properly denied. *S. v. Davis*, 86.

The introduction in evidence by the State of a statement of defendant that he shot deceased in self-defense as deceased was coming on him with a pocket knife, does not warrant nonsuit when the State also introduces other evidence, including evidence of the absence of powder burns on the body of deceased, that the knife found at the scene was unopened, etc., tending to show that the killing was not in self-defense, since in such instance the State's evidence does not establish self-defense as a matter of law. *S. v. Downey*, 348.

Evidence that both defendants aided and abetted each other in committing the felonious assault resulting in the death of the deceased is sufficient to sustain the conviction of both, regardless of which inflicted the fatal injury. *S. v. Peeden*, 562.

**§ 23. Instructions on Presumptions and Burden of Proof.**

Where the indictment charges murder while perpetrating the crime of rape, an instruction to the effect that the jury must be satisfied from the evidence beyond a reasonable doubt that defendant caused the death of deceased while

HOMICIDE—*Continued.*

perpetrating or attempting to perpetrate that particular felony, and that otherwise the jury should return a verdict of not guilty, is not unfavorable to defendant, and the court is not required to give further instructions requested by defendant to the effect that defendant could not be found guilty if the jury found he killed deceased while perpetrating another and distinct felony. *S. v. Davis*, 86.

**§ 27. Instructions on Defenses.**

An instruction which, in effect, limits a verdict of not guilty to a finding by the jury that defendant killed deceased in self-defense must be held for prejudicial error, since defendant's plea of not guilty places the burden upon the State of satisfying the jury beyond a reasonable doubt of each and every essential element of the offense. *S. v. Dallas*, 568.

HUSBAND AND WIFE

**§ 7. Right to Testify for or Against Spouse.**

While neither the husband or wife is competent to testify as to nonaccess when the legitimacy of a child is in issue, the husband may deny the intercourse asserted by the wife as the basis of her plea of condonment set up by her as a defense in his action for divorce on the grounds of adultery, even though she testifies she is pregnant as a result of such intercourse. *Biggs v. Biggs*, 10.

**§ 11. Construction and Operation of Deeds of Separation.**

Where a separation agreement provides in specific and unambiguous terms that the wife should have the right to sole possession and occupancy of the home owned by the parties, other provisions of the agreement giving her the option to surrender possession upon certain contingencies and receive larger monthly payments from him, etc., does not render her right to sole possession and occupancy of the realty uncertain or indefinite or constitute her a mere tenant at will, the separation agreement being construed as a whole to effectuate the intention of the parties, and her right to possession is valid and enforceable between them and their assigns with notice. *Stanley v. Cox*, 620.

**§ 12. Revocation and Rescission of Deeds of Separation.**

Payments and settlements under deed of separation are not "alimony", and executed provisions of deed of separation are not affected by subsequent reconciliation of the parties or their subsequent divorce. *Stanley v. Cox*, 620.

INDICTMENT AND WARRANT

**§ 1. Preliminary Proceedings.**

The object of a preliminary hearing is to inquire into the legality of the arrest and detention and to effect a release for one who is held in violation of law, and the rule that a defendant is entitled to a prompt hearing upon his arrest can have no application where the defendant is in lawful custody as an apprehended escapee from the State's prison. *S. v. Davis*, 86.

**§ 9. Charge of Crime.**

While it is ordinarily sufficient to charge a statutory offense in the language of the statute, when the statute characterizes the offense in general terms or

INDICTMENT AND WARRANT—*Continued.*

does not sufficiently set forth all of the essential elements of the offense, the statutory word must be supplemented by allegations which set forth every essential element of the offense and explicitly identify it. *S. v. Barnes*, 711.

Where a statute defines an offense in general terms, an indictment for the offense which merely follows the language of the statute is insufficient, but the words of the statute must be supplemented by language setting forth every essential element of the offense so plainly, intelligently and explicitly as to leave no doubt as to the offense intended to be charged. *S. v. Coleman*, 799.

**§ 14. Time of Making Motion to Quash.**

A motion to quash made before pleading to the indictment is made in apt time. *S. v. Avent*, 580.

**§ 15. Grounds for Motion to Quash in General.**

A motion to quash is the proper method of testing the sufficiency of a warrant or indictment to charge a criminal offense. *S. v. Barnes*, 711.

**§ 16. Effect of Quashal.**

The quashal of a warrant for its failure sufficiently to charge the offense will not bar a future prosecution on a valid warrant. *S. v. Barnes*, 711.

**§ 17. Variance.**

Where the indictment charges a murder committed in the perpetration or attempt to perpetrate rape, the State must prove that the offense was committed in the perpetration or attempt to perpetrate that particular felony in order to support a conviction of murder in the first degree. *S. v. Davis*, 86.

INFANTS

**§ 9. Hearings and Decree Awarding Custody of Minors.**

A decree modifying a prior order awarding the custody of a minor to her paternal grandparents by awarding the child's custody to her mother will be affirmed when the decree is based upon findings, supported by evidence, of a material change of conditions subsequent to the prior order and that the best interest of the child, upon the conditions then subsisting, required the awarding of her custody to her mother. *In re Woodell*, 420.

In proceedings by the mother of an illegitimate child to obtain the custody of the child from the widow of the child's father, who had cared for and maintained the child until his death, findings that the person whom the mother had married after the birth of the child is sympathetic with her efforts to obtain its custody and will cooperate with her in maintaining and supporting the child if custody is awarded her, is insufficient to support the conclusion that it is to the best interest of the child that its custody be awarded the mother, and the cause is remanded for further inquiry on the question of whether resources for the support and maintenance of the child are or will be available through petitioner or from the child's separate estate. *In re Kimel*, 508.

INJUNCTIONS

**§ 3. Adequacy of Legal Remedy.**

Ordinarily, injunction will not lie where there is a full, adequate and complete remedy at law which is as practical and efficient as the equitable remedy. *Mercer v. Mercer*, 164.

INJUNCTIONS—*Continued.*

**§ 13. Continuance and Dissolution of Temporary Orders.**

Upon motion to show cause why a temporary restraining order issued in the cause should not be continued to the hearing, the merits of the controversy are not before the court, and the court has jurisdiction to determine only whether or not there has been a showing of equitable grounds for continuing the order. *Carbide Corp. v. Davis*, 324.

In an action to restrain the violation of the North Carolina Fair Trade Act, it is error for the court upon the hearing of an order to show cause why the temporary restraining order theretofore issued should not be continued to the hearing, to dissolve the temporary order on the ground of the unconstitutionality of the statute, since constitutional questions were not before the court on the hearing and could be concluded only by a final judgement on the merits allowing or denying a permanent injunction. *Ibid.*

INNKEEPERS

**§ 1. Who are Innkeepers.**

The operator of a privately owned restaurant operated in a privately owned building is not an innkeeper. *S. v. Avent*, 580.

INSURANCE

**§ 2. Brokers and Agents.**

Where the authority of a person to cancel a policy as agent for the insurer is in issue, and insured's attorneys admit the authenticity of the contract of agency after copy had been furnished them as contemplated by G.S. 8-91, and the court excludes the testimony of the agent as to the fact of agency and also the contract of agency, although the agent had testified to its authenticity, a new trial must be awarded, since even if it were proper to exclude the oral testimony of the agent on the ground that his authority was in writing, the exclusion of the properly identified and authenticated contract of agency was prejudicial. *Sealy v. Ins. Co.*, 774.

**§ 3. Construction and Operation of Policies in General.**

Statutory provisions in effect at the time of the execution of a contract of insurance become a part of the contract to the same extent as though actually written into it. *Swain v. Ins. Co.*, 120.

If a contract of insurance is ambiguous and susceptible to two constructions, the court will adopt that construction which is more favorable to the insured. *Seaford v. Ins. Co.*, 719.

**§ 5. Modification and Waiver of Provisions and Admissibility of Parol Evidence.**

In the absence of fraud of collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the insurer, even though a direct stipulation to the contrary appears in the policy. *Faircloth v. Ins. Co.*, 522.

**§ 10. Effective Date of Life Policy.**

The complaint purported to allege two separate causes of action based upon the single circumstance of delay of insurer in acting upon intestate's application for life insurance, the first cause *ex contractu* upon the assertion that

such delay, together with the retention of the premium, constituted an acceptance of the application, and the second in tort upon assertion that if the application had been rejected within a reasonable time intestate, being in good health, would have had sufficient time to have secured similar insurance with another insuror. *Held*: The two asserted causes of action are not repugnant and it was error for the court to strike, on motion, the allegations of the second cause of action on the ground that the two causes of action were inconsistent. *Bryant v. Ins. Co.*, 565.

**§ 53. Automobile Insurance — Subrogation.**

An insurer paying the loss in the insured owner of the chattel acquires only such rights by subrogation as the insured had. *Ins. Co. v. Chevrolet Co.*, 243.

**§ 54. Vehicles Insured under Auto Liability Policy.**

Where a policy of automobile liability insurance fails to define the term "automobile", the word must be given its ordinary and commonly accepted meaning, and embraces a tractor-trailer unit designed for use on highways. *Seaford v. Ins. Co.*, 719.

Where a policy of automobile liability insurance covers liability attaching while insured is operating a vehicle not owned by him, with exclusion if the vehicle is used in any other business or occupation of insured, the policy does not cover an accident occurring while insured was operating a tractor-trailer in the employment of another, even though such employment was limited to a single trip and insured had other employment upon which he depended primarily for his livelihood. *Ibid.*

**§ 60. Notice of Accident or Claim to Liability Insurer.**

In an action on a liability policy by the insured person after recovery of judgment by the injured person against the insured, the burden is upon plaintiff to show compliance with a provision of the policy requiring as a condition precedent to liability of insurer that notice of an accident should be given insurer as soon as practicable. *Obiter* in *MacClure v. Casualty Co.*, 229 N.C. 305, in regard to the burden of proof, disapproved. *Muncie v. Ins. Co.*, 74.

Under 1957 Vehicle Financial Responsibility Act violation of policy provisions by insured after liability has become absolute cannot defeat rights of injured party, even though the policy is not an assigned risk policy. *Swain v. Ins. Co.*, 120.

**§ 61. Whether Liability Policy is in Force at Time of Accident.**

Conflicting evidence as to whether insured paid to insurer's agent before the accident and within the time allowed the premium for a renewal period extending the policy under its terms beyond the date of the accident, *held* to raise the issue for the determination of the jury. *Burkette v. Ins. Co.*, 284.

**§ 62½. Waiver of Limitations of Auto Liability Policy.**

The filing by insurer of form SR-21 with the Department of Motor Vehicles as required by G.S. 20-279.19 does not *estop* insurer from thereafter denying coverage under the policy. *Seaford v. Ins. Co.*, 719.

**§ 76. Avoidance of Policy for Nonpayment of Premiums.**

Evidence held sufficient to support finding that insured paid additional premium to cover property at new location. *Faircloth v. Ins. Co.*, 522.

INSURANCE—*Continued.*

**§ 77. Forfeiture of Policy for Breach of Condition Relating to Use, Condition or Location of Property.**

An insurer may waive or be estopped to rely on a provision or condition in a policy of insurance on personalty relating to the location of the property at a specified place. *Faircloth v. Ins. Co.*, 522.

**§ 80. Knowledge of Local Agent and Waiver of Conditions.**

Evidence tending to show that insured notified insurer's agent of the removal of the personalty insured from the location designated in the policy, that the agent had advised insured to send an additional premium to cover the cost of extending coverage to the new location, that insured paid the additional premium and that the agent had knowledge of the new location, *is held* sufficient to sustain the conclusion that insurer waived the provisions of the policy or is estopped to rely thereon, even though endorsement modifying the policy in this respect was never issued. *Faircloth v. Ins. Co.*, 522.

**§ 88. Actions on Fire Policies.**

Insurer's contention that nonsuit in this action on a fire policy should have been granted for that insured's evidence disclosed that the fire occurred more than sixty days after verbal notice by insured of the removal of the property to a new location, and that therefore the oral contract was ineffectual under G.S. 58-177(d), was properly denied when insured does not rely upon a verbal agreement but upon waiver or estoppel of insurer to assert the provision as to the location of the personalty insured. *Faircloth v. Ins. Co.*, 522.

INTOXICATING LIQUOR

**§ 13c. Sufficiency of Evidence and Nonsuit on Charge of Illegal Possession and Possession for Sale and Sale.**

Evidence of constructive possession of intoxicating liquor held sufficient to be submitted to the jury. *S. v. Turner*, 37.

Evidence of defendant's guilt of illegal sale of intoxicating liquor to a minor *held* sufficient to take the case to the jury. *S. v. Nance*, 424.

Evidence tending to show that a quantity of liquor was found in defendant's house, but also that defendant had not been home for two days prior to the search, and that defendant's brother-in-law was found on the porch of the house intoxicated at the time of the search, is insufficient to show that defendant had either actual or constructive possession of the liquor, and nonsuit should have been granted. *S. v. Hunt*, 811.

**§ 16. Verdict.**

When the warrant charges unlawful transportation and possession of nontaxpaid whiskey for the purpose of sale, a verdict of guilty of transporting nontaxpaid whiskey supports judgment and sentence, since the verdict spells out an offense contained in the warrant, it being permissible to treat the words "for the purpose of sale" as surplusage. *S. v. Mills*, 335.

**§ 17. Judgment and Sentence.**

Conspiracy to violate the liquor law is a misdemeanor punishable by fine or imprisonment, or both. *S. v. Brown*, 195.

JUDGMENTS

**§ 8. Nature and Essentials of Judgments by Consent.**

A consent judgment is a contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and depends for its validity upon the consent of both parties. *Stanley v. Cox*, 620.

Record held to show that provisions for payments to the wife were entered by consent of both parties, even though neither the wife nor her attorneys required same. *Ibid.*

It will be presumed that the attorneys for a party signing a consent judgment acted in good faith and had the authority to sign it in behalf of their client. *Ibid.*

**§ 10. Construction and Operation of Consent Judgments.**

A consent judgement that payments specified in a deed of separation should constitute a lien on the husband's realty creates an equitable lien on the husband's land, and the consent judgement constitutes a new agreement superceding provisions in the deed of separation that the husband might convey his lands without the joinder of his wife free of all claims by her. *Stanley v. Cox*, 620.

**§ 14. Actions in Which Default Judgment May be Entered.**

The clerk is without jurisdiction to enter judgement by default in an action for alimony without divorce. *Schlagel v. Schlagel*, 787.

**§ 21. Attack of Irregular Judgments.**

Where, in an action, brought by a passenger against the respective drivers and owners of the two cars involved in a collision, to obtain judicial approval of a settlement with the respective liability insurers, the same attorney represents the conflicting interests of defendants, and the claim of the minor driver for personal injuries is not brought to the attention of the court, the judgment is irregular and motion in the cause is the proper remedy of the minor driver to have the judgment set aside. *Smith v. Price*, 285.

**§ 28. Conclusiveness of Judgments and Bar in General.**

In an action involving liabilities arising out of an automobile accident, the defendant is entitled as a matter of right to amend his pleadings to allege a prior judgment in favor of a third party, adjudicating that the negligence of both parties to the pending action concurred in proximately causing the injury and damage to such third party resulting from the same accident, the plea of *res judicata* being asserted at the first opportunity after the prior judgment had been rendered. *Hunt v. Crawford*, 382.

The doctrine of *res judicata* must be strictly construed, and in determining whether an issue is precluded by a former adjudication, the prior judgment must be interpreted with reference to the pleadings, the evidence, the judge's charge and the issues submitted and answered by the jury, and the plea may not be allowed when it deprives a party of his right to a day in court guaranteed by the Constitution. *Gunter v. Winders*, 782.

A judgment in favor of a passenger in one of the vehicles against the defendants respectively responsible for the operation of the vehicles involved in the collision will not operate as an adjudication of the rights of defendants *inter se* unless they had an opportunity to cross-plead so that their rights *inter se* were brought into issue and embraced in the adjudication, since a right may not be precluded without an opportunity to be heard. *Ibid.*

JUDGMENTS—*Continued.*

**§ 32. Judgments of Courts of Other States as Res Judicata.**

A decree of divorce rendered by another state in *res judicata* as to all matters in issue and determined therein; thus where such decree awards the wife permanent subsistance it bars her from setting up a cross-action for alimony without divorce in her husband's suit for divorce instituted in this State. *Sears v. Sears*, 415.

**§ 33. Judgments of Nonsuit as Res Judicata.**

A plea of *res judicata* on the ground of a prior judgment of nonsuit can be sustained only if both the allegations and evidence in the actions are substantially the same, and it is error for the court to determine the plea on the pleadings alone prior to the introduction of evidence. *Hall v. Carrol*, 220.

**§ 34. Conclusiveness of Consent Judgment.**

Consent judgment as to application of recovery in eminent domain is binding on the parties. *Adams v. Taylor*, 411.

**§ 38. Plea of Bar, Hearings and Determination.**

Where, in action to recover for the wrongful death of a passenger in an automobile, the complaint alleges separate acts of negligence of the defendants and that intestate's death resulted from the negligence of defendants as set forth, with the legal conclusion that defendants were jointly and severally liable; and the issues and verdict establish the negligence of each defendant separately as a proximate cause of intestate's death; *held*, the record fails to establish the joint and concurrent negligence of the defendants and is insufficient to sustain the plea of *res judicata* as a matter of law in a subsequent action between the defendants. *Gunter v. Winders*, 782.

LABORER'S AND MATERIALMEN'S LIENS

**§ 2. Contract with Husband and Wife.**

Plaintiff's evidence in this case is held sufficient to permit the inference that the contract for the furnishing and installation of electrical equipment in the dwelling owned by the defendants by the entireties, was made and entered into by and between plaintiff and both of the defendants. *Grant v. Artis*, 226.

LARCENY

**§ 7. Sufficiency of Evidence and Nonsuit.**

Evidence of defendant's guilt of larceny held sufficient to overrule nonsuit. *S. v. Peters*, 331.

LIMITATIONS OF ACTIONS

**§ 1. Nature and Construction of Statutes of Limitation in General.**

Once the statute of limitations begins to run against an action, the statute continues to run against such action. *Rowland v. Beauchamp*, 231; *Speas v. Ford*, 770.

**§ 7. Fraud, Mistake or Ignorance of Cause of Action.**

The statute of limitations does not begin to run against a cause of action for fraud until the discovery of fraud or the time it should have been discovered in the exercise of reasonable diligence. *Brooks v. Construction Co.*, 214.

An action for fraud is barred after the lapse of three years from the date the fraud is discovered. G.S. 1-52(9). *Speas v. Ford*, 770.

Where defendant in his answer alleges that he refused to comply with his contract on the contractual date because of his discovery of fraudulent misrepresentations inducing his execution of the contract, and files a cross action against plaintiff and his co-defendant for such fraud more than three years after the contractual date, judgment dismissing the cross action on motion upon the plea of the three year statute of limitations is without error. *Ibid.*

**§ 11. Disabilities.**

In regard to the right of action of a minor to recover for personal injury negligently inflicted, the statute of limitations begins to run upon the appointment of a next friend for the special purpose of bringing such action. *Rowland v. Beauchamp*, 231.

**§ 12. Institution of Action, Discontinuance and Amendment.**

Where an action for wrongful death is instituted against several defendants and nonsuited for variance, a second action instituted within one year of the nonsuit is a continuation of the original action in so far as a party who is a defendant in both actions, upon substantially similar allegations of negligence, is concerned, notwithstanding that some of the parties defendant in the first action were not joined in the second and the fact that parties were joined as defendants in the second action who were not defendants in the first. *Hall v. Carroll*, 220.

Where an action instituted by a next friend to recover for the negligent injury of a minor is instituted within three years of the injury and is nonsuited, a new action may be instituted within one year of the judgment of nonsuit when the allegations in regard to the negligence are substantially the same in both actions, notwithstanding that the second action may be instituted by a different person acting as next friend, since under the provisions of G.S. 1-25 the second action is considered but a continuation of the first. *Rowland v. Beauchamp*, 231.

Where appeal is taken from a county court to the Superior Court from judgmen of involuntary nonsuit, but the appeal is not perfected, the judgment does not become final in the sense that it ends the action until judgment is entered dismissing the appeal, and a new action may be instituted within one year thereafter. *Ibid.*

G.S. 1-25 is an enabling staute extending the period of limitation, and should be liberally construed. *Ibid.*

**§ 16. Procedure to Let Up Defense of the Statute.**

Ordinarily the bar of a statute of limitations is a mixed question of law and fact, and may not be determined on motion to dismiss, but where all the facts with reference thereto are admitted, the question becomes a matter of law and can be raised by motion to dismiss. *Rowland v. Beauchamp*, 231.

**§ 17. Burden of Proof.**

When the applicable statute of limitations is pleaded, the burden rests on the party asserting the cause of action to prove his claim is not barred. *Speas v. Ford*, 770.

**§ 8. Sufficiency of Evidence, Nonsuit and Directed Verdict.**

Where defendant pleads the three year statute of limitations in plaintiff's

LIMITATIONS OF ACTIONS—*Continued.*

action for fraud, the introduction of evidence by plaintiff's tending to show that the action was instituted less than a year after the discovery of the fraud and that the fraud was not discoverable in the exercise of due diligence before that time, precludes nonsuit on the ground of the bar of the statute, plaintiffs having assumed and carried the burden of proof upon the issue. *Brooks v. Construction Co.*, 214.

The court may sustain a plea of the statute of limitations when it appears upon the face of the pleading that the claim is barred. *Speas v. Ford*, 770.

MANDAMUS

**§ 1. Nature and Grounds of Remedy in General.**

*Mandamus* does not lie when plaintiff fails to establish the nonperformance of a duty by defendant. *Watson v. Farms, Inc.*, 238.

MASTER AND SERVANT

**§ 1. Nature and Requisites of Relationship in General.**

Evidence tending to show that the owner of a field granted permission to an individual to use a portion of the field for a small garden, and that pursuant to such permission the individual, without knowledge of the owner, set out fire to the dry grass and vegetation covering the field, *is held* insufficient to show the relationship of master and servant between the owner and the individual in regard to the setting out of fire, the individual being a mere licensee. *Benson v. Montague*, 695.

**§ 3. Distinction between Employees and Independent Contractors.**

A contractural declaration that one of the contracting parties should have exclusive direction and control in the performance of the work is not conclusive as to whether such party is an independent contractor, but it is also necessary that the evidence disclose that the work was in fact performed pursuant to that contract. *Watkins v. Murrow*, 652.

Lessor of vehicle for trip in interstate commerce held to have retained such control over the driver as to be the employer. *Ibid.*

**§ 18. Liability of Contractor to Employees of Subcontractor.**

Where the main contractor undertakes to provide a hoist for the use of a subcontractor in the performance of the work under the subcontract, the main contractor is under duty to exercise the care of a reasonably prudent person to provide the employees of the subcontractor with a hoist reasonably suitable for the intended uses when properly operated. *Johnson v. Frye & Sons*, 271.

Evidence held insufficient to show that main contractor failed to provide employees of subcontractor with a hoist reasonably suitable for intended uses when properly operated. *Ibid.*

Employee of purchaser may not sue on warranty and may not recover for dangerous condition without alleging and showing in what respect design, material or construction of machinery was dangerous and that seller knew or should have known of defect. *Wyatt v. Equipment Co.*, 355.

**§ 48, 51. Independent Contractors and Dual Employments.**

Where the evidence discloses that the lessor of vehicles for trips in interstate commerce under lessee's franchise employed and paid the drivers of

such vehicles and did in fact exercise direction and control over the drivers on such trips, the lessor is the employer of such drivers, notwithstanding provision in the trip-lease agreement that the drivers should be under the exclusive direction and control of lessee, and lessor is liable for compensation to one of such drivers for injuries received in an accident arising out of and in the course of his employment. *Watkins v. Murrow*, 652.

The lessee of vehicles, with drivers furnished by lessor, for trips in interstate commerce under lessee's franchise will be held liable as a matter of public policy for compensation for injury to such drivers by accident arising out of and in the course of their employment. *Ibid.*

While the lessee of a vehicle for a trip in interstate commerce may, as a matter of public policy, be held liable by a driver for injuries received by accident arising out of and in the course of the employment, as between lessor and lessee the contractual provisions between them as to liability may be enforced when the rights of the employee are not adversely affected, and under provisions of the contract obligating lessor to indemnify lessee against any loss resulting from injury or death of such driver, the Industrial Commission may hold lessor and its insurance carrier primarily liable. *Ibid.*

**§ 53. Injuries Compensable in General.**

Whether an injury to an employee arises out of and in the course of his employment within the purview of the Compensation Act is a mixed question of law and fact. *Allred v. Allred-Gardner*, 554.

Where a driver is responsible for the care and safekeeping of the vehicle while being driven on a trip, and customarily sleeps in the cab while on a trip, injury to the driver from carbon monoxide poisoning while he was sitting in the cab at his destination awaiting the opening of the business of the consignee, is an injury by accident, and such poisoning is not an occupational disease. *Watkins v. Murrow*, 652.

**§ 54. Causal Relation between Employment and Injury in General.**

Where an employee who has been subject to "black-outs" for a number of years is required to drive an automobile in making service calls in the performance of the duties of his employment, and while driving back to the employer's place of business after having made a service call is injured in an accident as a result of "blacking-out" and hitting a pole, the injury arises out of and in the course of his employment, since the duties of the employment placed him in a position increasing the dangerous effects of his idiopathic condition. *Allred v. Allred-Gardner*, 554.

**§ 61. Compensation Act — Injuries on Highway.**

Where an employee who has been subject to "black-outs" for a number of years is required to drive an automobile in making service calls in the performance of the duties of his employment, and while driving back to the employer's place of business after having made a service call is injured in an accident as a result of "blacking-out" and hitting a pole, the injury arises out of and in the course of his employment, since the duties of the employment placed him in a position increasing the dangerous effects of his idiopathic condition. *Allred v. Allred-Gardner*, 554.

**§ 63. Compensation Act — Hernia and Back Injuries.**

Evidence tending to show that the injury to the employee's back resulted when, in the course of his employment, he bent over to one side to lift a sec-

MASTER AND SERVANT—*Continued.*

tion of prefabricated chimney weighing some forty pounds, *is held* sufficient to support a finding that the injury resulted from an accident arising out of and in the course of his employment. *Searcy v. Branson*, 64.

**§ 66. Occupational Diseases.**

Carbon monoxide poinsoning of truck driver is not occupational disease. *Watkins v. Murrow*, 652.

**§ 67. Amount of Compensation.**

There is no maximum amount of an award when there is permanent disability due to the injury to the spinal cord. *Baldwin v. Cotton Mills*, 740.

**§ 74. Review of Award for Change of Condition.**

The Industrial Commission has jurisdiction to review an award for change of condition *ex mero motu* or upon application at any time within one year after the last payment of compensation under the prior award, and when application is aptly made, the fact that the Industrial Commission does not actually hear the claim for change of condition until the elapse of more than one year after the last payment of compensation is immaterial. *Baldwin v. Cotton Mills*, 740.

**§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.**

The Industrial Commission has authority to promulgate rules not inconsistent with Article One of the Workmen's Compensation Act for the purpose of carrying out the provisions of the Act, G.S. 97-80, and the rule of the Commission requiring that upon appeal to the full commission the particular grounds for appeal should be set forth or be deemed abandoned, is valid. *McGinnis v. Finishing Plant*, 493.

The Industrial Commission has jurisdiction to review an award for change of condition *ex mero motu* or upon application at any time within one year after the last payment of compensation under the prior award, and when application is aptly made, the fact that the Industrial Commission does not actually hear the claim for change of condition until the elapse of more than one year after the last payment of compensation is immaterial. *Baldwin v. Cotton Mills*, 740.

**§ 83. Jurisdiction of Commission — Employment in This and Other States.**

Industrial Commission has no jurisdiction where employee is nonresident, or contract is not made here, or employer has no place of business here. *Suggs v. Truck Lines*, 148.

Driver held employee of lessee and not lessor of vehicle for trip in interstate commerce. *Ibid.*

**§ 84. Jurisdiction of Commission — Exclusion of Common Law Action.**

Evidence held not to show that action was within exclusive jurisdiction of Industrial Commission, and motion to dismiss was properly overruled. *Jackson v. Bobbitt*, 670.

**§ 91. Findings and Award of Commission.**

Where the trial commission finds for claimant in every respect and enters an award, and the full commission affirms the findings and conclusions of

MASTER AND SERVANT—*Continued.*

law of the hearing commissioner, the award is in effect a ruling on defendant's motion to dismiss for want of jurisdiction. *Baldwin v. Cotton Mills*, 740.

**§ 93. Compensation Act — Review in Supreme Court.**

On appeal from an award of the Industrial Commission, the courts may not review the findings except to determine whether they are supported by competent evidence, since the findings of the Commission which are supported by competent evidence are conclusive, even though there be evidence that would support a contrary finding. *Searcy v. Brannon*, 64.

Where on appeal to the Superior Court from Industrial Commission appellant concedes that the findings of the Commission are supported by evidence but contends that the conclusions of law are not supported by the findings, appellant's exceptions amount to no more than an exception to the judgment, presenting only whether the facts found support the judgment and whether error of law appears on the face of the record. *Suggs v. Truck Lines*, 148.

Where, in the hearing before the Industrial Commission, claimant challenges only the findings and conclusions as to whether later disability was the result of new injuries or was but a recurrence of his former condition, he may not on appeal to the Superior Court assert for the first time that the defendants had waived the provisions of G.S. 97-47, since this would be a change in the theory of trial. *McGinnis v. Finishing Plant*, 493.

The findings of fact of the Industrial Commission are conclusive if supported by any evidence, and when its conclusions of law are supported by the findings, the award must be affirmed. *Ibid; Baldwin v. Cotton Mills*, 740.

**§ 97. Construction of Employment Security Act in General.**

The Employment Security Law must be construed to promote and not to defeat the legislative policy as declared in the statute, and the courts will not construe the Act in such manner as to discourage parties from entering into contracts designed to lessen the hardships incident to termination of employment. *In re Tyson*, 662.

**§ 105. Right to Unemployment Compensation.**

Discharged employees who are entitled under the contract of employment to severance and vacation pay are not entitled to unemployment compensation until the moneys paid as severance and vacation pay have been exhausted by weeks elapsed at the employees' weekly wage rate, since such severance and vacation pay constitute "wages" within the purview of G.S. 96-8(13)a, and since such employees are disqualified under G.S. 96-14(8), it not being the policy of the law that an employee should receive by reason of unemployment a weekly sum in excess of what he would receive if employed. Retirement pay received by an employee comes within the same category. *In re Tyson*, 662.

MORTGAGES

**§ 1. Mortgages and Equitable Liens in General.**

Liens may be created by agreement, and every executory agreement in writing that sufficiently describes certain property, and expresses the intent that the property should be security for a debt or other obligation, creates an equitable lien enforceable against all except those having a superior title or claim or who take without notice. *Stanley v. Cox*, 620.

MORTGAGES—*Continued.*

**§ 16½. Partial Payment.**

Where part of a mortgaged tract of land is condemned and the judgment directs that the compensation be applied to the reduction of the mortgage indebtedness, evidenced by a single note payable in a specified number of monthly installments, the payment should be applied so as to disturb the contractual rights and obligations of the parties no further than necessary, and therefore should not be used to reduce the number of installments or to shorten the time for payment, but the amount of the monthly payment required to discharge the indebtedness, principal and interest, in the contractual time, should be recomputed on the basis of the debt as thus reduced. *Adams v. Taylor*, 411.

**§ 19. Right to Foreclose and Defenses.**

Where there is dispute as to the amount of the monthly payments necessary to discharge the mortgage indebtedness in accordance with the rights of the parties under the contract, foreclosure is properly enjoined when the holder of the note demands monthly payments in excess of that to which he is entitled, and upon computation of the correct amount of the monthly payments, the mortgage debtor will be given a reasonable time to pay the installments then due. *Adams v. Taylor*, 411.

MUNICIPAL CORPORATIONS

**§ 2. Territorial Extent and Annexation.**

Municipal corporations have the power to enlarge their corporate limits, and when they do so the annexed territory and its citizens are subject to all ordinances and regulations in force in the municipality. *Power Co. v. Membership Corp.*, 596.

G.S. 160-453.13 *et seq.* declares the policy of the State in regard to the annexation of territory by municipalities having a population of five thousand or more and provides in detail the procedure, guiding standards and requirements of annexation under the statute, and delegates to the governing boards of such municipalities only the discretionary right to employ the procedure outlined in the statute provided that the requirements and guiding standards of the Act are complied with, and therefore the statute does not contravene either Article I, section 8, or Article II, section 1, of the Constitution of North Carolina. *In re Annexation Ordinances*, 637.

Where the governing body of a municipality in good faith obtains all of the information required by the annexation statute with respect to the character of the area or areas to be annexed, the density of the residential population therein, the boundaries therof and the percentage of such boundaries which are contiguous to the municipality's boundaries, and provides or makes provision to extend all governmental services to the annexed areas, the compliance with the statute is substantial and real and cannot be considered a mere ritual of conformity. *Ibid.*

The fact that the residents of territory annexed by a municipality are brought within the city without their consent and their property made subject to future city taxes does not deprive such residents of their liberty or property without due process of law. Article 1, section 17, of the Constitution of North Carolina; Fourteenth Amendment to the Constitution of the United States. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

**§ 4. Powers in General.**

A municipal corporation has only those powers conferred upon it by statute and those powers necessarily implied by law therefrom. *Dennis v. Raleigh*, 400.

**§ 5. Distinction between Governmental and Private Powers.**

In selling water for private consumption, a municipality is engaged in a proprietary capacity and is liable for negligence in connection therewith; in supplying water for fire fighting purposes or for other public purposes, a municipality is engaged in a governmental capacity and cannot be held liable for negligence in connection therewith. *Faw v. North Wilkesboro*, 406.

A municipal corporation exercises two classes of powers: One governmental, which are performed for the public good in behalf of the State, and are discretionary, political, or public in nature; and the other commercial or proprietary, which are performed for the private advantage of the compact community. It is not liable in tort in the performance of a governmental function. *Clark v. Scheld*, 732.

In the operation of a chemical fogging machine on a street or highway for the purpose of destroying insects, a municipality acts in a governmental capacity in the interest of the public health, and it may not be held liable in tort for injuries resulting therefrom unless it waives its immunity by procuring liability insurance, G.S. 160-191.1, *et seq.* even though the operation of the machine renders a street or highway hazardous to traffic, since the exception to governmental immunity in failing to keep its streets in a reasonably safe condition relates solely to the maintenance and repair of its streets. *Ibid.*

**§ 12. Injuries from Defects and Obstructions in Streets or Sidewalks.**

Evidence held sufficient to be submitted to jury on issue of negligence in permitting lid of water meter box to become insecure from wear, resulting in fall of plaintiff. *Fay v. North Wilkesboro*, 406.

A municipal corporation cannot be held liable for the death of a motorist killed while driving along a street constituting a part of a State Highway when the limb of a dead tree on the right of way fell and crushed the cab of his vehicle, since under G.S. 160-54, G.S. 136-93 and G.S. 136-41.1 (the repeal of the latter statute by its express terms not affecting pending litigation) the right to control the area was vested in the State Highway Commission. *Taylor v. Hartford*, 541.

**§ 18. Municipal Franchises.**

A water company contracting with a city to furnish water for fire protection may be held liable by an individual property owner for damages resulting from the failure of the water company to provide sufficient quantity of water at sufficient pressure to fight a fire. *Potter v. Water Co.*, 112.

A municipal corporation has power to grant franchises to public utilities, G.S. 160-2(6), which power includes, among other things, the right to fix reasonable rates and to specify where the franchise may or may not be exercised so as to afford adequate service to the public. *Power Co. v. Membership Corp.*, 596.

But Utilities Commission nevertheless retains power to control and regulate utilities not municipally owned or operated even though such utilities encompass in their territory municipalities which have granted them franchises. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

When municipality annexes territory in which members of electric membership corporation reside, the corporation may continue to serve its customers within the municipality, but may not acquire new members within the municipality. *Membership Corp. v. Light Co.*, 612.

**§ 35. Municipal Charges and Expenses.**

City may appropriate non tax revenue to its chamber of commerce for advertising purposes. *Dennis v. Raleigh*, 400.

NEGLIGENCE

**§ 1. Acts and Omissions Constituting Negligence in General.**

Breach of contract may give rise to a cause of action for negligence when injury to person or property is reasonably foreseeable from such breach. *Potter v. Water Co.*, 112.

Ordinary negligence is the failure to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances; the standard of care is unvarying, but the degree of care varies with the circumstances. The rule of utmost care imposed on common carriers, while largely a difference in degree, is also a difference in standards. *Jackson v. Stancil*, 291.

The law does not require omniscience. *Clark v. Scheld*, 732.

**§ 3. Sudden Peril and Emergencies.**

A person confronted with a sudden emergency is held only to that degree of care which a reasonably prudent man would exercise under like circumstances and he is not chargeable with negligence merely because he fails to make the wisest choice. *Bundy v. Belue*, 31.

**§ 4. Dangerous Substances and Instrumentalities.**

The rule that a person engaging in an activity, with knowledge that it involves peril to others, is liable for injury resulting from his negligence, either of omission or commission while engaged in the activity, applies to the setting out of fire. *Benton v. Montague*, 695.

**§ 5. Res Ipsa Loquitur.**

The doctrine of *res ipsa loquitur* does not apply when the instrumentality causing the injury is not under the exclusive control or management of defendant. *Wyatt v. Equipment Co.*, 355.

**§ 7. Proximate Cause.**

In order for negligence to be actionable, it must be so related to the injury that, but for such negligence, the injury would not have occurred. *Lane v. Driver's Asso.*, 764.

**§ 10. Doctrine of Last Clear Chance.**

The doctrine of last clear chance is not applicable when plaintiff is guilty of contributory negligence as a matter of law. *Arvin v. McClintock*, 679.

The doctrine of last clear chance does not apply unless it is shown that plaintiff was in a helpless condition, that defendant saw, or in the exercise of due care could have seen, him and appreciated the danger in time to have avoided the injury, and that the failure to exercise such care to avoid the injury was one of the proximate causes thereof. *Mattingly v. R. R.*, 746.

NEGLIGENCE—*Continued.*

**§ 11. Contributory Negligence in General.**

Contributory negligence is an affirmative defense. *Boykin v. Bennett*, 725.

**§ 16. Contributory Negligence of Minors.**

A twelve year old child is presumed to be incapable of contributory negligence, although this presumption is rebuttable. *Carter v. Shelton*, 558.

**§ 19. Parties.**

The injured party may sue all whose negligence was a proximate cause of the injury, either jointly or severally, and the liability on one tort-feasor is not diminished nor enlarged by the fact that the negligence of another may or may not have been a contributory cause of the injury. *Hall v. Carroll*, 220.

**§ 20. Pleadings in Negligence Actions.**

The complaint in an action to recover for negligence must allege facts upon which the legal conclusion of negligence and proximate cause may be predicated. *Wyatt v. Equipment Co.*, 355.

Contributory negligence is an affirmative defense which ordinarily must be set up in the answer, and it is only when the facts alleged in the complaint disclose contributory negligence patently and unquestionably that a demurrer on the ground of contributory negligence may be allowed. *Boykin v. Bennett*, 725.

**§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.**

The existence of negligence must be proven by facts leading to that conclusion, or by facts from which that conclusion may be inferred as a legitmate inference, and may not be established by facts raising a mere conjecture or surmise. *Goldman v. Kossove*, 370.

The law does not require omniscience and proof of negligence must rest on a more solid foundation than mere conjecture. *Clark v. Scheld*, 732.

In order to establish actionable negligence, plaintiff must show a failure to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty was the proximate cause of injury, which is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Mattingly v. R. R.*, 746.

**§ 26. Nonsuit for Contributory Negligence.**

Contributory negligence is an affirmative defense, and nonsuit on the ground of contributory negligence is proper only when plaintiff's own evidence establishes the defense so clearly that no other reasonable conclusion can be drawn from plaintiff's evidence. *Smith v. Rawlins*, 67; *Leonard v. Garner*, 278; *Arvin v. McClintock*, 679.

Nonsuit for contributory negligence may not be allowed if it is necessary to rely in whole or in part on defendant's evidence to sustain the plea. *Carswell v. Lackey*, 387.

Where plaintiff's own evidence discloses contributory negligence constituting a proximate cause of the injury, nonsuit is proper since, in such instance, plaintiff proves himself out of court. *Clontz v. Krimminger*, 252.

NEGLIGENCE—*Continued.*

**§ 28. Instructions in Negligence Actions.**

Where a patron injured at an automobile race track seeks to recover on the dual grounds of negligence of the proprietor in permittting an improper and specially constructed vehicle to participate in the race and the negligence of the proprietor in failing to provide barriers reasonably sufficient to protect the patron, an instruction which submits only one of the theories of liability to the jury is incomplete. *Lane v. Driver's Asso.*, 764.

Where evidence shows that plaintiff was injured by car at race track which was traveling at 120 miles per hour out of control toward spectators, charge on failure to maintain safety barriers must instruct jury that proper barriers would have to have avoided the injury in order for failure to provide them to be actionable. *Ibid.*

**§ 31. Culpable Negligence.**

Culpable negligence in the law of crimes imports more than actionable negligence in the law of torts, and while an intentional, willful or wanton violation of a safety statute or ordinance, which proximately results in death or injury, is culpable negligence, the unintentional violation of such ordinance is not culpable negligence unless accompanied by a reckless or heedless indifference to the safety of others, under circumstances from which injury or death to others is reasonably foreseeable. *S. v. Sealy*, 802.

**§ 33½. Liability of Owner for Injuries Caused by Licensee.**

The owner of land is not liable for injury caused to third persons by the acts of a licensee unless the licensee creates a nuisance which the owner knowingly permits to continue. *Benton v. Montague*, 695.

Evidence held insufficient predicate for liability of owner for injury negligently inflicted by licensee. *Ibid.*

**§ 37a. Definition of Invitee.**

A mother taking her young son to a medical clinic for professional services is an invitee while on the premises. *Goldman v. Kossove*, 370.

**§ 37b. Duties to Invitees.**

An entrance or exit habitually used by invitees with the express or implied permission of the owner of the premises is within the scope of the invitation. *Goldman v. Kossove*, 370.

While the owner of the premises is not an insurer of the safety of his invitee, he is under duty to exercise due care to keep the premises, within the scope of the invitation, in a reasonably safe condition for use by the invitees, and to give them timely notice and warning of concealed perils known to the owner or ascertainable by him through reasonable inspection or supervision. *Ibid.*

When a person has knowledge of a dangerous condition, the failure to warn him of what he already knows is without significance. *Jones v. Aircraft Co.*, 482.

**§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.**

There is no presumption or inference of negligence from the mere fact that an invitee fell to her injury while on the premises, but in order to hold the owner liable in damages the invitee must establish negligence of the owner in failing to use due care to keep the premises in a reasonably safe condition or

NEGLIGENCE—*Continued.*

in failing to warn the invitee of hidden perils of which the owner knew or should have known in the exercise of reasonable inspection or supervision. *Goldman v. Kossove*, 370.

Evidence tending to show that an invitee, in stepping from the bottom step of the rear exit into grass some eight to twelve inches high, stepped into a hole concealed by the grass and fell to her injury, is insufficient to overrule nonsuit in the absence of evidence that the proprietors created or permitted the dangerous condition, or knew of its existence, or the length of time the hole had existed, since liability must be predicated upon actual or constructive knowledge of the proprietors of the existence of the dangerous condition. *Ibid.*

## NOTICE

**§ 1. Necessity for Notice.**

No notice is required of a motion made at the term at which the cause is calendared for trial unless specifically required by statute. *Speas v. Ford*, 770.

**§ 3. Waiver of Notice.**

Where motion to modify for change of condition a decree awarding the custody of a minor is served on respondents, but the hearing at the time designated is postponed, another judge of the Superior Court may thereafter, upon findings, supported by evidence, that the interest of the minor required the motion to be heard at the earliest possible date and that respondents had sufficient notice, hear the motion, and respondents, participating in the hearing and offering evidence, waive their right to further notice, G.S. 1-581, there being nothing to indicate that respondents lacked sufficient time, or failed to introduce any evidence they had or desired to present. *In re Woodell*, 420.

## OBSCENITY

Evidence tending to show that shoeprints were found six or eight feet from the window of a house in which a woman lived alone and that shoeprints were also found in the edge of a field nearby, that bloodhounds were put on the trail at the edge of the field and followed the scent to defendant's house, without evidence as to when or by whom the tracks were made, is insufficient evidence of the *corpus delicti aliunde* the confession of the defendant to be submitted to the jury in a prosecution under G.S. 14-202. *S. v. Bass*, 318.

In a prosecution for purposely and knowingly disseminating obscene pictures and photographs, it is not necessary that the pictures or photographs be particularly described, and the obscene material need not be attached to the warrant or indictment, but it is required that they be sufficiently described so that they may be identified, and a warrant which merely characterizes them in general terms as appealing to prurient interest in nudity and sex, is insufficient to charge the offense with sufficient definiteness, and motion to quash should have been allowed. *S. v. Barnes*, 711.

## PARENT AND CHILD

**§ 5. Right to Custody of Minor Children.**

A surviving parent has a natural and legal right to the custody and control

PARENT AND CHILD—*Continued.*

of a child of the marriage, and while this right is not absolute, it may be denied only when the interest and welfare of the child clearly require. *In re Woodell*, 420.

This rule applies also to the mother of an illegitimate child. *In re Kimel*, 508.

The fact that the mother of an illegitimate child consented that the natural father of the child should have its custody, and the fact that she did not seek to obtain custody of the child subsequent to her marriage to a third person until after the death of the father of the child, the child having been maintained and well supported by its father, *is held* insufficient to show that the mother had willfully abandoned the child so as to forfeit the right to its custody. *Ibid.*

PARTITION

**§ 1. Nature and Extent of Right to Partition in General.**

Tenants in common are entitled to partition as a matter or right, and if actual partition cannot be made without injury to some of the tenants, they are entitled to sale for partition as a matter of right, notwithstanding the claim of the widow to dower. *Batts v. Gaylord*, 181.

**§ 9. Proceeds of Sale, Liens, Claims and Distinction.**

A widow's right to dower does not make her a tenant in common and she is not entitled to assert a claim for improvements to the land, since such claim arises only when one tenant in common makes improvements on the common property. *Batts v. Gaylord*, 181.

Separate claims of the widow against each of three of the children petitioning for partition for medical and educational expenses paid out of her funds constitute a misjoinder by her in partition proceedings, since the claim against each child is independent of the claims against the others and each child has an independent right to contest the claim. *Ibid.*

Ordinarily, taxes are a lien upon land and may be treated as any other docketed judgement in partition proceedings, while insurance premiums are not a lien, but where claimant alleges that she has on hand receipts from rents more than enough to pay both, she fails to state a cause of action therefor. *Ibid.*

PAYMENT

**§ 1. Transactions Constituting Payment.**

A check does not operate as payment when the check is not paid upon presentation to the bank because of the instructions of the maker, even though the payee, upon receipt of the check, marks its records to show payment. *Finance Co. v. Pittman*, 550.

Where the purchaser of an automobile executes a note for the balance of the purchase price and makes no payment thereon, the fact that the dealer executes his check to the finance company does not constitute payment when the check is not paid by the drawee bank upon instructions of the dealer, the facts being insufficient to invoke the law of agency, the purchaser not having relied upon any right of the dealer to collect money in payment of the discounted notes. *Ibid.*

PAYMENT—*Continued.*

**§ 8. Application of Payment.**

Where judgement in proceedings condemning a part of a mortgaged tract of land directs that the amount of compensation recovered should be applied to the mortgage indebtedness, the payment is not voluntary, and neither the mortgagor nor mortgagee is entitled to direct the application of payment, but the court should so do in accord with intrinsic justice and equity. *Adams v. Taylor*, 411.

PERJURY

**§ 6. Civil Actions.**

Demurrer is properly sustained to a complaint alleging that defendant procured false testimony in an arbitration proceeding which resulted in an award sustaining the action of the defendant employer in discharging plaintiff, since, apart from defamation and malicious prosecution, no right to maintain a civil action for perjury or subornation of perjury exists. *Brewer v. Coach Co.*, 257.

PLEADINGS

**§ 2. Statement of Cause of Action in General.**

The complaint should state in a plain and concise manner the essential or ultimate facts constituting the cause of action, but it should not allege the evidence to prove such facts, and need not plead the law. *Moore v. W O O W, Inc.*, 1.

A cause of action consists of the facts alleged. G.S. 1-122. *Wyatt v. Equipment Co.*, 355; *Bryant v. Ins. Co.*, 565.

**§ 8. Counterclaims and Cross Actions.**

A cross action must have such relation to the plaintiff's claim that the adjustment of both is necessary to a final adjudication. *Batts v. Gaylord*, 181.

In an action against husband and wife to recover the balance due on a heating system installed in their home, the husband and wife may properly set up a counterclaim for damages to their home and its furnishings resulting from plaintiff's negligence in the performance of the contract. *King v. Libby*, 188.

A cause of action *ex delicto* may be pleaded as a counterclaim to an action *ex contractu* provided the counterclaim arises out of the same transaction or is connected with the same subject of action. *Ibid.*

**§ 12. Office and Effect of Demurrer.**

Exhibits attached to the complaint and made parts thereof are to be considered in passing upon a demurrer. *Moore v. W O O W, Inc.*, 1.

A demurrer admits the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom, but it does not admit conclusions of law asserted by the pleader. *Moore v. W O O W, Inc.*, 1; *Wyatt v. Equipment Co.*, 355.

Upon demurrer, a complaint will be liberally construed with a view to substantial justice between the parties, and the pleader given the benefit of every reasonable intendment in his favor. *Moore v. W O O W, Inc.*, 1; *Ins. Co., v. Chevrolet Co.*, 243.

PLEADINGS—*Continued.*

**§ 18. Demurrer for Misjoinder of Parties and Causes.**

A counterclaim alleging that because of negligence of plaintiff in installing a furnace pursuant to contract there was an accumulation of carbon deposits and noxious gases resulting in injury to defendants, husband and wife, and all members of their family, and damage to their home and furnishings, *is held* to state but a single cause of action for damage to the home and furnishings of defendants under the rule that where a pleading does not set forth separate statements of more than one cause of action it will be assumed that but a single cause was intended to be alleged, and that intimations of other causes of action are mere embellishments and not germane to the cause stated. *King v. Libby*, 188.

Husband and wife may maintain a counterclaim for damage to their home and furnishings therein resulting from the negligence of plaintiff, since both have a commmon interest in the relief sought, and when they do not demand a separate recovery demurrer to the counterclaim for misjoinder of parties should not be allowed. *Ibid.*

The joinder by plaintiffs of a cause of action against one defendant to remove cloud from title and against such defendant's grantor to recover for the wrongful cutting and removal of trees from the land some several years prior to the execution of the deed, constitutes a misjoinder of parties and causes of action, and in such instance the court has no authority to direct a severance of the respective causes of action, but is required to dismiss the action in its entirety upon demurrer. *Gaines v. Plywood Corp.*, 191.

Statutory provisions as to what causes of action may be joined in the complaint are mandatory and not directory. G.S. 1-123. *Ibid.*

**§ 19. Demurrer for Failure of Complaint to State Cause of Action.**

Where facts constituting a defense precluding recovery appear upon the face of the complaint, such facts are properly considered upon demurrer, particularly when the demurrer is special and specifically points out such facts as a bar to plaintiff's action. *Ins. Co., v. Chevrolet Co.*, 243.

**§ 24. Motions to Be Allowed to Amend.**

Where the court sustains the defendant's demurrer plaintiff has a right to move to be allowed to amend, but such motion is addressed to the discretion of the trial court, and the refusal of a motion will not be disturbed in the absence of abuse of discretion. *Tolman v. Dixon*, 193.

Defendant held entitled as matter of right to amend pleadings to allege prior judgement obtained by third person based on concurring negligence of plaintiff and defendant as *res judicata*. *Hunt v. Crawford*, 381.

A motion to be allowed to amend is ordinarily addressed to the discretion of the trial court, and when the trial court refuses as a matter of law to grant a motion for a proper amendment, the cause will be remanded in order that the motion may be determined as a discretionary matter. *Dixon v. Briley*, 807.

Allegations setting forth matters irrelevant to the controversy and allegations containing wholly evidential matter are properly stricken upon motion aptly made. G.S. 1-153. *Brewer v. Coach Co.*, 257.

**§ 25. Scope of Amendment to Pleadings.**

Motion to be allowed to amend denied in the Supreme Court in this case, the matter sought to be alleged having been presented to the jury upon the

PLEADINGS—*Continued.*

original allegations and evidence in so far as it was pertinent to the action. *Moore v. W O O W, Inc.*, 1.

**§ 28. Variance between Allegation and Proof.**

Plaintiff must succeed, if at all, upon case set up in his complaint. *Carswell v. Lackey*, 387.

Plaintiff's proof must conform to his allegations, since proof without allegations is ineffectual. *Vickers v. Russell*, 394.

Plaintiff must prove his case in conformity with the facts alleged as the basis of liability. *Bundy v. Belue*, 31.

**§ 34. Right to Have Allegations Stricken.**

Causes of action asserted held not inconsistent and action of court striking one of the causes upon refusal of plaintiff to make election, was error. *Bryant v. Ins. Co.*, 565.

PRINCIPAL AND AGENT

**§ 3. Revocation of Agency — Distributorship Agencies.**

When a distributor contract is for an indefinite time, it is terminable at the will of either party upon reasonable notice, and what constitutes reasonable notice depends upon the facts and circumstances of each case, and is ordinarily a mixed question of law and of fact. *Rubber Co. v. Distributors*, 459.

In determining what is a reasonable time for the termination of a distributor contract, the amount of promotional expenditures incurred by the distributor, the length of time the contract had been in operation before notice of termination, prospects for future profits, and whether the contract had proven profitable up to the time of notice, are all circumstances to be considered with the other circumstances of the particular case. *Ibid.*

**§ 4. Proof of Agency.**

While the fact of agency may not be proven by testimony of declarations of the alleged agent, the agent himself may testify as a sworn witness at the trial as to the fact of agency. *Sealy v. Ins. Co.*, 774.

PRISONS

**§ 2. Custody and Control of Prisoners.**

Where an escaped convict has been apprehended by municipal police officers who notify the Director of Prisons, the Director has authority to designate the place of imprisonment, and he may authorize the officers to hold the prisoner pending their investigation of crimes committed while the prisoner was at large. *S. v. Davis*, 86.

PROCESS

**§ 12. Service of Process on Agent of Foreign Corporation.**

Evidence that foreign corporation was doing business in this State held sufficient to support service on resident agent. *Dumas v. R. R.*, 501.

**§ 15. Service on Nonresidents in Actions to Recover for Negligent Operation of Automobile.**

Upon the hearing of a motion to dismiss on the ground that the court ac-

PROCESS—*Continued.*

quired no jurisdiction over defendant by service of process under G.S. 1-105, the findings of fact of the court are conclusive if supported by competent evidence. *Howard v. Lasso*, 185.

G.S. 20-71.1 applies, so that proof of ownership of automobile by nonresident is sufficient to support, but not compel, a finding of agency, notwithstanding evidence *contra*. *Ibid.*

QUIETING TITLE

**§ 2. Proceedings to Remove Cloud from Title.**

In an action to remove cloud from title, the burden is on plaintiff to prove title good against the whole world or good against defendant by estoppel. *Walker v. Story*, 59.

Where plaintiff's pleadings affirmatively disclose that defendant's claim constitutes a valid and subsisting lien on the property, demurrer is properly allowed in plaintiff's action to remove such claim as a cloud on title. *Stanley v. Cox*, 620.

RAILROADS

**§ 4. Accidents at Crossings.**

The evidence in this case is held to show, as the only reasonable conclusion, that the negligence of the driver of the vehicle in which plaintiff's intestate was riding was the sole proximate cause of the collision with defendant's train at a grade crossing, and therefore the railroad company's motion to nonsuit was properly allowed. *Carroll v. R. R.*, 572.

A railroad crossing is in itself notice of danger, and a motorist is required not only to stop, look and listen before entering upon a grade crossing, but to stop at a place where his precaution will be effective. *Arvin v. McClintock*, 679.

Where plaintiff's evidence tends to show that his intestate stopped the truck he was driving momentarily before entering upon a railroad grade crossing within a municipality, and was struck by a train, that the track was straight for a long distance in the direction from which the train approached, and that a person could see down the track when within twelve or fifteen feet of the crossing, *is held* to show contributory negligence as a matter of law on the part of intestate. *Ibid.*

Evidence held to show contributory negligence as a matter of law in attempting to drive oversized tractor-trailer over grade crossing without ascertaining whether train was approaching. *Lyday v. R. R.*, 687.

Evidence tending to show that plaintiff, in attempting to traverse a grade crossing, "misjudged the turn", ran off the asphalt surface, so that his wheels became lodged in the soft gravel around the tracks, without evidence of defect in the crossing itself, discloses contributory negligence barring recovery as a matter of law for damage to the vehicle resulting when it was hit by a train some twenty minutes after becoming stuck. *Mattingly v. R. R.*, 746.

Evidence held insufficient to invoke the doctrine of last clear chance. *Ibid.*

RECEIVING STOLEN GOODS

**§ 6. Sufficiency of Evidence.**

In a prosecution for receiving stolen goods with knowledge that they had

RECEIVING STOLEN GOODS—*Continued.*

been stolen, the failure of the indictment to show that the company from which the goods were stolen is a corporation is not a fatal variance, there being no controversy as to the true owner of the property. *S. v. Davis*, 220.

**§ 8. Verdict and Judgment.**

The value of the goods received by defendant with knowledge that the goods had been stolen relates only to the *quantum* of punishment. *S. v. Davis*, 224.

REFERENCE

**§ 3. Compulsory Reference.**

Ordinarily an appeal will not lie from an order of compulsory reference made pursuant to statute where there is no complete plea in bar to the entire case, but an appeal will lie from an order of compulsory reference when such interlocutory order is not in accordance with the course and practice of the courts, affects a substantial right, and would incur costs which the agreed party would be without remedy to recover. *Harrell v. Harrell*, 758.

REFORMATION OF INSTRUMENTS

**§ 2. Mistake Induced by Fraud.**

In order to reform a deed absolute on its face into a mortgage or security for a debt, plaintiff must show by clear, cogent and convincing proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage and must establish this conclusion by evidence *dehors* the deed. *Isley v. Brown*, 791.

**§ 10. Sufficiency of Evidence.**

In an action to reform an absolute deed into a mortgage, plaintiff's evidence to the effect that he signed the instrument without reading it, that defendant had agreed to take over the existing mortgage on his property and permit plaintiff to repay the money in monthly installments, without any evidence that defendant misrepresented the contents of the instrument or did anything to prevent plaintiff from reading it, and without allegation or evidence that the clause of redemption was omitted by mistake, is insufficient to be submitted to the jury. *Isley v. Brown*, 791.

REGISTRATION

**§ 5c. Parties Protected from Unregistered Instruments.**

G.S. 47-20 protects from the lien of an unregistered conditional sales contract or chattel mortgage only purchasers for a valuable consideration from the bargainor or mortgagor and creditors who have first fastened a lien on the personalty in some manner sanctioned by law. *Rubber Co. v. Crawford*, 100.

Judgement creditors may not levy upon chattels repossed by mortgagee prior to issuance of execution, notwithstanding the mortgage is not registered. *Ibid.*

SALES

**§ 6. Condition and Quality of Goods.**

The maxim *caveat emptor* does not apply in cases of fraud. *Brooks v. Construction Co.*, 214.

SALES—*Continued.*

**§ 13. Warranties in General.**

Both an express and an implied warranty are elements of a contract of sale, binding the seller absolutely for the existence of the warranted qualities irrespective of any fault on the part of the seller. *Wyatt v. Equipment Co.*, 355.

**§ 14. Express Warranties.**

Any affirmation by the seller which has a natural tendency to induce the buyer to purchase the goods, and which the buyer relies on in purchasing the goods, constitutes an express warranty. *Ins. Co. v. Chevrolet Co.*, 243.

**§ 17. Parties to Warranties.**

An employee of the purchaser is not a party to the contract and may not recover for breach of warranty that article is reasonably suitable for the purpose for which sold. *Wyatt v. Equipment Co.*, 355.

**§ 20. Actions and Counterclaims by Seller for Purchase Price.**

The fact that a complaint has attached to it as an exhibit a memorandum stating that the memorandum was executed pending the preparation and signing of the sales contract in question does not render the complaint demurrable for failure to allege an executed contract when in other parts of the complaint it is specifically alleged that the parties agreed to a sale at a stated price and that the purchaser thereafter retained and used the subject matter of the sale, etc., since such additional allegations present the reasonable inference that the contract mentioned in the exhibit was actually consumated. *Moore v. W O O W, Inc.*, 1.

**§ 25. Rescission of Sale and Recovery of Purchase Price Paid.**

Breach of express warranty entitles the buyer at his election to rescind the sale, but retention of the goods by the buyer after he discovers or has reasonable opportunity to discover the defects precludes the right of rescission. *Ins. Co. v. Chevrolet Co.*, 243.

**§ 27. Actions for Damages for Breach of Warranty.**

Upon breach of warranty as to quality, the buyer, at his election, may retain the goods and sue for damages. *Ins. Co. v. Chevrolet Co.*, 243.

The measure of damages for breach of warranty as to quality is the difference between the reasonable market value of the article as warranted and as delivered, together with such special damages as were within the contemplation of the parties, but where there are no allegations as to the reasonable market value of the chattel as warranted or as delivered, the dmages recoverable, if any, are restricted to special damages. *Ibid.*

Buyer continuing to use chattel with knowledge of defects may not recover damages reasonably foreseeable from such use. *Ibid.*

The right to recover on a breach of warranty is limited to those in privity of contract, with the sole exception that an ultimate consumer or user may recover when the warranty is addressed to him. *Wyatt v. Equipment Co.*, 355.

**§ 30. Actions for Damages Caused by Defects.**

Buyer using chattel after knowledge of defects may not recover damages reasonably foreseeable from such objects. *Ins. Co. v. Chevrolet Co.*, 243.

Ordinarily the right of a stranger to the contract to recover for injury resulting from defect in the article sold must be based upon negligence. *Wyatt v. Equipment Co.*, 355.

SALES—*Continued.*

The seller of a chattel may be held liable by a stranger to the contract for injuries resulting to such stranger from the dangerous character or condition of the chattel only if the seller knew of such defect or could have discovered such dangerous character or condition in the exercise of reasonable care. *Ibid.*

Mere allegation of dangerous condition of machinery is insufficient, but it is required that facts be alleged showing negligence in design, material or construction. *Ibid.*

SCHOOLS

**§ 1. Establishment and operation of Private Schools.**

Private schools have vested property and occupational rights which may not be arbitrarily denied or infringed, and the State may regulate private schools only to the extent that the interest of the health, morals or safety of the public generally manifestly require. Such regulations may not be arbitrary discriminatory, oppressive or unreasonable, and the statute delegating the regulatory power must provide adequate legislative standards to guide the administrative body. *S. v. Williams*, 337.

G.S. 115-253 requiring persons soliciting students for private schools to obtain a license from the State Board of Education is unconstitutional as delegating authority to grant or withhold a license without providing adequate standards to guide the administrative agency. *Ibid.*

SHERIFFS

**§ 2. Deputies and Assistants.**

The Board of Commissioners of Halifax County has the power to authorize the appointment of more than one salaried deputy sheriff for the County. *Moss v. Alexander*, 262.

STATUTES

**§ 2. Constitutional Inhibition against Passage of Special Acts.**

G.S. 160-453.13 *et seq.* is a public law, notwithstanding twelve counties of the State are excluded from its provisions, and the statute does not violate Article VIII, section 4, of the State Constitution, since that constitutional limitation does not preclude the General Assembly from conferring particular powers on municipalities by special acts and since Article VIII, section 1, of the State Constitution does not refer to public or quasi-public corporations acting as governmental agencies. *In re Annexation Ordinances*, 637.

TAXATION

**§ 4. Necessary Expense and Necessity for Vote.**

What constitutes a necessary expense within the purview of Art. VII, Sec. 7, of the State Constitution is for determination by the Supreme Court. *Dennis v. Raleigh*, 400.

Art. VII, Sec. 7, prohibiting a municipal corporation from expending funds derived from taxation for purposes other than necessary expenses without the approval of its voters applies to all taxes which a municipal corporation may levy or collect, and therefore a municipal resolution appropriating funds derived from sources other than *ad valorem* taxes for an unnecessary expense

TAXATION—*Continued.*

is void in so far as it purports to authorize for such purpose the use of funds derived from taxes other than *ad valorem* taxes. *Ibid.*

The expenditure by a municipality of funds for the purpose of advertising the advantages of the city in an effort to secure new industry is not for a necessary municipal expense within the meaning of Art. VII, Sec. 7, of the State Constitution. *Ibid.*

**§ 5. Public Purpose.**

When authorized by statute, a municipality has power to appropriate for a public purpose available surplus funds not derived from taxes or a pledge of its credit, and while legislative declaration that a particular expenditure is for a public purpose is entitled to great weight, what is a public purpose is a judical question. *Dennis v. Raleigh*, 400.

The expenditure of funds by a municipality for the purpose of advertising to promote the public interest and general welfare of the city is for a public purpose for which, under legislative authority, it may appropriate funds not derived from taxation. *Ibid.*

An appropriation by a municipality of funds to its Chamber of Commerce for use in advertising to promote the public interest and general welfare of the city under authority of a resolution providing that such funds should be used exclusively for that purpose and providing supervision and control by the city of the expenditure of the funds, is valid in so far as the appropriation is limited to nontax revenue of the city, the city having been given express legislative authority to expend money for such purpose. *Ibid.*

**§ 23½. Construction of Taxing Statutes in General.**

While the construction placed upon a revenue act by the Commissioner of Revenue is not controlling upon the courts, such construction will be given due consideration by the courts in interpreting the statute. *Maye v. Currie*, 363.

**§ 29. Computation and Assessment of Income Taxes.**

Where a resident conveys to a trustee her interest in a business located in another state, but retains her right to all income from the trust, such income, having been subjected to income tax by such other state, is exempt from income tax in this state under G.S. 105-147 (10) (b), prior to its repeal by Ch. 1340, Session Laws of 1957, since the resident remains the beneficial owner of her share of the business in such other state. *Maye v. Currie*, 363.

Where a resident beneficiary is also named a co-trustee of a testamentary trust of a business located in another state, the resident beneficiary's income from the trust is not exempt from income tax in this State, notwithstanding that the beneficiary takes an active part as co-trustee in the management of the business and the income of the business, is subjected to income tax by the state in which it is situate, G.S. 105-147 (10) (b), since the resident's ownership of the legal title as trustee does not constitute her the owner, in her capacity as beneficiary, of an established business in another state. *Ibid.*

TENANTS IN COMMON

**§ 4. Possession, Rents and Profits.**

An agreement between two tenants in common for the use and occupancy solely by one tenant and is valid and enforceable as between them and their representatives and assigns with notice. *Stanley v. Cox*, 620.

## TORTS

**§ 4. Determination of Whether Tort is Joint or Separable.**

Where two or more persons engage in speed competition upon the highway, each driver is a joint *tort-feasor* in engaging in the joint venture and in encouraging and inciting the others, and each may be held liable, jointly or severally, by a third person injured as a result of such speed competition, even though the injured party is a gratuituous passenger in one of the cars (in the absence of contributory negligence) and is injured when the driver of the vehicle in which he is riding loses control without having come in contact with any other vehicle. *Boykin v. Bennett*, 725.

**§ 6. Right to Contribution Among Joint Tort Feasors.**

The right of one defendant sued in tort to the joinder of another for the purpose of contribution rests solely on statute and may be enforced only in the manner prescribed by the statute. G.S. 1-240. *Jones v. Aircraft Co.*, 482.

A defendant seeking the joinder of another for contribution is in effect a plaintiff as to such other, and the demurrer of the additional defendant to the cross-action for contribution must be determined on the basis of whether the facts alleged in the cross-action are sufficient to show that such other was a joint *tort-feasor* whom the plaintiff could have joined as a defendant if plaintiff had so desired, and in determining this question neither the allegations of the complaint nor the evidence adduced by the plaintiff against the original defendant in a former trial may be considered. *Ibid.*

It is not required that the defenses set up in an answer be consistent, and a defendant sued in tort may deny negligence, set up the defense of contributory negligence, and allege in the alternative that, if he were negligent, a party sought to be joined for contribution was also negligent and that such negligence concurred in proximately causing the injury or death. *Ibid.*

While the original defendant may not set up in his cross-action for contribution that the injury was caused by an instrumentality entirely different from that asserted in the complaint, when the cross-action relates to the cause alleged in the complaint and is predicated upon the same basic factual situation, demurrer on the ground that the cross-action does not stem from the cause of action alleged in the complaint is untenable. *Ibid.*

Allegations in cross-action held insufficient to state cause of action for contribution. *Ibid.*

## TRESPASS

**§ 9. Nature and Elements of Criminal Trespass.**

The purpose of G.S. 14-134 is to protect those in possession of realty from trespasser, and the statute is concerned only with whether the land in question is in either the actual or constructive possession of one person and whether defendant intentionally entered upon the land after being forbidden to do so by the person in possession, and the statute applies to all persons coming within its purview and is not predicated upon race. *S. v. Avent*, 580.

The purpose of G.S. 14-126 isto protect the person in lawful possession of realty, and under the statute a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful. *Ibid.*

The failure of G.S. 14-134 to require the person in possession of private premises to identify himself does not render the statute unconstitutional on the ground of vagueness, since the statute necessarily means that the person

TRESPASS—*Continued.*

forbidding another to enter upon the land shall be the owner or occupier of the premises, or his agent, which essential must be established in the prosecution as a matter of proof. *Ibid.*

**§ 10. Prosecutions for Criminal Trespass.**

Evidence tending to show that each defendant, without legal or constitutional right or *bona fide* claim of right, entered the luncheonette department of a department store after having been forbidden by the manager and agent of the store to do so, and refused to leave after request, *is held* to show an intentional violation of G.S. 14-126 and G.S. 14-134 by each defendant, the Caucasian as well as the Negro. *S. v. Avent*, 580; *S. v. Williams*, 804.

TRIAL

**§ 21½. Necessity for Motion to Nonsuit and Renewal.**

Involuntary nonsuit is solely statutory, and the statutory requirement that the motion must be renewed at the close of all the evidence must be followed. *Biggs v. Biggs*, 10.

**§ 22a. Consideration of Plaintiff's Evidence on Motion to Nonsuit.**

Upon motion to nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable intendment upon the evidence and every legitimate inference to be drawn therefrom. *Smith v. Rawlins*, 67; *Brooks v. Construction Co.*, 214; *Grant v. Artis*, 226; *Clontz v. Kimminger*, 292; *Carter v. Shelton*, 558; *Benton v. Montague*, 695; *Matingly v. R. R.*, 746.

On motion to nonsuit, plaintiff's evidence must be interpreted in the light of his allegations to the extent that the evidence is supported by the allegations, since to interpret the evidence as contradictory to the allegations would compel nonsuit for variance. *Bundy v. Belue*, 31.

**§ 22c. Contradictions and Discrepancies in Plaintiff's Evidences.**

Contradictions and discrepancies, even in the plaintiff's own evidence, are for the jury to resolve and do not warrant nonsuit. *Leonard v. Garner*, 278; *Carswell v. Lackey*, 387; *Benton v. Montague*, 695.

**§ 23f. Nonsuit for Variance.**

Where there is a material variance between plaintiff's allegations and proof, nonsuit is proper. *Vickers v. Russell*, 394.

**§ 25. Voluntary Nonsuit.**

Upon intimation of opinion by the court adverse to plaintiff on the law upon which the action is founded, or the exclusion of evidence offered by plaintiff which is necessary to make out his case, plaintiff may submit to nonsuit and appeal. *Wimberly v. Parrish*, 536.

**§ 31b. Instructions — Statement of Evidence and Application of Law Thereto.**

It is error for the court to charge on an abstract principle of law not supported by any evidence in the case, or to charge upon an aspect of the law which is not supported by allegation. *Carswell v. Lackey*, 387.

TRIAL—*Continued.*

**§ 36. Form and Sufficiency of Issues.**

While the form and number of issues ordinarily rest in the sound discretion of the trial judge, the judge is required to submit such issues as are necessary to settle the material controversies raised by the pleadings and to support the judgment. *Rubber Co. v. Distributors*, 459.

**§ 49. Motions to Set Aside Verdict as Contrary to Weight of Evidence.**

A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the sound discretion of the trial court, and its ruling thereon is not reviewable on appeal in the absence of manifest abuse of discretion. *Grant v. Artis*, 226.

TRUSTS

**§ 26. Revocation of Trusts.**

A voluntary trust is revocable when it is created for the benefit of trustor or some person *in esse* with a future contingent interest limited to some person not *in esse* or not determinable until the happening of a future event, G. S. 399-6, but even so, it is revocable only as to the interest of persons not *in esse* or not determinable at the time the instrument of revocation is executed, and is not revocable as to vested interests of persons *in esse* who do not join in the execution of the instrument of revocation. *Washington v. Ellsworth*, 25.

A voluntary trust provided that the corpus, after the termination of the life estates, should be distributed *per stirpes* to the children of the representatives of deceased children of one of the life tenants. The trustor and the life tenants executed an instrument purporting to revoke the trust as to one of the ultimate beneficiaries then *in esse* so that the entire property would go to the other beneficiaries and their heirs as designated in the original instrument. *Held*: The interest of the beneficiary was vested, and therefore the revocation was ineffectual under G.S. 39-6. *Ibid.*

Where the trustor in a voluntary trust reserves the right to sell or dispose of the property with the written consent of the life beneficiary and the trustee, such right is limited to the power to dispose of the property in furtherance of the purpose for which the trust was established and contemplates an actual *bona fide* sale for an adequate consideration, and does not empower the trustor to modify the trust by revoking the vested interest of one of the ultimate beneficiaries for the benefit of the other beneficiaries. *Ibid.*

UTILITIES COMMISSION

**§ 1. Nature and Functions in General.**

Questions of policy in regard to rates for public utilities and carriers fall within the province of the legislative body, some of which it has delegated to the Utilities Commission. Whether the Legislature has given the Utilities Commission authority to initiate on its own motion an investigation of the entire rate structure of carriers, and place the burden upon the carriers to show that the old rate structure, which had been in effect for a number of years with the approval of the Commission, were just and reasonable, *quaere? Utilities Commission v. Motor Carriers*, 432.

**§ 2. Jurisdiction.**

By delegating the power to municipalities to grant franchises to public util-

UTILITIES COMMISSION—*Continued.*

ities, the General Assembly did not deprive itself of the power to control specific utilities in whole or in part, and the General Assembly has delegated power to the Utilities Commission to regulate and control utilities not municipally owned, even though such utilities encompass in their territory municipalities which have granted them franchises in regard to their operation within the municipality. *Power Co. v. Membership Corp.*, 596.

**§ 8. Hearings, Judgments and Orders.**

An order of the Utilities Commission striking out a rate structure which had been in existence for a number of years and substituting therefor a rate structure based solely on mileage, with a sole exception to meet barge competition between two specified termini, is properly reversed on appeal for failure of the Commission to take into consideration other relevant factors in rate making, but, there being some evidence before the Commission of equities in the rates theretofore listed in the tariffs, the cause should not be dismissed, but should be remanded for further hearing and disposition with respect to rates found to be unjust, unreasonable or unlawfully discriminatory. *Utilities Com. v. Motor Carriers*, 432.

The approval by the Utilities Commission of a contract between public utilities gives the contract the force and effect of an order of the Commission. *Power Co. v. Membership Corp.*, 596.

**§ 5. Appeals.**

On appeal by the affected carriers from an order of the Utilities Commission putting into effect a schedule of rates, it is the province of the courts to review the administrative decision to see that the rights of the parties involved are protected. *Utilities Com. v. Motor Carriers*, 432.

VENDOR AND PURCHASER

**§ 9a. Condition of Premises.**

The maxim *caveat emptor* does not apply in cases of fraud. *Brooks v. Construction Co.*, 214.

**§ 24. Recovery of Purchase Money Paid.**

A contract by defendants to convey their right, title and interest to certain lands does not impose the duty upon defendants to convey a good title but only such title as defendants may have, and further provision that defendants should convey their interests free from claims against them does not enlarge the right or interest which they agree to convey, and, therefore, upon failure of title in defendants, plaintiff may not maintain an action to recover that part of the purchase price paid. *Talman v. Dixon*, 193.

**§ 25. Actions for Fraud.**

Where material facts are accessible to the vendor only, and he knows them not to be reasonably discoverable by a diligent purchaser, the vendor is bound to disclose such facts, and in such instance *suppressio veri* has the same legal effect as *suggestio falsi*. *Brooks v. Construction Co.*, 214.

Allegation and evidence to the effect that defendant sold plaintiffs a house and lot, that the house was built over a large hole which had been filled with debris, composed in part of partially burned tree stumps, limbs, etc., that the debris had been covered over with clay by defendant so that the facts were

VENDOR AND PURCHASER—*Continued.*

not discoverable by plaintiffs in the exercise of due diligence, that defendant failed to disclose the facts in regard to the condition of the lot, and that the house settled as a result of being constructed on the filled land, resulting in material damage, *is held* sufficient to make out a cause of action for fraud and deceit. *Ibid.*

WILLS

**§ 31. General Rules of Construction.**

A will, especially a holographic will, must be construed on the basis of the particular language of the instrument for the purpose of ascertaining the testator's intent, and in so doing the will should be examined as a whole with regard to the situation confronting the testator at the time of its execution and the natural objects of the testator's bounty. *Andrews v. Andrews*, 139.

In construing a will, the extent and character of the estate is often helpful in ascertaining the intent of the testator, and the court should have before it an inventory of the estate to aid it in ascertaining such intent. *Ibid.*

In construing a will every clause will be given if possible and apparent conflicts reconciled; irreconciliable repugnances will be resolved by giving effect to the general prevailing purpose of testator and the last expression of such intent will prevail over a prior irreconciliable provision. *Ibid.*

In construing a will, the court may not add to valid portions thereof provisions which are not therein expressed. *Clarke v. Clarke*, 156.

Since the words of a will must be construed according to the context and the peculiar circumstances in each case, the same words may be given different constructions under dissimilar circumstances, and therefore each will presents a more or less unique problem of construction. *Clark v. Connor*, 515.

The language of a will and the sense in which the language was used by the testator are primary sources of ascertaining his intent, which is the polar star in the interpretation of every will. *Ibid.*

A will is to be construed as a whole and every clause and word given effect if possible. *Ibid.*

Ordinary words must generally be given their usual and ordinary meaning and technical words which have a well defined legal significance will be presumed to have been used in their technical sense when the language of the will does not show a contrary intent. *Ibid.*

**§ 31½. Construction of Codicils.**

A codicil operates as a republication of the original will and makes it speak as of the date of the execution of the codicil in so far as it is not altered or revoked by the codicil. *Young v. Williams*, 281.

**§ 32. Presumptions.**

The presumption is that testatrix intended to make a legal and valid disposition of her property. *Clarke v. Clarke*, 156.

**§ 32½. Transmissible Interests.**

A gift of the residue of a trust fund, remaining after the administration of the trust, vests in the specified beneficiaries upon the death of testatrix, even though it is uncertain that there will be any residue, and the beneficiaries take a transmissable interest. *Clarke v. Clarke*, 156.

Where the gift of a share of the residue of a trust fund stipulates that the share of one of the beneficiaries is to be used for designated purposes, the

WILLS—*Continued.*

directions regulating the mode of enjoyment of the gift does not render the gift less than absolute, and such beneficiary takes a transmissable interest even though, if the gift is distributed during the lifetime of the beneficiary, it is the duty of the trustee to supervise its expenditure in accordance with testatrix' directions. *Ibid.*

**§ 33a. Estates and Interests Created in General.**

A general devise to a person specified carries the fee unless the will discloses a manifest intent to the contrary. G.S. 31-38. *Clark v. Connor*, 515.

The general rule that an unrestricted bequest or devise of property to a particular person will be construed to be absolute, and a subsequent disposition of the same property at the death of the first taker will be rejected as repugnant to the absolute gift, G.S. 31-38, must yield to the paramount intent of the testator as gathered from the entire instrument. *Andrews v. Andrews*, 139.

Language of an item of a will, even though sufficient, standing alone, to pass an absolute gift to the first taker, will be construed to transmit only a life estate when the will directs a limitation over to another or others, and there is no absolute power of disposition, express or implied, to the first taker, and this result is consonant with the paramount intent of testator as gathered from the instrument as a whole. *Ibid.*

A devise and bequest of the remainder of testatrix' real and personal proprieties to testatrix' daughter, with provision in the same sentence that at the death of the daughter all the property should be equally divided among the daughter's children, grandchildren of testatrix, *is held* to transmit only a life estate in the properties to the daughter, this being consonant with the intent of testatrix as gathered from the instrument as a whole. *Ibid.*

Language of an item of a will to the effect that testatrix wanted her daughter to keep monies in a particular savings account for the daughter's old age, *is held* an absolute bequest of the savings account to the daughter, the provision that the money should be kept for the daughter's "old age" being a mere statement of the reason for making the gift, and the word "want" being used throughout the instrument as an imperative and not a precatory word, and this result being consonant with the intent of testatrix as gathered from the entire instrument. *Ibid.*

By one item of the will in question testatrix devised and bequeathed a life estate in the remainder of her properties, real and personal, to her daughter for life, with limitation over to the daughter's children. By subsequent item testatrix bequeathed the daughter a stipulated savings account. *Held*: The apparent repugnancy will be reconciled on the basis that testatrix did not intend to include the savings account within the term "remainder of my real and personal properties," or the subsequent item be given effect as the later expression of testatrix' intent, made particularly clear by a still later item directing that income from other properties should be used for the purpose of educating the grandchildren. *Ibid.*

A devise and bequest of all of testator's property to his wife to take, hold and do with as she deems best for the benefit of herself and the children of the marriage transmits an absolute gift to the wife and does not create a trust for the children, notwithstanding a subsequent provision of the will that in the event his wife predeceased testator the property should be divided equally among the children after taking into consideration all advancements, and a still further provision that, if his wife survived him, any advancements

made to the children by the testator or the wife should be accounted for in the division among the children to effectuate the purpose that the children should share equally in his estate and their mother's estate. *Clark v. Connor*, 515.

**§ 33c. Vested and Contingent Interests.**

A gift of the residue of a trust fund, remaining after the administration of the trust, vests in the specified beneficiaries upon the death of testatrix, even though it is uncertain that there will be any residue, and the beneficiaries take a transmissable interest. *Clarke v. Clarke*, 156.

The will in suit devised and bequeathed to testator's wife all of his property for life and directed that at her death the property should go to a designated person provided he should stay with and take care of testator's wife, otherwise the property should go to testator's heirs. *Held:* The condition involved duties in the nature of consideration and whether the condition was fulfilled could not be determined prior to the death of the life tenant, and therefore the condition was a condition precedent and the limitation over was contingent. *Wimberly v. Parrish*, 536.

So long as there is an uncertainty as to the person or persons who will be entitled to enjoy a remainder, the remainder is contingent. *Ibid.*

Where the evidence is conflicting as to whether a contingent remainderman had performed the duties imposed upon him as a condition precedent to the vesting of title in him, the issue is for the jury. *Ibid.*

**§ 33d. Estates in Trust.**

A bequest of funds to the children of testatrix' son to be used for educational purposes, with provision that the executor should pay the funds to the father whenever the children qualified to receive them, with further limitation of any unused funds to testatrix' children, requires that the executor retain the funds and administer the trust by providing the father with funds to meet college expenses when each particular child enters college, and the time of the termination of the trust depends on many varying circumstances, although it can not extend beyond the time within which the funds may be used for the purposes of the trust. Further testamentary provision that the funds might be used by the parties in case of dire necessity is a subordinate feature which does not affect this result. *Clarke v. Clarke*, 156.

Devise held to be in fee and not to create trust for benefit of testator's children. *Clark v. Connor*, 515.

**§ 33g. Inheritance and Estate Taxes and Costs of Administration.**

Funds of the estate not impressed with a trust and undisposed of by will should first be resorted to for the payment of debts of the estate, funeral expenses and cost of the administration, and any funds remaining after such payment should be distributed according to the law of intestacy in effect at the time of testatrix' death. *Clarke v. Clarke*, 156.

**§ 33h. Rule against Perpetuities.**

The rule against perpetuities provides that 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. *Clarke v. Clarke*, 156.

A bequest of funds to the heirs of testatrix' living son to be used for their education does not violate the rule against perpetuities, the word "heirs"

WILLS—*Continued.*

being construed to mean children, and the bequest being to the children living at the time of testatrix' death in accordance with the intent of tesatrix as gathered from the entire instrument, and the presumption that testatrix intended to make a valid disposition of her property. *Ibid.*

**§ 34c. Devises and Bequests to a Class.**

A bequest of funds to the heirs of testatrix' living son to be used for educational purposes, with any money left over to be divided among testatrix' children, transmits the funds to the children of the son living at the time of the death of testatrix, and is not subject to be opened up to let in after-born children, it being apparent from the will that the word "heirs" was not used in its technical sense. G.S. 41-6. The distinction is pointed out where there is an intervening life estate, in which event the limitation over to children would be subject to be opened up to admit after-born children. *Clarke v. Clarke*, 156.

**§ 41. After Born Children.**

Codicil disclosing intent not to make specific provision for after-born child is republication of will. *Young v. Williams*, 281.

**§ 46. Nature of Title and Conveyances by Heirs and Devisees.**

A warranty deed of a contingent remainderman conveys his interest since upon the happening of the contingency vesting title in him, he is estopped from denying his grantee's title. *Barnes v. House*, 444.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

1-15. When statute begins to run, it ordinarily continues to run until stopped by appropriate judicial process. *Speas v. Ford*, 770.

1-25. Second action after nonsuit is but continuation of the first even though action is in behalf of minor and second action is brought by different next friend. *Rowland v. Beauchamp*, 231.

1-42. Evidence of chain of title for more than thirty years, without connecting defendant to common source, is insufficient; 1959 amendment does not apply to pending litigation. *Walker v. Story*, 59.

1-52(5); 1-17; 1-64. Statute begins to run against action of minor for personal injury from date of appointment of next friend to bring the action. *Rowland v. Beauchamp*, 231.

1-52(9). Evidence that fraud was not discovered and was not discoverable in exercise of due dilligence until less than three years prior to institution of action precludes nonsuit. *Brooks v. Construction Co.*, 214.

1-53(4); 1-25. Second action in continuation of prior action nonsuited as to all who were parties to both actions. *Hall v. Carroll*, 220.

1-59(9). Where pleading discloses that fraud was discovered more than three years prior filing of pleading, court may dismiss the cause *Speas v. Ford*, 770.

1-97; 55-131(B) (5). Evidence that foreign corporation was doing business in this State held sufficient to support service on resident agent. *Dumas v. R.R.*, 501.

1-105. Court's findings are conclusive on hearing of motion to dismiss on ground that service was not effectual. *Howard v. Sasso*, 185.

1-122. Complaint should state ultimate facts, but not evidentiary facts. *Moore v. W O O W, Inc.*,1. Cause of action consists of facts alleged. *Wyatt v. Equipment Co.*, 355, *Bryant v. Ins. Co.*, 565.

1-123. Provisions as to what causes may be joined are mandatory and not directory, and when there is misjoinder of parties and causes, the action must be dismissed. *Gaines v. Plywood Corp.*, 191.

1-137(1). Cause *ex delicto* may be pleaded as counterclaim to action *ex contractu* provided counterclaim arises out of same transaction. *King v. Libbey*, 188.

1-151. Pleading must be liberally construed upon demurrer. *Moore v. W O O W, Inc.*, 1.

1-153. Allegations setting forth irrelevant matter and those containing wholly evidentiary matter are properly striken on motion. *Brewer v. Coach Co.*, 257.

1-183. Involuntary nonsuit is purely statutory, and statutory procedure must be strictly followed. *Biggs v. Biggs*, 10.

GENERAL STATUTES CONSTRUED—*Continued.*

1-189(2); 50-16. Order of reference on hearing for subsistance *pendente lite* is not in usual practice of court and appeal from such order lies. *Harrell v. Harrell*, 758.

1-240. Right to joinder for contribution is purely statutory and may be enforced only in manner prescribed by statute. *Jones v. Aircraft Co.*, 482.

1-271; 1-277; 1-279; 1-280. Appeal lies as matter of right and not of grace in those instances in which appeal is authorized. *Harrell v. Harrell*, 758.

1-277. Superior Court should not attempt to preclude appeal even though appeal is from interlocutory order. *Harrell v. Harrell*, 758.

1-282; 1-283. Duty remains on appellant to have case on appeal submitted to judge even when appellee's exceptions are deemed allowed. *Wiggins v. Tripp*, 171.

1-581. Parties participating in hearing waive notice. *In re Woodell*, 420.

7-64; 7-240. Even though county is exempt from G.S. 7-64, Superior Court acquires jurisdiction of petty misdemeanor upon transfer of cause upon demand for jury trial. *S. v. Davis*, 224.

7-64; 7-393. Where county court coming within G.S. 7-64 binds defendant over on misdemeanor, motion to remain to county court is properly denied. *S. v. Robbins*, 47.

8-51. Does not preclude party from testifying as to substantive facts about which he has independent knowledge not acquired from communication or transaction with decedent. *Carswell v. Greene*, 266.

8-56; 50-10. Husband may testify as to nonaccess in refutation of charge of condonation. *Briggs v. Briggs*, 10.

8-91. Contract of agency is competent to prove agency when other party has admitted its authenticity. *Sealy v. Ins. Co.*, 774.

14-3. Conspiracy to violate liquor law is misdemeanor. *S. v. Brown*, 195.

14-34. "Gun" is generic term including pistols. *S. v. Barnes*, 711.

14-107. Clerk who signs name to check of employer in performance of duties of employment may not be convicted under the statute; but officers of employer directing issuance of such check may be convicted. *S v. Cruse*, 456.

14-119; 14-120. Evidence held sufficient to be submitted to jury in prosecution for violating these statutes. *S. v. Coleman*, 799.

14-126; 14-134. Owner of lunch counter in private store on private property may discriminate as to those he will serve, and persons refusing to leave counter after request may be convicted of trespass. *S. v. Avent*, 580.

GENERAL STATUTES CONSTRUED—*Continued.*

14-189.1(a). Warrant or indictment must sufficiently describe obscene pictures to indentify them. *S. v. Barnes*, 711.

14-394. Indictment which fails to name person to whom defendant transmitted the writing and the character of language contained therein, is fatally defective. *S. v. Robbins*, 47.

14-402. Evidence of *corpus delicti aliunde* confession of defendant held insufficient to be submitted to jury. *S. v. Bass*, 318.

15-173. Upon motion to nonsuit, evidence is to be taken in light most favorable to State. *S. v. Downey*, 348.
Introduction of evidence by defendant waives his motion to nonsuit at close of State's evidence. *S. v. Avent*, 580.

15-200. Where court suspends execution upon condition that defendant pay fine and remain of good behavior, payment of fine does not prevent execution of sentence for condition broken. *S. v. Brown*, 195.

18-50. Evidence of constructive possession of intoxicating liquor held sufficient to be submitted to jury. *S. v. Turner*, 37.

20-71.1; 1-105. Proof of ownership is sufficient to support finding of agency against nonresident auto owner. *Howard v. Sasso*, 185.

20-116; 20-119. Operation of over-sized vehicle on highway without special permit is misdemeanor and may constitute negligence. *Lyday v. R.R.*, 687.

20-124(a); 20-124(b); 20-163. Failure to maintain brakes in good working condition or failure to set hand brake when required by statute, is negligence. *Bundy v. Belue*,

20-140. Violation is negligence *per se Carswell v. Lackey*, 387.

20-141 (b) (4) (5). Limit of 60 miles per hour when authorized by Highway Commission is exception to general speed limit. *S. v. Gurley*, 55.

20-141.3(b). Operation of vehicle on highway in speed competition is misdemeanor and is negligence *per se*. *Boykin v. Bennett*, 725.

20-148. Violation is negligence *per se*. *Carswell v. Lackey*, 387.

20-152(a). Violation of statute is negligence *per se*. *Smith v. Rawlings*, 67. Admission of violation of statute requires submission of issue to jury. *McGinnis v. Smith*, 70.

20-154(a); 20-155(b); 20-155(a). G.S. 20-154(a) and 20-155(b) apply to motorist turning left at intersection and not G.S. 20-155(a). *Fleming v. Drye*, 545.

20-158. Failure to stop in obedience to duly erected stop sign is not negligence *per se*, and violation of statute is not culpable negligence unless intentionally done in disregard of rights of others. *S. v. Sealy*, 802.

GENERAL STATUTES CONSTRUED—*Continued.*

20-279.1(8). Chattel mortgagee cannot be held liable for negligence of chattel mortgagor. *Trust Co. v. King*, 571.

20-279.19. Filing of form SR-21 does not estop insurer from thereafter denying liability under policy. *Seaford v. Ins. Co.*, 719.

20-279.21 Provision for notice of accident to insurer, except in policy within purview of statute, is valid and will be enforced as written. *Muncie v. Ins. Co.*, 74.

20-309. Under 1957 Vehicle Financial Responsibility Act, violation of policy provisions by insured after liability has become absolute cannot defeat rights of injured party. *Swain v. Ins. Co.*, 120.

22-1. Contract consigning goods to be stored in consignee's warehouse and providing for payment as goods are withdrawn, is not required to be in writing. *Rubber Co. v. Distributors*. 459.

25-55. Check drawn to drawer's own order and given for debt of drawer without endorcement passes title by mere delivery. *S. v. Cruse*, 456.

31-38. General devise carries the fee unless the will discloses intent to contrary. *Clark v. Conner*, 515.
Unrestricted devise does not convey the fee when will expresses clear intent to the contrary. *Andrews v. Andrews*, 139.

31-55. Codicil executed after birth of child precludes operation of statute even though child is born after execution of will. *Young v. Williams*, 281.

37-2. Does not necessarily require corporation to assign some value to each article of property owned by it. *Watson v. Farms, Inc.*, 238.

39-6. Trust is not revocable by trustor alone when interests of persons in esse are vested. *Washington v. Ellsworth*, 25.

39-23. Does not apply to seller's repossession of chattels under conditional sales contract even though they constitute bulk of purchaser's stock. *Rubber Co. v. Crawford*, 100.

41-6. Bequest to heirs of testatrix' living son is not subject to be opened up to let in after-born children. *Clarke v. Clarke*, 156.

47-20. Protects only purchasers for value and creditors who have first fastened lien on personalty in some manner sanctioned by law. *Rubber Co. v. Crawford*, 100.

47-23; 20-57(d). Proper registration and not certificate of title govern lien of chattel mortgage on automobile. *Finance Co. v. Pittman*, 550.

50-6. Where separation is due to mental incapacity of husband or wife neither may obtain divorce on ground of two years separation. *Moody v. Moody*, 752.
Decree *a mensa* legalizes separation, and husband may maintain action after two years for divorce on ground of separation. *Sears v. Sears*, 415.

GENERAL STATUTES CONSTRUED—*Continued.*

50-8. Does not have effect of making this the State of residence of servicemen here more than two years under military orders, but does allow such serviceman to select this as the State of his domicile. *Martin v. Martin*, 704.

50-11. Decree of divorce for separation does not affect right to alimony under prior decree. *Sears v. Sears*, 415.

50-16. Court is authorized to grant subsistance *pendente lite* under this section, and fact that wife has separate estate does not preclude award. *Mercer v. Mercer*, 164, *Rowland v. Rowland*, 328. Court should not enjoin husband from disposing of property in order to prevent him from defeating order. *Mercer v. Mercer*, 164.
Action for alimony without divorce comes within purview of G.S. 50-10, and clerk has no authority to enter default judgment therein. *Schlagel v. Schlagel*, 787.

55-37. Business Corporation Act does not require corporation to abandon system of accounting sufficient in computing capital and surplus for franchise tax purposes. *Watson v. Farms, Inc.*, 238.

58-177(d). Provision that contract may not be varied by parol does not preclude application of doctrine of waiver. *Faircloth v. Ins. Co.*, 522.

62-72; 62-121.29; 62-26. Whether Utilities Commission has authority to investigate entire rate structure of carriers *ex mero motu, quaere?. Utilities Commission v. Motor Carriers Asso.*, 432.

63-16; 63-24. Courts of this State have jurisdiction of action for injury in airplane accident when contract for flight is made in this State, even though accident occurs in another state. *Jackson v. Stancil*, 291.

96-2. Act must not be construed in manner discouraging parties from entering into contracts to lessen hardships incident to termination of employment. *In re Tyson*, 662.

96-8(13)(a); 96-14(8). Severance and vacation pay must be considered in determining unemployment benefits. *In re Tyson*, 662.

97-10. Evidence held not to show that action was within exclusive jurisdiction of Industrial Commission. *Jackson v. Bobbitt*, 670.

97-29; 97-41. There is no maximum amount of award for permanent disability due to injury to spinal cord. *Baldwin v. Cotton Mills*, 740.

97-36. Industrial Commission has no jurisdiction if employee is nonresident, or contract is not made here, or employer has no place of business here. *Suggs v. Truck Lines*, 148.

97-47. Industrial Commission has jurisdiction to hear application for review of award for changed condition provided application is made within one year of last payment of compensation. *Baldwin v. Cotton Mills*, 740.
Appellant may not assert liability on different ground than that upon which theory of trial before Commission was had. *McGinnis v. Finishing Plant*, 493.

GENERAL STATUTES CONSTRUED—*Continued.*

97-80. Rules of Commission governing appeals held valid. *McGinnis v. Finishing Plant*, 493.

115-253. Statute is unconstitutional. *S. v. Williams*, 337.

105-147(10) (b). Resident trustor is entitled to exemption of income received from nonresident trust, the trust being subject to tax in the state in which its business is situate; but resident beneficiary is not entitled to exemption of income from nonresident trust set up by another. *Moye v. Currie, Comr.*, 363.

160-1. Municipality has only those powers conferred and those necessarily implied therefrom; it has no authority to use tax money for advertising through its chamber of commerce. *Dennis v. Raleigh*, 400.

160-2(6); 62-30. Although cities have power to grant franchises, General Assembly retained power to regulate power companies, which power it has delegated to Utilities Commission. *Power Co. v. Membership Corp.*, 596.

160-54; 136-93; 136-41.1 City may not be held liable for defect in street constituting part of State highway. *Taylor v. Hertford*, 541.

160-191.1, *et seq.* Operation of chemical fogging machine by municipality is in exercise of governmental function, and it is not liable in tort unless it has waived governmental immunity by procuring insurance. *Clark v. Scheld*, 732.

160-453.5(f). Membership in electric membership corporation is not terminated by annexation of territory by municipality. *Power Co. v. Membership Corp.*, 596.

160-453.13. Is valid, and annexation in accordance with procedure provided by the statute does not deprive persons whose property is annexed of any constitutional rights. *In re Annexation Ordinances*, 637.

163-86. Applies to primaries as well as to general elections. *Strickland v. Hill*, 198. County Board of Elections has power to recount ballots upon suggestion of errors in tabulations prior to its canvass. *Ibid.*

163-168. Persons challenging election should check ballots of challeneged voters, who were required to sign their names, against registration books. *Overton v. Comrs. of Hendersonville*, 306.

163-172. It is a violation of statute for judge of election to mark ballots without request from voters or to fail to return marked ballots to voter. *Overton v. Comrs. of Hendersonville*, 306.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, §8; II, §1. Annexation statute is not unconstitutional delegation of power to municipalities. *In re Annexation Ordinances*, 637.

I, §14. Sentence within limits prescribed by statute cannot be cruel or unusual in constitutional sense. *S. v. Downey*, 348.

I, §17. Conviction of person of violating unconstitutional statute violates this section of the Constitution. *S. v. Williams*, 337.
Enforcing right of private owner to discriminate on basis of race persons he will serve at privately owned lunch counter does not deprive Negroes of any constitutional right. *S. v. Avent*, 580.
Annexation of territory by municipality under provisions of G.S. 160-453.13 does not reprive persons whose property is annexed of any constitutional rights. *In re Annexation Ordinances*, 637.
Enforcement of statutory provisions in existance at time contract was entered into cannot deprive party of property without due process. *Swain v. Ins. Co.*, 120.
Freedom of contract, unless contrary to public policy or prohibited by statute, is constitutional right. *Muncie v. Ins. Co.*, 74.

I, §19. Persons whose property is annexed by municipality persuant to G.S. 160-453.13 are not entitled to jury trial. *In re Annexation Ordinances*, 637.

II, §10. Divorce is purely statutory in this State. *Moody v. Moody*, 752.

IV, §1. Foreign decree of divorce *a mensa* and awarding permanent alimony does not preclude husband from maintaining suit in this State for divorce on ground of separation. *Sears v. Sears*, 415.

IV, §2. Superior Court is court of general state-wide jurisdiction. *Jackson v. Bobbitt*, 670.

VII, §7. Expenditure of funds by city for advertising is not for necessary expense. *Dennis v. Raleigh*, 400.

VIII, § §1, 4. G.S. 160-453.13 does not violate these sections. *In re Annexation Ordinances*, 637.

IX, § § 1, 9. State Board of Education has only that authority over private schools as may be conferred by statute, and has no authority to license solicitors for out of state schools. *S. v. Williams*, 337.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED

Fourteenth Amendment. Prohibits action on part of State but does not prohibit owner of private property from discriminating on basis of race those he will serve at private lunch counter. *S. v. Avent*, 580.

Record held not to show that defendant was deprived of right to communicate with friends and to show that confession was voluntary and that its admission in evidence violated no constitutional rights of defendant. *S. v. Davis*, 86.

"Liberty" as used in the amendment includes right to engage in common occupations subject only to controls necessary in interest of public safety, morals and welfare. *S. v. Williams*, 337.

Whether service on foreign corporation was valid must be determined in accordance with decisions of U. S. Supreme Court. *Dumas v. R.R.*, 501.

Annexation of territory by municipality under provisions of G.S. 160-453.13 does not deprive persons whose property is annexed of any constitutional right. *In re Annexation Ordinances*, 637.

Enforcement of statutory provisions in existance at time contract was entered into cannot deprive a party of constitutional rights. *Swain v. Ins. Co.*, 120.